

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

MOTION TO DISMISS

Judge Michael E. Allen, by undersigned counsel, moves to dismiss the May 2, 2007 Notice of Formal Charges filed against him by the Investigative Panel of the Florida Judicial Qualifications Commission. Dismissal is sought because the allegations of the Notice of Formal Charges fail to state a legally sufficient basis for initiating charges against Judge Allen. That failure is this: the allegations do not, as a matter of law (and fact) allege violations of Judicial Canons, the Rules Regulating the Florida Bar, or the Oath of Admission to the Florida Bar that “demonstrate [] a present unfitness to hold office.” That standard is the Constitutional and JQC Rule *sine qua non* for initiating and instituting formal charges.

The filing of charges against an appellate judge based on his written opinion is unprecedented in Florida and the Notice of Charges in this case provides no

basis for proceeding against Judge Allen.

The only case we have found relating to sanctions for a published appellate opinion is *State ex rel Shea v. Judicial Standards Commission*, 643 P.2d 210 (Mont. 1982). There, a Montana Supreme Court Justice was charged with intemperate language for these statements in a published dissent:

In a dissenting opinion written by you in the case of *State v. McKenzie*, Mont., 581 P.2d 1205, 1235, you employ the following language with reference to the majority of the court.

‘This court no more granted a fair review to defendant than the citizens of Pondera County could have given him a fair trial. The people of Montana can be well advised there is no law in the State of Montana.’ P. 1236

‘It is intellectual dishonesty for the majority not to recognize that the combination thereof is a radical departure from existing interpretations of constitutional law in this state * * * *’ P. 1238

‘And this is not the only matter in which the opinion is rather slippery with the facts.’ P. 1250

‘The dishonesty of the majority opinion is manifest* * * *’ P. 1260.

Id. at 213. The Montana Supreme Court concluded that the language did not constitute misconduct in office, holding that “[d]isciplinary proceedings should not apply to the decisional process of a judge. Otherwise judges would be as

concerned with what is proper in the eyes of the Commission as with what is justice in the cause.” *Id.* at 223.

The Court wrote this about the questioned Opinion:

It 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. The judicial power of a district judge is sovereign, in the name of the State, and the judicial power of a justice of the Supreme Court is likewise sovereign, provided the decision is in and with the opinion of the majority of the Court (excluding those few cases where the constitution allows a single justice to act). The requirement of a majority for any opinion of the Supreme Court (Art. VII, s 3(1), 1972 Montana Constitution) does not mean that one in the minority is throttled and may not speak his piece.

Id.

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). *See also Craig v. Harney*, 331 U.S. 367, 376 (1947) (“Judges are supposed to be men of fortitude, able to thrive in a hardy climate”). While *Bridges* and *Craig* involved contempts, and the First Amendment, their principles are relevant here; dislike of remarks made about a judge is not enough to silence or sanction the speaker. Against that backdrop we turn to the Notice of Formal Charges in this case.

THE CONSTITUTION

Article V, section 12 (a)(1) of the Florida Constitution provides, in relevant part:

Section 12. Discipline; removal and retirement. –

(a) JUDICIAL QUALIFICATION COMMISSION. – A judicial qualifications commission is created.

(1) There shall be a judicial qualifications commission vested with jurisdiction to investigate and recommend to the Supreme Court of Florida the removal from office of any justice or judge *whose conduct*, during term of office or otherwise occurring on or after November 1, 1966, (without regard to the effective date of this section) *demonstrates a present unfitness to hold office*, and to investigate and recommend the discipline of a justice or judge whose conduct, during term of office or otherwise occurring on or after November 1, 1966 (without regard to the effective date of this section), warrants such discipline. For purposes of this section, discipline is defined as any or all of the following: reprimand, fine, suspension with or without pay, or lawyer discipline (emphasis supplied).

Section 12(c)(1) of Article V provides, in relevant part:

(c) SUPREME COURT. – The supreme court shall receive recommendations from the judicial qualifications commission's

hearing panel.

(1) The supreme court may accept, reject, or modify in whole or in part the findings, conclusions, and recommendations of the commission and it may order that the justice or judge be subjected to appropriate discipline, or be removed from office with termination of compensation for willful or persistent failure to perform judicial duties *or for other conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office*, or be involuntarily retired for any permanent disability that seriously interferes with the performance of judicial duties. (emphasis supplied).

Thus there can be no doubt that the Constitutional “cause of action” against a judge requires that the conduct complained of must demonstrate “a present unfitness to hold office” and that “unbecoming” conduct alone is an insufficient basis for proceeding against a judge.¹

¹ The fact that discipline less than removal from office can be later recommended or imposed does not mean that charges can be initiated for conduct that does not demonstrate present unfitness to hold office. “*Present unfitness*” is a temporal state. The fact that a hearing panel or the Supreme Court may later decide that discipline other than removal from office is appropriate reflects a subsequent judgment based on facts established after charges are filed. But the plain language of the Constitution and the JQC Rules mandate that the initiation of charges must be tied to the kind of conduct that demonstrates unfitness. If the conduct does not rise to that level, then there is no basis for finding probable cause.

THE JUDICIAL QUALIFICATION RULES

Florida Judicial Qualifications Commission Rule 6(a) provides in relevant part:

The Investigative Panel of the Commission, upon receiving factual information, not obviously unfounded or frivolous, or an individual complaint made under oath, indicating that a judge is guilty of willful or persistent failure to perform judicial duties, *or conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office . . .* may make an investigation to determine whether formal charges should be instituted. (emphasis supplied).

Under Rule 6(f), “[w]hen the Investigative Panel finds probable cause that formal charges should be filed against the Judge, the Investigative Panel shall file a Notice of Formal Charges with the Clerk of the Supreme Court.”

Since conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office is both the Constitutional and Rule requirement, “probable cause” means that the alleged misconduct renders the subject judge presently unfit to hold office. Using the classic formulation of “probable cause,” *i.e.*, that an offense has been committed and that the defendant committed it, in the Article V, section 12 (a)(1) and (c)(1) and JQC Rule 6 language, the offense must

be such that the conduct makes the judge unfit to hold office. Indeed, JQC charges have historically only been brought against judges whose conduct plainly suggested unfitness based on either repeated or egregious conduct.²

**THE NOTICE OF FORMAL CHARGES
IN THIS CASE FAILS TO STATE A
CLAIM FOR CONDUCT DEMONSTRATING
A PRESENT UNFITNESS TO HOLD OFFICE**

We note at the outset that paragraph 15 of the Notice of Formal Charges is deficient insofar as it separates “conduct unbecoming a member of the judiciary” from “demonstrate your unfitness to hold office of judge.” Neither the Constitution nor the JQC Rules permit such a separation; the elements are tied together. But the heart of this Motion to Dismiss is not procedural, it is that the allegations cannot support a finding that Judge Allen’s published concurring opinion in *Childers v. State*, 936 So. 2d 619 (Fla. 1st DCA 2006) constitutes

² See, for example, *In re Schwartz*, 755 So. 2d 110 (Fla. 2000) in which the appellate judge had been “warned and advised [by the JQC] on three separate occasions – twice in 1993 and once in 1996 – to refrain from ‘rude, impatient, and discourteous remarks from the bench’ and then had “berated two legal interns who were presenting argument before the Third District” and walked out of the argument in one case. *Id.* at 113-14. See also the charges filed against Judge James Hauser on June 1, 2007 based on continued sexual advances toward a student and a pattern of “erratic and abusive behavior on the bench prompting complaints from attorneys. . . .” *Inquiry Concerning a Judge*, No.: 06-425. We set forth *infra* at pages 16-21 a review of the JQC cases that confirm our submission that charges have historically been brought for egregious and/or repeated misconduct, and never for statements in a published opinion.

conduct unbecoming a judge that demonstrates a present unfitness to hold office.

The Notice of Formal Charges does not always link the specific allegations to specific provisions of the Code of Judicial Conduct and Canons and Rules of Professional Conduct and/or the Oath of Admission, but begins by saying that the concurring opinion, “by text and innuendos directed to your colleague, Judge Charges Kahn, violated the preamble to the Code of Judicial Conduct and Canons 1, 2A, 3B(2), 3B(4), 3B(5), 3D(1), Rule 4-8(2)(a) of the Rules of Professional Conduct to the Florida Bar, and the Oath of Admission of the Florida Bar, to wit: . . .” Notice of Formal Charges, p. 1. Therefore we turn to the individual allegations to demonstrate why they cannot support the cause of action.

A. The Use of Newspaper Articles

One “charge” is that Judge Allen “quoted at length from various newspaper articles, the accuracy of which you admitted in the opinion were unknown to you, and which were not part of the record on appeal.” Notice of Formal Charges, p. 2, ¶ 2B. Another charge is that Judge Allen “conveyed [his] own, personal belief in the truth of the matters set forth in the [quoted article]” and, referencing another article, that he “signaled [his] own personal belief in the truth of the matters set forth in the . . . quotation. Notice, pp. 2-3, ¶¶ 2C and D. The Notice thrice refers to the opinion’s use of the “non-record” articles: “Having thus set the stage with

non-record ‘evidence;’” “Having utilized non-record newspaper articles . . .”
“together with non-record information about Judge Kahn” *Id.*, ¶¶ 2F and G.

The use of the newspaper articles is the fulcrum for the charges. But newspaper articles and other non-record materials are not necessarily *verboten* in appellate opinion writing. In *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) declaring unconstitutional a statute that created an “opportunity scholarship program,” Justice Bell, in a dissenting opinion joined by Justice Cantero, wrote:

And opportunity scholarships were a central part of Florida’s hotly contested 1998 gubernatorial campaign. Peter Wallsten & Tim Nickens, *Governor’s Race is Set; Education is the Issue*, St. Petersburg Times, July 7, 1998 at 1A available at <http://www.sptimes.com> (search Archives for “governor’s race is set”).

Id. at 419 (Bell, J., dissenting). Justice Anstead, joined by Justices Pariente and Quince wrote citing the *Miami Herald*: See *Inmate Wins DNA Request*, *Miami Herald* (Broward Edition), August 29, 2001 at B9. *Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, 807 So. 2d 633, 636 (Fla. 2001)(Anstead, J., concurring in part and dissenting in part). Then Chief Justice Pariente, in a DCF case, used a newspaper article to support her statement about DCF policy: See Curtis Krueger, *DCF Policy Shift Aims to Keep Families*

Together, St. Petersburg Times, February 7, 2003, available at http://www.sptimes.com/2003/02/07/State_DCF_Policy_Shift_aims.shtml (last visited June 23, 2004). *Florida Department of Children and Families v. F.L.*, 880 So. 2d 602, 612 (Fla. 2004) (Pariente, C.J., concurring).

Justice Pariente's concurring opinion in *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000) made extensive use of newspaper reports: "See Peter Whoriskey & Joseph Tanfani, *Punch Card Problems Were Ignored for Years*, Miami Herald, December 17, 2000;" "[S]ee also, Rafael Lorente, *96 Analysis: Minority Votes for President More Likely to Go Uncounted*, Sun Sentinel, December 7, 2000 . . . ;" Scott Maxwell, *Palm Beach Has Had Trouble Before*, Orlando Sentinel, December 5, 2000" She further cited: "See Mary McGrory, *Just Fine Without a Chad*, Washington Post, December 10, 2000, at B1 . . . ; Stephen Buckley, *Brazilians' Pride Grows in Electronic Voting System*, Washington Post, December 2, 2000, at A18" *Id.* at 537, n.34, n.35 (Pariente, J., concurring).

This month Justice Pariente, in a concurring opinion joined by Justices Anstead and Quince, cited a *New York Times* article to support the reasons for her concerns voiced in *Golphin v. State*, 945 So. 2d 1174 at 1202 (Fla. 2006) "'about our freedom as Americans to lawfully move about without attracting the unwanted and coercive attention of the authorities.'" *Mays v. State*, ___ So. 2d ___ (Fla. June

7, 2007) (Pariante, J., specially concurring) (“Troubling statistics released by the New York City Police Department show that the number of people stopped on the streets in that city increased from 97,296 in 2002 to 508,540 in 2006. See Al Barker, *6-Month Study to Review ‘Stop and Frisks’ by New York Police*, N.Y. Times, March 1, 2007, at B1”).

The use of such sources is not new. See *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221, 231-32 (Fla. 1965) where Justice Thornal’s dissent extensively quoted remarks of the editors of the *Miami Herald*, *Tampa Tribune* and *Pensacola News Journal* that had been reported in the Florida Bar Journal to show the different views that the public had about the meaning of the then newly adopted Article V.

Justices of the Supreme Court of the United States have also used newspaper articles to support their positions. See, for example, *Ashcroft v. ACLU*, 535 U.S. 564, 567 n.2 (2002); *Boy Scouts of America v. Dale*, 530 U.S. 640, 692 n.20 (2000)(Stevens, J., dissenting); *City of Boerne v. Flores*, 521 U.S. 507, 522 (1997); *Georgia v. McCollum*, 505 U.S. 42, 61 n.1 (1992) (Thomas, J., concurring) (surveying the *New York Times*, the *Los Angeles Times* and the *Chicago Tribune* to show that the public cares about the racial mix of juries); *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 457 (1983) (O’Connor, J., dissenting) (citing *Washington Post* to support proposition that advances in

medical technology meant that the viability of a fetus could no longer be determined according to *Roe v. Wade's* 28 week rule).

Thus, the use of newspaper article “non-record evidence” is not *per se* unbecoming conduct, and the allegation “that matters outside the record should not be considered in resolving appeals” (Notice of Formal Charges, p. 5, ¶ 3) cannot, as a matter of law, constitute conduct unbecoming a judge that violates any Canon or rule and renders him or her unfit for service. Were this not the case, numerous judges would have been subject to JQC charges or (in the federal system) threatened with impeachment.

Obviously it is not the use of newspaper articles that prompted the complaint against Judge Allen, it is that Judge Kahn was a subject of the concurring opinion.

B. Judge Kahn’s “Integrity” and “Prejudice” Against Judge Kahn

The only plausible reading of the Notice of Charges is that by directing the focus to Judge Kahn, Judge Allen’s concurring opinion was deemed offensive. *See* Notice, p. 5, ¶ 4: “Your concurring opinion did not comport with the high standards of conduct that Canon 1 requires, and your disparagement of Judge Kahn’s integrity was contrary to your duty to observe high standards” Canon 2A was invoked by alleging that “[y]our concurring opinion undermined public

confidence in the integrity and impartiality of the judiciary” *Id.* at p. 5, ¶ 5.³

Pages 6 and 7 of the Notice speak of an “attack on your colleague” (¶ 6); an “attack on Judge Kahn” (¶ 7); “The attack against Judge Kahn” (¶¶ 9 and 10); “a wholesale attack against Judge Kahn’s integrity” (¶ 10). Other paragraphs assert the alleged “attack” as violative of Canon 3B(4): “Your attack on Judge Kahn was neither patient, nor dignified, nor courteous” (p. 6, ¶ 7); and evidence of Canon 3B(5) prejudice: “Your concurring opinion, together with your conduct leading up to the publication of the concurring opinion, reveals that you are prejudiced against Judge Kahn.” *Id.* ¶ 8.⁴

We demonstrate below that discussing Judge Kahn and the *Childers* case was not, and is not, a violation of any Canon, Rule, or Oath that renders Judge

³ To the extent that paragraph 5 alleges that the “concurring opinion . . . was contrary to the existing law regarding the disqualification of a judge,” that allegation cannot support any charge because an erroneous application of the law cannot be, and has never been, the basis of JQC charges. If an erroneous application of the law were grounds for judicial sanctions, every reversal would put judges at risk. The same result obtains as to paragraph 6, p. 6, alleging that it violated Canon 3B(2) to question Judge Kahn’s participation in the *Childers* case because recusal should have been left to “the ‘conscience’” of Judge Kahn. That cannot be a basis for charges because such a “don’t ask, don’t tell” approach would mean that no judge could question another judge’s recusal or non-recusal decision.

⁴ The Notice contains no factual allegation regarding “conduct leading up to the publication of the opinion” and, even in a Notice pleading format, that bare assertion cannot support any legal cause of action under the Constitution, the JQC Rules or any Canon or Rule of Professional Responsibility.

Allen unfit for service, but first we address the extraordinary allegation that the concurring opinion violated Canon 3D(1)'s requirement that Judge Allen, if he thought Judge Kahn's participation in the *Childers* case was inappropriate, "should have reported the matter to the Judicial Qualifications Commission rather than publishing [his] attack on Judge Kahn" Notice, pp. 6-7, ¶ 9.⁵

If it was a violation of Canon 3D(1) for Judge Allen not to have filed a complaint with the JQC, then it was a violation by Judge Kahn, and every other judge who read Judge Allen's concurring opinion, to have failed to file charges against Judge Allen. If, as the Notice of Charges alleges, the concurring opinion violated Canons requiring courtesy, patience, dignity, and was contrary to the established law of Florida, revealed prejudice, failed to comport with general ethical standards, showed disrespect to judicial officers, engaged in offensive personality, and undermined public confidence in the integrity and impartiality of the judiciary (Notice of Charges, *passim*), then every judge in Florida had a duty to

⁵ It seems incongruous to allege on one hand that a judge's decision regarding recusal is left to his or her "conscience" (Notice, p. 6, ¶ 6) and is beyond criticism and to also allege that a JQC Complaint is the proper route to invade a judge's "conscience."

Additionally, alleging that the concurring opinion was "unnecessary" (Notice, pp. 6-7, ¶¶ 9 and 10) because a JQC Complaint would have sufficed and/or that the *en banc* decision mooted Judge Kahn's role, misses the plainly stated reasons for the opinion: Judge Kahn's and Judge Wolf's condemnation of the whole court's decision to go *en banc* and Judge Allen's explanation of why *he* voted to *en banc* the case. See 936 So. 2d at 622-23 (Allen, J., concurring).

report the matter to the JQC. *No one* did; not even Judge Kahn, the alleged subject of the “attack.”⁶ The *only* complaint was that of Martin Levin, the son of Fred Levin. His July 11, 2006 letter to the Executive Director of the Judicial Qualifications Commission accusing Judge Allen of a “venomous diatribe,” (p. 2) offered a list of Florida cases purportedly establishing “that judges are to be disciplined for the type of behavior exhibited by Judge Allen.” Letter of Martin Levin to Brooke Kennerly, p. 6.

Mr. Levin’s letter precipitated the inquiry against Judge Allen. But neither the cases he offered to support his Complaint, nor other case law and source material, support a conclusion that the concurring opinion constituted violations that constitute a cause of action against a judge under the Florida Constitution or the Rules of the JQC.

C. The JQC Cases

The Judicial Qualifications Commission has never filed charges against an appellate (or any other) judge based on the judge’s written opinion. The JQC cases all make allegations of misconduct that reflect unfitness for office. We have noted

⁶ Clearly Judges know a potential violation of the Canons when they see it. *See* Lucy Morgan, *Childers Case Roils Court, Complaint over Kahn’s Two Affairs Dismissed*, St. Petersburg Times, April 13, 2007 (“In one complaint, 13 of the 15 judges on the appellate court said that Kahn had affairs with two court employees, traveled with them at State expense and helped one of them get a better job”).

the recent charges against Judge Hauser. *See* footnote 1, *supra*, p. 7. The pending charges against Judge Aleman speak of “a *pattern* of arrogant, discourteous and impatient conduct toward lawyers and others appearing before you” *Inquiry Concerning a Judge*, No. 06-52, Cheryl Aleman, Notice of Formal Charges, p. 1 (emphasis supplied). Judge de Laroche was accused of “[a] *pattern* of deliberate misconduct” in vacating sentences and dismissing cases that were not assigned to him. *Inquiry Concerning a Judge*, No. 06-22, Notice of Formal Charges, p. 3 (emphasis supplied). Judge Barnes was accused of a litany of misconduct: “Unfounded public attacks against the judiciary and sitting judges and other public officials, demeaning your office by a series of actions including: contempt for the judicial education process; failure to wear appropriate attire during court proceedings; engaging in inappropriate colloquies on the bench with defendants during court proceedings; and by refusal to attend judicial meetings with other judges in your circuit.” *Inquiry Concerning a Judge*, No. 05-437, Amended Notice of Formal Charges, p. 2.

Indeed, the cases cited by the complainant in this case for his proposition that “Florida case law is well established that judges are to be disciplined for the type of behavior exhibited by Judge Allen” (Levin Letter, p. 5) bolster our argument. Those cases make it irrefutable that the charges brought against Judge

Allen for his published opinion *do not* constitute the kind of conduct that supports charges under the Florida Constitution or JQC Rules. We set forth below the cases offered by the complainant, just as he has described them, to cement our point:

In re Schapiro, 845 So. 2d 170 (Fla. 2003) (judge's conduct in belittling, embarrassing, and screaming at attorneys who appeared before him and exhibiting a pattern of rude and intemperate behavior over a long period of time warranted public reprimand).

Ex parte Haymans, 767 So. 2d 1173 (Fla. 2000) (judicial misconduct including a pattern of rudeness and disrespect toward lawyers, parties, witnesses, victims, and court personnel warranted public reprimand).

In re Schwartz, 755 So. 2d 110 (Fla. 2000) (appellate judge's rude and discourteous remarks during oral argument warranted public reprimand).

In re Wood, 720 So. 2d 506 (Fla. 1998) (engaging in rude and intemperate behavior in the courtroom, despite a prior admonishment about similar behavior, warrants a public reprimand, delivered in person, given the judge's candor, his voluntary submission to anger and stress management therapy, and his assurances that he will continue to undergo therapeutic treatment until no longer necessary).

In re Inquiry Concerning a Judge re Wright, 694 So. 2d 734 (Fla. 1997) (adopting rude,

abusive and inappropriate manner in addressing two assistant state attorneys and one crime victim during two separate incidents while on the bench warranted public reprimand).

In re Graham, 620 So. 2d 1273 (Fla. 1993) (using position as judge to make allegations of official misconduct and to improperly criticize fellow judges and elected officials, imposing improper sentences and improper use of contempt power, and acting in an undignified and discourteous manner, warrants removal from office of county judge).

In re Marko, 595 So. 2d 46 (Fla. 1992) (rude, improper and inappropriate remarks to wife at dissolution of marriage hearing warrants reprimand).⁷

In re Inquiry Concerning Carr, 593 So. 2d 1044 (Fla. 1992) (using inappropriate language in open court and referring to complaining witness in such a way as to slur his nationality warrants public reprimand).

⁷ Judge Marko's offensive remarks are quoted in the reprimanding opinion. It is noteworthy that the Court made a point of writing that "[n]o one suggests that Judge Marko is *presently* unfit to serve as a judge" (*id.*) (emphasis supplied), which supports our submission that unfitness at the time of charging is essential, while unfitness may be cured by later events, justifying a remedy less than removal.

Inquiry Concerning a Judge, No. 90-311 re Perry, 586 So. 2d 1054 (Fla. 1991) (engaging in verbal abuse and intimidation of attorneys, witnesses and parties violated judicial code of canons).

In re Zack, 570 So. 2d 938 (Fla. 1990) (judge's use of profane language in reference to county sheriff before employee of sheriff's office warranted public reprimand).

Id., pp. 5-6.

We borrow from Judge Aleman's Motion to Dismiss (p. 2) the examples of reported Supreme Court dispositions which demonstrate the difference between behavior rendering a judge "unfit" and this case:

- Viewing pornography on a courthouse computer and sexually harassing an assistant state attorney, *see In re Downey*, 937 So. 2d 643 (Fla. 2006);
- Having "an inappropriate romantic relationship with an attorney who was practicing before him," *see In re Adams*, 932 So. 2d 1025 (Fla. 2006), or showing favoritism to a paramour, *see In re Graziano*, 696 So. 2d 744 (Fla. 1997);
- "Accepting free tickets to Florida Marlin baseball games during 1994 through 1997 from a law firm whose lawyers appeared before him in at least two cases," *see In re Luzzo*, 756 So. 2d 76 (Fla. 2000);
- "Public intoxication" coupled with "inappropriate conduct of an intimate nature," *see In re Cope*, 848 So. 2d 301 (Fla. 2003);
- Attempting "to hinder law enforcement" and showing "disregard for law enforcement" when the judge "initially lied to two deputy sheriffs

concerning her knowledge that a crime had taken place,” *see In re Wilson*, 750 So. 2d 631 (Fla. 1999);

- Sending an anonymous email to a fellow judge and to the Broward County Hispanic Bar Association containing “an implied threat of organized group retaliation because of alleged actions of a fellow judge,” *see In re Diaz*, 908 So. 2d 334 (Fla. 2005);
- “Flagrant misrepresentations made to the voting public during . . . [a] judicial campaign, serious campaign financial misconduct and violations of law,” *see In re Renke*, 933 So. 2d 482 (Fla. 2006);
- Making “various inappropriate statements concerning the defendant . . . in an interview with a reporter for the *Daily Business Review* while “he presided over the case,” *see In re Andrews*, 875 So. 2d 441 (Fla. 2004);
- “Not expeditiously issuing rulings in a dozen cases, which conduct adversely impacted the administration of justice, *see In re Allawas*, 906 So. 2d 1052 (Fla. 2005); and
- Committing various election campaign violations, *see, e.g., In re Gooding*, 905 So. 2d 121 (Fla. 2005); *In re Pando*, 903 So. 2d 902 (Fla. 2005); *In re Kinsey*, 842 So. 2d 77 (Fla. 2003), *cert. denied*, 540 U.S. 825 (2003); *In re McMillan*, 797 So. 2d 560 (Fla. 2001).

No principled reading of the Florida Constitution, the Judicial Qualifications Commission Rules, the Canons of Judicial Conduct, the Rules Regulating the Florida Bar, the Oath of Admission to the Florida Bar, the cases brought by the Judicial Qualifications Commission, and the decisions of the Florida Supreme Court relating to judicial misconduct supports the notion that charges based upon Judge Allen’s published concurring opinion in *Childers v. State* can state a cause

of action for “conduct [which] . . . demonstrates a present unfitness to hold office.”

Article V, section 12 (a)(1), Florida Constitution.

CONCLUSION

For the foregoing reasons, the charges against Judge Allen should be dismissed.

Respectfully submitted,

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