

IN THE SUPREME COURT OF FLORIDA

CASE NO. 07-774

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

On Review of the Recommendations of the
Hearing Panel, Judicial Qualifications Commission

**JUDGE MICHAEL ALLEN'S REPLY BRIEF IN
OPPOSITION TO THE ANSWER BRIEF OF THE
JUDICIAL QUALIFICATIONS COMMISSION**

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ARGUMENT

THE FOCUS MUST BE ON THE PUBLICATION OF THE CONCURRING OPINION. BECAUSE NO EVIDENCE SUPPORTS ANY CONCLUSION THAT PERSONAL DISLIKE MOTIVATED THE PUBLICATION OF THE OPINION, THE JQC'S FINDINGS, CONCLUSIONS AND RECOMMENDATIONS SHOULD BE REJECTED

The JQC Answer Brief misses the point by focusing on testimony that does not address why Judge Allen's concurring opinion was *published*. Instead, the Answer Brief offers testimony of judges' thoughts about how Judge Allen felt about Judge Kahn, what some judges thought about how the concurring opinion might be perceived, and whether the opinion was necessary. The JQC concedes that there is no case like this one "in Florida or elsewhere in the United States" (Answer Brief, pp. 39-40), and in so doing inadvertently supports our position that *publication* is the critical moment. It is likely that there have been internal contretemps among appellate judges in American history, but it is the publication of Judge Allen's opinion that prompted this proceeding and which must be the focus here. With the proper focus, the outcome is clear: there was no evidence to support a finding that the *publication* of the opinion was motivated by ill will.¹

¹ This is not to suggest that there was any improper motive in Judge Allen writing the opinion, because the evidence and testimony showed that the opinion was written to respond to allegations of abuse of the *en banc* process. We stress the publication moment in this reply because publication is what led to these proceedings.

A. PUBLICATION AND MOTIVE

We start by taking issue with the first sentence of the JQC Answer Brief. It is wrong. The JQC wrote: "The Hearing Panel was faced with conflicting evidence regarding Judge Allen's motive." Answer Brief, p. 4. "Motive" means the reason for an act. There was no evidence that personal animus was the motive for the release and publication of Judge Allen's concurring opinion. Indeed, the JQC never responds to the uncontroverted documentary and testimonial evidence that Judge Allen offered to withdraw his opinion: "Nevertheless, if all *en banc* discussions are withdrawn by others, there is not a sufficient justification for publication of my opinion." Exhibit 7; Initial Brief, pp. 11-12. The JQC *never mentions* that undisputed fact.

We have acknowledged that there is clear and convincing evidence that Judge Allen did not care for Judge Kahn. Initial Brief, p.28. *When asked about Judge Allen's "motivation" for writing the opinion, Judge Thomas testified, "I cannot know a person's motivation other than what I read and what they've written, but being that I've been allowed to answer the question, I think animus was a*

factor." (T 284) There is no other evidence of any improper motive by Judge Allen in this entire record. Significantly, this testimony by Judge Thomas relates to the writing of the opinion, not the relevant consideration here, which is *publication*. Neither Judge Thomas nor any other Judge could say, given the email evidence, including the proposed withdrawal, that the motivation for *publishing* the opinion was animus. And, perhaps even more significantly, this testimony by Judge Thomas was a purely subjective opinion based upon nothing more than Judge Thomas's reading of documents which appear in the record in this case. These documents speak for themselves, and they must be allowed to do so. Notably, other judges did give their opinions as to Judge Allen's motivations, opinions based in part upon what he wrote

but primarily based upon his conduct in connection with the Childers case and his conduct and character generally. These Judges testified that Judge Allen's motivations were those clearly expressed by him in his concurring opinion. T-472-474, 491, 509, 539, 544, 549-550, 553-554. Thus, Judge Allen's explanation - both in the published opinion and his testimony - is uncontradicted: the publication was to explain his reason for going en banc and to counter the aspersions on the court contained in Judge Kahn's and Judge Wolf's opinions.

So what has the JQC Answer Brief done? It has set forth a hundred unnumbered bullet points of testimonial snippets as its "Summary of the Clear and Convincing Evidence" that the "Hearing Panel **accepted and found as fact.**" Answer Brief, p. 4 (emphasis in original). Few of those snippets were accepted and found as fact in the Findings, Conclusions and Recommendations. We

challenge the JQC to demonstrate *where in its findings* all those bullet points can be found as factual findings and we also challenge the JQC to demonstrate where the Hearing Panel “**rejected**” (*id.*) the evidence on which we relied in our initial brief. But more importantly, they all beg the critical question here. “Why did Judge Allen *publish* the opinion?” As to that, not a single piece of evidence offered in the Answer Brief supports any finding or conclusion that it was *published* because Judge Allen did not like Judge Kahn. Judge Padovano’s uncontradicted testimony that it would not have been published had Judge Kahn acceded to his entreaty (and that of Judge Ervin’s e-mail to which Judge Allen responded that he would withdraw – Exhibit 7), leaves no doubt that the answer to the pertinent question is Judge Allen’s answer. He published it to explain *his* reason for voting in favor of *en banc* consideration. Even Chief Judge Browning, whose testimony about personal relations was featured by the JQC (Answer Brief, pp. 4-7) agreed that on June 22, a few days before the opinions were released, Judge Allen was willing to withdraw his opinion and “none of this would have been published” if all the *en banc* opinions had been withdrawn. T-63. Judge Allen’s agreement to withdraw establishes that animus was not the motive for publication.

The JQC bolds Judge Thomas’ testimony that Judge Allen would not sign

off on a one sentence denial of certification, saying “**its time they get theirs.**” Answer Brief, p. 11 (emphasis added by the JQC). It attaches as an Appendix Judge Wolf’s June 22, 2006 e-mail explaining what he meant by his opinion criticizing the *en banc* decision and complaining that Judge Allen’s opinion attacked Judge Kahn. Answer Brief, p. 23, Exhibit 5, Tab 3 in JQC Appendix. But both of those items – so important to the JQC Brief – support our analysis. The use of “theirs” reflected exactly what, on June 22, 2006, Judge Allen’s e-mail explained: it was the opinions of Judge Kahn and Wolf that animated the publication of Judge Allen’s concurring opinion. And Judge Wolf’s criticism of the concurring opinion coupled with his defense of his (and Judge Kahn’s) opinions that the *en banc* court violated “the applicable constitutional and statutory provisions [and] . . . the rule of appellate procedure;” that going *en banc* was “a decision which . . . cannot be justified;” that *en banc* depends “solely upon the ability of the moving judge to obtain votes from a majority of judges” (*State v. Childers*, 936 So. 2d 585, 609, 614, 633 (Fla. 1st DCA 2006)) confirms that Judge Allen’s decision to publish was in response to their opinions.

Thus, the e-mail trail, the testimony about the events leading up to the publication from all the judges, the testimony of Judge Allen and the actual words of Judge Allen’s opinion, and Judge Padovano’s last minute efforts to get

agreement to pull all of the opinions and the undisputed fact that Judge Kahn was “the last man standing” in the way of that (T-489), shines the evidentiary light on the *motive for publication*. The JQC has completely missed that point, and been led off base by its prurient interest in what Judge Allen thought about Judge Kahn. Does it matter whether or why Judge Allen did not like Judge Kahn if the opinion had never been published? The answer is “no,” but the JQC, which started this unfortunate excursion into the First District’s internal dialogues, continues its misguided approach in its Answer Brief. Whether there was “bad blood” (T-40) or whether Judge Allen’s previously expressed concerns about Judge Kahn were “prophetic” (T-428), and all the tattling testimony in-between, is a red-herring. Even the Hearing Panel’s extraordinary “does not condone” statement and invitation to investigate Judge Kahn’s behavior (Recommendations, p. 20) exemplifies how far off course the JQC inquiry has gone. Judge Kahn’s conduct is not a necessary focus. Judge Allen’s Brief tried to focus on the publication: “Judge Allen’s willingness to not publish belies the finding that he published it out of malice. . . .” Initial Brief, p. 14.

Viewed through the prism of publication, there is no clear and convincing evidence to support the Findings, Conclusion and Recommendations.

B. PUBLICATION AND THE JUDGES' ADVICES

A theme of the JQC Answer Brief is that Judge Allen was advised “not to publish” by “all but one” of his fellow judges with whom he consulted. Answer Brief, p. 21, n.1. That is contrary to the evidence as we show below, but the erroneous submission also reinforces our position that the focus must be on publication, and that whatever views the other judges may have stated *vis a vis* publication, *not one of them* saw publication as a violation of the Code of Judicial Conduct or saw a duty to report the publication as a violation.

Judge Hawkes effusively complimented Judge Allen. T-338; Exhibit 18, Tab 4 to Answer Brief. Judge Davis said the opinion was “factual” and “ethical” (T-541) and offered to sign it. T-558. Judge Padovano said it was “a fair and even handed explanation” T-493-94. Judge Van Nortwick saw it as ethical and professional. T-573, 576. Judge Thomas did not try to talk Judge Allen out of publishing. T-259. The JQC has not (and cannot) controvert the undisputed fact that not a single judge ever said to Judge Allen that publication would be a violation of the Code of Judicial Conduct, nor did any judge, despite an ethical mandate to report violations of the Code, ever act on that obligation with regard to the opinion after it was published.

The JQC’s extended quotations from Judge Benton’s testimony (Answer Brief, pp. 13-18), including his cross-examination retort: “my advice to Judge

Allen was don't send this out. I wasn't asked for a treatise on the canons," (T-386; Answer Brief, p. 15) proves two things. First, "sending it out," i.e., *publication*, is the moment to be considered. Second, if the publication of the opinion was so clearly and convincingly violative of the canons, Judge Benton, the about-to-be Chairman of the Judicial Ethics Advisory Commission (T-381), did not need to prepare a "treatise on the canons" to recognize a violation. Interestingly, Judge Benton (and Judge Thomas) went to Judge Allen's office on May 19, 2006, after Judge Allen had initialed a simple *per curiam* denial of certification, and encouraged Judge Allen to write in response to the Kahn/Wolf criticisms. See T-91, 111, 195-196, 257, 267, 270-271, 375-376, 536-540, 553-554, 570.

In sum, the judicial testimony reinforces our publication point and the fact that publication did not prompt protests of judicial misconduct from Judge Allen's colleagues. Telling him that the opinion could "bite him on the ass" (Judge Benton, T-376, 386) is a far cry from the Answer Brief's attempt to portray Judge Benton's testimony as evidence of misconduct, especially when Judge Benton "understood his [Judge Allen's] concern" about Judge Kahn's participation in the case and did not think that concern was either "crazy" or "off the reservation." T-387-390.

**C. PUBLICATION, THE CASE LAW, AND
JUDICIAL INDEPENDENCE**

The JQC's effort to bend case law to support its chagrin with Judge Allen's opinion further reinforces our argument that what matters is the evidence relating to the decision to *publish*, and that *no evidence* supports the notion that the motive for publication was animus. None of the foreign cases cited at pages 43-44 of the Answer Brief for the proposition that discipline may be imposed upon "judges who criticize other judges" (*id.* at 43) involve an appellate judge's published opinion or an effort to divine the reasons why an appellate judge published what he or she published.

One must keep in mind that the JQC had to prove by "clear and convincing evidence that produces . . . a firm belief, without hesitancy" (*Inquiry Concerning a Judge Davey*, 645 So. 2d 398, 404 (Fla. 1994)) that Judge Allen published only out of spite. None of the cases come close to addressing what the JQC seeks to assert here. Indeed, the JQC's own "dual motive" assessment (Findings, Conclusions and Recommendations, p. 19) – a substantial retreat from the charge upon which the JQC proceeded – distinguishes this case from every other and confirms that there is no precedent for recommending (or approving) discipline being imposed upon a judge *via* a process that requires a determination of the judge's state of mind when he or she decided to publish a written opinion. Even the Hearing Panel's Findings, Conclusions and Recommendations (pp. 14-15) rejected *In re Richard A.*

Kelly, 238 So. 2d 565 (Fla. 1970) as precedent, yet the Answer Brief devotes nearly a page to quoting *Kelly* (Answer Brief, p. 41), ignoring the Panel's non-reliance and the fact that *Kelly* eschewed the foray into motive that is the whole foundation of the JQC effort here.

The weakness of precedent for the JQC action is highlighted by its offer of the *In re Glickstein*, 620 So. 2d 1000 (Fla. 1993), comment that there must be "strict compliance with the Code of Judicial Conduct," despite the testimony of the First District Court of Appeal judges, none of whom perceived a violation of the Code or even intimated to Judge Allen that publication would be a violation. Indeed, given the Code's obligation of a judge to report a violation, "strict compliance" seemingly compels JQC action against them for not doing so. Offering *In re Glickstein* merely demonstrates the dearth of legal precedent for this proceeding.

The JQC, trying to use *In re Schwartz*, 755 So. 2d 110 (Fla. 2000) as an analogy, says that "[a]pplying Judge Allen's argument, if Judge Schwartz had delivered his abuse in a written concurring opinion instead of orally, he would have been immune from discipline." Answer Brief, p. 43. Several problems plague that flawed logic. First, it assumes "abuse," unlike this case which is built on some personal perceptions of how the opinion might be read – six judges'

opinion that “the concurring opinion suggested or implied corruption.” Answer Brief, p. 33. Of course other judges disagreed, reading it as fair and reasonable. T-365, 499, 547. Secondly, *Schwartz* did not require an assessment of motive in order to determine if there was a violation of the Code. Here the JQC is faced with irrebuttable evidence that the motive for publishing was to explain Judge Allen’s vote for *en banc* review in response to Judge Kahn’s and Judge Wolf’s opinions. So the analogy to *Schwartz* fails because the JQC failed to adduce clear and convincing (or any) evidence that the *raison d’etre* for publication was to “abuse” anyone.

Nor are the JQC attempts to distinguish the powerful “judicial independence” cases any more persuasive than their other case law arguments. Devoting multiple pages to *In the Matter of XYP*, 523 Pa. 411, 567 A. 2d 1036 (1989) and *State ex rel. Shea v. Judicial Standards Commission*, 198 Mont. 15, 643 P.2d 210 (1982), the JQC completely ignores the Pennsylvania Supreme Court’s unequivocal paean to judicial independence “where the *sole* focus of inquiry is a judicial opinion” (567 A.2d at 1039, emphasis in original) and the Montana Supreme Court’s similar protections for “the decisional process of a judge.” 643 P.2d at 223.

The JQC writes that the “intemperate language” of a Montana Supreme

Court justice did not “accuse the majority of corruption or other form of venality,” only “intellectual dishonesty,” (Answer Brief, pp. 45-46), suggesting, we suppose, that telling the people of Montana that “there is no law in the State of Montana” (643 P.2d at 213) is less corrosive to public confidence in the judiciary than was Judge Allen’s recounting of the facts that led him to vote in favor of *en banc* review in *Childers* and explain his reason for doing so.

Interestingly, no one has ever taken issue with the accuracy of the facts set forth in Judge Allen’s opinion. We are not blind to the fact that some were offended by it, reading it as an attack, not an explanation, but the JQC’s prosecution of Judge Allen has wrongly intruded upon the concept of judicial independence. Paraphrasing the JQC’s Answer Brief, pp. 31-32, the JQC’s “indignation, rectitude [and] righteousness. . . has wreaked havoc upon Judge Kahn and Judge Allen, and upon the First District Court of Appeal and the judiciary of Florida as a whole.” This Court should restore that confidence by rejecting the Findings, Conclusions and Recommendations. Neither the evidence, nor the public policies that promote the importance of judicial independence, justify the JQC’s position in this case.

CONCLUSION

Because there was no clear and convincing evidence that the publication of

Judge Allen's concurring opinion was motivated by ill will; because there is no clear and convincing evidence that the publication of the opinion brought the court or the judiciary into disrepute; because the concept of judicial independence should protect against an inquiry into the motive for publishing an appellate judicial decision, the Findings, Conclusions and Recommendations should be rejected and the charge against Judge Allen dismissed.

Respectfully submitted,

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