IN THE SUPREME COURT
OF FLORIDA

CASE NO.

JUDGE MICHAEL E. ALLEN,

Petitioner,

v.

THE JUDICIAL QUALIFICATIONS COMMISSION,

Respondent.
_____/

PETITION FOR WRIT OF QUO WARRANTO AND PETITION FOR RELIEF PURSUANT TO THE ALL WRITS PROVISION OF THE FLORIDA CONSTITUTION

Michael E. Allen, a judge of the District Court of Appeal for the First District of Florida, seeks an Order directed to the Judicial Qualifications Commission preventing the JQC from proceeding against him because the Commission may not inquire into the reason for an appellate judge's published opinion. Such an inquiry would violate fundamental precepts of the Anglo-American common law tradition and compromise the independence of the judiciary, an independence that is essential to the judiciary's fulfillment of its role in our democracy.

On March 27, 2008, the JQC ordered a June 9, 2008 final hearing on the charges brought against Judge Allen. The relief sought would preclude that proceeding.

JURISDICTION

This Court has jurisdiction pursuant to Article V, sections 3(b)(7) (all writs) and 3(b)(8) (quo warranto). Because the JQC has no authority to inquire into the reason for an appellate judge's opinion, and because the actions of the JQC are within this Court's ultimate power of review pursuant to Article V, section 12(c), quo warranto and all writs relief are appropriate.

Pursuant to Article V, section 3(b)(7), this Court may "issue . . . all writs necessary to the complete exercise of its jurisdiction" and pursuant to Article V, section 3(b)(8), this Court may "issue writs of . . . quo warranto to state officers and state agencies."

The Judicial Qualifications Commission and its members are state officers and a state agency pursuant to Article V, section 12, Florida Constitution.

A writ of quo warranto is a proper remedy for contesting the authority of public officers and agencies to take action in their official capacities. *Crist v. Florida Association of Criminal Defense Lawyers, Inc.*, __ So. 2d __, 33 Fla.L. Weekly S172, S177, n.3 (Fla. March 13, 2008). See also *State ex rel Butterworth*

v. Kenny, 714 So. 2d 404, 406 (Fla. 1998) ("Attorney General Robert A. Butterworth petitions this Court for a writ of quo warranto seeking to prevent the Office of the Capital Collateral Regional Counsel for the Southern and Northern Regions (CCRC), respectively, and the other named respondents from representing death row inmates in civil rights lawsuits and to require withdrawal of their representation from all such pending civil cases. We have jurisdiction.") (footnote omitted). See also *Martinez v. Martinez,* 545 So. 2d 1338 (Fla. 1989):

> Quo warranto is the proper method to test the "exercise of some right or privilege, the peculiar powers of which are derived from the State." *Winter v. Mack*, 142 Fla. 1, 8, 194 So. 225, 228 (1940). *Compare, e.g., State ex rel Smith v. Brummer*, 426 So. 2d 532 (Fla. 1982) (quo warranto issued because public defender did not have authority to file class action on behalf of juveniles in federal court), *cert. denied*, 464 U.S. 823, 104 S.Ct. 90, 78 L.Ed. 2d 97 (1983); *Orange County v. City of Orlando*, 327 So. 2d 7 (Fla. 1976) (legality of city's actions regarding annexation ordinances can be inquired into through quo warranto); *Austin v. State ex rel. Christian*, 310 So. 2d 289 (Fla. 1975) (power and authority of state attorney should be tested by quo warranto). Testing the governor's power to call special sessions through quo warranto proceedings is therefore appropriate.

Id. at 1339.

In addition, because the recommendations of the Judicial Qualifications Commission fall within this Court's ultimate power of review pursuant to Article V, section 12(c), the all writs clause is also a basis for this Court's jurisdiction. See *Florida Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982) ("all writs" provided jurisdiction "[b]ecause jurisdiction of the issue of apportionment will vest in this Court with certainty in this year we have the jurisdiction conferred by Article V, section 3(b)(7), to issue all writs necessary to the complete exercise and in aid of the ultimate jurisdiction imposed by article III, section 16 (b), (c) and (f)"). See also *State ex rel. Chiles v. Public Employees Relations Commission*, 630 So. 2d 1093 (Fla. 1994):

> This Court may also exercise jurisdiction via the "all writs" provision of article V, section 3(b)(7) of the Florida Constitution. In *Florida Senate v. Graham*, 412 So. 2d 360 (Fla. 1982), we held that this Court may issue all writs necessary to aid the Court in exercising its "ultimate jurisdiction." *Id.* at 361. Article V, section 15 of the Florida Constitution vests this Court with the "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Because the regulation of attorneys falls within the Court's ultimate power of review, the all writs clause could arguably be invoked as a basis for this Court's jurisdiction.

Id. at 1094-95. That jurisdictional principle applies to this case.

THE PROCEEDINGS LEADING TO THIS PETITION

On May 2, 2007 the JQC filed a Notice of Formal Charges alleging that Judge Allen's concurring opinion in *Childers v. State*, 936 So. 2d 619 (Fla. 1st DCA 2006) "by the text and innuendos directed to your colleague, Judge Charles 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 of the Florida Bar and the Oath of Admission of the Florida Bar. . . ." Exhibit A, p. 1.

On February 28, 2008, the JQC filed an "Amended Notice of Formal Charges" which echoed its original Notice, but added allegations that Judge Allen "made false statements relating to material issues" when he denied during the investigation that "animus" motivated his opinion, and said that there was "no bad motivation" for the opinion and "there is no vendetta by me." Exhibit B, pp. 8-10, ¶ 15. The colloquy between a JQC Investigative Panel member and Judge Allen set forth in the Amended Notice of Charges captures the essence of the newly added false statement charges, which now makes it clear that the *reason* for the opinion is the foundation of the JQC proceeding.

> **D. Beginning at page 104, line 14, you were asked and you answered under oath:**
>
> JUDGE YOUNG: You took – you took the argument from clearly an intellectual argument to a

> clearly personal argument. I thought, "Is he okay?"
>
> ALLEN: Well, I think I'm okay, and I don't think it was personal. I think I – at the time, I –
>
> JUDGE YOUNG: Don't even go there. Of course it was personal. You brought in articles. You put extrajudicial stuff in your opinion. Yes, it was personal. If you don't think it was personal, you're deluding yourself.
>
> Yes, it was very personal, and I suspect it was personal because of the fights that are going on in the First DCA concerning who is going to be the chief judge, and I suspect it was personal because your guy lost. That's what happened here, isn't it?
>
> ALLEN: Well, the —
>
> JUDGE YOUNG: You're under oath, sir.
>
> ALLEN: I know that I am under oath, and I – and I really am not too happy about this question, but I'll answer it, and I'll try to be pleasant. I didn't vote for Judge Kahn for chief judge. A number of judges – a number of judges didn't vote for Judge Kahn for chief judge, and there is no animosity about that. There is none whatsoever.

Exhibit B, pp. 9-10.

That inquiry by the JQC and its false statement charges contravene *Inquiry Concerning Davey*, 645 So. 2d 398, 405 (Fla. 1994) ("Simply because a judge refuses to admit wrongdoing or express remorse before the Commission . . . does

not mean that the judge exhibited a lack of candor. Every judge who believes himself or herself truly innocent of misconduct has a right – indeed, an obligation – to express that innocence to the Commission. . . ."). Not only does it violate *Davey* to charge a judge with a false statement for disagreeing with the assertion that he had an improper motive for his opinion, but the new charges sharply illustrate that the JQC has crossed the line protecting the independence of the judiciary.

There can be no dispute that the charges against Judge Allen turn on his reason for writing his opinion. The JQC Response to [Judge Allen's] Motion to Dismiss the original Notice of Formal Charges argued: "A MOTION TO DISMISS IS INAPPROPRIATE WHERE MOTIVE IS AT ISSUE" (Exhibit C, p. 5) (emphasis in original), and continued: "Judge Allen's motivation is a question of fact that cannot be resolved on a motion to dismiss." Exhibit C, p. 6. Thus, the JQC has made the reason for the opinion the foundation of its charges.

At the hearing on March 3, 2008, which led to the continuance of the scheduled March 10, 2008 final hearing on the original Notice, the Chair of the Hearing Panel recognized that the May 2007, and the February 2008 charges "emanate effectively, out of the same situation; and if we had two separate trials or one trial, the evidence and testimony, in all likelihood, would almost be identical." Exhibit D, pp. 3-4, Transcript of March 3, 2008 hearing. The newly set June 9,

2008 proceeding will be an inquiry into the reason and motive for the opinion – an issue we submit is completely beyond the scope of the JQC's powers and authority. While the JQC may inquire into whether external forces – bribery or *ex-parte* contact – prompted an opinion, it cannot inquire into a judge's thought process underlying the opinion itself.

THE REASONS FOR GRANTING THE WRIT OF QUO WARRANTO OR RELIEF UNDER THE ALL WRITS PROVISION

A. AN INDEPENDENT JUDICIARY

There is no precedent in Florida or elsewhere in the United States for seeking sanctions against an appellate judge based on his or her reasons for writing a published opinion in a case before his or her court. No JQC proceeding has ever been initiated against an appellate judge in Florida based on what was written in a published opinion, or asking why the opinion was written. The Montana Supreme Court rejected the only reported effort to sanction an appellate judge for his opinion with this caution and concern for judicial independence:

> 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 a 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). The court held 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.[1]

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[1]Judge Shea's dissent in the *McKenzie* case stated:

> "'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 manner in which the opinion is rather slippery with the facts.' P.1250
> 'The dishonesty of the majority opinion is manifest* * * *' P.1260"

Decisional independence is central to judicial independence. Former Tennessee Supreme Court Justice Adolpho A. Birch, Jr. described it this way: "Judicial independence is the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing." See American Bar Association, ABA Standing Committee on Judicial Independence.[2] Judicial independence is not a platitude; it is a promise that judicial decisions will not subject judges to sanctions because there are those who disagree with the decision. To question the reason for, or the "motive" for a decision, is a gross intrusion into judicial independence.

An analogy to judicial immunity is apt. The Supreme Court of Pennsylvania in *In the Matter of XYP*, 523 Pa. 411, 567 A.2d 1036 (Pa. 1989), explained the reasons for insulating a judge from an inquiry into an opinion in which the judge made highly disparaging remarks about some lawyers:

> We believe, however, that it is necessary to limit the investigatory power of the [Judicial Inquiry and Review Board] JIRB in cases

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Shea, 643 P. 2d at 213.

[2] See, http://www.abanet.org/judind/aboutus/home.html

such as this where the *sole* focus of inquiry is a judicial opinion. Otherwise, fear of investigation by the JIRB might unduly inhibit and chill judges in the performance of their duties.

* * *

Judicial immunity rests upon a recognition of

> the necessity of preserving an independent judiciary, and reflects a belief that judges should not be hampered by fear of vexatious suits and personal liability. It also reflects a view that it would be unfair to expose judges to the dilemma of being required to render judgments while at the same time holding them accountable to the judgment of others. As stated in *Stump v. Sparkman*, 435 U.S. 349, 363, 98 S.Ct. 1099, 1108, 55 L.Ed. 2d 331, 343 (1978) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L. Ed. 646 (1872)), "the doctrine of judicial immunity is thought to be in the best interests of 'the proper administration of justice . . . [, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself.'" *See also Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 323-24, 275 A.2d 53, 56 (1971) ("The reasons for the absolute privilege are well recognized. A judge must be free to administer the law without fear of consequences. ["]). Thus, the JIRB is hereby directed to refrain from initiating such investigations.

Id. at 1039.

A published appellate opinion speaks for itself. To permit the Judicial Qualifications Commission to delve into a judge's reason for his or her opinion is to open the door to a grave threat to both judicial independence and public respect

for the judicial process. Twelve of the fifteen judges of the First District Court of Appeal, in addition to the Court's Marshal and Clerk and possibly the State Courts Administrator, will be witnesses in a public trial and the inquiry will, of necessity, delve into the decision- making processes of the various judges and their opinions of the reasons and motivations of their brothers and sister on the bench. It is hard to imagine a proceeding with more potential for damaging the public perception of the judiciary, or one more disruptive, inappropriate and destructive of judicial independence than the journey into judicial minds proposed by the JQC effort to divine the reason for Judge Allen's concurring opinion in the *Childers* case.

Not only is it unprecedented, but the JQC's attempts to justify its inquiry has no support in Florida or American law. The Court should prevent the JQC from acting here because its actions are beyond the scope of its authority.

B. THE REASON, INCLUDING "MOTIVE," FOR AN APPELLATE OPINION, MAY NOT BE A BASIS FOR JQC INQUIRY

Throughout these proceedings the JQC has offered *In re Richard A. Kelly Circuit Judge*, 238 So. 2d 565 (Fla. 1970) as its main rationale for seeking sanctions against Judge Allen. Its recent March 3, 2008 trial memorandum emphasized that "motive" is the linchpin of its effort and relied on selective quotes from *Kelly* relating to Kelly's reasons for his continuous attacks on lawyers and

judges. See JQC's Trial Memorandum, p. 12, Exhibit E (emphasis in original).

Kelly's case did not involve a published appellate opinion. The Court wrote:

> The record in this case clearly reflects a pattern of petitioner's hostility toward many attorneys, court officials, and fellow judges, as well as a concerted effort to pamper the public and news media by press releases designed to bolster his personal image at the expense of the judiciary. This is conduct unbecoming a member of the judiciary.

Id. at 566. Kelly sought self-aggrandizement; his method was, *inter alia*, publicizing a baseless "Petition to the Judges of the Sixth Judicial Circuit in the Circuit Court of Pinellas County," an "*ex parte* grievance petition of a politician" whose object was to "seek revenge by embarrassing public officials." *Id.* at 567-568. *Kelly* clearly does not support the JQC's attempt to justify its inquiry into the reasons for Judge Allen's appellate opinion in the *Childers* case.

No decision of this Court (or any other court) supports a JQC inquiry into the reasons or motive for an appellate decision. The JQC will offer *In re Gary G. Graham*, 620 So. 2d 1273, 1275 (Fla. 1993), where the Court said that "misconduct of others" is not a defense to judicial misconduct. But "misconduct of others" is not the issue here; it is whether the JQC can ask why Judge Allen wrote his *Childers* opinion. *Graham* does not support a foray into an appellate judge's

thought process.

C. NEITHER JUDICIAL CRITICISM NOR THE USE OF NEWSPAPER ARTICLES IN AN APPELLATE OPINION JUSTIFIES INQUIRY INTO THE REASON FOR AN APPELLATE JUDGE'S OPINION

The Supreme Court of the United States, in a contempt context, 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"). Indeed, judicial criticism, within opinions, and by the public, has long been an accepted by- product of the First Amendment and judicial independence. The JQC attempts to bolster its inquiry by alleging that the use of newspaper articles in Judge Allen's opinion is evidence of ill will. See Exhibit

A, pp. 2-3. Newspaper articles and other non-record materials are not *verboten* in appellate opinion writing. See *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), declaring unconstitutional a statute that created an "opportunity scholarship program," in which Justice Bell, 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). Other examples of newspaper use include: *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, joined by Justices Pariente and Quince); *Florida Department of Children and Families v. F.L.*, 880 So. 2d 602, 612 (Fla. 2004) (Pariente, C.J., concurring); *Gore v. Harris*, 773 So. 2d 524, 537 n.34 and n.35 (Fla. 2000) (Pariente, J., concurring); *see also, Golphin v. State*, 945 So. 2d 1174, 1202 (Fla. 2006) (Pariente, J., concurring, joined by Justices Anstead and Quince).

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 JQC's newspaper use allegations provide no principled basis for attempting to delve into the reasons for an appellate opinion, and do not justify its intrusion into the judicial decision-making process.

D. THE SILENCE OF THE JUDICIARY AND THE BAR SUPPORTS THE CONCLUSION THAT THERE CAN BE NO INQUIRY INTO THE REASONS FOR A JUDICIAL OPINION

The Code of Judicial Conduct, Canon 3D(1) and (2) provide:

> **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 judges called as witnesses by the JQC for depositions on January 28, 2008 acknowledged their duties and responsibilities under the Canon, and the fact that they took no action. *See* Deposition Excerpt of Judge Robert R. Benton, II, pp. 15-16, Exhibit F; Deposition Excerpt of Chief Judge Browning, pp. 35-36, 44-45, Exhibit G; Deposition Excerpt of Judge Webster, pp. 19-20, Exhibit H. While there may have been readers of Judge Allen's opinion who criticized it, the fact that no judge

viewed it as a violation of any rule or canon reflects a recognition of the importance of judicial independence.

The only person to file a complaint with the JQC was Martin Levin, the son of Fred Levin, whose relationship with Judge Kahn and Senator Childers was related in Judge Allen's opinion. Even Judge Kahn, who telephoned Fred Levin the day the opinion was released (Exhibit I, p. 28), 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. But Judge Kahn and his colleagues did not violate Canon 3D by not considering a complaint because Judge Allen's concurring opinion cannot be a basis for a JQC charge. No judge, indeed, no lawyer save Fred Levin's son, sought to take the JQC into a search for the reason for Judge Allen's opinion. This Court should end that effort because the JQC inquiry is beyond its power.

CONCLUSION

For the foregoing reasons the Court should grant the writ of quo warranto, or grant relief under the all writs provision and order dismissal of the Amended Notice of Charges.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to counsel listed below, by Federal Express this 31st day of March, 2008:

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