

BEFORE THE HEARING PANEL OF THE
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

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

CASE NO. SC07-774

JQC'S TRIAL MEMORANDUM

The JQC submits this trial memorandum.

I. THE CONCURRING OPINION.

On June 28, 2006, Judge Michael Allen released to the public a concurring opinion in the *Childers* case that is biting, mean-spirited and malicious. It accuses his fellow judge, Charles Kahn, of corruption without supporting evidence. It was entirely unnecessary because the First District Court of Appeal had already affirmed, en banc, the conviction of Mr. Childers thereby overturning the preliminary ruling of reversal by the initial three-judge panel that heard the appeal. It was improper because there was no corruption and because public perception of the judiciary demands that suspected judicial corruption be reported to the JQC and not spread upon the pages of the Southern Reporter. And it was also improper because it was motivated by Judge Allen's long-existing personal hatred of Judge Kahn that predated the Childers appeal by several years.

The following summary captures the essence and "logic" of Judge Allen's opinion:

- "My vote ... was based upon my concern that participation by a particular judge of this court [Judge Charles Kahn] in the panel decision would have led to public perceptions of partiality by this court."
- Quoting three separate newspaper articles from 1998 and 2002, the accuracy of which Judge Allen admits is unknown to him, he uses the newspaper articles to make these points:
 - Fred Levin and W.D. Childers were cronies of Lawton Chiles.
 - The tobacco legislation and the Governor's handling of it was "the good ole boy network run amuck."
 - W.D. Childers was a redneck politician who displayed a contempt for open government.
 - Describing the passage of the tobacco legislation, Childers was quoted as saying: "All we did was snooker the bastards."
 - The tobacco settlement made a handful of trial lawyers wealthy, including Fred Levin.
 - Fred Levin plotted with Childers to pass the tobacco law and now represents Childers on the Sunshine Law charges against Childers.
 - Upon being elected County Commissioner, Childers continued all of the bad-government habits he had when he was in the legislature.

- Childers and Levin have faced serious “jams” and experienced “success together” for more than two decades.
 - Levin represented Childers in a grand jury investigation.
 - Childers testified on Levin's behalf when the Florida Bar accused him of illegal gambling.
 - In 1980, Levin represented Childers during a grand jury investigation.
- After reading those [newspaper articles], most members of the public would believe that Mr. Childers and Mr. Levin are extremely close personal and political allies, that they both had a close personal and political relationship with Governor Chiles, that their close relationship with one another and with Governor Chiles ultimately resulted in Mr. Levin's firm receiving hundreds of millions of dollars in litigation made possible by a law adapted as a result of a legislative 'scam' orchestrated by the three of them, that Mr. Levin was Mr. Childers' long-time personal attorney, and that Mr. Levin was personally representing Mr. Childers on various criminal charges growing out of his actions as an Escambia County Commissioner when – and for some period of time after – the indictment was handed down in the present case.
 - Governor Chiles appointed nine judges to the 1st DCA, and the very first went to Fred Levin's 39-year old law partner, Charles Kahn. [But what Judge Allen completely omits from the opinion is the date of Judge Kahn's appointment – 1991 – years before the 1998 and 2002 newspaper articles. The state tobacco litigation and settlement occurred years after Judge Kahn was appointed to the bench. The omission of Judge Kahn's appointment date from Judge Allen's opinion was a sleight of hand designed to associate Judge Kahn with events that occurred long after he was appointed to the bench.]

- A member of the public familiar with the reported relationships among Chiles, Levin and Childers described above would doubt that Charles Kahn was appointed to this court without the considerable influence of Levin and Childers.
- A reversal of the Childers' conviction might result in Mr. Childers not being required to further answer for the crimes for which he had been convicted because news reports reveal that the witness, Willie Junior, was dead.
- The deciding vote on the reversal would have been cast by Fred Levin's former law partner, Charles Kahn.
- More suspicious members of the public "would have assumed that Judge Kahn had simply returned past favors provided to him by Mr. Levin and Mr. Childers, thus allowing them, once again, to 'snooker the bastards.'"
- The first district has been respected by the public for its integrity, honor and impartiality and has a record unblemished by public suspicion. [The strong implication is that Kahn's activities have blemished the court.]
- The court should never perform our responsibilities in a manner that would cause the public to question the impartiality of our decisions, but that is what Judge Kahn did by failing to recuse himself from consideration of the case.¹
- "I cast my vote for consideration of this case by the full court, not to affect the outcome of the ultimate decision but to see that the ultimate decision of this court is made by judges unblemished by public suspicion." [Thus suggesting that Kahn is blemished by public suspicion.]

¹ The law concerning disqualification of appellate judges in Florida is established in *In Re: Estate of Carlton*, 378 So.2d 1212, 1216-17 (Fla. 1979) ("[W]e . . . hold that each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances.") Here, no party requested that Judge Kahn recuse himself. The decision to recuse rested with Judge Kahn, alone and not with Judge Allen or any other judge.

Based on the foregoing non-record newspaper articles, innuendo and supposition that portray Messrs. Childers and Levin as wicked bogymen, and the crucial omission of the date of Judge Kahn's appointment to the bench, Judge Allen's opinion constructed this tortured and faulty syllogism:

- Levin and Childers were friends, and Childers sponsored legislation (years after Judge Kahn was appointed to the bench) that benefited Levin.
- Judge Kahn was once a member of Levin's law firm.
- Levin was responsible for Judge Kahn's appointment to the Court.
- Therefore, Judge Kahn's vote to reverse the Childers conviction was a "payback" to Levin for facilitating Judge Kahn's appointment.

Thus did Judge Michael Allen burn down the Court to save it.

II. THE CHARGES

A. The Original Charges

- Judge Allen violated Canon 1 because his disparagement of Judge Kahn's integrity was contrary to his duty to observe high standards so that the integrity and independence of the judiciary may be preserved.
- Judge Allen violated Canon 2A because his concurring opinion undermined public confidence and the integrity and impartiality of the judiciary, was contrary to the existing law regarding the disqualification and recusal of appellate court judges and consideration of matters outside the record.

- Judge Allen violated Canon 3B(2) because his attack on Judge Kahn was not in keeping with the established law of Florida which provides that decisions on disqualification or recusal of an appellate judge are committed to the "conscience" of that judge, and that an appellate judge should not consider matters outside the record.
- Judge Allen's concurring opinion violated Canon 3B(4) because his attack on Judge Kahn was neither patient, dignified nor courteous.
- Judge Allen violated Canon 3B(5) because his concurring opinion, and his conduct leading up to the publication of the concurring opinion, establishes that he is prejudiced against Judge Kahn.
- The attack against Judge Kahn in the concurring opinion was improper because Canon 3B(1) requires a judge with knowledge of a violation of the Code (such as corruption) to communicate with the judge involved, or to report the violation to the appropriate authority, which in this case is the JQC.
- Judge Allen's attack on Judge Kahn was unnecessary because an en banc proceeding had already assured that Judge Kahn would not cast the deciding vote that would reverse the conviction. Furthermore, a disagreement between Judge Allen and Judge Kahn and several other members of the Court over the legal issue whether en banc treatment was appropriate did not merit a wholesale attack on Judge Kahn's integrity arising out of an issue that was mooted by the en banc proceeding.

- Judge Allen's concurring opinion is contrary to the general ethical standards that the Preamble to the Code of Judicial Conduct provides should govern judges in their judicial and personal conduct.
- Judge Allen's concurring opinion violated the Oath of Admission which all lawyers take when sworn in as a member of The Florida Bar which obligates lawyers to maintain the respect due to courts of justice and judicial officers and requires lawyers to abstain from all offensive personality.
- Judge Allen's concurring opinion also violated Bar Rule 4-8.2(a), which prohibits a lawyer from making a statement "with reckless disregard as to its truth or falsity concerning the integrity of a judge"

B. The Additional Charges.

On October 6, 2006, Judge Allen appeared before the JQC Investigative Panel. Given the option of making an unsworn statement or testifying under oath, he elected to testify under oath. The additional charges assert that Judge Allen violated Canons 1, 2A and 4A of the Code of Judicial Conduct, Rule 4-8.4(c) of the Rules of Professional Conduct of The Florida Bar, and of the oath that he took before testifying. Among other things, Judge Allen falsely testified that he had no personal animus toward Judge Kahn associated with the concurring opinion; that he did not write the opinion with an evil intention; that he had no bad motivation; that there was no animosity "whatsoever" associated with

the concurring opinion; and that this was "no vendetta" on his part, nor was it a "retaliation" against a fellow judge. He also testified that he had no intention of "embarrassing anyone."

The evidence will show that this testimony is palpably false.

III. THE EVIDENCE

The concurring opinion speaks for itself. The issue is whether Judge Allen's "motive or method does violence to the Canons of Judicial Ethics." *In Re Richard A. Kelly, Circuit Judge*, 238 So.2d 565, 570 (Fla. 1970).

As to the method of criticism, publishing a charge of corruption by "payback" in the pages of the Southern Reporter is on its face improper. See Canon 3D(1), the commentary to the Canon and *In Re Boyd*, 308 So.2d 13, 20 (Fla. 1975). The Florida Supreme Court has repeatedly held that "the impartiality of the . . . judge must be beyond question." *In Re: McMillan*, 797 So.2d 560 (Fla. 2001). "This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge...." *Id.* at 571, quoting *State ex rel. Davis v. Parks*, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939). "When any person, and most especially a lawyer or judge, has reason to believe that public corruption exists at any level of government, that person is obligated to disclose such information to the appropriate authority without hesitation. However, when charges are leveled without basis in fact, enormous harm is inflicted upon our public institutions by loss of confidence among a public little equipped to sort out the valid from the invalid and campaign rhetoric from fact.." *Id.* at 572.

As to Judge Allen's motive, the evidence will show:

- Judge Allen harbors a "personal hatred," "a visceral dislike," and an "intense animosity and hostility" toward Judge Kahn.
- This animosity of Judge Allen toward Judge Kahn existed for several years before the Childers matter came to the Court.
- Judge Allen's comments to fellow judges about Judge Kahn are always derogatory and usually laced with profanity.
- One judge has never seen a level of personal hatred as intense as that of Judge Allen for Judge Kahn.
- Even before Childers became an issue in the Court, Judge Allen organized opposition to electing Judge Kahn as Chief Judge, and then organized a campaign to have him removed as Chief Judge.
- Judge Allen spearheaded an effort personally to investigate Judge Kahn and put great pressure on the Office of State Court Administrator (OSCA) to divulge records regarding Judge Kahn and even threatened the First DCA Marshal with his job if he told Judge Kahn (who was then the Marshal's boss) what Judge Allen was doing.
- Judge Allen has continued his assault on Judge Kahn by attempting to make Judge Kahn's purported misbehavior an issue in this case, and attempting to utilize Judge Kahn's purported misbehavior as a defense to Judge Allen's actions.

- When Judge Kahn's extramarital activities became the subject of newspaper stories, Judge Allen noted that that would keep Kahn from ever being appointed to the Florida Supreme Court.

IV. ARGUMENT

[F]ragile as reason is, and limited as law is as the . . . institutionalized medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling.

Felix Frankfurter
Time, Sept. 7, 1962 at 15

Judge Michael Allen succumbed to the "tyranny of mere will and the cruelty of unbridled, undisciplined feeling." Based not on evidence and law, but upon innuendo and supposition, Judge Allen accused a fellow judge of corruption and published the accusation in the Southern Reporter where it will stand for all eternity.

He published his allegation of corruption *after* the case in question was removed from the three-judge panel that initially decided it, and *after* the full court decided the case contrary to the three-judge panel's decision. So at the time of Judge Allen's public assertion of his colleague's corruption, there was no danger that the purported corruption would taint the Court's decision.

Judge Allen's professed concern – that the decision was tainted by corruption – had already been resolved when Judge Allen published his charge. Judge Allen's act was not grounded on fact and law, but arose from his "unbridled, undisciplined" personal animosity and ill-will toward his fellow judge.

It is in the nature of the legal system that judges frequently disagree with each other on legal principles, and those disagreements are sometimes

expressed in strong language. But Judge Allen's disagreement with his colleague was not over a legal principle. It was a bald allegation of corruption – based on no evidence and no law – in the context of a case where neither party asked Judge Kahn to recuse himself.

In the 1960's, Sixth Judicial Circuit Judge Richard A. Kelly engaged in a pattern of conduct reflecting hostility toward many attorneys, court officials and fellow judges. After being elected presiding judge of the Circuit, his erratic behavior caused his fellow judges to take steps to remove him as presiding judge. After meeting with his fellow judges and hearing that they fully intended to remove him, he resigned and threatened those judges in attendance that he would embarrass them and cause them to regret their decision. *In re Richard A. Kelly Circuit Judge*, 238 So.2d 565 (Fla. 1970).

He then met with a local newspaper editor and several reporters and told them about a "petition" he would file with the Sixth Circuit Clerk. The essence of Judge Kelly's written criticism of his fellow judges by "petition" was focused on the administration of the criminal justice system and was not a public charge of corruption as in the present case. The Supreme Court found (*Id.* at 568):

[Judge Kelly] knew judicial reform could be attained in a variety of ways 'under the law.' But vengeance could best be served through publicizing his grievance. This was accomplished when [Judge Kelly], in his official capacity as a judge, filed his ex parte petition with the clerk so that it would be a public record.

In finding that Judge Kelly engaged in conduct unbecoming a member of the judiciary and publicly reprimanding him, the Court made the following points that apply to the present case:

- Since we have a government of law and not men, no member of the judiciary should act officially as a 'judge' save only as it is found in and defined by the law. (*Id.* at 568).

* * *

- The question is whether the *motive* of, and the *methods* used by, the petitioner together with the resulting turmoil created by his actions should be considered as conduct unbecoming a member of the judiciary and contrary to the Canons of Judicial Ethics. (*Id.* at 569) (emphasis added).

* * *

- There are many authorized methods of protest, dissent and criticism within the framework of the judiciary, such as the preparation of dissenting opinions, petitions to the Supreme Court for changes in the rules of procedure, submission of suggested changes to various committees of the Florida Bar, participating in the various legal seminars conducted by the Committee on Legal Education, or taking an active part in the state and local conferences as judges. (*Id.* at 569)

Criticism is not neutral. When a judge sets himself up to criticize other judges, his criticism ultimately must be viewed as having been constructive or destructive in its impact. If he has been tempered and judicious, his criticism is likely to be, in its ultimate result, beneficial to the community which he serves – and it does not matter whether this constructive criticism is publicly or privately voiced. On the other hand, impetuous argument, or criticism taken by methods which prevent honest discussion and a fair rebuttal can be expected only to have a destructive result. No matter how bland or even wholesome the content, if the methods used raise suspicion of motives among the judges, and renders the courts all suspect to the public, the result can only be an increase in disrespect for law and order, an increase in lawlessness, a greater tendency among some of our citizens to let loose their tendencies to disorder. (*Id.* at 569-70).

* * *

- He cannot avoid the resulting inquiry as to his motive and methods by invoking the right of freedom of speech in this disciplinary proceeding. We are not concerned with his right to speak, but *whether his motive or method does violence to the Canons of Judicial Ethics.* (*Id.* at 570) (emphasis added).

* * *

- Every man in public office hungers for public esteem, but no man has the right to buy this esteem with the stolen coin of other men's public reputations, not even a twice-elected member of the judiciary. (*Id.* at 573).

If the high ideals and standards of the Code of Judicial Conduct, the Rules of Professional Conduct of The Florida Bar and the Oath of Admission of The Florida Bar are to have any meaning, the Judicial Qualifications Commission must condemn Judge Allen's action.

Judge Allen compounded his wrong when he appeared before the Investigative Panel of the JQC on October 6, 2006, and repeatedly denied, under oath, that he had any animosity toward Judge Kahn, that there was any bad motivation connected with his opinion, that he intended to embarrass anyone and that his conduct toward Judge Kahn was a vendetta or a retaliation against him.

When the sworn testimony of Judge Allen's judicial colleagues contradicted his October 6, 2006, testimony, the JQC filed an amended notice of formal charges that Judge Allen had knowingly and willfully made false statements to the JQC relating to material issues. In *In Re: Davey*, 645 So.2d 398 (Fla. 1994), the Florida Supreme Court noted:

The Commission as a constitutional body charged with the duty to investigate the state judiciary, has a right to expect absolute candor from the judges appearing before it.

Where a judge knowingly and willfully provides false information to the JQC, the JQC is authorized to file an amended notice of formal charges embracing such misconduct. *Id.* at 406. See *In Re Richard E. Leon*, 440 So.2d 1267 (Fla. 1983).

V. CONCLUSION

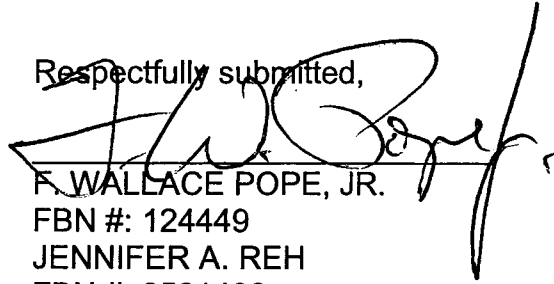
There is clear and convincing evidence that Judge Allen's concurring opinion is an improper method of dealing with a claim of corruption on the part of a colleague, and that he was motivated by personal animosity rising to the level of personal hatred of his colleague, Charles Kahn. There is also clear and convincing evidence that Judge Allen's sworn denials of animosity, bad motive, intent to embarrass, vendetta and retaliation in his October 6, 2006, testimony before the JQC are false. The Hearing Panel should find that Judge Allen violated provisions of Judicial Canons, the Rules of Professional Conduct, the attorney's oath and his oath to tell the truth, and should recommend appropriate discipline to the Florida Supreme Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JQC's Trial Memorandum has been furnished by regular U.S. mail to Richard C. McFarlain, Esq., Carr Allison, 305 South Gadsden Street, Tallahassee, FL 32301; Guy Burnette, Jr., Esq., 3020 N. Shannon Lakes Drive, Tallahassee, FL 34309; Bruce S. Rogow, Esq. and Cynthia Gunther, Bruce S. Rogow, P.A., 500 East Broward Blvd., Suite 1930, Ft. Lauderdale, FL 33394; Hon. Paul Backman, Chairman, Hearing Panel, Broward County Courthouse, 201 S.E. 6th Street, Suite 5790, Ft. Lauderdale, FL 33301; Lauri Waldman Ross, Esq., Lauri Waldman Ross, P.A., 9130 S. Dadeland Blvd., Datan II, Suite 1612, Miami, FL 33156; and Michael Schneider, General Counsel and Brooke S. Kennerly, Executive Director, Judicial Qualifications

Commission, 1110 Thomasville Road, Tallahassee, FL 32303 the this 3 day of
March, 2008.

Respectfully submitted,



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