

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE

BARRY M. COHEN, NO. 12-285

SC12-_____

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NOTICE OF FORMAL CHARGES

TO: The Honorable Barry M. Cohen
County Judge, Palm Beach County
205 N. Dixie Highway, Room 9.2210
West Palm Beach, Florida 33401

The Investigate Panel of the Florida Judicial Qualifications Commission, at its meeting of October 4, 2012, by a vote of the majority of its members, pursuant to Rule 6(f) of the Rules of the Florida Judicial Qualifications Commission and Article V, Section 12(b) of the Constitution of the State of Florida, finds that probable cause exists for formal proceedings to be instituted against you. Probable cause exists on the following formal charges:

1. You have made statements in the course of presiding over criminal cases and have issued orders and opinions in which you have expressed disagreement with the laws passed by the Florida Legislature. Your statements have covered several different areas of the criminal law:

a. In *State v. Williams*, Palm Beach County Case #2007MM001698AXX, in a written verdict you criticized the law making cannabis illegal. In doing so you admitted that your statements were not relevant to the

verdict and you found it necessary to clarify that you were not criticizing the State Attorneys Office or law enforcement.

b. In *State v. Brown*, Palm Beach County Case #2010CF003091AXX, you stated your concern about the propriety of the minimum mandatory sentencing for possessing trafficking amounts of oxycodone. You went further and suggested that minorities were disproportionately arrested, prosecuted and incarcerated for such crimes, and you questioned whether the purpose of the law was legitimate.

c. In *State v. Domino*, Palm Beach County Case 32010CF010998AXX, you distributed an editorial questioning the wisdom of the laws regarding sex offenders, even though the defendant was charged with Failure to Register as a Sex Offender. You then granted the State's Motion to Disqualify. This matter was reported in the press.

d. In *State v. Gonzalez*, Palm Beach County Case #999CT015262AMB, #1999MM021775AMB and #2004MM202898, you openly questioned the mandatory requirement of probation for a defendant convicted of Driving Under the Influence.

2. You have repeatedly suggested that the actions of law enforcement may have been improperly motivated by the race or status of suspects:

a. In *State v. Sampson*, Palm Beach County Case #2004MM025017AMB, you opined that the system was "out of kilter" and suggested that the justice system discriminates based upon race and poverty.

You also recognized that you were an activist judge and that your actions could subject you to discipline.

b. In *State v. McCullon*, Palm Beach County Case #2001CF002107XXXX, in an order granting a motion to suppress, you found that African Americans could not feel free to exercise their constitutional rights in Palm Beach County.

c. On September 14, 2009, while you were presiding over *State v. Hollis*, Palm Beach County Case #2009MM014113AMB, you took it upon yourself to make statements about the case at a symposium on racial profiling. In this statement you accused law enforcement in Palm Beach County of improper racial profiling. You went further and alleged that “laws are enforced in a discriminatory fashion.” In doing so you acknowledged that it was improper for you speak in such a manner, and boasted that you had done so before.

3. While presiding over criminal cases you have criticized the charging decisions of the Assistant State Attorneys who appear before you, thus calling into question your role as a neutral and detached magistrate.

a. In *State v. Gonzalez*, cited above, you challenged the Assistant State Attorney to have the courage “to do the right thing” by dropping the case.

b. In *State v. Bryant*, Palm Beach County Case #2003MM030859AMB, after the State had already reduced the charge from a Lewd and Lascivious to a misdemeanor Battery, you criticized the charging decision and argued that an inadmissible polygraph examination should have been the basis for dismissal.

c. In *State v. Cole*, Palm Beach County Case #2004MM021199ANB, after denying a defense motion to dismiss, you criticized the State for going forward on a charge of making false 911 calls against a person with long term mental health issues. You stated that, “this defendant is not pleading guilty to anything.” This statement gave the appearance that you were advocating for the defendant.

d. In *State v. Dykinga*, Palm Beach County Case #2004MM021200ANB, and *State v. Kuller*, Palm Beach County Case #2004MM02119ANB, you criticized the Assistant State Attorney for proceeding on a misdemeanor charge of Unnatural and Lascivious Act where a 41 year old man and 19 year male were caught having sex on a public beach.

e. In *State v. Torocsik*, Palm Beach County Case #2007MM011769AXX, you criticized the State for appealing the granting of a Motion for a New Trial. You then felt compelled to comment that this retrial was “outrageous” because it was only a misdemeanor for which the only penalty was a withhold of adjudication, and, in your opinion, therefore not worth the cost and time of prosecution. When you did so, you specifically stated that your comments were not directed to the Assistants present in the courtroom, but at the elected State Attorney, even though he was not present. The defendant was convicted. Your behavior was such that it was reported in the news.

4. You have engaged in a pattern of using your judicial position as a “bully pulpit.” Since there is a disparity in authority between a judge and those who appear in court as attorneys and litigants, you have taken advantage of this fact to espouse your

personal views about your fellow players in the criminal justice system, and well as your personal views about other irrelevant matters.

5. While this discourse about the criminal justice system may be proper and encouraged in an appropriate setting, to do so from the trial bench is wholly inappropriate. This point was clearly made in a letter from a prospective juror who appeared in your courtroom on February 24 and 25, 2011. This letter, attached as Exhibit 1, demonstrates the perception of your misuse of your judicial position by those outside the criminal justice system.

6. The foregoing pattern of advocacy was most recently expressed by your letter, Exhibit 2, published in the Palm Beach Post on March 22, 2012, in which you identified yourself as a judge and then commented on the qualifications of a candidate in the election for the State Attorney for the Fifteenth Judicial Circuit, a partisan election. That behavior is consistent with, and cumulative of, a pattern of conduct that undermines the role of a judge as a neutral, detached magistrate.

7. The foregoing conduct, if proved as alleged, constitutes inappropriate conduct and violates Canons 12Am 3B(5), 3B(7), 3B(9), 3E(1)(a), 5A(1), and 7A(1)(b) of the Code of Judicial Conduct.

You are hereby notified of your right to file a written answer to these charges within twenty (20) days of service of this notice upon you. The original of your response and all subsequent pleadings must be filed with the Clerk of the Florida Supreme Court, in accordance with the Court's requirements. Copies of your response should be served on the undersigned General Counsel for the Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, FL 32303.

Respectfully submitted,

F. WALLACE POPE, JR.
FBN #: 124449
JOHNSON, POPE, BOKOR,
RUPPEL & BURNS, LLP
P.O. Box 1368
Clearwater, FL 33757
727-461-1818
727-462-0365 – fax
Special Counsel for Florida
Judicial Qualifications Commission

and

FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION
By: Michael L. Schneider
General Counsel
Florida Bar No. 525049
1110 Thomasville Road
Tallahassee, FL 32303
(850) 488-1581

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of investigation has been furnished by U.S. Mail and Electronic Mail to Counsel for Judge Cohen, Scott N. Richardson, Esq., Law Office of Scott N. Richardson, P.A., 1401 Forum Way, Suite 720, West Palm Beach, FL 33401 this _____ day of October, 2012.

F. WALLACE POPE, JR.
Special Counsel

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Scott N. Richardson, Esq.
Law Office of Scott N. Richardson, P.A.
1401 Forum Way, Suite 720
West Palm Beach, FL 33401