Destry

Emailing: Fla. Judge Charged With Quid Pro Quo Ethics Violations

Mueller, Michael to: rloukonen@cohenlaw.com, RCrown@CA.CJIS20.org 09/30/2016 12:30 PM

From: "Mueller, Michael" <mmueller@hunton.com>

To: "rloukonen@cohenlaw.com" <rloukonen@cohenlaw.com>, "RCrown@CA.CJIS20.org" <RCrown@CA.CJIS20.org>,

History: This message has been replied to.

Here is a possible issue to cover in our January 10 presentation. Also see attachment, which is the official notice. (As you may or may not know, Judge Destry's recent campaign, which he lost, was marred by controversy and he lost his seat.)

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Fla. Judge Charged With Quid Pro Quo Ethics Violations

By Carolina Bolado

Law360, Miami (September 29, 2016, 5:18 PM EDT) -- A Florida judge was accused of ethics violations Thursday over a meeting with a political activist that allegedly led the judge to change his position on a 60-year prison sentence for a probation violation by cutting out jail time entirely.

In a notice of charges filed with the Florida Supreme Court, Florida's Judicial Qualifications Commission said the actions of Judge Matthew Destry, who sits on the Seventeenth Judicial Circuit in Fort Lauderdale, "create the appearance of a quid pro quo exchange of political support for favorable judicial action" and violate the state's Code of Judicial Conduct.

Judge Destry initially sentenced 23-year-old Herbert Smith to 60 years in prison in November after he was caught driving with a suspended license with ammunition and stolen property in his car. Smith had already served time for a burglary and was on probation.

The JQC said the sentence was closely scrutinized by local media and "widely condemned as excessive." The 60-year sentence was more than four times what the prosecution had requested.

Shortly after the sentencing, the judge had lunch with political activists Vicente Thrower and the Rev. Alan B. Jackson, who argued that he should reopen the matter and give them a chance to speak on Smith's behalf, according to the JQC. Judge Destry acknowledged later that he agreed at the meeting to set a hearing to reconsider the sentence.

At an Aug. 19 hearing about the meeting, the JQC said Judge Destry was

evasive when asked about how he knew Thrower.

"Only when pressed did you disclose that he was a political activist who had worked to generate community support for your first judicial campaign in 2010," the JQC said.

The judge also told the commission that after the meeting with Thrower, he was aware that the activist had begun urging members of the community to support his re-election campaign.

In addition, the JQC says the information about the case on the judge's campaign site — excerpts of the resentencing hearing transcripts that attempt to set the record straight on why Smith got a long prison sentence in the first place — is a public comment on a pending case in violation of the Code of Judicial Conduct.

The controversy surrounding the sentence has already cost Judge Destry his seat on the bench. In the crowded Aug. 30 primary, he finished fourth out of five candidates. Solo practitioner Barbara Duffy and state's attorney Abbe Rifkin will compete for Judge Destry's seat in a runoff election in November.

Judge Destry could not immediately be reached for comment Thursday.

The JQC is represented by Alexander John Williams.

Counsel information for Judge Destry was unavailable.

The case is Inquiry Concerning a Judge, the Honorable Matthew Destry, case number SC16-1757, in the Supreme Court of the State of Florida.

--Editing by Brian Baresch.

2016.09.29-Note of judicial ethics issue.pdf

Filing # 47064829 E-Filed 09/29/2016 09:32:27 AM

BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE,
THE HONORABLE MATTHEW DESTRY
JQC NO. 16-238
_____/

SC16- ____

NOTICE OF FORMAL CHARGES

TO: The Honorable Matthew Destry
Circuit Judge, 17th Judicial Circuit
201 SE 6th Street, Chamber 4910
Fort Lauderdale, FL 33301

The Investigative Panel of the Florida Judicial Qualifications Commission ("JQC" or "the Commission"), at its meeting on August 19, 2016, 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.

> Canon 2A of the Florida Code of Judicial Conduct (the "Canons") requires a judge to avoid even the appearance of impropriety, stating that a judge "...shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."
>
> ***
>
> Canon 3B(7) states that "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to

law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided;

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and;

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

***

Canon 3B(9) provides that a judge "shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness…".

The specific allegations for which the Commission has found probable cause are that:

1. In November of 2015, while presiding over the criminal case of State v. Herbert Smith, Jr. (Broward County Case No. 2012-CF-009067) you sentenced the Defendant to a 60-year prison term. Your sentence received intense media coverage and was widely condemned as excessive.

Approximately one week after Mr. Smith's sentencing, Mr. Vicente Thrower, a well-known political activist who had assisted in your previous judicial campaign, called you to arrange a lunch meeting. This meeting, which was also attended by Rev. Alan B. Jackson, took place outside the presence of the State Attorney and Defendant, and without the knowledge of either party.

2. At the 6(b) Hearing before the Commission August 19, 2016, you were questioned how Mr. Thrower contacted you to arrange the meeting. You disclosed that he had your personal cell phone number. When asked how you knew Mr. Thrower, and what he did for a living, you were evasive. Only when pressed did you disclose that he was a political activist who had worked to generate community support for your first judicial campaign in 2010.

3. You met with Mr. Thrower and Rev. Jackson for an hour at a Broward County restaurant called Mangos. At that meeting you engaged in a discussion about Mr. Smith's sentencing. Mr. Thrower and Rev. Jackson convinced you to reopen the matter, arguing that their community had not been adequately heard on Mr. Smith's sentencing, and they wanted a chance to speak on his behalf. You have admitted that while meeting with Mr. Thrower and Rev. Jackson you committed to setting a hearing to reconsider

Mr. Smith's sentence, and invited Mr. Thrower and Rev. Jackson to attend and be heard regarding the matter.

4. You also acknowledged this meeting between yourself and Mr. Thrower and Rev. Jackson during an interview with the editorial board of the Sun Sentinel newspaper. Your comments were tape-recorded, and witnessed by other judicial candidates as well as newspaper staff. You further acknowledged to the Commission that, after this meeting, you were aware that Mr. Thrower began urging members of his community to support your current re-election campaign.

5. During your testimony before the Commission, you conceded that your lunch-time meeting with Mr. Thrower and Rev. Jackson was an ex-parte communication, but argued that it fell under the Canon 3B(7)(a) exception for "scheduling, administrative purposes, or emergencies, not dealing with substantive matters or issues…". This analysis fails for reasons explained in Paragraph 7 of this Notice.

6. After meeting with Mr. Thrower, and Rev. Jackson, you *sua sponte* scheduled a hearing in Mr. Smith's case. At that time, there was no motion to mitigate or reconsider the sentence pending or even filed. Additionally, the hearing you ordered was set as a "status date," which did not provide adequate notice to the State, or the Defense, about the nature or purpose of

the hearing. The Defense did independently file a motion to mitigate Mr. Smith's sentence, however, it was only filed one day before your judicially ordered "status date." Prior to the hearing, you personally phoned Mr. Thrower to inform him of the date and time of the hearing, and again invited him to be present.

7. At the mitigation/resentencing hearing, Mr. Thrower and Rev. Jackson were present, and provided testimony on behalf of Mr. Smith. You admitted to the Commission you did not disclose your previous meeting with Mr. Thrower or Rev. Jackson regarding Mr. Smith's case at any time before, during, or after the hearing. You acknowledged that this fact alone placed you in violation of Canon 3B(7)(a), which requires prompt and full disclosure of ex-parte communications.

8. At the mitigation/resentencing hearing, you rescinded Mr. Smith's original sentence, choosing instead, to suspend the 60-year prison term, and release Mr. Smith on probation.

9. If it is alleged that Mr. Smith violated the terms and conditions of his probation, the matter would be brought back before you to determine whether the alleged violation was willful, and to determine the appropriate sanction. These decisions would be at your sole discretion and without the benefit of a jury.

10. Notwithstanding any future rulings you may have to make in Mr. Smith's

case, your campaign website features carefully selected excerpts of the resentencing hearing transcripts. The portion of the transcript you include is a lengthy speech in which you; (1) acknowledge the widespread public clamor about your original sentence, and (2) attempt to set the record straight on why you sentenced Mr. Smith to the lengthy prison term. The curated information about Mr. Smith's case on your campaign website constitutes a public comment on a pending case in violation of Canon 3B(9).

Taken together, your actions create the appearance of a *quid pro quo* exchange of political support for favorable judicial action, and further constitutes inappropriate conduct in violation of Canons 1, 2(A), 3B(2), 3B(7), 3B(8), 3B(9), 5A(2), 5A(3), 5A(4), 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 Counsel for the Judicial Qualifications Commission, and the General Counsel of the Commission.

Dated: this 28th day of September, 2016.

THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

Alexander John Williams
ASSISTANT GENERAL COUNSEL
Florida Bar No. 99225
P.O. Box 14106
Tallahassee, Florida 32317
(850) 488-1581
awilliams@floridajqc.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Formal Charges has been furnished by E-Mail on this the 28th day of September, 2016, to the following:

The Honorable Matthew Destry
Circuit Judge, 17th Judicial Circuit
201 SE 6th St- Chamber 4910
Fort Lauderdale, FL 33301

Alexander John Williams
ASSISTANT GENERAL COUNSEL

Filing # 37254035 E-Filed 02/01/2016 03:02:11 PM

Lakin

BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE,
THE HONORABLE JOHN LAKIN
No. 15-524
_____/

SC16-___

NOTICE OF FORMAL CHARGES

TO: **The Honorable John Lakin**
Circuit Judge, 12th Judicial Circuit
1051 Manatee Avenue West
Bradenton, Florida 34206

The Investigative Panel of the Florida Judicial Qualifications Commission, at its meeting on January 29, 2016, 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:

Among other restrictions, Canon 5A requires a judge to conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially…;

(2) undermine the judge's independence, integrity, or impartiality; or

(3) demean the judicial office.

In addition, Canon 5D requires that a judge *shall not accept*…a gift,

bequest, favor or loan from anyone who is likely to come or whose interests have come or are likely to come before the judge. The commentary to Canon 5D(5)(h) specifically states that this rule "prohibits judges from accepting gifts, favors, bequests or loans from lawyers or their firms if they have come or are likely to come before the judge," and similarly "prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge."

Furthermore, Canon 2A affirmatively requires a judge to avoid even the appearance of impropriety, stating that a judge "...shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The Code of Judicial Conduct violations alleged by this Notice of Formal Charges relate to the conduct set forth below:

1. You were presiding over the case of Wittke v. Walmart, (Manatee County case # 2012-CA-003458). The Plaintiff, Sandy Wittke, was represented by attorneys Melton Little and Scott Kallins of the law firm *Kallins Delgado & Little*. Ms. Wittke alleged that Walmart's negligence caused her to fall and injure herself, resulting in personal injuries. A four-day trial was conducted before a jury, and on June 25, 2015, the jury found that Walmart was not liable for Ms. Wittke's injuries.
2. On June 26, 2015, the day after the verdict, you instructed your Judicial Assistant to contact the law firm of *Kallins Delgado & Little* to request tickets for that evening's game between the Tampa Bay Rays and The

Boston Red Sox. The firm sent over five tickets. You admit to using two of the tickets and throwing the remaining three away. Despite the fact that the Wittke case was not yet final, and you expected that there would be post trial motions requiring your adjudication, you failed to advise Walmart's counsel of your contact with the Plaintiff's law firm.

3. Six days later, counsel for the Plaintiff filed a motion to set aside the jury's verdict for Walmart, and conduct a new trial. The Plaintiff's motion is heard on August 21, 2015, after which you did not issue a ruling, but took the motion under advisement. On August 25, 2015, you requested and received five more tickets to the Tampa Bay Rays from the *Kallins Delgado & Little* law firm. The next day, on August 26, 2015, you issued an order setting aside the jury's verdict and granted a new trial, finding that "...no reasonable jury could have returned a verdict finding that the Defendant was not at least partially liable for the injuries sustained by the plaintiff based on the evidence presented at trial." Your extraordinary action allowed the Plaintiff a second opportunity to seek damages from Walmart. You have acknowledged that during your tenure on the bench you have never before overturned a jury verdict.
4. In total, you requested and received five tickets to four separate Major League Baseball games from the Plaintiff's attorneys in the Wittke case, all while the case was pending, and without ever disclosing this fact to the counsel for Walmart.
5. The tickets you received were excellent seats, being located seven to eight

rows back, between home plate and first base. They each had a face value of approximately $100.

6. The Chief Judge of the Circuit, and the Administrative Chief Judge of your division counseled you that your conduct was inappropriate and that you needed to disclose your actions to the JQC, and to the parties involved in the Wittke matter. Your subsequent disclosure to the parties on October 9, 2015, stated only that, "I previously received Tampa Bay Rays baseball tickets from the Kallins & Little law firm." Your disclosure did not include the dates that you accepted the tickets, nor did you even explain that you had accepted the tickets while the Wittke matter was pending.

7. The following is a timeline of events during the trial of the Wittke v. Walmart matter, and the dates that you requested and used tickets provided by the Plaintiff's law firm.

1/16/15 First hearing with counsel

1/29/15 Order setting case for jury trial and pretrial conference

6/19/15 Pretrial motions heard

6/22/15 Jury seated

6/25/15 Jury verdict

6/26/15 Boston Red Sox

7/2/15 Motion for new trial

8/21/15 Hearing on Plaintiff's Motion for New Trial

8/25/15 Minnesota Twins

8/26/15 Order Granting New Trial

9/12/15 Boston Red Sox

9/21/15 Notice of Appeal to 2nd DCA

9/24/15 Motion for Stay Pending Review by 2nd DCA

10/3/15 Toronto Blue Jays

10/9/15 Court discloses the conflict to the parties for the first time, and recuses itself from case.

8. In addition to the foregoing, there are at least two other instances where you have accepted tickets to major league sporting events from lawyers, or law firms that may appear before you.
    a. In May of 2015 you received two tickets to a Tampa Bay Rays game from attorney Ed Sobel.
    b. In 2013 you received two tickets from the *Gallagher & Hagopian* law firm. You have admitted that attorney Gregory Hagopian appeared before your criminal court both before, and after you accepted tickets from him.

Your actions constitute inappropriate conduct demonstrating a present unfitness to serve, and violate Canons 1, 2A, 2B, 3B(5), 3B(8), 3E(1), 5A(1), 5A(2), 5A(3), and 5D(5)(h) 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 Counsel for the Judicial

Qualifications Commission, and the General Counsel of the Commission.

Dated: this 1st day of February, 2016.

THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

By: /s/ Alexander John Williams
Alexander John Williams
ASSISTANT GENERAL COUNSEL
Florida Bar No. 99225
P.O. Box 14106
Tallahassee, Florida 32317
(850) 488-1581
awilliams@floridajqc.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Formal Charges has been furnished via electronic service on this the 1st day of February, 2016, to the following:

Hon. John Lakin
Circuit Judge, 12th Judicial Circuit
1051 Manatee Avenue West
Bradenton, Florida 34206

John A. Weiss, Esq.
John A. Weiss, P.A.
2937 Kerry Forest Parkway, Ste B-2
Tallahassee, Florida 32309-7800
jack@johnaweisspa.com
COUNSEL FOR JUDGE LAKIN

/s/ Alexander John Williams
Alexander John Williams
ASSISTANT GENERAL COUNSEL

Schwartz

BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE,
THE HONORABLE JACQUELINE SCHWARTZ
Nos. 14-299 and 14-415

SC15-____

NOTICE OF FORMAL CHARGES

TO: The Honorable Jacqueline Schwartz
Hialeah Courthouse
11 East 6th Street
Hialeah FL, 33010

The Investigative Panel of the Florida Judicial Qualifications Commission, at its meeting on January 30, 2015, 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. On or about June 2, 2014 you entered at KWIK Stop convenience store in Coconut Grove, Florida and asked to speak with the owner regarding a campaign sign for your opponent that was on the property of the store. You were told that the owner was not there and might be back later that day or the next day.
2. Later that night you returned to the KWIK Stop and, again, asked to speak to the owner. During your discussion with the owner, Firas Hussain, you lost control of your temper and told Mr. Hussain to "GO F--K YOURSELF" when he stated that he could not display your campaign sign. You also told Mr. Hussain that you were going to sue him. You then left the store.

3. In the case of Vidal, et al, v. Cattoira Montessori, Inc., (2011SC4792), you wrote notes and made notations on several pages of original documents that were a part of the official court file. One of the parties photocopied the court's file. Later, when a request was made for a certified copy of the entire court file, including your notes and notations, you instructed your bailiff to remove your notes from the court file. This prevented further copying or inspection of those original documents and notes. However, after receiving and reviewing the uncertified copies of your notes and notations, the party decided to file a motion to disqualify you. You then denied the motion.
4. You testified that your bailiff, at your instruction, removed the pages from the court's file and placed them into an envelope. That envelope has since disappeared, and as of January 30, 2015, you are unsure what happened to the missing pages.
5. Removing those documents from the court's file made them unavailable for further inspection and copying, and inhibited the litigant's ability to make an appropriate record for appeal of any rulings you made based those documents.

The foregoing conduct constitutes inappropriate conduct that violates Canons 1, 2, 3B(8), 4A(2), 4A(3) and 7A(3)(b) and 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 Counsel for the Judicial Qualifications Commission, and the General Counsel of the Commission.

JUDICIAL QUALIFICATIONS COMMISSION

By: _____

Alexander John Williams
ASSISTANT GENERAL COUNSEL
Florida Bar No. 99225
P.O. Box 14106
Tallahassee, Florida 32317
(850) 488-1581
awilliams@floridajqc.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Formal Charges has been furnished by E-Mail on this the 18th day of January, 2015, to the following:

Richard Baron, Esquire
Baron Breslin & Sarmiento
501 Northeast 1st Avenue, Ste. 201
Miami, Florida 33132
RB@RichardBaronLaw.com
COUNSEL FOR JUDGE SCHWARTZ

_____

Alexander John Williams
ASSISTANT GENERAL COUNSEL

Filing #32617495 E-Filed 09/29/2015 02:15:19 PM

Schwartz

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE **SC 15-312**
THE HONORABLE JACQUELINE SCHWARTZ
No. 14-451,
_____/

NOTICE OF COMPLIANCE RE: LETTER OF APOLOGY

COMES NOW, Honorable Jacqueline Schwartz by and through undersigned counsel and hereby files her Letter of Apology and states;

1. On September 10, 2015 this Court accepted the Revised Consent Judgment (Filing No. 27046677) in this matter.

2. Pursuant to the Court's Order one of the sanctions imposed upon Judge Schwartz was that she provide a Letter of Apology (to Mr. Hussein)[1].

3. On June 4, 2015 Judge Schwartz sent via United States Postal Service Certified Mail said Letter of Apology to Mr. Hussein. A copy of the Letter of Apology is attached hereto as Exhibit 1.

WHEREFORE, Honorable Judge Jacqueline Schwartz respectfully notifies the Court of her compliance with the Letter of Apology requirement.

Respectfully submitted,

JEFFREY E. FEILER, P.A.
Attorney for Defendant
7685 S.W. 104 Street, #200
Miami, Florida 33156
Tel: (305) 670-7700
Fax: (305) 669-8198

By: _____
JEFFREY E. FEILER

[1]The Order will be final on October 10, 2015 unless a rehearing is requested on the Motion. Judge Schwartz does not intend to request a rehearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-file to Alexander J. Williams, Assistant General Counsel this 29th day of September, 2015.

JEFFREY E. PEILER

May 27, 2015

Dear Mr. Hussein,

I apologize for the vulgar language that I directed toward you in the store. My behavior was inappropriate, unacceptable and wrong. I take full responsibility for what I said to you. My behavior is wrong on a personal level and because I am a judge. I am a representative of the judiciary and it is critical that I maintain the conduct and the character so that all people regard and perceive a judge's ability to carry out judicial functions and responsibilities with integrity, impartiality and competence. My behavior did not reflect those qualities.

I know that I am held to a high standard of conduct because I am a judge. My behavior was improper and irresponsible and did not promote public confidence in our judiciary.

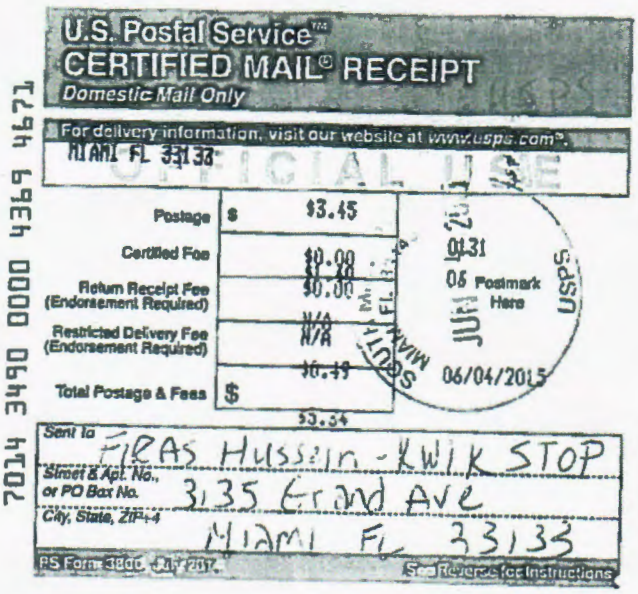
My behavior violated the Judicial Canons 1, 2 and 4(A)(2) and 4(A) (3). I have read all the Canons repeatedly.

I have learned from this experience.

I hope this letter helps to make things right.

Respectfully,

Judge Jacqueline Schwartz



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PS Form 3800, July 2014 — See Reverse for Instructions

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Schwartz

BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE,
THE HONORABLE JACQUELINE SCHWARTZ
JQC No. 2016-135

SC16-____

/

NOTICE OF FORMAL CHARGES

TO: The Honorable Jacqueline Schwartz
Miami-Dade County Judge
South Dade Justice Center, Room 2301
Miami, Florida 33189

The Investigative Panel of the Florida Judicial Qualifications Commission, at its meeting on April 15, 2016, 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.

1. On Friday March 18, 2016, you were observed by staff, patrons, and police and EMS personnel acting in an irrational, and disorderly manner at the Ergon Greek Restaurant. You appeared to be impaired. You were unsteady on your feet, and slurring your words. You also spilled a glass of wine, and then poured water all over the floor of the restaurant while attempting to refill your own water glass. The wait-

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staff refused to serve you any more alcohol, and you became enraged, berating and swearing at the waiters, and stating, "I want to speak with the fucking owner. You are a fucking idiot, you don't know who I am." You told one server that you would have him fired for refusing to serve you.

2. Because of your condition, and the disturbance you were causing, a security guard responded to the restaurant. Patrons also phoned 9-1-1 to request assistance from the City of Miami Police, and Miami Fire Rescue. You were further aggressive and uncooperative with the emergency responders, swearing at the police and EMS personnel, calling them "pigs," and telling the officers that they couldn't do anything to you because you are a Judge. You were not permitted to drive yourself home, and you were eventually taken home by your friend.

3. After consulting with your attorney, and officials from the 11th Judicial Circuit, you self-reported the March 18 incident to the JQC. In your self-report, you state that you "had nothing at all to drink and had not taken any substances of any sort." You do not mention any of the intemperate statements are alleged to have made to the restaurant staff, and emergency responders. You further state that "[f]rankly, I do not believe that I have committed any ethical violation, a violation

of any Bar Rule, Law or Judicial Rule...". You later admitted, during an April 15, 2016 appearance before the Investigative Panel of the Judicial Qualifications Commission, that your conduct at the restaurant, if proven as alleged, would constitute actions that demean your judicial office.

4. Then, while at work on Monday March 28, 2016, you were observed to be impaired while presiding over cases in the South Dade Courthouse. Court personnel, litigants, and police officers waiting to testify observed that you were unsteady on your feet, slurring your words, and unable to concentrate. You were removed from the bench and sent home by the Chief Judge. After police officers at the courthouse prevented you from driving yourself home, your bailiff volunteered to drive you home in your car. During the drive you were unable to recall your address, or provide coherent directions. You also did not recognize your bailiff, or remember whose car you were in.

5. You have previously been reprimanded by the Florida Supreme Court for using profanities towards members of the public, and acting in a manner that demeaned the judiciary.

Your actions constitute inappropriate conduct in violation of Canons 1, 2(A), 3A, 5A(2), 5A(3), and 5A(4) 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 Counsel for the Judicial Qualifications Commission, and the General Counsel of the Commission.

Dated: this 18th day of April, 2016.

THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

Alexander John Williams
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Formal Charges has been furnished by E-Mail on this the 18th day of April, 2016, to the following:

Mr. Jeffrey Feiler, Esq.
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7685 S.W. 104th Street
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COUNSEL FOR JUDGE SCHWARTZ

Alexander John Williams
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Filing # 44662222 E-Filed 08/01/2016 02:02:36 PM

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE
HON. JACQUELINE SCHWARTZ
JQC NO. 16-135
_____/

SC16-655

NOTICE OF VOLUNTARY DISMISSAL

The Florida Judicial Qualifications Commission, by and through the undersigned counsel, hereby gives notice of its' voluntary dismissal of the charges against Judge Jacqueline Schwartz, pursuant to Rule 1.420, Florida Rules of Civil Procedure because this notice is given prior to the final hearing before the Hearing Panel. Alternatively, the Commission seeks dismissal under Rule 9.350(b), Florida Rules of Appellate Procedure. The basis for the dismissal is Judge Schwartz's resignation as Circuit Judge for the 11th Circuit on June 28, 2016, effective July 31, 2016.

Respectfully submitted,

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RECEIVED, 08/01/2016 02:03:47 PM, Clerk, Supreme Court

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Voluntary Dismissal has been furnished by electronic service to Jeffrey Feiler, Esquire, counsel for Judge Schwartz, at jfeiler@jeffreyfeiler.com, on this 1st day of August, 2016.

Alexander J. Williams
ASSISTANT GENERAL COUNSEL

Filing # 33545015 E-Filed 10/22/2015 10:33:32 AM

Imperato

BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING JUDGE

CYNTHIA G. IMPERATO, NO. 13-545 S. Ct. Case No.: 15-355
/

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATIONS OF THE HEARING PANEL, FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

Pursuant to the Florida Constitution, art. v, §12(a)(1), (b) and (c) and the Florida Judicial Qualifications Commission ("FJQC") Rules, the FJQC Hearing Panel certifies these Findings, Conclusions and Recommendations to the Florida Supreme Court.

Course of Proceedings

On March 2, 2015, the Investigative Panel of the FJQC filed a notice of formal charges against the Honorable Cynthia G. Imperato, Circuit Judge for the 17th Judicial Circuit (Broward County). The notice alleged that Judge Imperato was stopped by law enforcement after driving erratically, displayed her judicial badge to a police officer, admitted she had been weaving, and appeared to be driving under the influence of alcohol. The judge was requested, but refused to exit her vehicle and to step to the front of the officer's vehicle (for roadside sobriety tests). Upon her refusal, Judge Imperato was taken into custody. Thereafter, Judge Imperato refused to submit to a breathalyzer test, and was

charged with driving under the influence and reckless driving.

This was a second offense, since Cynthia Imperato pled guilty to driving under the influence and failing to comply with a lawful order of a police officer in 1988 (some 25 years earlier).

Following an investigative hearing during which the judge was questioned at length, the FJQC Investigative Panel and Judge Imperato jointly executed a "Stipulation," and "Findings and Recommendation of Discipline," subject to the Florida Supreme Court's review. The stipulation and findings recommended that the judge receive a public reprimand, a $5,000 fine, a 20 day suspension without pay, and an alcohol evaluation with the completion of any recommended treatment pursuant to a contract with the Florida Lawyers Assistance Program.

On April 30, 2015, the Florida Supreme Court rejected the parties' stipulation, disapproved the proposed sanctions, and remanded for further proceedings "to include a full hearing... so that the Court, in determining the appropriate sanction, will be apprised of all the facts and circumstances bearing on the violation."

The Hon. James A. Ruth chaired the FJQC Hearing Panel, which conducted a final hearing on September 10, 2015. In addition to Chairman Ruth, the panel included Mayanne Downs, Esq., Nancy Mahon (lay member/ad hoc), Ricardo Morales (lay member), the Hon. Michele Morley, and John G. White, III, Esq. All

six commissioners were present during the hearing and deliberations.

David L. McGee, Esq. represented the FJQC Investigative Panel. Judge Imperato was represented by David Rothman, Esq. and Jeanne Melendez, Esq. Lauri Waldman Ross Esq. served as counsel to the FJQC Hearing Panel.

FINDINGS OF FACT[1]

On November 5, 2013, the Broward County Justice Association hosted a legal reception at Maggiano's restaurant in Boca Raton, from 6:00 to 8:00 p.m. The event charged a fee to lawyers, was complimentary (free) to judges, and served alcohol from an open bar. (T.81). Servers circulated with drinks on trays, and a limited amount of food was provided. Lawyers also commonly brought drinks over to the judges. (T.97). Attendees at these type of receptions often arrive late and stay after they end. (T.83).

Judge Imperato arrived shortly after the reception began, mingled with other guests and stayed until approximately 9:00 p.m. She lost track of what she drank, but thought it was "a couple of glasses of wine." (T.82-83; 98). She explained that when someone brought her a drink, "Sometimes I drink part of it, put it down. You're walking to another part of the room. It's not like you're sitting down to dinner. Everybody's walking around to different tables, socializing with different people." (T.98). She left Maggiano's planning to meet others for dinner at Mizner

[1]References are to the transcript of final hearing (T.), and the exhibits admitted into evidence by agreement. (Pet. Ex.___; Resp. Ex.____).

Park. (T.85-86).

At 9:49 p.m., a citizen phoned 911, reporting that a white Mercedes traveling north on Federal Highway was "all over the road" and "really dangerous." (T.26-28; Pet. Ex.1&2). The Mercedes drifted into other lanes, causing two cars to swerve to avoid collisions. (Pet. Ex.9, pp.490-91; T.89). The citizen identified and took a photo of the car's license plate number, and last saw the Mercedes in the area of 49 NE 2nd Street in Boca Raton. (Pet Ex.9, pp.494-95). At the time of the citizen's report, the white Mercedes was only four to five miles away from Maggiano's. (T.36; 85).

Later that same evening, Det. Douglas Immler (employed by the Boca Raton police department) was headed home from work, with no knowledge of the prior 911 call. (Pet. Ex. 9, pp.554-56).

Palmetto Park Road is a six lane highway separated by a divider, with three lanes eastbound, and three lanes westbound. (T.57). Det. Immler saw a white Mercedes in the 600 block of West Palmetto Park Road swerve into other lanes, and nearly side-swipe another vehicle. Id. at 565. (T.23-24). The Mercedes stopped at a red light in the 1200 block, remained stationary approximately ten seconds after the light turned green, then moved forward, again swerving into other lanes. Detective Immler was situated behind the Mercedes the entire time and had an unobstructed view. (T.44-45). He stopped the Mercedes at 10:53 p.m. (just east

of I-95). (Pet. Ex. 7).

Judge Imperato was at the wheel of the white Mercedes from the time it left Maggiano's until it was stopped. She was lost, and had been driving in circles for approximately 2 hours. (T.84-87). There was no evidence presented supporting the suggestion that she might have stopped to have drinks elsewhere during this time period. (T. 86; 161-62).

Det. Immler was wearing his police uniform, and identified himself to Judge Imperato as a police officer. (T.37-38). Rather than requesting her driver's license and registration, he merely asked for identification. (T.30; 38). Judge Imperato responded "I'm a judge" and presented a "shiny" badge. (T.39-40; 46; Pet. Ex.9, pp.579-80). She did not request favors or seek special treatment. (T.40-42, 46).

Judge Imperato initially wouldn't meet Det. Immler's gaze, and was directed to look at the officer. (T.31-32). Det. Immler observed that the judge's eyes were glossy and bloodshot, and he detected the odor of alcohol. The judge slurred her words, and had trouble putting together cohesive thoughts. When Det. Immler inquired whether the judge had consumed any alcohol, she responded that she had "a couple of glasses of wine." (T.82; Pet. Ex.9, p.582). Det. Immler concluded she was "highly intoxicated." (T.43).

Det. Immler called in the vehicle's license plate number. Officer Robert Jesionek, dispatched earlier to search for a white Mercedes in response to the 911

call, arrived on the scene at 10:56 p.m., and took charge of the ensuing DUI investigation. (T.49-50; 65).

Officer Jesionek has served as an officer with the Boca Raton police department for the last 18 years. He was assigned to the DUI task force for the last seven of those years, has investigated hundreds of DUI cases, and trains other police officers for the Department. (T.34; 48-49).

The two officers discussed Detective Immler's observations, and reasons for the stop (out of the judge's earshot). (T.50-51). Officer Jesionek's vehicle was equipped with a police dash camera which records audio and visual, and he positioned it for a clear view of contemplated roadside sobriety tests. (T.35; 51-52).

At 11:01 p.m., Officer Jesionek approached the Mercedes, with his dashcam recording. (Pet. Ex.1). At Judge Imperato's window, he smelled a strong odor of alcohol emanating from her breath; both officers observed the judge unsuccessfully try to manipulate her phone. (T.33; 52). Officer Jesionek asked the judge several times politely to step outside her car (so field sobriety exercises could be videoed). (T.53-56). Judge Imperato declined stating that "I'm not doing anything until I talk to my lawyer," while she continued to unsuccessfully manipulate her phone. She indicated she had no medical condition, and understood she had been pulled over for weaving. (T.52-53). Officer Jesionek finally removed the phone from her

hand, placed it on top of her car's roof, opened its door, and the judge exited. (T.54).

Judge Imperato refused to walk in front of the officer's vehicle, and was arrested. (T.56-61). She was transported to the Boca Raton Police Department, and twice was requested to provide a breath sample (once before and after "implied consent" warnings). At 11:47 p.m., she refused. (T.64; 91-92; Pet. Ex.8).

On December 19, 2014, over a year after her arrest, Judge Imperato was tried by a jury of her peers and convicted of driving under the influence and reckless driving. (Pet. Ex.9, pp.1144-45; Resp. Ex.10). She was adjudicated guilty, and sentenced to 12 months probation, with a special condition of 20 days community control, AA meetings twice weekly, community service and random alcohol testing. (Pet. Ex.9, pp.1172-1200; Resp. Ex.10-11; T.116).

On January 29, 2015, Judge Imperato appeared before the JQC Investigative Panel at an investigative hearing pursuant to FJQC Rule 6(b). (Resp. Ex.13). The judge fully cooperated with the investigation, did not dispute the underlying facts, agreed she should never have been behind the wheel of a car on November 5, agreed that her conduct was unacceptable, and took full responsibility for her actions. (Resp. Ex.13, pp.5, 33, 59-61, 77). Judge Imperato apologized for embarrassing the judiciary, and the community she'd been honored to serve. (Resp. Ex.13, pp.5-6, 84). After the hearing, she voluntarily dismissed her criminal

appeal, served the 20 days of community control, and went to work wearing an ankle monitor (equipped with GPS). (Resp. Ex.12; T.116-17).

Judge Imperato has more experience than most with the effects of drunk driving. From 1981 to 1990, she was employed by the Tallahassee Police Department as a police officer, was called to the scene of accidents caused by intoxicated persons, and worked DUI cases. (T.75-76). She worked her way through law school, and obtained a job with the statewide prosecutor's office, where she remained for the next 13 years. She was appointed to the circuit court in 2003, where she presided over a wide variety of cases, where driving while intoxicated was an issue. She even received an award from Mothers Against Drunk Drivers ("MADD"). (T.76-77). When arrested in November 2013, Judge Imperato had served as a circuit judge for over ten years, and had spent 33 years serving the public in different facets of the criminal justice system. (T.75-76).

At the final hearing before this Hearing Panel, Judge Imperato did not dispute the underlying facts, and that her conduct had embarrassed the judiciary. Once again, she took responsibility and apologized for her actions. (T.90-95; 111-15; 117, 122-23). She also stipulated that her conduct violated the Judicial Canons. (T.122-23).

After the police officers testified, Judge Imperato took the stand, agreed that they "did a perfect job" in their DUI investigation, and apologized to them publicly

and personally as they sat in the back of the courtroom. (T.100-01). The Hearing Panel believes and credits the judge's explanation that she didn't issue this apology earlier for fear "it would seem like I was trying to sway [the officers'] testimony..." (T.101).

In meting out discipline, Judge Imperato asked the Hearing Panel to take into account her entire career in public service, her reputation on the bench, her cooperation and contrition.

Judge Imperato testified that she's learned from this experience, which provided "humility" and a better "understanding of what people are going through in the system." She promised she would never again "have anything to drink and get behind the wheel of a car." (Resp. Ex.13, p.63).

Peter Weinstein, the Chief Judge of the 17th Judicial Circuit, testified that Judge Imperato is well respected and liked by both the prosecution and criminal defense bar, and the civil plaintiffs' and defense bar. (T.146-47). When assigned to the foreclosure division, she did an "exemplary job." (T.148-49). While Judge Imperato's arrest, conviction and ensuing publicity clearly embarrassed the court, her reputation was otherwise "impeccable," and her quality as a judge, "outstanding." (T.148-49; 154-56). In his opinion, Judge Imperato remained an effective judge, presently fit to serve. (T.150-51).

Georgette Douglas, an attorney and member of the 17th Judicial Circuit

Nomination Commission, echoed these sentiments. (T.138-43). She testified that Judge Imperato was "one of the most professional judges she had ever met." Judge Imperato arrived early every morning, came well prepared, was fair, well liked by both sides and didn't "have an agenda..." She was also actively involved in a plethora of community organizations. (T.141; Resp. Com. Ex.4). Ms. Douglas also described the judge as "deeply embarrassed and ashamed," particularly in view of the fact that her earlier career was law enforcement, and "mortified" that her conduct has affected public confidence in the judiciary. (T.143).

CONCLUSIONS OF LAW

Judge Imperato was charged with violating Florida's Code of Judicial Conduct, Canons 1, 2A, 2B, 3A, 3B(2), 3B(4) and 5(G), and Fla. Const. art. v., §13. The parties substituted Canon 5A(3) for Canon 5(G) in prior submissions. (Findings & Recommendations of the Investigative Panel dated March 2, 2015).[2]

Canon 1 of the Florida Code of Judicial Conduct provides:

> **A Judge Shall Uphold the Integrity and Independence of the Judiciary**
>
> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of

[2] Canons 3A, 3B(2), 3B(4), 5(G), and Fla. Const. art. v., §13 have no application to the present case.

> the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 of the Florida Code of Judicial Conduct provides, in pertinent part:

> **A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities**
>
> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. ... [A] judge shall not lend the prestige of the judicial office to advance the private interests of the judge or others...

Canon 5 of the Florida Code of Judicial Conduct provides in pertinent part:

> **A Judge Shall Regulate Extrajudicial Activities to Minimize the Risk of Conflict With Judicial Duties**
>
> A. **Extrajudicial Activities in General.** A judge shall conduct all of the judge's extra-judicial activities so that they do not:
>
> * * *
>
> (3) demean the judicial office;
>
> * * *

Judge Imperato clearly violated these provisions of the Code. Her conduct in driving under the influence on November 5, 2013 "not only violated Florida's criminal law, but also endangered the public," undermined public confidence in the judiciary, and demeaned her judicial office. Inquiry Concerning Sheehan, 139

So.3d 290, 292 (Fla. 2014); Inquiry Concerning Nelson, 95 So.3d 122 (Fla. 2012).

As she clearly recognized after the fact, Judge Imperato had much more to drink than a couple of glasses of wine, and should never have gotten behind the wheel of a car. She was trying to get to Mizner Park, but was intoxicated, got lost, and spent approximately two hours driving around in circles. (T.36; 43; 86-87).

That no one was injured on the night in question was attributable to the quick thinking of a concerned citizen, a diligent police officer, and the grace of God.

Judge Imperato did not exhibit respect for the law when she refused to step to the front of Officer Jesionek's vehicle (for roadside sobriety tests) and refused a breathalyzer test. Cf. Inquiry Regarding Sheehan, 139 So.3d at 291 (affirming a public reprimand where judge was given field sobriety tests, and breathalyzer tests, and blew more than double the legal limit).

Judge Imperato may not have intended to obtain special treatment by identifying herself as a judge and displaying her badge, but Det. Immler could have reasonably perceived this to be the case.

RECOMMENDED DISCIPLINE

The object of disciplinary proceedings is not for the purpose of inflicting punishment, but rather to gauge a judge's present fitness to serve as an impartial judicial officer. Inquiry Concerning Sloop, 946 So.2d 1046, 1055 (Fla. 2006). The

standard of fitness to hold office calls for an examination of misconduct from two perspectives: (1) its reflect on the public's trust and confidence in the judiciary "as reflected in its impact on the judge's standing in the community;" and (2) "the degree to which past misconduct points to future misconduct fundamentally inconsistent with the responsibilities of judicial office." Id. at 1055-56.

Other published cases involving driving under the influence have led to public reprimands. See Inquiry Concerning Sheehan, 139 So.3d at 291 (judge stopped by law enforcement for driving erratically at night, blew breathalyzer results more than double the legal limit, and entered a guilty plea to the charge of DUI); Inquiry Concerning Nelson, 95 So.3d at 123 (judge stopped by law enforcement after she struck a guardrail, crashed into a bridge, refused to exit the vehicle and to submit roadside sobriety and breathalyzer tests, where judge pled guilty to DUI and it was an isolated incident); Inquiry Concerning Esquiroz, 654 So.2d 558 (Fla. 1995)(judge charged with DUI while driving home from a birthday party, adjudicated guilty, and sentenced to six months, where her actions did not result in personal injury or property damage to others, and she had no prior charges or convictions); Inquiry Concerning Gloeckner, 626 So.2d 188 (Fla. 1993)(same, where judge was charged with DUI and careless driving for causing an accident, but cooperated with police at the scene and submitted to roadside sobriety and breath alcohol tests); Inquiry Concerning Norris, 581 So.2d 578 (Fla. 1991)(three

day drinking binge, leading to irrational acts, including DUI and attempted suicide, where judge entered into substance abuse programs, and evidence was presented regarding rehabilitation and current fitness).

Recently, an FJQC Hearing Panel recommended a judge's removal from the bench, but did so on facts much more egregious than those here. Inquiry Concerning Pollack, S.Ct.14-985.[3] At the time of Judge Pollack's DUI arrest, she had already taken the bench while intoxicated, and entered into a stipulation with the JQC to a series of measures designed to keep her sober, including an FLA contract and monitoring. Judge Pollack violated this stipulation when she again took the bench while impaired, checked herself out of her alcohol treatment program, and was arrested driving home from the treatment facility.

Judge Imperato's DUI arrest and conviction clearly affected public trust and confidence in the judiciary. Based on the judge's testimony, demeanor, and expression of remorse, the Hearing Panel has no concern that the conduct at issue will recur. Id. at 1056. Judge Imperato pled guilty to DUI related offenses in 1988, some 25 years ago, before she was either a lawyer or a judge, and its remoteness in time may be taken into consideration. See e.g. McGough v. State, 302 So.2d 751, 754 (Fla. 1974)(remoteness of a crime is an aspect of relevance); see generally Roberts v. Tejada, 814 So.2d 334, 342-43 (Fla. 2002).

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[3] Judge Pollack resigned from the bench following the Hearing Panel's report and recommendation. Thus, its report did not result in a published opinion.

The conduct at issue here clearly requires serious, suitable discipline. See Sheehan, 139 So.3d at 292; Inquiry Concerning Holloway, 832 So.2d 716 (Fla. 2002). However, a judge's expression of remorse, cooperation with the JQC, general reputation as a fair, impartial, competent, and well-regarded judge, are all properly taken into account as mitigating factors. See Inquiry Concerning Colodny, 51 So.3d 430, 433 (Fla. 2010); Inquiry Concerning Luzzo, 756 So.2d 76 (Fla. 2000).

The Hearing Panel believes Judge Imperato's statements of remorse and contrition are heart-felt. The Hearing Panel received letters from a multitude of sources, attesting to the judge's diligence, work ethic, ability, competence and professionalism. (Resp. Exs. 4, 5 & 14). The former Chief of the Homicide Division, State Attorney's Office in Broward, currently in private practice, is illustrative:

> [S]ince she has been a judge I have had the distinct privilege to have litigated cases before her. I do understand she has recently been convicted of a DUI, but I can truthfully say she is one of the most outstanding judges we have had on the bench in Broward County since I started practicing law.
>
> Judge Imperato has always been courteous and respectful to all attorneys and litigants before her. She has a true knowledge of the law and her community service and life experiences make her a judge that should remain on the circuit bench and continue to serve the public. She has made such a difference in many lives and should be allowed to continue to do so.

> Judge Cynthia Imperato is a devoted and hard working public servant, and should remain on the bench. (Resp. Comp. Ex.14, Letter of Kelly D. Hancock, 3/20/15)

The Hearing Panel was particularly impressed by correspondence pre-dating Judge Imperato's arrest, in which parties who had appeared before her expressed their gratitude for fair treatment. (Resp. Ex.5).

The record is also replete with evidence that Judge Imperato is a highly regarded, well-respected, competent judge, who cooperated with the JQC, displayed remorse, and has repeatedly apologized. The Hearing Panel credits testimony from the Chief Judge of her circuit, who believes she continues to remain effective. Thus, without minimizing the judge's conduct, the Hearing Panel recommends the following discipline:

(1) a public reprimand;

(2) a $20,000 fine;

(3) a 3 month suspension without pay; and

(4) an alcohol evaluation with the completion of any recommended treatment pursuant to a contract with the Florida Lawyers Assistance Program.

All of the Hearing Panel's findings are supported by clear and convincing evidence. The vote of the Hearing Panel on guilt as well as the recommended discipline has been determined by an affirmative vote of at least two thirds of the

six hearing panel members, in compliance with Fla. Const. art. v, §12(b); FJQC Rule 19.

Dated this 22th day of October, 2015.

FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

By: /s/ James A. Ruth
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Rosenthal

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE,
THE HONORABLE LYNN ROSENTHAL
NO. 14-229
_____/

SC15-____

FINDINGS AND RECOMMENDATION OF DISCIPLINE

The Florida Judicial Qualifications Commission (hereafter, "JQC" or "the Commission") served a series of Notices of Investigation on Circuit Judge Lynn Rosenthal, Seventeenth Circuit, pursuant to Rule 6(b) of the Florida Judicial Qualification Commission Rules. Pursuant to those Notices, Judge Rosenthal appeared before the Investigative Panel of the Commission and provided sworn testimony on December 5, 2014, and again on June 5, 2015. On June 5, 2015, the Commission voted to institute the filing of formal charges that accompany this filing.

The Investigative Panel of the Commission has now entered into a Stipulation with Judge Rosenthal in which the Judge admits that the circumstances surrounding her arrest for Driving Under the Influence, including her refusal to submit to a urine and blood sample, as well as her subsequent conduct before the Commission, including the erasure of pertinent records from her cell phone, and some misleading, or incomplete statements to the Commission during her

testimony, brought disrepute to her Court, the Broward County judiciary, and the entire Florida judicial system. The Judge also admits and acknowledges that her conduct violated Canons 1, 2A, 5A(2), 5A(3), 5A(4), and 7A(3)(b) of the Code of Judicial Conduct, as set forth in the Stipulation that is being submitted in conjunction with the filing of the Notice of Formal Charges and this Findings and Recommendations.

Judge Rosenthal has acknowledged that some of her answers during her testimony before the Commission were incomplete and misleading. The judge has explained that her lapse in judgment was borne out of personal family crisis, which Judge Rosenthal has acknowledged caused her best judgment to be overcome by a desire to protect her family, and the judge's own difficulty in dealing with the family crisis. Judge Rosenthal now also acknowledges that her conduct eroded public confidence in the judiciary and demeaned the judicial office she holds.

This Court has previously had to address the issue of judges providing incomplete and misleading responses to the JQC. In the case of In re Leon, 440 So. 2d 1267 (Fla. 1983), this Court noted that although Judge Leon had made false statements to a Commission member, he was not entitled to the defense of voluntary recantation, with the court noting that, "The integrity of the judicial

system, the faith and confidence of the people in the particular judge are all affected by the false statements of a judge."[1] Id. at 1269.

In In re Holloway, 832 So. 2d 716, (Fla. 2002) the Court ordered Judge Holloway to be suspended for 30 days, and to receive a public reprimand for, among other things, making untruthful statements during a deposition in a contested custody case involving a close friend of the judge.

In the more recent case of In re Hawkins, SC12-2495 (Fla. Oct. 30, 2014), this Court ordered the removal of Judge Hawkins for, among other things, making misstatements during testimony to the Commission, and destroying evidence that was under subpoena on the morning of her deposition.

Finally, in 2015, this Court considered the conduct of Judge Recksiedler, who made misstatements during her unsworn testimony before the Judicial Nominating Commission regarding her driving record. In that case the Court accepted a Stipulation from the judge and the JQC for a public reprimand, and noted that, "We agree with the JQC that the incompleteness and inaccuracy of the responses constitutes a lack of candor amounting to an ethical violation, where, as

[1] The Court ultimately ordered the removal of Judge Leon for a multitude of offenses including, improper ex-parte communications with judges and attorneys, improperly securing alterations of a criminal defendant's sentence, improper fraternization with a criminal defendant's father during the pendency of the case, engaging in the sale of land to a father and daughter while the daughter's criminal case and sentence were pending before the court, and falsely denying previous ex-parte communications.

here, the statements are misleading." See In re Recksiedler, SC15-311 (Fla. Apr. 9, 2015).

Here, like the Recksiedler case, Judge Rosenthal has accepted responsibility for her conduct and acknowledges that the incompleteness, and inaccuracy of her responses to the Commission were misleading, and amounts to an ethical violation.

The Commission has determined, and the Judge has agreed, that based on the facts and referenced case law, the appropriate sanction should be a Public Reprimand by this Court, a 90-day suspension without pay, 12 additional hours of continuing legal education ethics, family counseling, and the repayment of fees and costs associated with this investigation by the Commission.

Dated this _14th_ day of August, 2015.

INVESTIGATIVE PANEL OF THE
FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION

By: _/S/_James Ruth_____
Hon. James Ruth,
VICE-CHAIR OF THE JQC
P.O. Box 14106
Tallahassee, Florida 32317

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Rosenthal

THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE
LYNN ROSENTHAL
NO. 14-229
_____/

SC15-1498

NOTICE OF VOLUNTARY DISMISSAL

The Florida Judicial Qualifications Commission, by and through the undersigned counsel, hereby gives notice of voluntary dismissal of the charges against Judge Lynn Rosenthal. The Commission invokes Rule 1.420, Florida Rules of Civil Procedures because this notice is given prior to the final hearing before the Hearing Panel. Alternatively, the Commission seeks dismissal under Rule 9.350(b), Florida Rules of Appellate Procedure. The basis for the dismissal is Judge Rosenthal's resignation as Circuit Judge for the 17th Circuit, effective October 31, 2015.

Respectfully submitted,

Alexander J. Williams
Asst. General Counsel
Florida Bar No. 99225
PO Box 14106
Tallahassee, Florida 32317
(850) 488-1581
awilliams@floridajqc.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Voluntary Dismissal has been furnished by electronic service to Guy Lewis, Esq., counsel for Judge Rosenthal, at glewis@lewistein.com, on this 12th day of October, 2015.

Alexander J. Williams

Filing # 32465641 E-Filed 09/24/2015 04:23:17 PM

Shepard

BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE,
THE HONORABLE KIMBERLY SHEPARD,
No. 14-488
_____/

SC15-____

NOTICE OF FORMAL CHARGES

TO: **The Honorable Kimberly Shepard**
Circuit Judge, 9th Judicial Circuit
Osceola County Courthouse
2 Courthouse Square
Courtroom 4-C
Kissimmee, FL 34741

The Investigative Panel of the Florida Judicial Qualifications Commission, at its meeting of August 27, 2015, 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. During your contested 2014 judicial campaign both you and your opponent sought the endorsement of the Orlando Sentinel newspaper. The Orlando Sentinel chose to endorse your opponent, Norberto Katz. In their endorsement they highlighted his experience. They also noted that

member of the Florida House. In fact, in quoting the prior endorsement, you purposefully excluded parts of the original endorsement that made reference to your legislative service. [Orlando Sentinel endorsement from 1994 included as JQC Exhibit 2].

Your use of misleading campaign materials was inappropriate, and unsuitable for a candidate seeking judicial office. Additionally, your actions constitute a breach of Canons 1, 2A, 7A(3)(b), 7A(3)(c), 7A(3)(d), and 7A(3)(e)(ii).

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 Special Counsel for the Judicial Qualifications Commission, and the General Counsel of the Commission.

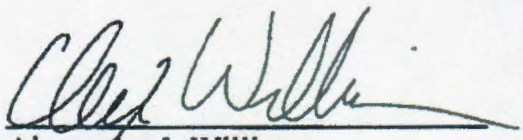
Dated this 24th day of September, 2015.

JUDICIAL QUALIFICATIONS COMMISSION

By: Alexander J. Williams
Asst. General Counsel
Florida Bar No. 99225
awilliams@floridajqc.com
P.O. Box 14106
Tallahassee, Florida 32317
(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 e-mail to Luis Gonzalez, Esquire, L. A. Gonzalez Law Offices, P.A., 130 Pasadena Place, Orlando, FL 32803, at laglaw@cfl.rr.com, and; Harold E. Morlan II, Esquire, Fisher-Rushmer, P. A., 390 North Orange Avenue, Suite 2200, Orlando, FL 32801, hmorlan@fisherlawfirm.com, counsel for Judge Kimberly Shepard, this 24th day of September, 2015.



Alexander J. Williams
Asst. General Counsel

2000

EXHIBIT
FQC 1

KIM SHEPARD

For Circuit Judge
Orange & Osceola Counties

VOTE AUGUST 26th

Business Sense... For the Bench !

Proven Integrity

KIM SHEPARD

**"Ms. Shepard has done well.
She has kept her promises.
She has worked hard.
She has maintained her integrity."**

- The Orlando Sentinel

HER OPPONENT

FOUND GUILTY !!

1. "Conduct which is **UNLAWFUL** and contrary to honesty and justice"
2. "Making a **FALSE STATEMENT** of material fact or law to a third person"
3. "**KNOWINGLY** making a false statement of material fact in the course of a disciplinary hearing"
4. "Engaging in conduct involving **DISHONESTY, FRAUD, DECEIT,** or **MISREPRESENTATION**"

By The Florida Supreme Court:
The Florida Bar v. Norberto Katz Case No. 83,857

A GREAT Judge Should Be...	**KIM SHEPARD**	**HER OPPONENT**
Independent	☑ Running An Independent Campaign To Be YOUR Independent Judge ☑ Divested Potential Conflicts Well Before Qualifying To Run	– Campaign Backed By The SAME Lawyers That Would Practice In Front Of Him – 16 Years: Career Government Employee
Honest	**30 YEARS SPOTLESS PROFESSIONAL RECORD** ☑ A Lifetime of Integrity and Service ☑ Provided Free Legal Services to : Veterans, Firefighters, First Responders, Police, Teachers, Trades People & The Elderly ☑ Florida Prosecuting Attorney's Association Award: Outstanding Leadership, Criminal Justice Issues	**SUSPENDED FROM THE PRACTICE OF LAW** FOR 90 DAYS PLUS One Year Supervised Probation By The Florida Supreme Court : The Florida Bar v. Norberto Katz Case No. 83,857 Federal Tax Lien, 1995 ALSO Federal Tax Lien, 1997
Experienced	☑ 22 Years Business Focused Law Practice ☑ Former Felony Prosecutor ☑ Director of Domestic Violence Division ☑ Executive Director, Battered Women's Shelter ☑ Former Child Abuse Investigator ☑ Emergency Medical Technician	– 16 Years Doing ONLY ONE Thing : Calculating Statutory Child Support Amounts – Failed To Do What He Was Paid To Do Until His Client Grieved Him To The Florida Bar The Florida Supreme Court : The Florida Bar v. Norberto Katz Case No. 83,857

"Her 22 years of legal experience focused on the business community will bring a wealth of expertise to the bench. Kim Shepard is EXACTLY what we want our Circuit Court Judges to be . . . courageous, independent and above reproach."

Lawson Lamar / Former State Attorney

For More Personal Endorsements See Electshepard.com

Paid for by Kim Shepard NONPARTISAN for Circuit Judge, GROUP 10

P.O. Box 696722
Orlando, FL 32869
Like Us On
Facebook: Elect Shepard

Shepard, with enthusiasm

Not to re-elect Rep. Kim Shepard would come close to being an act of injustice. That's why the *Sentinel* endorses Ms. Shepard for re-election in Florida House of Representatives District 36, representing north-central Orange County.

ENDORSEMENT

House District 36

Her [redacted] opponent, [redacted] a former mayor of Winter Park, has an admirable record of community service. If both candidates were running for an open seat, voters would have a tough choice, and so would we.

Ms. Shepard, however, has served one term and is asking for another. For that to be denied, there should be some failure on her part, some case to be made against her re-election.

There is none.

On the contrary, Ms. Shepard has done well. She has kept her promises. She has worked hard. She has legislated effectively. She has maintained her integrity. She has served her constituents diligently.

Ms. Shepard is more than just a good legislator. She actually reads the bills. She turns down the gifts and the dinners. She isn't afraid to challenge the chairman of her own committee over legislation she regards as flawed — and she's smart enough to prevail.

A former child-abuse investigator and former emergency medical technician who worked her way through law school and became a felony prosecutor, Ms. Shepard knows government. She also knows the pain of people who need help, and she cares enough not to be deterred from doing the right thing.

The *Sentinel* enthusiastically endorses Kim Shepard for re-election to represent Florida House District 36.

EXHIBIT DEC 2

Filing # 42527063 E-Filed 06/09/2016 11:52:01 AM

Shepard

BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING JUDGE

KIMBERLY MICHELE SHEPARD, NO. 14-488 SC 15-1746

/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF THE HEARING PANEL, FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

Pursuant to the Florida Constitution, Art. V, §12(a)(1), (b) and (c), and the Florida Judicial Qualifications Commission ("FJQC") Rules, the FJQC Hearing Panel certifies these Findings of Fact, Conclusions of Law and Recommendations of Discipline to the Florida Supreme Court.

COURSE OF THE PROCEEDINGS

On September 24, 2015, the Investigative Panel of the FJQC filed a Notice of Formal Charges against the Honorable Kimberly Shepard, Circuit Court Judge for the Ninth Judicial Circuit, Osceola County, Florida. The Notice alleged that, during her campaign for election to judicial office, attorney Shepard circulated a deceptive, misleading advertisement which implied that the *Orlando Sentinel* had endorsed Ms. Shepard, when it had, in fact, endorsed her opponent. The advertisement's language was taken from a 1994 endorsement for Ms. Shepard for a legislative race, without disclosing the date and office to which it applied. The Notice asserted violations of Judicial Canons 1, 2A, 7A3(b), 7A3(c), 7A3(d), and 7A3(e)(ii), and

was amended to assert violations of Rule 4-8.2(b), Rules Reg. Fla. Bar.

Attorney Luis Gonzalez appeared for the Respondent, but moved to withdraw before a scheduled status conference. He was replaced by attorney Robert J. Buonauro on November 16, 2015. On November 17, 2015, Respondent filed a Motion for More Definite Statement, a Motion to Strike "Irrelevant, Immaterial Language" in the Notice of Formal Charges, and an Answer and Affirmative Defenses. Respondent withdrew her Answer, almost immediately, on the basis it was "inadvertently filed." She did **not** file a Motion to Dismiss.

The Chair issued an order scheduling the final hearing to commence February 3, 2016.

On December 2, 2015, the Hearing Panel denied Respondent's motions to strike and for definite statement, but **sua sponte** directed the parties to be prepared to address the applicability of Inquiry Concerning Kinsey, 842 So.2d 77 (Fla. 2003), in their presentation to the FJQC Hearing Panel. Respondent was directed to answer on or before December 8, 2015.

Judge Shepard answered, denying that her advertisement was "either intentionally or actually deceptive" or violative of any judicial Canon. Judge Shepard also asserted that the verbiage of the notice of formal charges was "designed to build sympathy for [her] defeated judicial opponent and to defend the *Orlando Sentinel's* editorial decision, and [was] the subject of a previously filed Motion to

Strike." (Amended Answer and Affirmative Defenses to the Amended Notice of Formal Charges," ¶1). Judge Shepard alleged "there was no indication that [her] integrity or character underwent a fundamental transformation in the intervening [20] years since being recognized and praised by the *Orlando Sentinel*" (Id. at ¶3), that "the *Orlando Sentinel* never withdrew or receded from its earlier evaluation," and that the statements made in her advertisement were correctly attributed and truthful. (Id. at ¶6).

Mr. Buonauro withdrew as Respondent's counsel, and was replaced by attorney Hugh James McDonnell. Mr. McDonnell sought a continuance based on his personal schedule. Following denial of this motion, he prepared for trial.

On January 14, 2016, Mr. McDonnell moved to withdraw asserting that, after diligently working on Judge Shepard's behalf, he had a "fundamental disagreement" with the Judge regarding how the case should be handled, making it unreasonably difficult to continue representation. Right before the hearing scheduled on this motion, the Chair received "Respondent's Response to Counsel's Motion to Withdraw," from email address mycell1@hush.com. This response contained many numbered paragraphs, indicated it was filed by Judge Shepard, but was unsigned, and contained no certificate of service. Judge Shepard contested her counsel's withdrawal asserting that "the single issue remaining to be determined... was relatively straight forward, could be mastered quickly and easily explained by

someone of Mr. McDonnell's considerable intellectual talents and experience..." (Id. at ¶55, emphasis in original).

The Chair treated the Judge's response as a motion for continuance, based on paragraphs 53, 55, and 57, which asserted that the Judge was recently hospitalized for a serious medical condition, and that her mother had just died. The Chair did **not** consider the balance of the response which "ma[de] allegations against multiple parties (including four attorneys who previously represented the judge), and was based, in large part, on the Judge's 'impressions.'" Mr. McDonnell's Motion to Withdraw was granted, and the final hearing was continued for a limited period.

On February 19, 2016, attorney Timothy R. Hartung appeared as counsel for Judge Shepard,[1] and filed a Motion to Dismiss which bore a certificate of service dated December 29, 2015, and was denied, as was an amended motion (with a corrected service date). Mr. Hartung withdrew on April 6, 2016, but continued to file motions, thereafter. These included several renewed motions to dismiss various charges and a renewed motion to strike verbiage in the amended notice of formal charges.

The FJQC Hearing Panel conducted a final hearing on April 8, 2016, heard argument, and reserved ruling on Respondent's motions. The Hearing Panel was

[1] This notice was styled as a "limited" notice "for the specific purpose of filing certain motions in this cause... intended to facilitate timing..."

chaired by Mayanne Downs, Esq., and included the Hon. Michelle Morley, the Hon. Krista Marx, John G. White, III, Esq., Ricardo Morales, III (lay member) and Alvin Alsobrook (lay member).

Scott N. Richardson, Esq. represented the FJQC Investigative Panel. The Respondent represented herself. Lauri Waldman Ross, Esq. served as counsel to the FJQC Hearing Panel.

FINDINGS OF FACT[2]

Kimberly Michelle Shepard was admitted to the Florida Bar in 1990. She worked as a certified legal intern during law school, and as an assistant state attorney for the Ninth Judicial Circuit from 1990 to 1992. (T.118). From 1992 to 1994, Ms. Shepard served as a legislator in the Florida House of Representatives (T.32).

In 1994, Ms. Shepard received the *Orlando Sentinel's* endorsement for her legislative reelection campaign. (T.32-33). This endorsement for House District 36 was titled "Shepard, with enthusiasm" and stated, in pertinent part:

> [M]s. Shepard has done well. She has kept her promises. She has worked hard. **She has legislated effectively.** She has maintained her integrity. **She has served her constituents diligently.** (JQC Ex.12, emphasis added).

Ms. Shepard lost the legislative race, and went into private practice. In 2014, Ms. Shepard launched a bid and qualified for judicial office. (T.35).

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[2] References are to the hearing transcript (T.), and the parties' respective exhibits (JQC Ex.____; Resp. Ex.___).

She ran for judicial office against Norberto Katz, a child support hearing officer. Ms. Shepard knew that Mr. Katz had been previously disciplined for ethics violations because "At that time, Mr. Katz and I were engaged in litigation as opposing counsel" and she remembered when it transpired. (JQC Ex.6, March 12, 2015 6(b) hearing, p.151). Ms. Shepard qualified on the last day, campaigning for a very short period of time – from May 2014 through the August 14, 2014 election. (JQC Ex.6, March 12, 2015 6(b) hearing, pp.71-72).

She explained that:

> [I] wasn't planning to run for Judge. I didn't qualify for this position until two hours before qualifying closed. And I only did so because it became apparent to me that there was not going to be a significant challenge to the gentleman who we now refer to as my former opponent.
>
> And I, frankly, felt that if no one would challenge this gentleman and provide a significant challenge to him that he would arrive in office without the public having any real idea of what his disciplinary record is. (T.229-30).

Ms. Shepard signed a "Statement of Candidate for Judicial Office" acknowledging that she had received, read and understood the requirements of Florida's Code of Judicial Conduct. (T.35; JQC Ex.14).

During the campaign, both candidates appeared for an interview before the *Orlando Sentinel's* editorial board. (T.43).

Ms. Shepard distributed a mailer before the *Orlando Sentinel* issued its 2014 endorsement. (JQC Ex.9). Under the heading "A Life of Service," the front of this

mailer stated that "Kim Shepard has spent her entire life serving others and building a reputation for integrity, independence, honesty, diligence, service, competence and compassion..." It listed Ms. Shepard's prior positions as a child abuse investigator, emergency medical technician, and executive director, battered women's shelter. In the lower left corner, underneath the depiction of two children pledging allegiance, was a snippet taken from the *Orlando Sentinel* endorsement for Shepard's 1994 legislative campaign. This endorsement contained a portion of the *Orlando Sentinel's* masthead, titled "Shepard, with Enthusiasm." It was dated "Election 1994," and referenced Ms. Shepard's prior service as a "good legislator." (JQC Ex.9; T.37-39).

On July 26, 2014, the *Orlando Sentinel* endorsed Mr. Katz stating:

> **Group 10**
> This race matches two veteran lawyers: Norberto Katz of Maitland, who has practiced 30 years, and Kim Shepard of Orlando, who has practiced 24. We prefer Katz, whose experience makes him better qualified to be a judge.
>
> Katz, a child-support hearing officer since 1998, was made the chief among the circuit's hearing officers four years ago by Chief Judge Belvin Perry – a vote of confidence from the dean of judges in Central Florida. Katz also worked with Perry in developing the circuit's truancy court, and volunteers as a special magistrate for it. Katz has shown his dedication to his profession by serving in top posts in multiple legal organizations, and to his community through leadership in cultural and charitable groups.
>
> Shepard served two years as a prosecutor to begin her

> career, but says she has spent the past 22 years running a "business-focused law practice" that has largely kept her out of the courtroom. She does have admirable examples of community service in her past, including a term in the Legislature.
>
> We didn't endorse Katz when he ran 12 years ago, noting that he had been suspended in 1995 for 90 days by the Florida Bar for misconduct. In the nearly two decades since his sanction, however, Katz has worked diligently to rebuild his reputation. Currently, he's chair of the Bar's family law section, a telltale sign he's regained his good standing within the legal community. In this race, his dozens of endorsers include 18 past Orange County Bar presidents.
>
> We don't think his 90-day suspension in 1995 should carry with it a lifetime ban from the bench. We endorse Norberto Katz. (JQC Ex.13).

After the *Orlando Sentinel* endorsed her opponent, Ms. Shepard distributed the campaign mailer at issue, referred to as JQC Ex.10. (T.44-45; 47-48). A copy of the original color mailer is attached. The front and back of the mailer compared Kim Shepard to her opponent in multiple categories. On the back, under the column for Kim Shepard it stated:

> "Ms. Shepard has done well. She has kept her promises. She has worked hard. She has maintained her integrity."
> - The *Orlando Sentinel*

This purported to be a direct quotation taken from the *Orlando Sentinel*, but significantly (1) omitted the 1994 date of the newspaper's endorsement; (2) omitted the fact that this statement was twenty years old, and made in connection with a 1994

legislative race, **not** the current judicial race; and (3) was substantially edited to delete all reference to Ms. Shepard's legislative service. Both the intervening sentence and end sentence of the paragraph of the *Orlando Sentinel* endorsement were removed without any indication. (JQC Exs.10; 12; T.42-43).

Special Counsel called two witnesses in his case: Donald Lykkebak, Esq. and Judge Shepard. Mr. Lykkebak, a criminal defense attorney admitted to the Florida Bar in 1970, and a registered voter in the 9th Circuit, did not receive Ms. Shepard's first mailer (JQC Ex.9) but received JQC Exhibit 10 after the *Orlando Sentinel's* 2014 endorsement. (T.66-67; 70).

Mr. Lykkebak read the *Orlando Sentinel*, knew that its 2014 endorsement had gone to Mr. Katz and believed that JQC Exhibit 10 was "untruthful," "deceptive" and intended to deceive the public. (T.68-69, 80). It was "purposefully edited" to remove the 1994 date, and any reference to Ms. Shepard's legislative service. (T.68-69; 99). Mr. Lykkebak had no involvement with or stake in the Katz campaign, but "mind[ed] that [JQC Exhibit 10] was a lie intended to deceive the voters in a judicial election." (T.88; 105).[3]

Judge Shepard agreed she was responsible for the conduct of her campaign and the content of her advertisements. She admitted that the language in her mailers

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[3] Attorney Cheney Mason testified similarly in a deposition that Judge Shepard submitted in evidence. (Resp. Ex.6, pp.8, 10-11, 14, 28-29).

was significantly changed:

> Q. The sentence from the original 1994 endorsement that was placed on Exhibit No.9 for 2014 that says she has legislated effectively does not appear on Exhibit No.10, does it?
> A. [Judge Shepard] No.
> Q. The sentence that was in the 1994 endorsement as part of the 2014 campaign material, quote "She has served her constituents diligently" does not appear on Exhibit No.10, does it?
> A. That's true.
> Q. In addition, the words "Election 1994" also do not appear on Exhibit No.10, do they?
> A. No, they do not.
> Q. Exhibit No.10 makes no reference to your previous legislative experience, does it?
> A. No, I don't believe it does. Let me look for sure, but I don't believe so. Wait. Let me look, I don't believe so.
> Q. And Exhibit No.10 does not make any reference to your years of legislative experience, does it?
> A. No. (T.42-43).

Judge Shepard asserted the *Orlando Sentinel's* assessment of her character and reputation for integrity, written in 1994, still applied in 2014 because "integrity is a quality... you either have or you don't," and it doesn't diminish with the passage of time. (T.55-56; 167-69). She used this particular language to distinguish between herself and her opponent because **inter alia** the *Orlando Sentinel* never withdrew or receded from its prior assessment "when they had an ample opportunity to do so..." (T.55; 57). She didn't believe her mailer was misleading because she personally handed out the entire 1994 article on the campaign trail. (T.63; 188).

Judge Shepard also disclaimed any intent to deceive or mislead. (T.51). She testified that no one received JQC Ex.10, who had not previously received JQC Ex.9, urging her mailer should be considered in context. (T.51, 60-61, 166-67). Judge Shepard relied on a demonstrative aid, with an overlay depicting her mailers sequentially. (T.170; Notice of filing demonstrative exhibits, dated April 11, 2016). While not intended for this purpose, Judge Shepard's demonstrative aid actually highlighted the language which she deleted from JQC Ex.10: the date of the 1994 election, and sentences reflecting it referred to her prior legislative service. (T.170-71).

In her defense, Judge Shepard called one character witness, and two witnesses to attest to their "perception" of JQC Ex.10 (the mailer at issue) and whether they were personally misled.

Lawson Lamar, Esq. met Ms. Shepard in 1989, when she was a certified legal intern, and he was the new state attorney. (T.118). She continued working for his office as an assistant state attorney for two years after graduation. (R.119).

Mr. Lamar testified that, during her employment as an A.S.A., Ms. Shepard was "appropriately aggressive," had "a great sense of duty and justice," was well-liked by co-workers, and he "never heard a bad word." (T.119; 122). He believed she was a truthful person and "never had any involvement with [her] or [her] reputation that did not involve truth." (T.124). After Ms. Shepard left the state

attorney's office, they had less contact, but talked from time to time. (T.119).

Anthony Ferentinos, a "super duper voter" and frequent candidate for county commissioner met Judge Shepard on the campaign trail. (T.128; 133-36).[4] Mr. Ferentinos supported and voted for Ms. Shepard's opponent. (T.134). He testified that the mailer at issue didn't seem misleading to him because it "doesn't say anything other than the fact that you know, Kim Shepard is running for judicial position, and she's done well, and different things about her opponent." (T.133). Mr. Ferentinos added that "[I] don't see any endorsement here whatsoever. Doesn't say that they endorsed you, other than the fact that maybe on the first one that you were at one time running for election for, I guess, state, and they endorsed you then. But that's all it says." (T.135). He also volunteered that "these cards are – half of them are throwaways... people read them, and they already know who they want to vote for" and that "the *Orlando Sentinel* endorsement might as well have a death sentence. I mean I wouldn't want it if I was running, which I am running." (T.133; 135).

Judge Shepard also questioned Karl Kaiser, a longtime friend, about the "impression" made on him by JQC Ex.10 (T.152). Mr. Kaiser knew Ms. Shepard was a former legislator before she ran for judge. (T.158). He testified that "These

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[4] Mr. Ferentinos did not recall receiving JQC Ex.9, but saw it at a campaign function. (T.128, 129-31).

are various things that various parties send," that JQC Ex.10 didn't say that Shepard had received the *Orlando Sentinel's* current endorsement, and "You'd have to read something else into it. It doesn't say that." (T.152-53).

Hearing Panel members questioned Judge Shepard about her selective editing of JQC Ex.10, including the lack of a date for the language attributed to the *Orlando Sentinel*, and the removal of both sentences relating to her legislative service, including one located mid-quotation, without the mailer so reflecting. (T.170-71; 173-77). Judge Shepard claimed she "didn't really think about quotes" but, when pressed, admitted that two sentences in the 1994 *Orlando Sentinel* endorsement (relating to her legislative service) had been excised from her mailer (JQC Ex.10). This was a deliberate act. (T.176-78).

Even with the benefit of hindsight, Judge Shepard was either unable or unwilling to answer "Yes" or "No" to the most basic questions regarding whether her mailer was misleading. (T.188-90). She apologized **only** "If anyone was misled," stating that "wasn't my intent." (T.180). Judge Shepard argued that she read and tried to follow the judicial canons, and that nothing "requires a judicial candidate to wrap... truth in velvet before delivering it in the course of a judicial campaign, far as I can tell," but offered an apology in the event she "misunderstood." (T.208). She attributed these disciplinary proceedings to linguistic "differences of interpretation." (T.194-95). There was little, if anything, she would do differently.

(T.180-84; 190-92).

During the course of these proceedings, Judge Shepard repeatedly tried to shift the focus from her conduct to that of her prior opponent, his qualifications to become a judge, and his campaign literature. (T.95-97; 104-06; 107-10; 113; 155-57). Judge Shepard's formal response to the "Notice of Investigation" denied that JQC Ex.10 was misleading, attributing such contention to the "self-serving interpretation of the party pursuing the complaint." (JQC Ex.4, Response, pp.3 and 4).[5]

The "Notice of Formal Charges" alleged **inter alia** that Ms. Shepard and her opponent both sought the *Orlando Sentinel's* 2014 endorsement, and that the Sentinel preferred Katz. Judge Shepard did not merely deny that she sought the endorsement, she implied powerful improper forces were at work on Katz' behalf, stating she was "without specific knowledge as to whether Mr. Katz and other powerful influencers on his behalf, made specific appeals to or lobbied the *Orlando Sentinel* editorial board and others to provide an endorsement of Mr. Katz despite his established disciplinary record and suspension from the practice of law for misconduct and dishonesty." (Amended Answer, ¶1).

Judge Shepard's answer did not merely defend her conduct. It attacked Mr. Katz, asserting that:

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[5] Judge Shepard apparently believed that Mr. Katz was the complainant.

> There is no indication that Mr. Katz's participation on bar committees after his suspension from the practice of law at the age of 37... for "conduct involving dishonesty, fraud, deceit, or misrepresentation among multiple other ethical and professional conduct violations, or the close social relationships he may have developed while fraternizing with other powerful and influential bar members at meetings and social gatherings, produced a fundamental transformation of his character or suddenly instilled in him, an integrity that was not evident or demonstrated prior to his suspension from the practice of law. (Id. at ¶1).

The Judge's selective editing of the 1994 endorsement, in context, was much more than a matter of inexact punctuation, or a mistake. (T.220, 224). Ms. Shepard believed Mr. Katz to be unworthy of judicial office, and that any action she under took to defeat him was justified. In doing so, she knowingly misled the public by campaign literature which implied that she was endorsed by the *Orlando Sentinel*, when this was untrue.

CONCLUSIONS OF LAW

A. Preliminary Issues

Judge Shepard posited, by way of Motion to Dismiss, that all charges relate to her conduct as a candidate for judicial office. Thus, she cannot be found guilty of violating Canons 1 and 2 of the Code of Judicial Conduct. The Hearing Panel agrees, based on In re Kinsey, 842 So.2d 77, 85-86 (Fla. 2003), which is controlling and applicable.

Judge Shepard also moved "**in limine** to strike prejudicial language from the

notice of formal charges" pursuant to Rule 1.140(f), Fla.R.Civ.P., which permits the striking of "redundant, immaterial, impertinent or scandalous matter" from any pleading at any time.

This kind of motion is "not favored." Costa Bella Development Corp. v. Costa Development Corp., 445 So.2d 1090 (Fla. 3d DCA 1984); see Padovano, Florida Civil Practice §7.30 p.278 (2009 ed). It should only be granted if the matter alleged is "wholly irrelevant," can have no bearing on the equities, and no influence on the decision. McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss, 704 So.2d 214, 216 (Fla. 2nd DCA 1998); Pentecostal Holiness Church, Inc. v. Mauney, 270 So.2d 762, 769 (Fla. 4th DCA 1972).

The Judge sought to strike language in the notice of formal charges paraphrasing the *Orlando Sentinel's* 2014 endorsement of her judicial opponent, which was relevant to these proceedings. Her Motion to Strike is respectfully denied.

B. Violations of Canon 7 and Rule 4-8.2

Canon 7 of Florida's Code of Judicial Conduct provides, in pertinent part:

> **A Judge or Candidate for Judicial Office Shall Refrain from Inappropriate Political Activity**
>
> **A. All judges and candidates**
>
> * * *
>
> 3. **A candidate for judicial office:**

* * *

(b) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary...

(c) shall prohibit employees and officials who serve at the pleasure to the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(d) except to the extent permitted by Section 7C(1) shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under sections of this Canon;

(e) shall not:

* * *

(ii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent...

Rule 4-8.2, Rules Regulating the Florida Bar, governing "Judicial and legal officials" further specifies:

(b) **Candidates for Judicial Office; Code of Judicial Conduct Applies.** A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Florida's Code of Judicial Conduct.

States may regulate judicial elections differently than political elections "because the role of judges differs from the role of politicians." Williams-Yulee v.

Florida Bar, 135 S.Ct. 1656, 1667 (2015). Florida's interest in protecting public confidence in the judiciary is one "of the highest order." Id.

The Florida Supreme Court has repeatedly warned members of the judiciary and judicial candidates, that they should not mislead the public by placing factually incorrect statements in campaign materials. See In re Dempsey, 29 So.3d 1030, 1033 (Fla. 2010); In re Renke, 933 So.2d 482, 493 (Fla. 2006); In re Kinsey, 842 So.2d at 90; In re McMillan, 797 So.2d 560, 571-72 (Fla. 2001); In re Alley, 699 So.2d 1369 (Fla. 1997).

In Renke, the closest case factually, a successful candidate for judgeship was charged with violating Judicial Canon 7A3(d)(iii)* by prominent display in his campaign brochure of Judge Renke sitting beneath a large banner captioned "Southwest Florida Water Management District" in front a nameplate reading "John F. Renke, Chair." The JQC concluded this was a deliberate attempt to convey to the public that Renke was the chairman of the Southwest Florida Water Management District, a public body of considerable importance, when, in fact, there was no such position, and Renke only chaired the Coastal River Basin Board.

---

* Canon 7 of the Code of Judicial Conduct has been amended. The text of this provision remains the same, but is currently located in Canon 7A3(e)(ii). See In re Amendment to Code of Judicial Conduct, 918 So.2d 949, 960-61 (Fla. 2006); In re Amendment to the Code of Judicial Conduct – Amendments to Canon 7, 985 So.2d 1073, 1076-77 (Fla. 2008).

Judge Renke's campaign further disseminated a picture of the judge, surrounded by firefighters below the caption "Supported by our area's bravest: John with Kevin Bender and the Clearwater firefighters." Judge Renke admitted that he did not have the support of the Clearwater firefighters union or any group or organization, just the specific firefighters with whom he posed. The JQC found that the photograph, as captioned, was an attempt to mislead the public into believing Renke had the official support of the Clearwater firefighters.

The Florida Supreme Court affirmed both findings, concluding there was evidence supporting "clear violations of the judicial canon's prohibition on knowing misrepresentations of a candidate's experience and qualification for judicial office." Id. at 487-88.

The present case is stronger. It does not merely involve a picture with a misleading caption. By knowingly deleting the 1994 date of the *Orlando Sentinel's* endorsement, and all references to her legislative service, Judge Shepard made it appear that she had received the *Orlando Sentinel's* current endorsement, which was patently untrue. The Hearing Panel believes that judicial endorsements by local newspapers can and do have significant impact on the electorate, and the outcome of judicial races. Voters, often unable to discern the differences between judicial candidates, rely on local editorial boards to steer them in the right direction. Active and intentional manipulation of those endorsements represents both a strategic

understanding of how important those endorsements are, and a willingness to mislead for personal gain. The Hearing Panel finds Judge Shepard's behavior in this respect to be offensive, and disturbing.

Handing out the original article personally, or mailing an accurate flier first, did not make JQC Ex. 10 any less misleading. If a voter "should not be required to read the fine print in an election flyer to correct a misrepresentation contained in large bold letters" in the same flyer, see Kinsey, 842 So.2d at 90; Renke, 933 So.2d at 488; Dempsey, 29 So.3d at 1033, then a voter should not be required to read prior campaign literature from the same candidate or original source material to glean the truth.

The Hearing Panel finds the Respondent not guilty of violating Canon 7A3(c) and Canon 7A3(d), and that these provisions of Canon are inapplicable to the facts. There was no allegation or proof that any employee or official of respondent's campaign or that any person other than the respondent engaged in conduct prohibited by the judicial canons.

However, the Hearing Panel finds Respondent guilty of violating Canon 7A3(e)(ii) by knowingly misrepresenting "other facts" concerning her candidacy, and Canon 7A3(b) by acting in a manner inconsistent with integrity of the judiciary

by these knowing misrepresentations. Respondent is also guilty of violating Rule 4-8.2, Rules Regulating the Florida Bar.

RECOMMENDED DISCIPLINE

The object of judicial disciplinary proceedings is not for the purpose of inflicting punishment, but to gauge a judge's fitness for office. In re McMillan, 797 So.2d 560, 571 (Fla. 2001).

In Alley, 699 So.2d 1369 (Fla. 1977), a judge was charged with knowing misrepresentations of her own qualifications and those of her opponent in newspaper advertisements and campaign mailers. The JQC Investigative Panel found the advertising violations "very serious," but stipulated to a public reprimand based upon respondent's answer in which she indicated she had learned a great lesson, and showed remorse adjudged to be sincere. The Florida Supreme Court felt "constrained" by the JQC's recommendation and approved it, while signaling difficulty in "allow[ing] one guilty of such egregious conduct to retain the benefits of those violations and remain in office." Id. at 1370.

Alley was decided based on provisions of the Florida Constitution, which were subsequently amended. See Kinsey, 842 So.2d at 95, n.10. In the ensuing almost 20 years since Alley issued, the Court affirmed a public reprimand where the judge exaggerated her legal experience and advertised her "re-election," rather than election, but immediately apologized and acknowledged wrongdoing. Dempsey, 29

So.3d at 1032.

At the other end of the spectrum, the Court has ordered removal for "a series of blatant, knowing misrepresentations... in [the Judge's] campaign literature and... statements to the press," Renke, 933 So.2d at 495, or "cumulative misconduct." McMillan, 797 So.2d at 573.

Here, Judge Shepard knowingly misrepresented facts surrounding her endorsement in a single campaign flier disseminated to the public. However, the Hearing Panel is seriously concerned about the Judge's inability to recognize or understand her inappropriate actions and reactions to these proceedings. In addition, her approach to these proceedings reflects a fear of sinister forces at work conniving at her defeat; the "existence" of these forces – and their alignment against her – appear to justify in her mind her behavior in both the underlying matter and this proceeding. In many respects, Judge Shepard appears to believe these disciplinary proceedings were an extension of the election to be "won" by demonstrating that she was the superior candidate. The Hearing Panel has no hesitancy in recommending a public reprimand, but feeling constrained by prior precedent, still believes that leaving her in office without further penalty is entirely inappropriate. See Kinsey, 842 So.2d at 92. The penalty imposed here must be sufficient to deter others from similar violations.

Accordingly, the Hearing Panel recommends the following discipline:

(1) a public reprimand; and

(2) a 90 day suspension without pay; and

(3) Payment of investigative costs, and the costs of these proceedings.

All of the Hearing Panel's findings are supported by clear and convincing evidence. The votes of the Hearing Panel on guilt, as well as the recommended discipline has been determined by an affirmative vote of at least two thirds of the Hearing Panel members, in compliance with Fla. Const. Art. V, §12(b); FJQC Rule 19.

Done and Ordered this 9th day of June, 2016.

FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

By: /s/ Mayanne Downs
MAYANNE DOWNS, ESQ.
FJQC HEARING PANEL CHAIR
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Filing # 39659300 E-Filed 03/30/2016 04:55:36 PM

Collins

BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE,
THE HONORABLE JERRI COLLINS
No. 15-530
_____/

SC 16-____

NOTICE OF FORMAL CHARGES

TO: The Honorable Jerri Collins
Seminole County Judge
Criminal Justice Center
101 Bush Blvd.

The Investigative Panel of the Florida Judicial Qualifications Commission, at its meeting on November 20, 2015, 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.

The Florida Code of Judicial Conduct (the"Canons" or "Code") requires that "judges must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in the legal system." The same Code also states that, "The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law." Preamble to the Florida Code of Judicial Conduct.

Canon 3B(4) specifically requires that a judicial officer, "...*shall be patient, dignified, and courteous* to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." [Emphasis supplied.]

The basis for your alleged violation of the Canons is laid out below:

1. While presiding over the case of State v. Myles Brennan, (Seminole County Case # 2015MM4751A) you berated and belittled a victim of domestic violence who did not respond to a subpoena issued by the State Attorney to testify in the trial of the father of her child. As a result of the victim not appearing for trial, the State dismissed the dangerous exhibition of a weapon charge and the defendant accepted a plea to a reduced charge of simple battery because the State was unable to go forward with trial on that day.

2. You issued an order to show cause upon written notice by the State why the victim should not be held in contempt for violating the trial subpoena by failing to appear at Mr. Brennan's trial. The State had previously advised the Court that Ms. Anderson had indicated that she was refusing to appear in response to the trial subpoena and had stated she did not care if she was arrested for failure to appear. Several days later when the victim appeared before you on the show cause order you immediately instituted direct criminal contempt proceedings (also known as summary contempt). In this abbreviated hearing, lasting approximately six minutes in which the Defendant was not represented by counsel or advised of her right to present

evidence or testimony on her own behalf.[1] During the contempt proceedings you were discourteous, and impatient towards the crying victim. You raised your voice and cut her off mid-sentence, using sarcasm to make your point. Moreover, once you had finished upbraiding the victim, you found her in contempt of court and sentenced her to spend three days in jail.

3. Your aggressive and discourteous treatment of a victim of domestic violence abuse for failing to appear for a criminal prosecution was inappropriate, and created the appearance of partiality toward the State. For example, you badgered the victim to know if the statements she made to the police were true, and if so, why wouldn't she show up to testify against her abuser at trial. You further departed from the role of a neutral arbiter by telling the victim that her actions did "not turn out good [sic] for the State" [ostensibly referring to the fact that the defendant had to take a plea to a lesser charge]. In fact, it wasn't your duty to decide what was "good" for the State, but rather only to ensure a fair proceeding for everyone involved, including the victim. A video of the incident may be downloaded at this web address: media.flcourts18.org/releasetomedia/073015Anderson.wmv

4. Your conduct brought unnecessary criticism upon the judiciary and could have the effect of diminishing the public's confidence in the judicial system.

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[1]Shortly after this, the Florida Supreme Court clarified that a witness' failure to appear pursuant to a subpoena should be considered "Indirect Contempt" rather than summary contempt, which would provide the contemptor with greater due process rights, including having the opportunity to speak with and be represented by counsel, and to present evidence and testimony on their own behalf. State v. Diaz De La Portilla, 177 So.3d 965 (Fla. 2015).

Indeed, the victim in the Myles Brennan case told a national audience on the Today show that, "I think after everything that's happened, I would most likely not call the police at all [in the future]."

Your actions constitute inappropriate conduct in violation of Canons 1, 2(A), and 3B(4) 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 Counsel for the Judicial Qualifications Commission, and the General Counsel of the Commission.

Dated this 30th day of March, 2016.

THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

By: _____

Alexander John Williams
ASSISTANT GENERAL COUNSEL
Florida Bar No. 99225
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(850) 488-1581
awilliams@floridajqc.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Formal Charges has been furnished by electronic service, on this the 30th day of March, 2016, to the following:

The Honorable Jerri Collins
Seminole County Judge
Criminal Justice Center
101 Bush Blvd.

c/o Warren W. Lindsey, Esq.
Lindsey & Ferry, P.A.
1150 Louisiana Avenue, Ste. 2
Winter Park, FL 32789
COUNSEL FOR JUDGE COLLINS

Alexander John Williams
ASSISTANT GENERAL COUNSEL

Contini

BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE,
THE HONORABLE JOHN PATRICK CONTINI
No. 15-200
_____/

SC15-___

NOTICE OF FORMAL CHARGES

TO: **The Honorable John P. Contini**
Circuit Judge, 17th Circuit
201 SE 6th Street
Ft Lauderdale, Fl. 33301

The Investigative Panel of the Florida Judicial Qualifications Commission, at its meeting on October 9, 2015, 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. On or about Monday, March 16, 2015, you sent an email to an Assistant Public Defender that stated:

> "Sam, fyi, see the Palm Beach Judge's Order re downward departures generally, not regarding any particular cases… and hopefully, you can perfect your own motions for downward departure (when you believe appropriate) using the excellent research you've already begin [sic], and perhaps some of the Judge's Order and perhaps the cases she relied upon as well, but in either case maybe there is something of interest (generally) below…" (The email and attachment are attached as JQC Exhibit 1).

2. Attached to your email was a recent opinion from a judge in another circuit.
3. You sent the email to a lawyer in the Public Defender's Office. That person then forwarded your email to the other Assistant Public Defenders within their office. Only at that time, did one of those individuals recognize their ethical duty to provide your correspondence to the State Attorney's Office.
4. The State, believing that your offer of research and drafting assistance to members of the Public Defender's Office had robbed them of a neutral and detached magistrate, filed a timely motion to disqualify you. You denied the State's motion finding that it was, 'legally insufficient.' The State then timely filed an appeal of your decision with the Fourth District Court of Appeal (4th DCA).
5. During the course of the State's appeal, a stay was placed on hundreds of cases in your division. As a result, many of the cases before your division were effectively frozen, and defendants who were incarcerated had to remain behind bars because you were unable to make any rulings or determinations in their case.

6. After appearing before the Investigative Panel of the JQC, and while the Commission had taken your ex parte contact with the Public Defender's Office under advisement, you again breeched the judicial canons by exhibiting discourteous, impatient, and undignified conduct during in-court discussions of the aforementioned appeal.

   a. During the case of State v. Lewis on August 11, 2015, you made intemperate remarks calling a submission to the 4th DCA by the Attorney General, "*misleading*," "*disingenuous*," and "*a fraud on the Fourth DCA*." Several times during this case you referred to the Attorney General's position as "*a lie from the pit of hell*."

   b. Later the same day, while handling the case of State v. Moore, you continued to make insulting and disparaging remarks about the appeal pending before the Fourth DCA. Among your inappropriate comments, you stated that "*I want the Fourth to spank the person who put it there...*," and you again referred to the filing by the Attorney General as "*disingenuous*." Later you stated, "*I think they are going to ream out the idiot who put it on the list to begin with...*". Several times you refer to the attorneys handling the appeal as "*idiots*" and their work as "*fraudulent*."

   c. Before accepting a plea in Mr. Moore's case, you again explained that you believed that you were allowed to take a plea because you felt that the automatic stay did not apply to this case because the list on which the stay was based, was "*a lie from the pit of hell*."

You also singled out a specific Assistant Attorney General as the source of your significant angst, telling the state prosecutor:

"*I personally differentiate between your office and the AG's office. Not just that the AG's office is handling the appeal. I don't believe anybody in your office would have put together a list of hundreds of cases that were pending sentencing would have misled the Fourth DCA. I know your office. I used to work in your office, and I know my prosecutors in this courtroom. You guys are all very fair and people of integrity. I don't believe you ever would have put together a list that included hundreds of people that had maintained not guilty pleas. You would not have put them on a list and sent that to the Fourth District Court of Appeal saying these cases are pending sentencing. Those cases are pending acquittal.*

I think the AG's office in this case -- I don't want to label the whole office -- I'm saying this particular AG, Heide Bettendorf, the one who actually filed this list, she put together a list of a couple hundred cases, people like Mr. Moore, who maintained their not guilty plea, who were never ever were facing state prison in terms of the guideline computation."

   d. On August 12, 2015, you found out that the State Attorney's Office *had* in fact assisted AAG Bettendorf, and you engaged in a heated argument with Assistant State Attorney Joel Silvershein, over his role in assisting

Ms. Bettendorf. During the exchange you challenged Mr. Silvershein, asking if he was "afraid" to tell you whether he assisted Ms. Bettendorf. You even ordered your bailiffs to escort Mr. Silvershein out of your courtroom when he refused to answer. You then ordered him to answer your question of whether he assisted the Attorney General's Office. While Mr. Silvershein probably had good reason to fear raising your ire— having heard about your comments directed at Ms. Bettendorf and her filings on the day before— he did finally acknowledge that he assisted the Attorney General's Office after you ordered him escorted out of the courtroom, and then ordered him to answer.

e. Moreover, in addition to again using intemperate langugage, and an aggressive tone, your comments during this case also seemed to accuse Mr. Silvershein of engaging in a conspiracy, when you stated, "*Your office is co-complicit with Heide Bentancourt* [sic] *of the AG's office in putting together a list...*"

7. Furthermore, for a period of some months, while the 4th DCA was considering the State's appeal, you refused to step away from the criminal division, allowing the stay to continue to freeze the cases of numerous defendants. When questioned by the JQC Investigative Panel, you explained that you

remained in the criminal division because you expected the appellate court to "vindicate" you.

8. Notably, you indicated to the Commission that while you did send an apology email to Mr. Silvershein soon after your outburst, you did not make any apology to Assistant Attorney General Bettendorf prior to your appearance before the Investigative Panel.

9. Transcripts of your comments on August 11, 2015 and August 12, 2015 are attached as JQC Exhibits 2 and 3, respectively.

10. The events of this case have been broadcast in the local and regional news media, further amplifying the negative effect of your actions.

Your actions constitute inappropriate conduct that violates Canons 1, 2(A), 3B(4), 3B(7), 3B(9) 3E(1), 4A(1), 4A(2), 4A(3), 4A(4), 4A(5), 5A(1), 5A(2), 5A(3), 5A(4), and 5A(5) 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 Counsel for the Judicial Qualifications Commission, and the General Counsel of the Commission.

Dated: this 23rd day of November, 2015.

THE FLORIDA JUDICIAL
QUALIFICATIONS COMMISSION

By: _____

Alexander John Williams
ASSISTANT GENERAL COUNSEL
Florida Bar No. 99225
P.O. Box 14106
Tallahassee, Florida 32317
(850) 488-1581
awilliams@floridajqc.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Formal Charges has been furnished via electronic service on this the 23rd day of November, 2015, to the following:

Bruce Rogow, Esq.
Bruce S. Rogow, P.A.
100 Northeast 3rd Ave., Ste. 1000
Fort Lauderdale, FL 33301
COUNSEL FOR JUDGE CONTINI

Hon. John P. Contini
Circuit Judge, 17th Circuit
201 SE 6th Street
Ft Lauderdale, Fl. 33301

_____

Alexander John Williams
ASSISTANT GENERAL COUNSEL

EXHIBIT 1

FTU - Rayna Karadbil

From: Johanna Cipau <JCipau@browarddefender.org>
Sent: Friday, March 20, 2015 4:11 PM
To: FTU - Rayna Karadbil
Subject: Fwd: Doug / Beth : Paula Fedorka Sentencing Order.pdf
Attachments: Paula Fedorka Sentencing Order.pdf; ATT00001.htm

EXHIBIT
JQC 1

Begin forwarded message:

> From: "Samuel Perlmutter" <sperlmutter@browarddefender.org>
> To: "Shadae Miller" <smiller@browarddefender.org>, "Sara Singer" <ssinger@browarddefender.org>
> Cc: "Johanna Cipau" <JCipau@browarddefender.org>, "Ernesto Perez" <eperez@browarddefender.org>
> **Subject: FW: Doug / Beth : Paula Fedorka Sentencing Order.pdf**
>
> Judge Contini sent these attachments regarding Downward Departures
>
> From: John Contini [mailto:johnpcontini@gmail.com]
> Sent: Monday, March 16, 2015 3:23 PM
> To: Samuel Perlmutter
> Subject: Sam: Doug / Beth : Paula Fedorka Sentencing Order.pdf
>
> Sam, fyi, see the Palm Beach Judge's Order re downward departures generally, not regarding any particular cases ... and hopefully, you can perfect your own motions for downward departure (when you believe appropriate) using the excellent research you've already begin, and perhaps some of this Judge's Order and perhaps the cases she relied upon as well, but in either case, maybe there is something of interest (generally) below:
>
> Sent from my iPhone
>
> Begin forwarded message:
> From: John Contini <johnpcontini@gmail.com<mailto:johnpcontini@gmail.com>>
> Date: March 16, 2015 at 2:48:58 PM EDT
> To: "Doug Feuer, Staff Attorney" <dfeuer@17th.flcourts.org<mailto:dfeuer@17th.flcourts.org>>, "Beth Ranalli, JA" <eranalli@17th.flcourts.org<mailto:eranalli@17th.flcourts.org>>
> Subject: Doug / Beth : Paula Fedorka Sentencing Order.pdf
> Doug (!) This very helpful Judge -- Samantha Feuer, even has the same exact last name as you (Palm Beach Circuit Criminal judge) so if you ever needed confirmation that you were doing the right thing in helping me to *perfect* a great template (of sorts) of an Order for unique downward departure reasons/cases and decisions, you JUST GOT IT! "Feuer"□ Please read her very thorough and thoughtful opinion, which we can now also use (90% thereof) to check against the good work we've already begun -- adding the 4th DCA Montanez case; and of course, we'll have to have the unique facts and testimony in each involved case, memorializing the unique

testimony in each respective Order, as we discussed; but please grab this excellent Order, below; and Beth, please save it on my laptop and more importantly, onto the desk top computer on my bench, and onto your own desk top too, so we can quickly have YOU also personally adding the edits and adding the text from my individual notes and cases (based on notes from hearings that I provide to you, in the future) and please print this: Doug, and Beth, please see her downward departure 921.0026 (1) (2) Order:

Sent from my iPhone

Begin forwarded message:
From: Samantha Schosberg Feuer
<samanthasfeuer@bellsouth.net<mailto:samanthasfeuer@bellsouth.net>>
Date: March 16, 2015 at 11:40:02 AM EDT
To: "johnpcontini@gmail.com<mailto:johnpcontini@gmail.com>"
<johnpcontini@gmail.com<mailto:johnpcontini@gmail.com>>
Subject: Paula Fedorka Sentencing Order.pdf

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION "X"

CASE NO.: 2013CF007736AXXX

STATE OF FLORIDA,

vs.

PAULA FEDORKO,
Defendant.
_____/

AMENDED SENTENCING ORDER

THIS CAUSE came before the Court on February 11, 2015, for sentencing of Paul Fedorko ("Defendant") for one count of Grand Theft over $100,000.00, a first-degree felony in violation of sections 812.014(1) and 812.014(2)(a), Florida Statutes, and one count of Money Laundering, a first-degree felony in violation of sections 896.101(3) and 896.101(5)(a), Florida Statutes. Defendant is facing a maximum sentence of up to sixty (60) years imprisonment in the Department of Corrections. After having heard the evidence presented at the sentencing hearing, having reviewed the Defendant's Motion for a Downward Departure,[1] including a Commission Agreement from Comp Air Aviation, letters from the Defendant's husband, the Defendant's daughter, and the Defendant's current employer, having heard argument of counsel for the State and Defense, having reviewed the court file, the record, and the Presentence Investigation Report ("PSI") and being otherwise fully advised in the premises, the Court makes the following findings and legal rulings:

[1] The State did not file a response to the Defense Motion for Downward Departure.

STATEMENT OF THE CASE AND FACTS

A. Procedural History

The Defendant was charged by Information on August 12, 2013, with one count of Grand Theft over $100,000.00, in violation sections 812.014(1) and 812.014(2)(a), Florida Statutes ("Count 1"), and one count of Money Laundering, in violation of sections 896.101(3) and 896.101(5)(a), Florida Statutes ("Count 2"). These charges stemmed from a series of thefts beginning on or around May 10, 2011, and continuing through and including July 15, 2013, where the Defendant stole a total of $763,997.00 from her employer, Palm Beach County based In-O-Vate Technologies and its owner Richard J. Harpenau ("Harpenau").

On November 17, 2014, the Defendant entered an open plea of guilty to both Count 1 and Count 2. The Court then ordered the Department of Corrections to complete a PSI. A Criminal Punishment Score Sheet, prepared by the State and approved by the Defendant, revealed a recommended minimum sentence of sixty-nine (69) months in the Department of Corrections.

B. Factual Background

1. Facts Obtained from the Court File and Record

On or about July 16, 2013, Harpenau discovered that the Defendant, his employee/bookkeeper of ten (10) years, had written, appropriated and deposited approximately $763,997.00 of unauthorized checks from Harpenau's TD Bank business account into the Defendant's Wells Fargo bank account. Harpenau discovered the fraudulent activity upon receiving a call from his bank regarding a suspicious $40,000.00 check that was ultimately stopped prior to being cashed.

Subsequently, on July 17, 2013, Detectives Kenerson and Hoosac of the Palm Beach County Sheriff's Office met with the Defendant. The Defendant immediately and voluntarily

gave a statement to the Detectives in which she admitted to writing checks from Harpenau's business account to a business entity she controlled without permission or authorization. The Defendant further explained the manner in which she embezzled the funds: the Defendant, who was authorized to sign on Harpenau's business checking account, would login into Harpenau's business bank account online, draft a check made out to a business entity she controlled, Wave Publication, and then move the money from that business account to her own personal account. The Defendant further stated that she used some of the funds to pay off her American Express credit card. In order to conceal the theft, the Defendant would draft the check and then delete any traces of the check in Harpenau's business account.

2. Facts Developed at the February 11, 2015 Sentencing Hearing

The Defendant's husband, William Fedorko, testified he and the Defendant have been married for forty-four (44) years, and they live together with their daughter and grandchild. Mr. Fedorko also testified that he is an airline broker and is due a $950,000.00 commission from a foreign government in the near future, but was unable to state with specificity the date the funds will be available.[2] The Court reviewed the Commission Agreement from Comp Air Aviation which was signed on August 7, 2014, and evidenced the apparent commission payment that is due, in the amount of $950,000.00 to Wave Media/Bill Fedorko. Mr. Fedorko testified that when the commission payment was made, all of it would be used for restitution to repay Harpenau. The Court found Mr. Fedorko's testimony credible, despite the fact that the date of the commission payment was unknown at the time of the hearing.

[2] Mr. Fedorko stated he was unable to disclose which foreign government due to a confidentiality agreement. Defendant's attorney also stated that he had $30,000.00 in his trust account to be made as an upfront lump sum restitution payment to the victim immediately after sentencing, as well as the Defendant's ability to pay installations of $4,000.00 per month.

The Defendant called Harpenau to testify about employing the Defendant for eleven (11) years as his bookkeeper and how they grew the business together from the ground up. Harpenau testified that his business grosses about five (5) million dollars per year or more, and when Harpenau discovered that the Defendant had been stealing money from the business, he felt betrayed by someone he trusted. At that time, the business suffered a hardship and was left in disarray causing Harpenau to have to borrow money to continue operations. Harpenau also substantiated and authenticated the validity and accuracy of an email he sent to the Defendant's lawyer, referenced in the Defendant's Motion for Downward Departure, which stated the following:

> The subject monies stole and concealed till the time of arrest created a panic situation where a substantial cash infusion was necessary to continue operations. Company morale suffered and hours and hours of forensic work was conducted....any repaid monies would mitigate the damage done to this company. If the Defendant is imprisoned, the proposed monthly payment may be diminished substantially due to no social security monthly payment, no West Marine payroll and not being able to administer the now profitable business of her daughter she seeded over the past 5 years. (Island Trading) Victim firmly believes if Defendant is assisting with its administration, Island Trading is more likely to generate profit and fulfill the proposed monthly payments. In his opinion the past 18 months has been sufficient in penalizing the Defendant (personal losses and mental anguish). That victim does not believe incarceration will succeed in making more of an impression her of her wrong doing. Victim does believe that Defendant's husband will make good on his promise to pay victim back in full with interest.[3]

However, he further stated that after the discovery of the theft and to date, his business has since thrived and flourished. Harpenau did not notice any change in the Defendant's behavior over the two (2) and a half years the Defendant stole the funds and was unaware of the Defendant having a drug or alcohol problem. Regarding sentencing, Harpenau specifically stated he felt the Defendant had "suffered enough over the past eighteen months" since the Defendant was

[3] The date of the email was not evidenced through the Motion for Downward Departure nor though testimony at the Sentencing hearing.

arrested, and that he believed house arrest and restitution were appropriate forms of punishment for the crime.

The Defendant read a letter to the Court where she expressed regret and remorse, admitting she had "violated her employer's trust" due to a lapse in judgment. Furthermore, the Defendant admitted "what she did was wrong" and that she was sorry for her actions. The Court found the Defendant to be honest and extremely remorseful.

C. Sentencing Positions

The Defendant seeks a sentence below the recommended Criminal Punishment Code Scoresheet minimum sentence of sixty-nine (69) months imprisonment based on statutorily recognized and non-statutorily recognized factors. She urged this Court to sentence her to probation that would include house arrest. The State is urging this Court to reject the Defendant's evidence and arguments for mitigation and requests the Defendant be sentenced to eighty-four (84) months imprisonment, despite the Defendant's lack of any criminal record.

ANALYSIS

A. Legal Standard

Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment. Fla. Stat. § 921.002(b) When a Defendant seeks a downward departure sentence, the Court must engage in a two-step analysis. *Banks v. State*, 732 So. 2d 1065, 1067 (Fla. 1999). First, the Court must determine whether it *can* depart, in other words, whether the defendant has established by a preponderance of the evidence a statutory or non-statutory basis for departure. *Id.* The recognized statutory bases for departure are found in sections 921.0026(2)(a) through (2)(m), Florida Statutes. In the statutory scheme, the Legislature explicitly provided for non-statutory reasons for downward departure. § 921.0026(2), Fla. Stat.

(2013). If the Court determines that there is a legally permissible basis for departure, it must then engage in a second step, that is, a discretionary decision as to whether it *should* depart. *Banks*, 732 So. 2d at 1068. This decision involves the Court exercising its sound discretion in a determination as to whether departure is the best sentencing option based on the totality of the circumstances. *Id.*

B. Statutory Basis for Departure: Section 921.0026(2)(e), Florida Statutes

Harpenau's need for restitution outweighs the need to sentence the Defendant to incarceration. The Defendant has established this statutory mitigator by a preponderance of the evidence through the testimony of Harpenau. Not only is restitution to victims a central penological interest of Florida law, but its purpose is to both compensate the victim as well as serve the rehabilitative, deterrent and retributive goals of the criminal justice system. *Noel v. State*, 127 So. 3d 769 (Fla. 4th DCA 2013); *State v. Hawthorne*, 573 So. 2d 330, 333 (Fla. 1991). Furthermore, in *State v. Prasad*, the Fourth District Court of Appeal noted that "[i]f the harm suffered by the victim as a result of the theft was greater than normally expected, and restitution could mitigate that increased harm, then a downward departure sentence may be justified." 889 So. 2d 204, 205 (Fla. 4th DCA 2004) (citing *Dumoss v. State*, 843 So.2d 309 (Fla. 1st DCA 2003)). "In weighing the need for restitution versus the need for imprisonment, a sentencing court must also take into consideration relevant factors such as the nature of the loss, the efficacy of restitution, and the consequences of imprisonment." *Prasad*, 889 So. 2d at 205.

The Court finds, based on the testimony of Harpenau regarding the harm to his business, as well as the email from Harpenau referenced in the Defendant's Motion for Downward Departure which reflects his belief that any repayment by the Defendant would mitigate the damage to his company, it is apparent that Harpenau's business did suffer a hardship as a result

of the Defendant's theft. The Court rejects the argument that because Harpenau's business is flourishing that there is no need for restitution. The sheer amount of monies stolen, the cash infusion that was necessary to continue operations of the business, and the testimony regarding the Defendant's ability to pay the $30,000.00 lump sum immediately and $4,000.00 per month thereafter conclusively establish that the need for restitution outweighs the need for incarceration.

C. Non-statutory Bases for Departure

This Court is not limited to the mitigating circumstances enumerated in section 921.0026, Florida Statutes. *McCorvey v. State*, 872 So. 2d 395, 396 (Fla. 1st DCA 2004); *State v. McLaren*, 763 So. 2d 1171, 1172 (Fla. 4th DCA 2000). This Court may impose a downward departure sentence for reasons not delineated in section 921.0026(2), Florida Statutes, as long as the reason given is supported by competent, substantial evidence and is not otherwise prohibited. *State v. Henderson*, 108 So. 3d 1137, 1140 (Fla. 5th DCA 2013).

In the present case, the Court finds three (3) separate non-statutory bases for a downward departure sentence have been established by a preponderance of the evidence.

1. Harpenau has Expressed a Desire for a Probationary Sentence for Defendant.

As discussed above, Harpenau, the victim in this case, testified, as well as memorialized in his email, that he wishes the Defendant to be sentenced to a probationary sentence that includes house arrest and restitution. The Court observed the demeanor and heard the testimony of Harpenau and finds that he testified honestly and credibly, free from coercion or undue influence from the Defendant. Harpenau is a bright, articulate, and sincere individual, and while certainly not controlling, Harpenau's wishes are relevant. Given the Court's finding that his testimony was voluntary and uncoerced, this Court finds that his wishes constitute a non-

statutory basis for a downward departure sentence in this case. *State v. Barnard*, 744 So. 2d 1134, 1136 (Fla. 2d DCA 1999); *State v. McLaren*, 763 So. 2d 1171, 1172 (Fla. 4th DCA 2000) (noting that a victim's request for leniency as a valid non-statutory basis for downward departure was an open issue); *see also Banks v. State*, 732 So. 2d 1065, 1069 (Fla. 1999) (stating that the victim's wishes are relevant to the sentencing decision).

2. Defendant is Sixty-Five (65) Years Old.

The Defendant is currently a sixty-five (65) year-old grandmother. The Federal Bureau of Prisons defines prisoners fifty (50) years and older as elderly. B. Jaye Anno et al., National Institute of Corrections, Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates 29 (2004); *see also* § 944.02, Fla. Stat. (2013) (defining a prisoner fifty (50) years or older as an elderly offender). Recently, the United States Sentencing Guidelines were amended to provide that a defendant's age may be relevant in determining if downward departure is warranted. U.S. Sentencing Guidelines Manual § 5H.1.1 (2013). Given that the United States Sentencing Guidelines acknowledges that a defendant's age may be a factor in determining whether to downward depart, this Court similarly finds that the Defendant's age may be properly factored into its decision to downward depart.

The Court finds that, despite the fact that the Defendant appears to be in good health, the Court believes a lengthy prison sentence will have a much greater impact on the Defendant than a younger offender, and therefore finds the Defendant's age to be a non-statutory basis for downward departure.

3. Despite the Sophistication and Length of the Ongoing Theft, Defendant is Remorseful.

The Court finds that, while the Defendant's continuous unlawful conduct in writing checks to herself from her employer's business over a two (2) and a half year period without

repaying her employer, on at least twenty (20) separate occasions is neither unsophisticated nor isolated within the statutory definition of those terms, her conduct in totality, especially considering her complete lack of prior criminal convictions, as well as her profound and sincere remorse for her criminal conduct herein support a separate non-statutory reason for a downward departure sentence. *See State v. Strawser*, 921 So. 2d 705, 708 (Fla. 4th DCA 2006) (departure sentence upheld for remorseful defendant without prior record even though criminal conduct did not squarely fit into unsophisticated, isolated and remorseful statutory mitigator).

For these reasons, both individually and collectively, the Court finds the Defendant's remorsefulness to be a non-statutory basis for downward departure.

D. Whether the Court Should Depart

Based on the totality of the circumstances demonstrated and discussed herein and after exercising its sound discretion, the Court finds that it should depart downward. The Court also finds that it would impose the same sentence if one or more of the four (4) stated reasons for departure are subsequently invalidated by an appellate court, leaving one or more valid reasons supporting a downward departure sentence. *See State v. Randall*, 746 So. 2d 550, 552 (Fla. 5th DCA 1999).

E. Sentence

After extensive consideration, the Court sentences Paula Fedorko as follows:

As to Count 1: the Defendant is adjudicated guilty and sentenced to a term of imprisonment of 366 days in the custody of the Department of Corrections, followed by ten (10) years' reporting probation with the first two (2) years being served on house arrest/community control II with a GPS monitor. Besides the standard conditions of probation, the Court imposes the following additional special conditions:

a) $30,000 in restitution to be paid immediately to Richard Harpenau/In-O-Vate Technologies prior to incarceration

b) Prior to release from incarceration in the Department of Corrections, the Defendant is to be fitted with a GPS monitor and placed on house/arrest community control II

c) Restitution to Richard Harpenau/In-O-Vate Technologies, upon release from the Department of Corrections, in the amount of $763,997.00 at a rate of at least $4,000 per month until entire restitution is paid in full.

d) An 8 hour theft abatement course

e) 1000 hours of community service to be done at a rate of 100 hours per year

f) Court costs in the amount of $519.05

g) Fine in the amount of $10,000.00

h) Defendant may petition the Court for early termination only after five years of community control and after the entire restitution amount is paid in full.

As to Count 2: the Defendant is adjudicated guilty and sentenced to 366 days incarceration in the custody of the Department of Corrections followed by two (2) years house arrest/community control II with a GPS monitor. The incarceration is to run concurrent with Count 1, but the term of community control is to run consecutive to the two (2) year term of community control II on Count I.[4]

It is further

ORDERED and **ADJUDGED** that the State of Florida shall have fifteen (15) days to perfect an Appeal of this Court's sentence.

[4] It is the intent of this Court for the Defendant to serve 366 days in the Department of Corrections followed by ten (10) years probation with two (2) years community control II with a GPS monitor followed by another two (2) years community control II with a GPS monitor with all the aforementioned special conditions to remain.

DONE and **ORDERED** in Chambers, at West Palm Beach, Palm Beach County, Florida, this 26th day of February, 2015.

SAMANTHA SCHOSBERG FEURR
CIRCUIT JUDGE

COPIES FURNISHED:

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IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA
CASE NO. 15002813CF10A

EXHIBIT
STATE VQC 2

STATE OF FLORIDA,
Plaintiff,
vs.
TAMARA LEWIS,
Defendant.
----------/

Broward Judicial Complex
Fort Lauderdale, Florida
August 11, 2015

The above-entitled case came on for hearing before the Honorable JOHN PATRICK CONTINI, as Judge of the Circuit Court, in court pursuant to notice.

APPEARANCES:
OFFICE OF THE STATE ATTORNEY
MICHAEL J. SATZ
BY: DIANA DIAZ, ASA
FOR THE DEFENDANT: ERNESTO PEREZ, APD

TUESDAY, AUGUST 11, 2015, 11:27 A.M.

MR. PEREZ: Ms. Lewis is on page 23.

THE DEFENDANT: Your Honor, I'd like to speak for a moment.

THE COURT: Ms. Lewis?

Page 23.

MR. PEREZ: On for competency status. We have had reports come back incompetent to proceed.

THE COURT: Tamara Lewis. Do I have -- Danielle -- Dennis Day was one of the doctors and the other one is Tracy Ziegler. Was there a third one?

MR. PEREZ: I believe there was only two ordered, Your Honor.

THE COURT: So, it came back both of them incompetent to proceed. Are you transferring this to mental health court?

MR. PEREZ: It's like Mr. Luna's case -- the case is exactly like Mr. Luna's case. The case is currently stayed. We are trying to see if we can get some sort of transfer.

THE COURT: They allowed me to do that because it's ministerial in nature, but would you rather I not do that?

MR. PEREZ: Let me speak to Ms. Lewis about that.

THE DEFENDANT: Can I speak to you, sir?

THE COURT: Don't talk about the facts of your case.

THE DEFENDANT: No. What are we talking about?

THE COURT: We are talking about resolving your case?

THE DEFENDANT: What is the case that is set?

MR. PEREZ: Your Honor --

THE DEFENDANT: He keeps doing this.

THE COURT: He's trying to help you.

THE DEFENDANT: No, he's not.

THE COURT: You and I disagree on that.

THE DEFENDANT: Can I say something?

THE COURT: Not right now because I don't want it to hurt you. I don't want what you say to end up hurting you.

THE DEFENDANT: I'm telling you it's okay to let it hurt me or not. Can I speak to you?

THE COURT: I have to protect you from yourself. There are times the Court has to do that. In other words, some inmates try to --

THE DEFENDANT: What doctor? He keeps saying that. What doctor?

THE COURT: You can feel free, Deputy Mahone, to escort Ms. Lewis from the courtroom if she persists in talking.

I don't want you to end up hurting yourself. You could end up hurting your case. Ms. Lewis, we will try to resolve your case as fact as we can.

MR. PEREZ: Your Honor, we would like for this case to be transferred, if possible.

MS. DIAZ: Your Honor, this as set for competency hearing. It was reset for another competency hearing.

I would ask the Court to follow the procedure as we have with all the other cases, and if we are to transfer this, then the proper motion has to be filed with the Court. Just like we did with the other case.

THE COURT: The other case? What did we do with that?

MR. PEREZ: With respect to Mr. Luna?

THE COURT: Both of them are incompetent. The reports are coming back incompetent.

MR. PEREZ: As far as Mr. Luna, there is a split. So, it will be a contested transfer.

MS. DIAZ: I'm not agreeing to anything. That's why had we have the restitution hearing set.

THE COURT: Restitution hearing?

MS. DIAZ: Competency hearing.

THE COURT: There are two reports. You are not stipulating to the reports?

MS. DIAZ: Again, we were going to a competency

hearing. I'm not prepared today to agree to transfer the defendant because either way it's out of our control. There is no jurisdiction to transfer case to another judge.

THE COURT: I want you to take me up to the Fourth. I find that a person who is incompetent, who has two reports from two different doctors saying that they are incompetent, that person, that person, by definition, their case is not pending sentencing because they cannot be sentenced.

They are, in fact, incompetent according to two doctors. Therefore, their case cannot be "pending sentence."

And if a prosecutor, someone with the AG's office, wants to put that person's case on their disingenuous list of cases that are pending sentencing, that's a lie from the pit of hell, and that is a fraud on the Fourth DCA.

And for an attorney general to list cases where people have maintained their plea of not guilty, where they are presumed innocent, they are pending acquittal just as much as they are pending sentencing.

They were not pending sentencing until they decide to plead guilty and ask to be sentenced.

Here's a person who is incompetent, two doctors have said they are incompetent, they cannot be pending sentencing.

Therefore, for their name to be on a list that's disingenuous at best, to list hundreds of cases that are pending sentencing when they are not pending sentencing, they are pending acquittal, they maintain their plea of not guilty, they are presumed innocent. That's America. They are presumed innocent. Everybody is presumed innocent.

We tell juries that in every single case. The defendant is presumed innocent. They filed written motions, notice of not guilty, written pleas of not guilty, their lawyers have maintained their plea of not guilty. they are presumed innocent. They are not pending sentence.

Take a case like this where two doctors have said that this poor woman, Tamara Lewis, is incompetent. Both doctors. She is clearly not pending sentencing.

So if an AG or some prosecutor wants to put her name on a list as a case that's pending sentencing, that again is a fraud on the Fourth DCA.

It's a disingenuous inclusion on a list that makes no sense and it's misleading at a minimum the Fourth DCA in that the case cannot be pending sentence. Therefore, transferring it right now to mental health Court over your objection, which is noted and preserved.

I'd like you to order this transcript and take me up to the Fourth and see what they say about --

MS. DIAZ: Okay, Your Honor.

THE COURT: I'm not upset with you.

MS. DIAZ: I understand.

THE COURT: I want the Fourth DCA to tell me how this case is pending sentencing. And I assume that they are going to admonish quickly the attorney general who listed disingenuous and in a fraudulent fashion this case as one that is pending sentencing.

For that AG to have listed this case on that list, again, that's a lie from the pit of hell. I'm transferring it to right now, Tamara Lewis's, case to mental health.

I find that she certainly meets the definition of criteria for mental health. But we have a mental health court for a resson. We have two doctors weigh in as incompetent to proceed. We have a court that addresses that.

MR. PEREZ: We would be transferring it pending contested competency.

MS. DIAZ: Your Honor, if I may just for one moment.

THE COURT: Are you contesting it?

MS. DIAZ: I don't believe there was anyone, whenever this person was put on the list, that was aware of anything that was going on. They were not able to tell --

THE COURT: I'm done talking about Tamara Lewis. I'm done. Take me up to the Fourth. We are done. Next

case.

MR. PEREZ: Your Honor --

THE COURT: Make your record later. I'm done.

MS. DIAZ: I have to make my record.

THE COURT: I'm done.

MS. DIAZ: I believe these reports have expired and I don't know if one was from the PDs office or if, in fact, the Court ordered two.

THE COURT: Do your fishing expedition and your inquiry --

MS. DIAZ: Your Honor has not --

THE COURT: I'm transferring this to mental health court. Take me to the Fourth. I'm done talking about it.

There are two doctors' reports here.

MS. DIAZ: Not two ordered by the Court as we are supposed to do.

THE COURT: Let mental health kick it back to me then take it to the Fourth.

MS. DIAZ: That would be over the state's objection.

THE COURT: Tamara Lewis there are two reports here: Dennis Day and Tracy Ziegler. Incompetent to proceed. Both doctors found her incompetent to proceed.

Both done in April and May of 2015; Dr. Ziegler Dennis Day, 5-8-2015. Both of them were in April and May of

2015. Both doctors have found her incompetent to proceed.

MS. DIAZ: That wasn't ordered by the Court, Your Honor.

(Proceedings concluded at 11:35 a.m.)

CERTIFICATE OF COURT REPORTER

STATE OF FLORIDA
COUNTY OF BROWARD

I, BRYNN DOCKSTADER, Court Reporter for the Circuit Court of the Seventeenth Judicial Circuit of the State of Florida, in and for Broward County,

DO HEREBY CERTIFY, that I was authorized to, and did, report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages constitute a true, accurate and correct computerized transcription of my report of said proceedings and evidence.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Ft. Lauderdale, Broward County, Florida, this 11th day of August, 2015.

_____

Brynn Dockstader, RMR

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA
CASE NOS. 14010277CF10A, 14004619CF10A
14004615CF10A, 13010756CF10A

STATE OF FLORIDA,
Plaintiff,
vs.
ALLEN MOORE,
Defendant.
----------/

Broward Judicial Complex
Fort Lauderdale, Florida
August 11, 2015

The above-entitled case came on for hearing before the Honorable JOHN PATRICK CONTINI, as Judge of the Circuit Court, in court pursuant to notice.

APPEARANCES:
OFFICE OF THE STATE ATTORNEY
MICHAEL J. SATZ
BY: KRISTEN POGUE, ASA
FOR THE DEFENDANT: ERNESTO PEREZ, APD

TUESDAY, AUGUST 11, 2015, 12:01 P.M.

MR. PEREZ: May I call Mr. Allen Moore? Mr. Moore is on page 17?

THE COURT: Okay.

MR. PEREZ: In custody, Your Honor. An offer has been made. Mr. Moore is willing to accept it. We are just waiting for his whole issue to resolve itself.

THE COURT: The same thing? It's the list.

MR. PEREZ: It's on the list. We'd ask for a two-week reset.

THE COURT: I see notes here. Something about DOC offer to revoke, 364. You guys worked out already.

MR. PEREZ: Ms. Pogue made an offer of 270. She came down the 364.

MS. POGUE: I was very nice.

THE COURT: Sounds like it.

Your case can be resolved very soon, Mr. Moore. We can set it for two weeks.

And, again, as soon as the stay is lifted, your lawyer can set it down the next day. I've given the prosecutors and the public defenders the same message. Anybody who wants to set it down and resolve their case the very next day.

For now, what kind of a date should I give?

THE DEFENDANT: Your Honor --

MR. PEREZ: Change of plea, two weeks.

THE COURT: Change of plea in two weeks.

Where is Mr. Moore? In the red. I'm sorry.

THE DEFENDANT: I've been coming back and forth to court. I have like 117 days in already. Can you set me off until October or something? Around that time I should be getting out.

THE COURT: Is he on another case, Mr. Perez? Does he have another case?

MR. PEREZ: He doesn't have another case, Your Honor.

MS. POGUE: Judge, this case, I think there's been a lot of back and forth whether the offer accepted or not accepted. I'd rather keep track of it and not set it all the way out and then there's a change of heart again and now we have got issues.

MR. PEREZ: And to be fair to Mr. Moore, he has been willing to accept the offer since the last court date.

THE COURT: Mr. Moore, it sounds like you have something worked out.

Ms. Pogue, let you I ask you a question.

One more moment, Mr. Moore. Sit down.

Is this one of the discretionary with me?

MR. PEREZ: It is, Your Honor.

THE COURT: Ms. Pogue, I'll just ask you for your

thoughts on this and I'll respect your decision if you don't want to and that's fine. One of these cases discretionary --

MS. POGUE: Yes, Judge.

THE COURT: -- if you like, what I could do, my inclination is, I'd like you to take a case -- doesn't have to be Mr. Moore's case -- take the plea and then have one you have take me up and see what the Fourth has to say about that, because I personally believe for all the reasons I said before, I don't believe Mr. Moore's case should have been put on the list.

And I know you didn't put it on the list but it's there. It's not your fault that it's there. It's there. You are trying to live by the fact that it's there.

I believe it was absolutely wrong that it was put there and I want the Fourth to spank the person who put it there, because it should never have been listed among the cases that are pending sentencing, so it was a disingenuous list.

So, I would like to take a plea on one of these cases and have the Fourth tell me that I shouldn't have, if that's their position. I don't think they'll say that.

I think they are going to ream out the idiot who put it on the list to begin with because it was discretionary. It wasn't an FSP case. It wasn't a case

that requires a downward departure. It was a case that somebody maintained their presumption of innocence and never should have been put on that list.

And, again, in fairness to you, you never had anything to do with putting -- deciding which cases were on the list.

I'd like to take a plea on one of these cases. If you don't want it to be Mr. Moore, we don't have to have it to be Mr. Moore. I want you to keep that in mind.

MS. POGUE: Judge, my position on you doing that, for better or for worse, whether they should be on the list or they should not be on the list. Unfortunately, they are and I think because they are, this Court does not have jurisdiction.

THE COURT: It's the tail wagging the dog. I got some disingenuous prosecutor who inartfully or artfully created a fraudulent list and now we are stuck with it and that's what's unfair to you.

It's unfair to the defendants, the inmates, it's unfair to the prosecutors. It's to the PDs. It's unfair to all the victims in all these cases. It's unfair to witnesses. It's unfair to everybody.

Because some idiot put together a creative list that was absolutely fraudulent, we are all stuck with that?

MS. POGUE: Unfortunately, Judge, I think the

remedy, and I hate to continue to say this and trust me I have gotten sick of saying this to defense attorneys and everyone else, but the remedy I believe lies with the Fourth, unfortunately.

So, if you are going to do this at some point, because you feel that you do have the jurisdiction, Mr. Moore's I think is as good as any other case to do it on. He'll still be in custody, if the Fourth does come back and say, "No, that wasn't right."

Again, our position is that no matter who you try it with, you don't have jurisdiction.

Unfortunately, for better or for worse those cases are on the list. They are up there right now. They are in the appellate world. They are not down here.

Again, if you are going to do it anyway, why not this one? Having said that, it would be over the state's objection. We do feel that the Court does not have jurisdiction. And it would be take up.

THE COURT: Okay. For now with Mr. Moore, 9-1.

MR. PEREZ: Perez. Mr. Moore would like to take the offer.

THE COURT: Let me think about it. Perhaps I'll have you bring Mr. Moore back for this plea.

(Proceedings held on unrelated matters).

THE COURT: The State of Florida versus -- let's

just back up here. Your client, Mr. Perez?

MR. PEREZ: Yes, Your Honor.

THE COURT: The gentleman's name, Mr. Moore?

MR. PEREZ: Yes.

THE COURT: What page?

MR. PEREZ: Page 17.

THE COURT: Let me get there. We have one case or two?

MS. POGUE: Pogue. Judge, there's actually two cases. The second one did not make the docket. I don't know why. He was on probation for two cases. One is the case that's on your docket, which I believe is the 4619CF10A.

THE COURT: No, 277CF10A.

MS. POGUE: Okay. Then the missing case is 14004615CF10A. He's also on probation for that case concurrently. The warrant reflects that it's on both cases. The public defender's office has to get appointed to that case.

MR. PEREZ: It's administerial.

MS. POGUE: The warrant indicates for both of them. He's on probation for both of them. He would have been on probation for both of them at the time of his violation.

THE COURT: And how is he alleged to have

violated?

This is State of Florida versus Allen Moore. Two case numbers, 14010277CF10A and 14004615CF10A.

MS. POGUE: Judge, there are three allegations in the warrant. He is alleged to the tested positive for marijuana as show by an urinalysis on May the 11th, confirmed on May 15th by Oncology Services, Inc.

The second alleged violation is not attending a evaluation at House of Hope on May the 21st, 2015, as he was ordered to do.

And his third violation is that he actually refused to submit to urinalysis testing the week of May 4 through May 8th, as evidenced by a failure to report to probation.

THE COURT: The third is really a failure to report.

MS. POGUE: It is and failure to submit.

THE COURT: Those are the three allegations on the warrant that both speak to both cases.

MS. POGUE: That's correct.

THE COURT: He was on probation for the possession of cocaine on the one that ends in 277CF10A. And what was he on probation for the one ending in 4615.

MS. POGUE: Possession of ethanol, Your Honor.

THE COURT: Tanya do you have both case numbers

now?

Mr. Perez, do you have a --

MR. PEREZ: We are filling out the plea form for the second --

MS. POGUE: I thought that Mr. Perez knew about this case. I thought that we talked about it. 14004619CF10A.

THE COURT: Which case, Ms. Pogue, is on the list?

MS. POGUE: Your Honor, they are actually both on the list. Both of these cases. The first case, 4619, which is not on your docket. That case happened first.

THE COURT: 4615?

MS. POGUE: 4619. That case occurred on that April the 21st, 2014. It resolve the August 21st of 2014. He was sentenced to 24 months of drug offender probation.

He violated with a technical, and he was reinstated concurrent with the other case which, I guess he had picked up prior to resolving probation, but was not resolved concurrently probably because of case filing issue.

THE COURT: And that's the 277CF10A?

MS. POGUE: Correct. The offense date was 7-28-14. He resolved to probation 8-21-14.

THE COURT: Both of those discretionary with the Court even on a revocation?

MS. POGUE: Yes, Your Honor. He's scoring right now 43.2, which is obviously just under mandatory prison. The state's best and final offer is a revocation, 270. This would be the second time he's tried drug offender probation and was unsuccessful.

THE COURT: What he has accepted is that he be adjudicated. Was he already adjudicated before?

MS. POGUE: He was already adjudicated on both cases.

THE COURT: It's discretionary with the Court. He is accepting the offer of 270 days Broward County Jail concurrent on each case on a revocation of each probation and no supervision to follow?

MS. POGUE: No, Judge.

THE COURT: Just so on the record is very clear, both of these probation cases, these VOPs, are on the previously-filed state list that the attorney general had filed.

Notwithstanding that, I am going to accept his plea today, and the reasons I'm doing that because this Court knows that the Fourth District Court of Appeal was mislead by what appears to be a very disingenuous list.

These two cases should never have been put on this list. They were never pending sentencing as the Fourth District Court of has repeatedly defined "pending

sentencing."

They even did another order about a week ago reducing the list to 28, and they actually put quotation marks around the words, "pending sentencing," shouting at the AG, this is what we mean by "pending sentencing." They amplified that to the attorney general's office and to the state saying, "Give us a new list of those cases" and they put quotes around "pending sentencing," essentially shouting that to the AG. And then they further defined that in the very next phrase saying, "those for which a downward departure motion has been filed."

So, they, again, repeatedly trumpeted what it is they mean by "pending sentencing." They are trying to tell the attorney general, "give us only a list of those cases that are truly pending sentencing," meaning those cases for which a downward departure motion has been filed. Now they reduced that list on the 3rd, a week ago, to 28 cases.

This case of Mr. Moore, both of his cases, should never have been on either list because he has maintained his not guilty and his denial on these VOPs from the beginning. Only until this proceeding today are we discussing about him changing his denial to an admission.

And, again, this whole Fourth District Court writ of prohibition and this whole stay issue has resulted from the argument that on downward departure cases, where a

person scores Florida State Prison and the defense has to file a motion for downward departure, and it's not discretionary with Court, then that triggers the concern the state has had that this Court was being too benevolent in granting downward departure motions, et cetera.

That's a FSP case, Florida State Prison, where a person is scoring prison and the defense is filing a motion for downward departure. Mr. Moore's cases, the two VOP cases, that I'm about to take his admission on were never ever in that category of cases. He never scored FSP.

You, yourself, are telling me now, Ms. Pogue, that it's discretionary with the Court. So, if he didn't score FSP then, he doesn't score FSP now.

The state acknowledges that the public defender's office, his lawyers, have never filed a motion for downward departure. They don't need to. They don't need to ask me for downward departure. It's discretionary with the Court. This case was never pending sentencing.

Mr. Moore, to this day, from the inception of these cases, he has maintained his presumption of innocence. He has entered not guilty pleas and denials. So he was never ever pending sentencing. He was pending acquittal. He was pending a not guilty as much as he was pending a guilty or a sentencing. He was no more pending sentencing than he was pending an acquittal.

This is America and even in the Fourth DCA, in this area, a not guilty or a denial is the same thing across this land. Your presumption of innocence still is in full force and effect and his cases should never ever have been disingenuously included on that list.

And it's this Court's opinion that the attorney general's office has included hundreds of cases on that list that was misleading. That's the nicest way to put it. I believe it was a fraud on the Fourth DCA committed by the attorney general's office, specifically, it was Heide Betancourt, who included filed that list of hundreds of cases.

I believe it was an absolute fraud on the Fourth DCA to include hundreds of cases where it was discretionary with the court, where all these people have maintained their not guilty plea the entire time. They have never not maintained their not guilty plea. They were pending acquittal as much as they are ever pending anything else.

It was just arrogant and presumptuous of an attorney general to say, "Some day they might change their plea." Some day if they do change their plea some day -- in that case perhaps some day they would be pending sentencing, but right now they are not pending sentencing, they are pending acquittal. They are maintaining their not guilty plea.

And there were hundreds of these cases on this list that were, in fact, discretionary with the Court. They never scored Florida State Prison. No downward departure motion was ever filed in those cases.

And for the attorney general's office to have hijacked those defendants, their cases, and their cases numbers, and their lawyers and to travel over their bones and to create this very, very creative and disingenuous and misleading list and present that to the Fourth DCA and mislead the Fourth DCA should be subject to many, many sanctions.

And that's the situation and the Fourth is smelling the coffee, naturally, because the Fourth last week shortened that list to 28. Now the Fourth went out of their way to say "pending sentencing."

And Mr. Moore's case, both his cases, are not on that abbreviated list of 28 cases last week when the Fourth ordered the state to produce a real list. And they produced finally and belatedly a list that was really quote "pending sentencing," those for which a downward departure motion has, in fact, been filed. Mr. Moore's cases are not on that abbreviated list.

For all those reasons and I want the Fourth District Court of Appeal to look very, very hard at what this attorney general did in misleading the Fourth. It's

unethical, it's misleading, it's disingenuous, it's a fraud on the court, it's a lie from the pit hell.

For all those reasons I want the Fourth to look at this list. And I want to the Fourth to look at Mr. Moore to see that he has been inappropriately included on this list when he never should have been. By the way, he's not on the list of 28 that came out last week.

Having said all of that, I'm going to take his plea at this time.

Allen Moore, raise your right hand.

(Defendant sworn).

THE DEFENDANT: Yes, sir.

THE COURT: I'll let you make a record when I'm done.

MS. POGUE: It will be very brief.

THE COURT: Do you understand that you have a right to maintain your innocence and you don't have to admit to anything.

Is it your understanding, air, that you could have your witnesses come up here where Deputy Mahone is sitting and your lawyer can call witnesses on your own behalf and the prosecutor would call witnesses and they would sit up there in that same chair and the prosecutor would call those witnesses and then your lawyer could cross-examine those witnesses?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand your lawyer could compel witnesses on your own behalf?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand the state attorney's office, that they have the burden of proving this VOP in an evidentiary hearing, like a minitrial, and that they have that burden of proof and you don't have to prove anything. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Is it your decision, sir, that you want to admit to the VOP in both these cases 14010277CF10A and 14004619CF10A. That's your decision, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Do you want to change your plea from the denial before to an admission today right now as we speak?

THE DEFENDANT: Yes, sir.

THE COURT: Because you feel that's your best interests to do that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with the advice and counsel of Mr. Perez, your lawyer?

THE DEFENDANT: Absolutely.

THE COURT: He has done a great job for you.

Are you under the influence of any drugs, alcohol, or prescription medication? Anything in the jail right now that would cause you to have an inability to completely understand what you are doing right now?

THE DEFENDANT: No, sir.

THE COURT: Are you under the care of a psychiatrist or psychologist or any mental health diagnosis or affliction that would cloud your thinking?

THE DEFENDANT: No, sir.

THE COURT: Do you have an absolute clarity of thought right now?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that the negotiations between Mr. Perez, your lawyer and Ms. Pogue, your prosecutor, are that you would be sentenced to an adjudication.

You would be adjudicated on both of these cases and sentenced to jail for 270 days on each case, and those jail sentences would run concurrent, one with the other. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Has anybody promised you or threatened you or enticed you with anything else in order to get you to change your denial to an admission today?

THE DEFENDANT: No, sir.

THE COURT: Do you agree that you willfully and substantially violate your probation by testing positive in an urinalysis for marijuana, by not attending the House of Hope evaluation, and by refusing to submit to an urinalysis and failure to report. Do you agree with me?

THE DEFENDANT: Yes, sir.

THE COURT: That those are, in fact, willful and substantial violations?

THE DEFENDANT: Yes, sir.

THE COURT: All three of those allegations are on the warrant and that applies to both of your cases. So we all in agreement on that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that if you are not a U.S. citizen, that what you are doing here today could result in your deportation? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you want to go forward with your admission?

THE DEFENDANT: Yes, sir.

THE COURT: And sometimes if you have a sexually motivated offense in your background, you could end up going to a DCF facility, whether it's prison or it might be jail, if it's determined that you have a sexually-motivated offense in your history under the Jimmy Ryce and the Jessica

Lundsford. Is that a concern of yours?

THE DEFENDANT: No, sir.

THE COURT: Do you want to go forward with your admission then?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you will score higher in life? If you are ever charged in the future down the road, you will score higher as a result of what is going on here today --

THE DEFENDANT: Yes, sir.

THE COURT: -- by virtue of these sentences here today?

THE DEFENDANT: Yes, sir.

THE COURT: You want to go forward with your admission?

THE DEFENDANT: Yes, sir.

MR. PEREZ: Permission to approach?

THE COURT: I'm showing you your plea forms in Case No. 14004619CF10A and 14010277CF10A, is that your signature on the second page of both of these plea sheets?

THE DEFENDANT: Yes, sir.

THE COURT: I'm showing you both. Is that your signature on both?

THE DEFENDANT: Yes, sir.

THE COURT: There's ten paragraphs that are

identical on both of these violation of probation plea sheets. They are verbatim, identical, but did you go over all ten of those paragrapha with your lawyer, Mr. Perez, and you understood every one of these rights and all these promises and representations that you are making in all ten of these paragraphs?

THE DEFENDANT: Yes, sir, I did.

THE COURT: Do you agree that you are representing thinga truthfully in all ten of these paragraphs that speak to representations and assurances that you are making?

THE DEFENDANT: Yes, sir.

THE COURT: Any constitutional rights that are memorialized in these ten paragraphs, as I discussed with you before, about your right to an evidentiary hearing, the right to confront witnesses against you and your right to compel witnesses on your own behalf and all of these other rights that are memorialized on both of these plea sheets, you are giving up all of these rights and you are assuring me again that it's all accurate, what is being signed by you, in order to accept this negotiated resolution by Mr. Perez, your lawyer and Ms. Pogue, your prosecutor?

THE DEFENDANT: Yes, sir.

THE COURT: Is this what you want to do, sir?

THE DEFENDANT: Yes, sir.

THE COURT: I find you to be alert and

intelligent. I find that you understand the nature and consequences of your admissions to your violations of probation.

I find that you are admissions in both cases your cases, 14010277CF10A and 14004619CF10A, I find that your admissions to violating your probation on both of these cases are freely, voluntarily, knowingly and intelligently entered.

I find that your satisfied with the advice of counsel, Mr. Perez, your lawyer, in both cases. I find they are, in fact, willful and substantial violations pursuant to that warrant in all three of those allegations that you and I went over and you agreed that you did, in fact, willfully and substantially violate in all three respects.

Therefore, I accept your admissions that you violated your probation in both your cases. I'm going to honor the negotiations worked out between your lawyer, Mr. Perez and Ms. Pogue, your prosecutor.

I'm going to sentence you accordingly: You are adjudicated on both cases and all counts, and your sentence is concurrent on both cases 270 days Broward County Jail, credit for any time served. You have 30 days within which to appeal the legality of these concurrent sentences.

And before Ms. Pogue makes more of a record on behalf of the state is there anything further that we need

to take up with Mr. Moore before Ms. Pogue recites some of her concerns on the record?

MR. PEREZ: Nothing from the defense.

THE COURT: You have 30 days within which to appeal the legality of this sentence, otherwise you have waived any appellate rights that you otherwise enjoy, Mr. Moore.

Ms. Pogue, you wanted add some more things on the record?

MS. POGUE: Judge, I just wanted to incorporate everything that I already stated to Your Honor on the record previously when we discussed the matter.

Our concern is the jurisdiction for better or for worse. Whatever is on the list is in the appellate world. That's all.

THE COURT: It's okay. I rather you restate it, if you don't mind. Whatever your concerns are, they are legitimate. I know you are a prosecutor of integrity. I was impressed with you since you got here.

I know you have valid concerns and you are trying to show quintessential respect to the Fourth District Court of Appeal's rulings to date, even though you perhaps deemed it as a changing list that goes from hundreds down to 28, still even a shortened list was a list that the AG provided. The Fourth has not yet ruled on the abbreviated shortened

list of 28.

Therefore, it begs the question what happened to those other few hundred that were previously stayed. There's no order --

MS. POGUE: They are still stayed. I don't think that the shortening of the list has been a ruling on whether or not those cases are -- whatever is going to happen with them, whether the recusal happens or not.

They have asked for clarification from us. They have asked for different kinds of lists multiple times. Why? I don't know what their purpose is. I think only they know why they want to know this information in making a decision.

It is really not our position, Judge. We don't have a position on this.

Really it would be the AG's office who would take a position because they are dealing with the appeal. We are not dealing with the appeal.

THE COURT: I agree with you. You couldn't have said it better. I agree with you.

I personally differentiate between your office and the AG's office. Not just that the AG's office is handling the appeal. I don't believe anybody in your office would have put together a list of hundreds of cases that were pending sentencing would have misled the Fourth DCA.

I know your office. I used to work in your office, and I know my prosecutors in this courtroom. You guys are all very fair and people of integrity. I don't believe you ever would have put together a list that included hundreds of people that had maintained not guilty pleas.

You would not have put them on a list and sent that to the Fourth District Court of Appeal saying these cases are pending sentencing. Those cases are pending acquittal.

I think the AG's office in this case -- I don't want to label the whole office -- I'm saying this particular AG, Heide Betancourt, the one who actually filed this list, she put together a list of a couple hundred cases, people like Mr. Moore, who maintained their not guilty plea, who were never ever were facing state prison in terms of the guideline computation. They were discretionary with the Court.

And both sides agree that many people were trying to plead guilty. They are trying to work out their cases. For months now we are sitting on hundreds of cases, perhaps as many as 50, 60 or 70 at this point. And they are trying to plead and they are discretionary.

And their lawyers have stood up here next to you, and everybody is on the same page, and they are asking me to

take their plea and I can't take their pleas because their cases are on the list. And meantime they have never plead guilty and they are still maintaining their not guilty plea.

Their cases are discretionary with the Court so I think the Fourth District Court of Appeal would be very helpful in clarifying further -- in other words, this Court should be able to take the pleas of those people whole are languishing in custody and there are victims out there that want closure.

There are victims that want restitution. There are victims that are hurting as a result. There are witnesses being jerked around to come to court every couple of weeks to come to court.

Meanwhile, there needs to be closure on those cases for those witnesses, for those victims, and defendants shouldn't languish in custody when their lawyers have already worked out a plea with your office that is discretionary, that requires no downward departure and so this court needs to be able to accept those pleas.

The Fourth DCA has been mislead by this particular AG into believing that those cases are pending sentencing when they are not pending sentencing.

So, I do seek the same clarification. This stay has to be confined until they rule to those cases that are truly pending sentencing, meaning a PSI has been ordered, or

a jury has convicted somebody, and sentencing is actually imminent and there's been a plea of guilty and a downward departure motion has, in fact, already been filed.

Now that case, yes, that's on that list of abbreviated cases that's been abbreviated down to 28.

I understand that and pending a ruling from the Fourth, I accept that, but any of these other cases like Mr. Moore's have no business whatsoever being disingenuously included among that abbreviated list.

That's my position and I welcome both of you to put more on the record, if you like to. I'm done.

Again, sir, you have 30 days within which to appeal the legality of your sentence. Other than that you have waived all appellate rights, like I told you before. I wish you all the best with your life, sir.

Ms. Pogue, you can add anything you would like for the record.

MS. POGUE: Again, Judge, our position is that we don't have a position. The only thing I would add is that obviously the law is not black and white. That's why we have an appellate court.

I know the AG's office can speak for themselves as to what cases were attached to the list and why they were and what the allegations of the motion were.

Again, even without having a position we do think

there's no jurisdiction because those cases are for better or worse up at the Fourth right now.

THE COURT: I thank you profusely and if you would kindly order this transcript. Thank you.

MS. POGUE: We will be ordering the transcript.

THE COURT: Mr. Boszilkov, it is great to have you present with us this morning as well.

I wish you all the best, Mr. Moore.

(Proceedings concluded at 1:00 p.m.)

CERTIFICATE OF COURT REPORTER

STATE OF FLORIDA
COUNTY OF BROWARD

I, BRYNN DOCKSTADER, Court Reporter for the Circuit Court of the Seventeenth Judicial Circuit of the State of Florida, in and for Broward County,

DO HEREBY CERTIFY, that I was authorized to, and did, report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages constitute a true, accurate and correct computerized transcription of my report of said proceedings and evidence.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Ft. Lauderdale, Broward County, Florida, this 12th day of August, 2015.

_____

Brynn Dockstader, RMR

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

EXHIBIT
10QC3

IN RE:
WRIT OF PROHIBITION
FROM FOURTH DCA
ON FG CASES.
----------/

Broward Judicial Complex
Fort Lauderdale, Florida
August 12, 2015

The above-entitled case came on for hearing before the Honorable JOHN PATRICK CONTINI, as Judge of the Circuit Court, in court pursuant to notice.

APPEARANCES:
OFFICE OF THE STATE ATTORNEY
MICHAEL J. SATZ
BY: JOEL SILVERSHEIN, ASA

WEDNESDAY, AUGUST 12, 2015, 10:47, A.M.

THE COURT: Here comes Mr. Silvershein. Do you wish to be the recipient of the wonderful news?

MR. GELIN: The judge was telling everybody that he believes that these agreed pleas or people are discretionary and I think could be set before Judge Bidwill because the order now states it's Judge Contini, specifically, not FG.

THE COURT: Take a look at those orders, Mr. Silvershein, we got a number of them in his hand. Even though the orders speak to individually-named defendants, I think we are still waiting for one or two more orders.

MR. SILVERSHEIN: There were eight orders that were signed.

THE COURT: I think the ones that you are holding there that were signed speak to be individually-named defendants, but there's language in the orders that speak to another circuit court judge having the ability to resolve some of the agreed pleas.

MR. SILVERSHEIN: No, it doesn't. It talks about orders. It doesn't talk about files. It talks about orders.

THE COURT: So, get together all of you because the Fourth DCA is going out of their way in all of these orders to say that the stay does not speak to the circuit

court generally. Only to me as the acting judge, only Contini is precluded from acting on any of the cases in the stay.

They further define stay to say it doesn't speak to the circuit generally, meaning Judge Bidwill can take any of these agreed-upon pleas and that's the position of the Fourth.

MR. SILVERSHEIN: I unfortunately disagree with the Court.

THE COURT: It's okay.

MR. SILVERSHEIN: I have the whole Stamper -- we just need the main case, which is the 4D15-370.

Actually, this was Regional Counsel's motion to clarify is my understanding.

THE COURT: If you look at the language, it says the stay speaks to just the acting judge meaning myself.

MR. SILVERSHEIN: What it says is they are not modifying their June 10th order, which means that those cases are stayed.

It's only granted to the extent that judges other than you can consider from entering orders in the cases. Now, I'm looking at the whole Stamper case. I understand that you have individual cases.

THE COURT: I'm looking -- if you could -- thank you, Mr. Silvershein.

MR. SILVERSHEIN: I've given a copy to Ms. Singer. I didn't mean to interrupt your proceedings.

THE COURT: I agree, Mr. Silvershein. I'm looking at what you are looking at.

This is what it says, "We decline to modify our prior order but clarify that the stay imposed on the cases "pending sentencing" applies only to the judge at issue, that's myself, from acting.

"The stay does not deprive the circuit court of jurisdiction or prevent other circuit court judges, i.e. Judge Bidwill from entering orders in cases at issue.

Having said that -- and take up to the Fourth, again, if you like -- "Any case in FG division, any case that was previously listed on any AG list, any stay list, now can be resolved by Judge Bidwill or any other circuit judge, notwithstanding anybody's argument to the contrary."

I've talked to Judge Bidwill and he is willing to take those because according to the Fourth, "It is very, very clear, only the acting judge, Contini, is precluded from resolving those cases or acting as a quote "acting judge" from acting, but they go out of their way to say "the stay does not deprive the circuit court of jurisdiction or prevent other circuit court judges from entering orders in the cases at issue."

So, especially all the 50, 60 or 70 agreed-upon

pleas that we have right now, that we keep resetting every week or two, where everybody is in agreement that it's discretionary, that they are not even scoring Florida State Prison, that there's no downward departure motion filed.

MR. SILVERSHEIN: The problem is judge --

THE COURT: They were never pending sentencing. They were pending acquittal.

MR. SILVERSHEIN: No, Judge, I disagree.

THE COURT: I'm going to speak and hold you in contempt if you interrupt me again, Mr. Silvershein.

MR. SILVERSHEIN: You are commenting on what you can't comment on.

THE COURT: I'm going to let you speak. I'm going to let you speak when I'm done.

All these cases that were disingenuously listed by the attorney general, not by your office, by the attorney general's office, listing cases where the people have always maintained their not guilty plea. They were presumed innocent. They are pending acquittal as much as they are pending sentencing.

And for the AG to have taken and hijacked all those cases where people have plead not guilty, where they never changed their plea from not guilty to guilty, they were never pending sentencing. They were disingenuously included on a master list of hundreds of

cases.

That's what the AG did in misleading and perpetrating and a fraud on the Fourth DCA.

Now all those cases that were erroneously put on their list -- actually, deliberately, put on the AG's list and then sent to the Fourth DCA and misrepresenting to the Fourth DCA that those cases were pending sentencing. They were not pending sentencing.

Now, the Fourth DCA last week said "pending sentencing." They put quotes around it. They actually defined what pending sentencing meant.

They ordered the state to come up with a real list of those cases that are really pending sentencing. Those cases for which a downward departure motion has been filed. The AG listed only 28. Those are the cases pending sentencing.

Now, even as to those, what are they saying today? The Fourth DCA is saying today as to either list, "Any other circuit court judge except for Contini can resolve those," and if you have a dispute with what I'm saying, take it up to the Fourth, seek a further clarification if you like.

But how many times are they supposed to clarify for you that "pending sentencing" means somebody has been convicted by a jury or they decided to plead guilty, we ordered the PSI, their sentencing date is set out a few

weeks, they score prison, a downward departure motion has been filed. A downward departure motion has been filed. That is a person, quote, "pending sentencing." That's the list of 28.

Even on those, Mr. Silvershein, even on those, Judge Bidwill can take those pleas. Any other circuit court judge can take those pleas according to this order that you just handed me.

Now, if you dispute what I'm saying, go to the Fourth and seek further clarification. I don't know why we would need further clarification when they just clarified it for all of us now.

Go ahead, Mr. Silvershein. I told you I would let you speak.

MR. SILVERSHEIN: I respectfully disagree with you as to your interpretation, number one.

Number two, I think it's improper for you to comment on these cases. You are essentially ruling on these cases.

THE COURT: I'm not.

MR. SILVERSHEIN: You are ruling on these cases and giving your opinion when the Fourth says you are not to be handling these cases.

THE COURT: I'm not giving my opinion at all. If I give my opinion on the petition of writ of prohibition,

you are right. I'm not giving my opinion on a petition of writ of prohibition at all.

I'm telling you about the list itself, the list of cases that, not your office, to the credit of your office, your office did not put together that list?

MR. SILVERSHEIN: We did.

THE COURT: Okay. Are you telling me that you, Joel Silvershein, participated --

MR. SILVERSHEIN: Our office assisted in creating that list.

THE COURT: Your office is co-complicit with Heide Betancourt of the AG's office in putting together a list of --

MR. SILVERSHEIN: Are you accusing us of acting disingenuously?

THE COURT: I am not accusing you of disingenuously misleading the Fourth DCA. Are you telling me that your office put together --

MR. SILVERSHEIN: You have used the word disingenuously.

THE COURT: Are you telling me that your office put together a list of hundreds of cases where people have maintained their not guilty plea, they are presumed innocent and you hijacked those cases and those --

MR. SILVERSHEIN: I think it's improper --

THE COURT: -- hijack those cases numbers, and hijack those cases numbers, and travel over their bones, and you are actually putting people who were presumed innocent, you are putting their cases on a list of cases pending sentencing? Is that what you did?

MR. SILVERSHEIN: Judge, I think it's improper.

THE COURT: Did you do that, Mr. Silvershein? Did you put together that list of people pending sentencing?

MR. SILVERSHEIN: Our office --

THE COURT: -- people who have maintained their not guilty plea -- did you put those cases, Mr. Silvershein? "Yes" or "no." Did you put them on a list of cases pending sentencing? Answer the question.

MR. SILVERSHEIN: We created a list based on the order of the Fourth DCA and the attorney general.

THE COURT: You disingenuously mislead --

MR. SILVERSHEIN: We didn't disingenuously do anything. We didn't disingenuously do anything do one particular thing.

THE COURT: Mr. Silvershein, you, Mr. Silvershein, you are telling me that you are admitting that you participated with the AG in coming up with a list of people that are presumed innocent, presumed innocent, have maintained their not guilty pleas, have never changed their plea from not guilty, you put them on a list of cases

pending sentencing? Did you do that? Answer the question.

MR. SILVERSHEIN: Judge, it's improper.

THE COURT: Leave the courtroom. If you are not going to answer the question, leave the courtroom.

MR. SILVERSHEIN: Fine, Judge.

THE COURT: Leave the courtroom. Leave the courtroom. I'm going to give you one last chance. Answer the question.

Did you put those cases, did you, personally assist Heide Betancourt, the AG, in putting presumed innocent not guilty defendants who maintained their not guilty pleas, did you put their names on that list of cases pending sentencing? "Yes" or "no."

MR. SILVERSHEIN: Look, Judge, I'm sorry.

THE COURT: Are you afraid to answer the question?

MR. SILVERSHEIN: No, I'm not.

THE COURT: Answer the question. Did you do that?

MR. SILVERSHEIN: Why do you keep pushing me on these issues --

THE COURT: Escort this gentleman out of the courtroom please.

MR. SILVERSHEIN: Judge, I'll walk.

THE COURT: If you are not going to obey this Court's order, I'm ordering you to answer the question.

MR. SILVERSHEIN: Judge, you can't order me to

answer the question. The answer is "yes." I assisted.

THE COURT: Thank you for being honest. Thank you. Thank you. You are excused.

MR. SILVERSHEIN: However, am I allowed to address the Court?

THE COURT: You are excused. You are excused, Mr. Silvershein.

MR. GELIN: I ask that this transcript be ordered.

THE COURT: I have no idea what that mumbling was all about.

* * * * * * * * *

MR. GELIN: Mr. Dampman has a court date tomorrow. We put him on in the hopes that you would have some clarification from the Fourth which obviously came down today. That's wonderful.

However, what I'll ask to do is to delete the hearing today, keep him on for tomorrow, but in the meantime call Judge Bidwill's office to see if I can get him on the docket and report back tomorrow and tell you what's going on.

While Mr. Boszilkov is here as well, I'm going to tell Mr. Boszilkov, for the record, I'll be setting Mr. Byron Woods on Judge Bidwill's docket because that is agreed.

On this case before the court, Mr. Dampman, it's

Ms. Diaz's case. I'm sure that she's objecting but we'll take care of it with Judge Bidwill.

(Proceedings concluded at 10:59 a.m.)

CERTIFICATE OF COURT REPORTER

STATE OF FLORIDA
COUNTY OF BROWARD

I, BRYNN DOCKSTADER, Court Reporter for the Circuit Court of the Seventeenth Judicial Circuit of the State of Florida, in and for Broward County,

DO HEREBY CERTIFY, that I was authorized to, and did, report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages constitute a true, accurate and correct computerized transcription of my report of said proceedings and evidence.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Ft. Lauderdale, Broward County, Florida, this 12th day of August, 2015.

_____

Brynn Dockstader, RMR

Contini

BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING JUDGE,

JOHN PATRICK CONTINI, NO.15-200 SC15-2148

/

FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATIONS OF THE HEARING PANEL, FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

Pursuant to the Florida Constitution, Art. v, §12(a)(1), (b) and (c), and the Florida Judicial Qualifications Commission ("FJQC") Rules, the FJQC Hearing Panel certifies these Findings, Conclusions and Recommendations to the Florida Supreme Court.

COURSE OF THE PROCEEDINGS

On October 9, 2015, the Investigative Panel of the FJQC filed a Notice of Formal Charges against the Honorable John P. Contini, Circuit Court Judge for the 17th Judicial Circuit, Broward County. The notice alleged that Judge Contini: (1) forwarded a Palm Beach County sentencing order to an Assistant Public Defender with an email message regarding its general use without copying the State Attorney's Office; (2) denied, as legally insufficient, the State's ensuing motion for disqualification, leaving cases in his division in limbo; and (3) made disparaging, demeaning remarks about the government attorneys who sought his disqualification, while an appellate petition for prohibition regarding his disqualification order was pending.

Judge Contini's answer admitted violations of Canons 1, 2(A), 3B(4), 3B(7) and 3B(9) of the Code of Judicial Conduct by an improper ex-parte communication, exhibiting discourteous, impatient, undignified conduct, and making disparaging, intemperate remarks. Judge Contini contested only the propriety of his ruling on the State's disqualification motion, and the appropriate discipline.

The FJQC Hearing Panel conducted a final hearing on March 14, 2016. The Hearing Panel was chaired by the Hon. Robert Morris, and included the Hon. Morris Silberman (*ad hoc*), Alan Bookman, Esq., John P. Cardillo, Esq. (*ad hoc*), Dr. Jerry Osteryoung (lay member) and Nancy Mahon (lay member/*ad hoc*). All six commissioners were present during the final hearing and deliberations.

Alexander Williams, Esq. represented the FJQC Investigative Panel. Judge Contini was represented by David Rothman, Esq., Jeanne T. Melendez, Esq. and Bruce S. Rogow, Esq. Lauri Waldman Ross, Esq. served as counsel to the FJQC Hearing Panel.

FINDINGS OF FACT[1]

John P. Contini was admitted to the Florida Bar in 1983. After four years as

[1] References are to the parties' "Stipulation of Facts for Final Hearing" (Stip.¶), the transcript of the final hearing (T.), and the parties' respective exhibits, admitted into evidence by agreement (JQC Ex. __; Resp. Ex. ___).

an assistant state attorney with the Broward County State Attorney's Office, he entered private practice, primarily in the field of criminal defense. (Stip. ¶1).

In August 2014, when he was elected to a circuit judgeship, Judge Contini was an experienced attorney, who had been practicing law for 31 years. (T.80). Judge Contini sought assignment to the criminal division based on his background and experience. (T.217).

On January 6, 2015, his first day on the bench, Judge Contini was assigned to a felony criminal division which had a significant backlog due to multiple judicial vacancies (requiring judges to cover different dockets) and the unexpected illness of his predecessor. (Stip.¶3; T.46-47, 82). Judge Contini's division was one of the largest in Broward County, with approximately 1,000 pending cases, and 20 to 30 new cases every week. (T.175-79). This division was essentially in a holding pattern pending the election. (T.46-47; 180-81).

Judge Contini was enthusiastic, worked hard to be fair and efficient, and regularly sought advice from other judges about efforts to manage his caseload and move cases. (T.179-82). He also met with division prosecutors and public defenders in an effort to whittle down and streamline the division's docket. (T.83-84). Among other things, they generally discussed downward departures in sentencing as a case management tool in instances where appropriate. (T.83).

On March 16 through March 20, 2015, Judge Contini attended Phase I of

Judicial College, and programs intended to train new judges. (Stip. ¶4; T.187). During the first day of judicial college (March 16, 2015), Judge Contini came into possession of a copy of an "Amended Sentencing Order" entered by another judge in State v. Fedorko, Fifteenth Judicial Circuit, Case No. 2013 CF007736AXXX (Crim. Div. X) ("the Palm Beach Order.") (T.84; JQC Ex.7).

That same day at 2:48 p.m., Judge Contini forwarded the Palm Beach order by email to his judicial assistant and staff attorney as a "very thorough and thoughtful opinion" on downward departures which could be used for checking against a template order he was then in the process of preparing. (JQC Ex.7). At 3:23 p.m., Judge Contini forwarded the Palm Beach order by email to Samuel Perlmutter, an assistant public defender assigned to his division, with the message:

> Sam, fyi, see the Palm Beach Judge's order re downward departures generally, not regarding any particular cases... and hopefully, you can perfect your own motions for downward departure (when you believe appropriate) using the excellent research you've already begin (sic), and perhaps some of this Judge's Order and perhaps the cases she relied upon as well, but in either case, maybe there is something of interest (generally) below: (JQC Ex.7).

Judge Contini's email and attachment were not copied on or sent to the State Attorney's office. (JQC Ex.7).

On March 20, 2015, assistant public defender Johanna Cipau forwarded Judge Contini's email and attachment to the State Attorney's office. (Stip.¶6, JQC Ex.7 &

8).

Upon his return to the bench on March 23, 2015, Judge Contini held a "side bar conference" with several assistant state attorneys and assistant public defenders, and handed out various materials he received at judicial college, including the Palm Beach Order (Stip.¶7; Resp. Ex.10, ¶6).

On March 26, 2015, the Broward County State Attorney's office filed a Motion to disqualify Judge Contini from all open pending criminal cases. The motion was signed by assistant state attorneys Joel Silvershein and Peter Holden, attached the affidavit of a different state attorney Rayna Karadbil, and a list of open pending cases in the division. (Stip.¶8; JQC Ex.8). Ms. Karadbil's affidavit detailed the means by which the email and attachment reached her attention, adding only that:

> This undersigned ASA was unaware of the communication or the contents of the communication between APD Samuel Perlmutter and Judge Contini.
> This undersigned ASA has numerous cases against APD Perlmutter and was unaware that Judge Contini had an **ex parte** communications (sic) with APD Perlmutter regarding motions for downward departure. (JQC Ex.8, ¶5 and 6).

Judge Contini was "shocked... embarrassed and humiliated" when he received the motion for disqualification. (T.88). He sought advice from the Administrative Criminal Division Judge Martin Bidwell and Chief Judge Peter Weinstein, who called in the Circuit's General Counsel and its court administrator

(who previously served as the circuit court's staff attorney). (Stip.¶9; T.89; 148; 190-92). Judge Contini was advised to deny the motion as "legally insufficient" based **inter alia** on the fact that the lawyers who signed the motion did not attest to its contents, but, instead, attached an affidavit from a line prosecutor, who failed to set forth any fear that hearings before Judge Contini would be unfair. (T.89; 190-92). They, thus, reasoned that the motion was "technically" legally insufficient, since the motion's allegation that the state could not receive a fair hearing, was unsworn. (T.212-13; 218-19). Judge Contini also thought his email, while improper, "didn't speak to a specific case." (T.90-91).

On March 27, 2015, Judge Contini denied the State's motion for disqualification as "legally insufficient." (Stip.¶9; T.89-91).

On April 9, 2015, the State, through the Attorney General's office, petitioned the Fourth District Court of Appeal ("Fourth DCA") to issue a Writ of Prohibition disqualifying Judge Contini as the trial judge in all open pending criminal proceedings. The respondent named in the petition was "see attached list of cases;" the petition was signed by assistant attorney general Heidi L. Bettendorf. (Stip.¶10; JQC Ex.9).

On April 10, 2015, the Fourth DCA ordered the State to serve a copy of filings "on all attorneys indicated on the list of cases attached to the Petition," to ensure that all parties received notice of these and further proceedings. (Resp.Ex.1). The

Attorney General's office immediately complied. (Resp.Ex.1).

On May 12, 2015, the Fourth DCA ordered the State to file a response within 10 days "identifying from the list of cases attached to the petition those cases where sentencing had not yet occurred," as well as cases, where the public defender was assigned to represent the defendant. (Resp.Ex.2). The Attorney General's office promptly furnished the requested information. (Stip.¶12 &13; Resp.Ex.3).

While the State's petition for prohibition was pending, the JQC Investigative Panel served Judge Contini with his first "Notice of Investigation" regarding his ex **parte** email to assistant public defender Samuel Perlmutter, and denial of the State's disqualification motion. (Stip.¶11; JQC Ex.3).

Judge Contini responded, through counsel, to the Notice of Investigation, acknowledging a "serious mistake" in sending the ex **parte** email. He committed to being a "neutral and detached Magistrate," indicating that he denied the disqualification motion as "legally insufficient" because his email, while improper, was general in nature, not case specific. (Stip.¶14; JQC Ex.4).

On June 5, 2015, Judge Contini appeared before the FJQC Investigative Panel, and provided sworn testimony. (JQC Ex.10, p.6). The Judge offered "no excuses," and apologized, noting he was a new judge still learning the ropes. (JQC Ex.10, pp.6-7, 18-19; 23-24; 30-31). Investigative Panel members questioned the substance, as well as the ex **parte**, nature of Judge Contini's email, and his giving of what could

be perceived as legal advice to one of the parties. (JQC Ex.10, pp.22-24; 29-30; 32-34). At the conclusion of the hearing, Judge Contini apologized for his error and the publicity and embarrassment to the judiciary it generated, vowing he'd learned a "very valuable lesson" and that his behavior had changed. (T.30-31).

The FJQC Investigative Panel took the judge's testimony under advisement, and did not vote on whether to pursue formal charges at that time. (Stip.¶15).

On June 10, 2015, the Fourth District ordered the respondents to show cause why the petition for prohibition should not be granted, as to all cases "pending sentencing" listed by the State. Responses, and the State's reply, were due June 17, and June 22, 2015, respectively, with extensions of time prohibited due to the effect of the show cause order on pending cases. (Resp. Ex.4). By operation of law, the show cause order stayed "further proceedings in the lower tribunal" in all cases to which it applied. Fla.R.App.P. 9.100(h).[2]

Judge Contini took the State's motion for disqualification and the appellate proceedings very personally. (T.88; 102-03). He wanted to stay in the criminal division, felt angry, embarrassed and humiliated, and that "the State's list of cases was absolutely wrong" because it included every pending case in Judge Contini's division, and was not limited to cases in which motions for downward departure in

[2] The order excluded cases already called to trial with the jury sworn. (Resp.Ex.4).

sentencing had been filed. (T.101-02). Judge Contini reasoned that:

> [T]his clearly was about downward departure orders and many – most of those cases on the 962 were people that didn't score prison at all. **They were probationary – type cases, what they call discretionary, that you would never need a downward departure, and they were not pending sentencing.** They just filed a not guilty plea. There was no pending sentencing. So they didn't belong on the list. And so I felt that they [State lawyers] were trying to force a complete division change, using this as a reason. (T.104).

There was no formal stay order in effect from March 26, 2015 (the date the motion for disqualification was filed) until June 10, 2015 (when the 4th DCA's order to show cause issued). (T.57; 127-28). However, all parties concerned acted as though there was a stay for fear that rulings could be vacated if the State's prohibition petition succeeded. (T.127-28).

Judge Contini neither recused himself **sua sponte** nor requested a temporary transfer out of the criminal division despite his negative feelings regarding the State's action, and the fact that his division was essentially frozen. (T.101-05; 123-24). Instead "nothing was done." (T.124).

On August 3, 2015, the Fourth District ordered the state to provide a list of cases "pending sentencing" in which a motion for downward departure had been filed. (Resp.Ex.6). The State responded with a list of 28 cases, in which written motions for downward departure had been filed (Resp.Ex.7). Judge Contini (and his advisors) believed that an appellate ruling would be forthcoming swiftly. (T.98;

101-02; 149).

On August 11, 2015, at 11:27 a.m., State v. Lewis, was called for a competency hearing for a defendant who had already been declared incompetent by two doctors. The State argued that this case was "out of [its] control," and Judge Contini had no jurisdiction to transfer it to another judge. (JQC Ex.11, Lewis, p.5). Judge Contini transferred the case, lost his temper, and stated:

> I want you to take me up to the Fourth. I find that a person who is incompetent, who has two reports from two different doctors saying that they are incompetent, that person, by definition, their case is not pending sentencing because they cannot be sentenced.
>
> They are, in fact, incompetent according to two doctors. Therefore, their case cannot be "pending sentence."
>
> **And if a prosecutor, someone with the AG's office, wants to put that person's case on their disingenuous list of cases that are pending sentencing, that's a lie from the pit of hell, and that is a fraud on the Fourth DCA.** (Resp.Ex.11, Lewis, p.5; emphasis added).

Judge Contini further urged the State to "Take me up to the Fourth," assuming that the appellate court was "going to admonish quickly the attorney general who listed disingenuous and in a fraudulent fashion this case or one that was pending sentencing." He added "[f]or that AG to have listed this case… that's a lie from the pit of hell." (Id. at p.7).

In State v. Moore, approximately one half hour later, Judge Contini again made demeaning comments about the "disingenuous prosecutor" who created an

"absolutely fraudulent" list. (Resp.Ex.11, Moore, pp.4-5; 10-11). He singled out assistant attorney general Heidi Bettendorf for committing "fraud on the Fourth DCA" in filing a "misleading" list (Id. at pp.12-15; 23-24), adding that he wanted the Fourth DCA "to spank the person" who put the Moore case on its "disingenuous list," and "ream out the idiot..." (Id. at p.4). Judge Contini also indicated he wanted the Fourth DCA to "look very, very hard at what this attorney general did in misleading [it]" urging that "It's unethical, its misleading, it's disingenuous, it's a fraud on the court, it's a lie from the pit [of] hell." (Id. at p.14-15). At the time Judge Contini made these remarks, he did not know, and had never met Ms. Bettendorf, and she wasn't present in his courtroom. (T.109-10).

On August 12, 2015, the Fourth DCA clarified in court orders that "the stay imposed on the cases 'pending sentencing' applies only to prevent the judge at issue from acting" and "does not deprive the circuit court of jurisdiction or prevent other circuit court judges from entering orders in the cases at issue." (Resp.Exs.1&8). ASA Joel Silvershein delivered copies of the 4th DCA's orders to Judge Contini. (T.59, JQC Ex.11, 8/12/14 hearing, pp.2-3).

Judge Contini apparently believed that the Attorney General's office acted alone in filing the prohibition petition, distinguishing between the assistant attorney general, whom he accused of disingenuous, misleading conduct, and the assistant state attorneys assigned to his courtroom. (Id. at pp.5-8). Mr. Silvershein disabused

the judge of this notion, stating that his office assisted in creating the list. (Id. at p.8). He also asserted that it was improper for Judge Contini to comment on the pending prohibition petition. (Id. at pp.5, 7, 9-10). When they disagreed on the meaning of the Fourth DCA orders, Judge Contini told ASA Silvershein "I'm going to speak and hold you in contempt if you interrupt me again, Mr. Silvershein." (Id. at p.5).

Judge Contini became red-faced, yelling, and accusatory and the hearing became increasingly adversarial. (T.60). He ordered Mr. Silvershein to answer questions or "leave the courtroom," while simultaneously accusing him of "co-complicity" with Ms. Bettendorf. (JQC Ex.11, 8/12/2015 hearing, pp.8-11). ASA Silvershein was thereafter escorted out of the courtroom. (T.60-61; Pet.Ex.11, 8/12/2015 hearing).

Almost immediately afterwards, Judge Contini sought an administrative transfer to another division, and cooperated with the FJQC. (T.131; 151-52; JQC Ex.10, p.4). On August 18, 2015, Judge Contini was reassigned from the criminal to the family division, where he's remained ever since. (T.138; 151-52; 169-70; JQC Ex.6). The Fourth DCA ultimately dismissed the State's petition for prohibition as moot. (Resp.Ex.1).

On September 2, 2015, the FJQC Investigative Panel served Judge Contini with an "Amended Notice of Investigation" relating to the "belittling, embarrassing and... rude" comments he made on August 11 and 12, 2015 and his heated exchange

with ASA Silvershein. (Stip.¶25; JQC Ex.5). Judge Contini responded (JQC Ex.6), and appeared for a second time before the JQC Investigative Panel. (JQC Ex.10, October 9, 2015 hearing). Judge Contini testified under oath that the State was trying to force a division change, its list was "absolutely inappropriate," and he was frustrated because he "couldn't defend himself." (Id. at 22, 25). He also agreed that he "lost it" in court, "overreacted," "personified incivility," and had "no excuse" for his comments. (Id. at p.16, 25).

Thereafter, the Investigative Panel filed a Notice of Formal Charges for the events detailed in both notices of investigation, and this case proceeded to a final hearing.

ASA Silvershein testified that he had known Judge Contini since 1987 (when they were both prosecutors), that they were personal friends and professional colleagues, and there was no conspiracy afoot to force Judge Contini out of the criminal felony division. (T.42-45). The State sought Judge Contini's disqualification because his **ex parte** email to Mr. Perlmutter appeared to be giving legal advice to the public defender's office which "had the potential of affecting every case... being sentenced." (T.48-50). Judge Contini "made it personal" with disparaging remarks against Mr. Silvershein and Ms. Bettendorf, over the course of two days, when Ms. Bettendorf wasn't even present to defend herself. (T.71-72). Mr. Silvershein thought that "No lawyer should be treated in the manner that I was,"

and was particularly incensed about the judge's treatment of Ms. Bettendorf because:

> We live in a world now where what happens out of the courtroom immediately shows up on a blog or an Internet post, and he disparaged her reputation. Reputations are earned over a long period of time. And to disparage somebody like that who he doesn't even know, who he hasn't even met, because they were doing their job, zealously advocating a case within the bounds of the law, that's unacceptable. It's totally unacceptable. (T.72).

Six witnesses testified at the hearing in addition to the Respondent judge. All who knew John Contini as a lawyer (including ASA Silvershein) agreed that he practiced law very professionally, and that his behavior on the bench on August 11 and 12, 2015 was unexpected and an aberration. (T.64; 173; 209; 215; 226; 233; 236; 251-54). Brian Cavanaugh, a veteran Broward County prosecutor, worked with the Respondent at the state attorneys' office, and subsequently tried a first degree murder case against him. He commented on attorney Contini's "remarkable evenness of temper," which made what happened here "all the more disturbing, because it's so out of character." (T.252).

Broward Circuit Judge Jeffrey Levenson served as a federal prosecutor for many years prior to his appointment to the bench. (T.224-25). Judge Levenson was impressed with the Respondent as a lawyer, describing him as "well prepared," "passionate" about his clients, and one who always treated others with respect. (T.226; 233). Judge Levenson, who subsequently served as Judge Contini's "mentor judge" indicated that Judge Contini took his job "very seriously." (T.225;

231).

The Hearing Panel credits the testimony of multiple witnesses that sending the March 16, 2015 email to an assistant public defender without copying the state attorneys' office was a "rookie mistake." (T.190; 237; 248). Broward County Circuit Judge Andrew Siegel explained the dynamics of new judges who "feel close to the lawyers that are regularly assigned to [them];" they have to think carefully about sending emails quickly and offering assistance to a party. (T.248).

Judge Contini followed proper procedure when he denied the disqualification motion for "legal insufficiency." See Fla.R.Jud.Admin. 2.330(f). However, feeling the way he did about the State's position and its effect on his division, Judge Contini was required to take further action. He should have either recused himself **sua sponte** thereafter OR sought an administrative transfer. Instead, he remained on cases and in the criminal division out of "pride and ego" in the hope of personal vindication, while his frustration kept building. (JQC Ex.10, 10/9/2015 hearing, pp.49-50; T.202).

Judge Contini agreed that his conduct was "wrong on every level." He made a "mistake" in sending the email, but thereafter was discourteous, intemperate, and rude and there was "zero justification or excuse" for his statements. (T.106). He recognized the disparity in his position and those before him, was embarrassed, ashamed, and remorseful. (T.107-09).

Witnesses were questioned regarding Judge Contini's "present fitness" to hold judicial office and the likelihood that his conduct would be repeated. ASA Cavanaugh (who had known Respondent the longest, in all facets of his career) testified that Judge Contini possesses the character and fitness required of a judge, and his remorse was sincere. He indicated "I'm not Nostradamus either, but I know John Contini, and I am morally certain that he... could not ever do that again." (T.254). Judge Levenson echoed these sentiments, noting "No one can predict the future, but... having met and worked with Judge Contini over the course of time... it would seem to me that he's a very good risk," unlikely to repeat his behavior. (T.233). Other assessments were similar. (Resp. Ex.11).

CONCLUSIONS OF LAW

Judge Contini was charged with violating Florida's Code of Judicial Conduct, Canons 1, 2A, 3B(4), 3B(7), 3B(9) and 3E(1).[3]

Canon 1 of the Code of Judicial Conduct provides:

> **A Judge Shall Uphold the Integrity and Independence of the Judiciary**
>
> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe

[3] Canons 4A(1), 4A(2), 4A(3), 4A(4), 4A(5), 5A(1), 5A(2), 5A(3), 5A(4) and 5A(5), referenced in the notice of formal charges, have no application to the present case.

those standards so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 of the Code of Judicial Conduct provides, in pertinent part:

> **A Judge shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities**
>
> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3 of the Florida Code of Judicial Conduct provides, in pertinent part:

> **A Judge shall Perform the Duties of Judicial Office Impartially and Diligently**
>
> * * *
>
> **B. Adjudicative Responsibilities**
>
> * * *
>
> (4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity...
>
> * * *
>
> (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit or consider *ex parte* communications made to the judge outside the presence of the parties concerning a pending or impending proceeding... (exceptions inapplicable).
>
> * * *

> (9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect the outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing...
>
> * * *
>
> **E. Disqualification**
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding...

Judge Contini clearly violated all of these Canons. The Hearing Panel accepts the judge's explanation that he forwarded the Palm Beach County order to A.P.D. Perlmutter (without copying the State) by mistake, in an overabundance of enthusiasm to share what he had just learned. While his email did not pertain to any specific case, it was still an improper **ex parte** communication applicable to an entire category of pending and impending cases. His communication created the appearance of impropriety because it reasonably could be perceived as rendering advice to one of the parties. See e.g. Blackpool Assoc., Ltd. v. SM-106, Ltd., 839 So.2d 837, 838 (Fla. 4th DCA 2003)(and cases collected).

Rule 2.330(f), Fla.R.Jud.Admin., governing trial judge disqualification, provides:

> **Determination – Initial Motion.**
>
> The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. It the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

Judge Contini followed this proper procedure in denying the motion. However, Judge Contini's mindset, and personal interest in vindication, required him thereafter to either **sua sponte** recuse himself or to put in for an administrative transfer, particularly as time passed, and problems in his division mounted. See generally Inquiry Concerning Cohen, 99 So.3d 926, 939 (Fla. 2012)(regardless of judge's motivation, disqualification required where impartial observers could have reached the conclusion that judge was seeking to use the power of his office to vindicate his wife).

Judge Contini further violated the Canons when he lashed out at the government attorneys who sought his recusal. Judge Contini not only commented on the merits of the pending prohibition petition, he lost his temper, and made

derogatory remarks about the attorneys, who were just trying to do their job. Judge Contini singled out Ms. Bettendorf for particular abuse, when he did not know her, she wasn't present in court and had no ability to defend her reputation from attack.

The disparity between a judge and attorneys requires the judge to treat those appearing before him with courtesy and patience. Judge Contini created an intolerable atmosphere in the courtroom, by disparaging two attorneys who were merely doing their job. This intemperate courtroom behavior "not only damaged public confidence in him as a judicial officer but struck 'at the very roots of an effective judiciary...'" Inquiry Concerning Shea, 110 So.3d 414, 418 (Fla. 2013)(demeaning comments made to litigants and attorneys); Inquiry Concerning Aleman, 995 So.2d 395 (Fla. 2008)(mistreatment of lawyers, including threatened use of "contempt" powers); Inquiry Concerning Allen, 998 So.2d 557 (Fla. 2008)(improper personal attack on another judge); Inquiry Concerning Schapiro, 845 So.2d 170 (Fla. 2003)(berating lawyers); Inquiry Concerning Schwartz, 755 So.2d 110 (Fla. 2000)(rude, impatient, discourteous remarks made to legal interns and their mentor).

RECOMMENDED DISCIPLINE

Judge Contini was a new judge, who underestimated the process of transitioning from a well-respected, professional lawyer to a judge, and made a series

of significant missteps. In mitigation, the Hearing Panel finds that Judge Contini immediately accepted responsibility for his conduct, expressed sincere remorse, and apologized to Mr. Silvershein. The Hearing Panel took into account the testimony of ASA Silvershein, who suggested "a public reprimand [was] definitely in order in this case," and that Judge Contini should give Ms. Bettendorf "as public an apology as possible." (T.71-72).

In several similar cases involving a judge's rude or improper behavior in open court, the Florida Supreme Court has approved a public reprimand, or a public reprimand plus conditions. See Inquiry Concerning Shea, 110 So.3d at 417-18 (four separate incidents of mistreating litigants and attorneys over the course of three years); Inquiry Concerning Aleman, 995 So.2d at 399-400 (mistreating public defenders by forcing them to handwrite disqualification motions in short time periods, and then threatening them with contempt); Inquiry Concerning Schapiro, 845 So.2d at 173-74 (pattern of belittling, embarrassing conduct directed at attorneys, which were "extreme in their seriousness, in their number, and in the length of time over which they occurred"): Inquiry Concerning Wood, 720 So.2d 506 (Fla. 1998)(numerous rude and improper comments in six different cases, including derogatory comments about counsel who made recusal motions).

Without minimizing the judge's conduct, the Hearing Panel recommends the following discipline:

(1) A public reprimand;
(2) A written apology delivered in person to Heidi Bettendorf;
(3) Continued active judicial mentoring for a period of three years by a mentor selected by the Chief Judge of the Circuit;
(4) Setting up a program of stress management with Dr. Scott Weinstein, Clinical Director of the Florida Lawyer's Assistance Program and completion of this program to Dr. Weinstein's satisfaction; and
(5) Assessment of the costs of these proceedings.

All of the Hearing Panel's findings are supported by clear and convincing evidence. The vote of the Hearing Panel on guilt as well as the recommended discipline has been determined by an affirmative vote of at least two thirds of the six hearing panel members, in compliance with Fla. Const. Art. v, §12(b); FJQC Rule 19.

Done and Ordered this 11th day of May, 2016.

FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

By: /s/ Robert Morris
HONORABLE ROBERT MORRIS
FJQC HEARING PANEL CHAIR
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Pollack

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BEFORE THE
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE,
THE HONORABLE GISELE POLLACK
Nos. 13-633, 14-151, 14-187

SC14-____

NOTICE OF FORMAL CHARGES

TO: The Honorable Gisele Pollack
Broward County Court Judge
201 S. E. 6th Street, Room 358
Ft. Lauderdale, Florida 33301

The Investigative Panel of the Florida Judicial Qualifications Commission, at its meeting on May 16, 2014, 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. On December 17, 2013 you were acting erratically at the Broward County Courthouse.

2. You had suffered a relapse in your struggle with alcohol and you took the bench while intoxicated.

3. On Friday, February 21, 2014, you met with the Investigative Panel at its meeting in Tallahassee. As a result of that meeting you entered into a Stipulation with the Commission in which agreed to refrain from the use of alcohol, but if you did, use alcohol, you agreed not to take the bench. The Stipulation was executed March 3, 2014.

4. On March 19, 2014 you took the bench while impaired. Judge Zeller was forced to intervene and ask you to leave the bench. You were impaired to the extent that Judge Zeller had to physically assist you in walking. Subsequently you took a leave of absence from the Court and you enrolled in an inpatient substance abuse treatment.

5. On May 1, 2014 you walked away from the inpatient substance abuse program. You drove from the inpatient substance abuse program towards Ft. Lauderdale. You became intoxicated.

6. Sometime around 1:30 a.m. on May 2, 2014, police reports indicate that you were involved in a motor vehicle crash in Plantation Florida. The vehicle you were operating stuck another vehicle, causing personal injuries. You were arrested and charged with Driving Under the Influence Causing Property Damage and Failure to Use Due Care.

7. Through counsel, you do not contest that the foregoing behavior violated the terms of the Stipulation entered into with the Commission on March 3, 2014.

The foregoing conduct constitutes inappropriate conduct that violates Canons 1, 2A, 3A, 3B(4), and 5A 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 Special Counsel for the Judicial Qualifications Commission, and the General Counsel of the Commission.

JUDICIAL QUALIFICATIONS COMMISSION

/s/ Michael L. Schneider

By: Michael L. Schneider
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Investigation has been furnished by E-Mail on this the 22nd day of May, 2014, to the following:

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Michael L. Schneider
General Counsel

Filing # 22146887 E-Filed 01/05/2015 11:13:27 AM

Pollack

BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING JUDGE,

GISELE POLLACK, NOS. 13-633, 14-151, 14-187

SC14-985

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATIONS OF THE HEARING PANEL, FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

Pursuant to the Florida Constitution, art v, §12(a)(1), (b) and (c) and Florida Judicial Qualifications Commission ("FJQC") Rules, the FJQC Hearing Panel submits these Findings, Conclusions, and Recommendations to the Florida Supreme Court.

The Course of Proceedings

On May 22, 2014, the Investigative Panel of the FJQC filed a notice of formal charges against the Honorable Gisele Pollack, a Broward County Judge for the 17th Judicial Circuit. The charges allege that Judge Pollack, while under the influence of alcohol: (1) on December 17, 2013, took the bench while impaired; (2) on March 19, 2013, took the bench while impaired (after execution of a stipulation with the JQC investigative panel); and (3) on May 1, 2013, walked away from the

substance abuse program in which she was enrolled, became intoxicated, involved in a motor vehicle accident, and was arrested and charged **inter alia** with DUI.

Judge Pollack's answer admitted the facts alleged, and that her acts violated Canons 1, 2A, 3A, 3B(4) & 5A of the Code of Judicial Conduct. By way of mitigation, she asserted that her actions "were caused by, and as a result of, a dependency upon alcohol that incapacitated her and for which she has sought, and is successfully receiving, treatment and therapy." Judge Pollack urged the appropriate sanction was "reprimand with special conditions" which addressed her disability, and that, save for her struggle with alcohol, her record as a lawyer and judge was exemplary.

During the pendency of these proceedings, Judge Pollack was suspended without pay by order of the Florida Supreme Court.

Alan A. Bookman, Esq. chaired the FJQC Hearing Panel, which conducted a final hearing on November 13 and 14, 2014. Six commissioners were present during the hearing and deliberations. In addition to Chairman Bookman, the panel included the Hon. Robert Morris, the Hon. Michelle Morley, Michele K. Cummings, Esq., Harry R. Duncanson (lay member) and Jerome S. Osteryoung, Ph.D (lay member).

Alex Williams, Esq. (JQC assistant general counsel) represented the JQC Investigative panel. Judge Pollack was represented by J. David Bogenschutz, Esq., and Eric Schwartzreich, Esq. Lauri Waldman Ross served as counsel to the Hearing Panel.

The parties executed a "Stipulation of Facts for Final Hearing," and supplied exhibits for the Hearing Panel's consideration.[1] All of the exhibits were admitted without objection. (T. 11).

Findings of Fact

Gisele Pollack first began struggling with alcoholism in 1980, during her last year of law school. (T. 292). Upon graduation, she joined her father's Miami-based law practice. (T. 290-91). In 1982 or 1983, she entered a one month residential treatment program in Summit, New Jersey, and remained clean and sober for several years, (T. 292-93).

Ms. Pollack accepted a position with the Broward County Public Defender's office in 1986. After a relapse in 1990, the public defender's office performed an intervention, and gave Ms. Pollack a choice between treatment and resignation. She resigned, remained "in denial," and returned to her father's law firm. (T. 291-

[1] References are to original stipulation (Stip. ___), trial exhibits (JQC Ex.__; Resp. Ex. ___) and transcript of final hearing (T.), which have been forwarded to the Florida Supreme Court.

92). Shortly thereafter, she phoned a judge in the middle of a jury trial, reported she was under the influence of alcohol, and was unable to represent her client or appear in court at the time. When that judge reported her to the Florida Bar, Ms. Pollack sought treatment, and signed a three year contract with Florida Lawyer's Assistance ("FLA"). (T. 291-92; 324). After a full year of sobriety, in 1993 she returned to the Broward County Public Defender's office where she remained without incident. (T. 291-92).

In the course of her employ by the public defender's office, Ms. Pollack was assigned to felony drug court. (T. 249-51). She was one of two public defenders juggling approximately 1400 cases, and had a lot of responsibility. She (and others she worked with) was praised for doing a tremendous job with very few resources. (T. 251-52).

Ms. Pollack was open about being in treatment or recovery for alcoholism. (T. 72; 216-17). In 2004, she was elected to the Broward County court bench. (T. 289). During her first year, Judge Pollack handled both civil and criminal matters (in a satellite division), was transferred to the general criminal division (where she juggled two full divisions) and spent stints in juvenile and felony drug court (by appointment as a circuit judge). (T. 289-90).

Drug courts are a type of problem-solving court of recent vintage, designed to rehabilitate, rather than punish. (T. 254-55). Similar courts include mental health, and veterans' courts, which were created in recognition of special needs, which can be dealt with more effectively by means other than punishment. These types of courts are used as a coercive factor so offenders obtain treatment and lead more productive lives without the burden of a criminal conviction. (T. 53; 68-71; 148; 150; 254-55; 488).

With the help of others, Judge Pollack successfully promoted and assisted in creating Florida's first criminal misdemeanor drug court. (T. 79-80). In 2005, Judge Pollack was assigned to preside over this court. (T. 290).

Persons arrested for qualified misdemeanors are given the opportunity to transfer to drug court if they qualify for the program. At the time of first appearance (arraignment) in drug court, personnel with BSO Day reporting (a division of the Broward County sheriff's office responsible for case management and supervision) explain the program to the defendant, who then appears before the judge. The defendant is given the option of entering the program, accepting a plea offer, or returning to the original criminal court for trial. (T. 54-56). The misdemeanor drug court program lasts six to twelve months. Enrollees report to case managers or supervision specialists who follow their progress. They are

randomly urine tested, and have to go for substance misuse evaluation to determine the need for treatment. If treatment is required, they are referred to one of several treatment providers for treatment sessions. They have to attend 12 step meetings and write a paper on their experiences while drug free. They report back periodically to Judge Pollack who reviewed their progress. (T. 54-56). In the ordinary course, Judge Pollack had the authority to discharge them from the program upon successful completion (with dismissal of pending charges), continue them in the program, or continue them in the program with extra conditions. (T. 57-58). Judge Pollack was known for giving those who appeared before her multiple chances to stay clean and sober. (T. 58).

Judge Pollack typically called problem-free cases (involving those colloquially referred to as "Allstars") first on the docket, providing additional incentive for compliance. She called "generally satisfactory" cases next, while problem cases (which might involve exiting the program, changes of plea and sentencing) were left to the end, to be addressed with the assistant state attorney present. (T. 32-33).

Judge Pollack abstained from the use of alcohol and maintained complete sobriety for approximately eighteen years. (Stip., ¶8; T. 292).

In 2009, Judge Pollack's personal life took a "nose dive" when her 20-year old son Scott, a college student, became disabled after what was supposed to be a routine hernia operation. (T. 325-27; JQC Ex. 15). Scott has since had four surgeries, and had to leave college. He is in constant pain, cannot walk, sleep or work, and is on a Dilaudid pain pump. Scott lives with Judge Pollack who cares for him full time when she is not at work. (JQC Ex. 15).

On December 31, 2012, Judge Pollack suffered a relapse. (T. 217-19; 244). Deborah Eisinger, one of the judge's friends, phoned to wish her Happy New Year, and found her distraught on the phone. She drove to the judge's home, sat outside until she gained admittance, and stayed with her all night. Ms. Eisinger, in agreement with Scott, and the judge's mother (who also lived with her), finally phoned in an emergency and Judge Pollack was transported to the hospital. (T. 217-22).

On January 5, 2013, the judge entered an intensive three month residential treatment program for alcoholism at the University of Florida/Shands-Florida Recovery Center ("Shands"). (T. 221-22; Stip., ¶10). Ms. Eisinger drove Judge Pollack directly from the hospital to Shands, where she remained through April 5, 2013, and completed the program. (T. 222; 295; Stip, ¶10).

On September 26, 2013, Judge Pollack's mother died. (JQC Ex. 15). In October 2013, Judge Pollack suffered another relapse and secretly began to drink. (T. 296-98; 333; 366).[2] Matters came to a head on December 17, 2013, when Judge Pollack, for the first time ever, took the bench impaired. (T. 297-98; 321).

David Jaroslav was employed by the Broward County State Attorneys' office, and served as the only misdemeanor drug court prosecutor assigned to Judge Pollack's division for 6 ½ years. (T. 29-30). Mr. Jaroslav had appeared before Judge Pollack on thousands of cases, believed she was fair and professional, and generally held her in high esteem. (T. 30-31; 59-60).

On December 17, 2013, Mr. Jaroslav arrived from another court towards the end of Judge Pollack's docket, and immediately noticed that the judge was "not herself;" he believed she was under the influence of alcohol. Mr. Jaroslav observed that Judge Pollack spoke slowly, slurred her words, and appeared distracted and unable to hear what was said. (T. 35-36; 40-41).[3] Mr. Jaroslav did not know how to handle the incident and did not report it to his supervisors. Judge Pollack was escorted off the bench by her judicial assistant. She asked her judicial

[2] While on vacation, Judge Pollack picked up another person's drink by mistake, got the taste of alcohol in her mouth, and testified "that's all an alcoholic needs to start off to the races again." (T. 296).

[3] Mr. Jaroslav's perception was corroborated by a sound recording of the morning's proceedings. (JQC Ex. 16).

assistant for her car keys. In light of the judge's condition, however, the judicial assistant did not believe the judge should be driving. (Stip. ¶11).

On December 19, 2013, this incident was reported in the Fort Lauderdale Sun Sentinel. Judge Pollack acknowledged in the article that she had suffered a relapse, and would be spending her upcoming vacation in an intensive outpatient treatment program. (JQC Ex. 12). After the news became public Mr. Jaroslav was "taken to the woodshed" by his supervisors, and warned to report any further incidents. (T. 51-52; 61-62; 136). Judge Pollack's friends were relieved, believing that public knowledge would lift the weight of guilt off Judge Pollack's shoulders, and aid in her recovery. (T. 242).

On December 18, 2013, Judge Pollack had called Dr. Richard Seeley (a well-known psychiatrist and addiction treatment specialist) seeking help. (T. 416). Dr. Seeley met with Judge Pollack on December 20, 2013, and advised her to return to extended residential treatment. Judge Pollack refused, insisting on intensive, outpatient treatment. (T. 418-19; 443-45).[4]

[4] Judge Pollack explained that she had a sick son at home, and inpatient treatment was difficult, "like being in custody" and watched 24 hours a day, seven days a week. (T. 300-01).

On December 23, 2013, Judge Pollack entered and completed intensive outpatient treatment for alcohol dependency and major depression at Satori Waters, in Fort Lauderdale, Florida. (Stip. ¶12, T. 302; 331-32; 418).

The FJQC Investigative Panel issued a notice of investigation to Judge Pollack relative to the December 17, 2013, incident on the bench and, on January 13, 2014, she appeared personally, acknowledging her actions were "a result of an alcohol abuse problem that [she] recognizes and admits." (JQC Ex. 1; Stip. ¶13). Judge Pollack agreed she would never again take the bench under the influence of alcohol. (T. 303).

On February 10, 2014, Judge Pollack submitted a written response to the FJQC notice of investigation. She explained she'd been largely successful previously with the help of Alcoholics Anonymous (AA), but that recent events in her personal life had triggered a relapse. (JQC Ex. 15).

Judge Pollack also advised the Investigative Panel of the following curative efforts she had taken to maintain sobriety: (1) she had contacted Dr. Richard Seeley for assistance; (2) she had entered Satori Waters; and (3) she had voluntarily signed a three year contract with Florida Lawyers Assistance, Inc. ("FLA"). (JQC Ex. 15).

Judge Pollack's response was supported by multiple documents. In a letter dated February 7, 2014, Dr. Seeley opined that Judge Pollack "is currently solidly grounded in 12 step recovery, and is receiving more than adequate monitoring and care to ensure that she will continue to be successful in maintaining her sobriety." (JQC Ex. 15, Ex. V). In a letter dated February 10, 2014, Nancy Ewing, the Program Director and Primary Therapist at Satori Waters, wrote that Judge Pollack had "successfully completed the IOP level of treatment." Ms. Ewing indicated that Judge Pollack's progress was "going well" as evidenced by her "increased insight into family of original issues as they pertain to [Judge Pollack's] recent lapse in recovery, and ... significant increase in self-worth ..." She opined that the judge's "prognosis for continuing recovery is good based on [her] overall success in treatment and level of commitment." (Stip., ¶12; JQC Ex. 13; JQC Ex. 15, Ex. III). In a letter dated February 10, 2014, Judith Rushlaw, the assistant director of FLA confirmed Judge Pollack's execution of a three year contract, which required "complete abstinence from mood altering substances, regular attendance at an attorney support group, random urine testing, and regular contact with a FLA volunteer designated as her monitor." Ms. Rushlaw noted Judge Pollack's compliance with the contract to date, and added that "All indications are that Judge

Pollack is committed to recovery and rehabilitation, and is doing well." (JQC Ex. 15, Ex. IV, T. 336).

On March 3, 2014, the JQC Investigative Panel and Judge Pollack executed a written stipulation for formal charges to be held in abeyance for three years, pending compliance with the FLA contract and monitoring "unless circumstances dictate that further action is required." Judge Pollack stipulated to "totally refrain from the use of alcohol," to "continue her relationship with [FLA]," "to not take the bench if ... impaired," and to a procedure whereby the Chief Judge of her circuit would designate a fellow judge to personally meet with her each morning before beginning her judicial duties to determine that she was not under the influence. (JQC Ex. 4; T. 334-35).

At the time Judge Pollack signed the stipulation, she intended to comply. (T. 303; 367). On the evening of March 18, 2014, however, Judge Pollack became irritated because her son did not acknowledge her when she came home. She responded by going to the liquor store, buying a bottle, and drinking throughout the night. She then drove herself to work the next morning. (T. 306; 360-61).

On March 19, 2014, Judge Pollack again took the bench impaired to preside over drug court. (T. 306; 360-61). Once again, she appeared distracted, had problems remembering things said moments earlier, and slurred her words. (T. 46-

47). Mr. Jaroslav was the prosecutor in the courtroom and was "surprised and shocked" to find Judge Pollack on the bench in this condition. (T. 47). This time, per instruction, he e-mailed and texted his supervisors at the State Attorney's Office, asking them to come to Judge Pollack's courtroom. (T. 47-48). When these supervisors arrived, Judge Pollack was slumped over to the side of her chair, her speech was garbled, slurred and "sing-songy" and she called both supervisors (whom she knew) by the wrong names. (T. 137-39; 152-54; JQC Ex. 16). These supervisors then left to contact their own supervisors. (T. 140). One of the supervisors, Melissa Steinberg (a veteran prosecutor), testified that she had never previously appeared before a judge in the criminal division who was physically impaired. (T. 155).

Mr. Jaroslav sought leave to be excused from the courtroom at the docket's end, but Judge Pollack refused permission, an "extremely unusual" event. Instead, she demanded to know what Mr. Jaroslav had texted his supervisors, and accused him of running to the newspapers back in December. (T. 48-50) Mr. Jaroslav was not the source of the December 19, 2013, Sun Sentinel story. Judge Pollack had been so informed previously. In her impaired state, however, the judge called Mr. Jaroslav a "Rat," and a cold "heartless son of a bitch." (T. 50). The judge did not deny making such statements, but recalled little that happened. (T. 307-09).

The Assistant State Attorney supervisors alerted County Court Administrative Judge Sharon Zeller, that they believed Judge Pollack was impaired. Judge Zeller personally escorted Judge Pollack out of the courtroom and another judge was called in to handle Judge Pollack's afternoon docket. (T. 141-42; 309-10; Stip. ¶15).

At Judge Pollack's request, a phone call was placed to Judge Melanie May, who drove to Judge Pollack's home. (T. 260-61). Judge May told Judge Pollack she had "messed up," advised her to take the high road, and enter treatment. They had a "terrible fight," and Judge May left. (T. 262). Judge Pollack continued to drink at home until a team from the Broward Sheriff's office (sent by friends who feared for her life) talked her into checking into University Hospital, where she was Baker-acted. (T. 310-12). She would only be released from the hospital by agreeing to re-enter another 90 day treatment program at Shands. (T. 312).

Ms. Eisinger and Judge May picked Judge Pollack up from University Hospital and personally drove her to Shands for another 90 days of treatment. (T. 262-63). Judge Pollack went in with a positive attitude, was clean and sober, but did not appear to be getting better. (T. 263-64). She felt angry and ashamed, hated the treatment program, and still wanted to drink. (T. 314-15). Every conversation with friends began the same way, "I hate it here. I feel like I'm in prison. I'm not

getting any better. I... ruined my life [and] I'll never be able to overcome this." (T. 265).

On May 1, 2014, Judge Pollack "escaped" from Shands without the permission of program staff, rented a car and a phone. (T. 225; 314-15; Stip. ¶17). She stopped at a liquor store, bought "a lot" of alcohol, started drinking in the car, and headed home. (T. 315-16). Judge Pollack phoned Ms. Eisinger on the way, to tell her what she had done. Ms. Eisinger could tell that Judge Pollack was drinking and was immediately concerned. Ms. Eisinger begged her to stop and warned her not to risk her life or the lives of others. (T. 224-26). Ms. Eisinger next phoned the sheriff's office to report Judge Pollack was driving under the influence, but no one could track her down; Judge Pollack was driving an unidentified rental car. (T. 234-35).

Shortly before midnight, Judge Pollack's rental car rear-ended another vehicle stopped at a traffic light in Plantation, Florida. (T. 159-60). There was no evidence of braking. (T. 161). The driver of the other vehicle initially lost consciousness and was transported to the hospital by Plantation EMS after he awoke. (T. 164). Judge Pollack was treated for a forearm burn. (T. 163-64; JQC Ex. 17).

Plantation Police Officers Jeff Beauregard and Jeremy Clark separately responded to the scene. (T. 158-59). Officer Beauregard has worked for the City of Plantation Police Department eight years, four of which have been spent in the traffic unit as a DUI enforcement specialist. (T. 156). Officer Beauregard smelled the odor of alcohol emanating from Judge Pollack's vehicle. He smelled the same odor on Judge Pollack's breath, which grew stronger as she spoke. (T. 161-62). Her eyes were red, bloodshot and watery, and her speech was slurred. (T. 162). When Judge Pollack exited her vehicle at the officer's request, she was unsteady on her feet and nearly fell over. Judge Pollack also gave inconsistent answers to the officers regarding when she last ate. (T. 162).

Officer Beauregard advised Judge Pollack that the crash investigation was over, that he was conducting a criminal investigation, and requested the judge's consent to take a blood sample. Judge Pollack initially consented, but revoked consent after a second EMS unit was called, and arrived to take the sample. (T. 163-65). Once the second EMS truck departed, Judge Pollack changed her mind and offered to give blood. (T. 168). Officer Beauregard advised Judge Pollack that "This isn't a game... We did that one time. I offered you that as an option. Called them out here, and then you turned them away." (T. 169). He was concerned that Judge Pollack was stalling for time until her blood alcohol level went down. (T.

168-69). He then requested that Judge Pollack submit to field sobriety exercises. (T. 166).

Judge Pollack did not successfully complete the field sobriety exercises. (T. 166-69). In the early hours of May 2, 2014, she was arrested for DUI, DUI with bodily injury and property damage, and failure to use due care. (T. 174-75; JQC Ex. 17; Stip. ¶18). Judge Pollack's mood fluctuated; she went from crying and begging one minute, to yelling and cursing the next. (T. 171).[5] These events were captured by dashcam video and audio from the officer's patrol car which were admitted into evidence and ultimately viewed by the Hearing Panel. (JQC Ex. 18).

A search of Judge Pollack's rental car yielded a plastic cup which had spilled in the passenger compartment. The car's trunk contained one half-full 750ml bottle of Stolichnaya brand vodka, two unopened 1.75L bottles of Stolichnaya brand vodka, one unopened 750ml bottle of DeKuyper Triple Sec; one unopened 750ml bottle of Chambord brand liqueur; and two unopened cans of Bluebird brand pineapple juice. (Stip. ¶18; JQC Ex. 17 and 18). The removal of these items was captured on the dashcam recorder in Officer Beauregard's patrol car before he left the scene with Judge Pollack. (JQC Ex. 18).

[5] While impaired, Judge Pollack called the officer a heartless son of a bitch, virtually the same terms she previously directed towards A.S.A. Jaroslav. (T. 171-72).

Officer Beauregard did not know Judge Pollack previously. He learned she was a judge from Officer Clark, who indicated "[s]he's already showing us her badge and said she wants us to take her home." (T. 172-73). Because of his respect for the judge's position, Officer Beauregard testified this was the hardest arrest he ever had to make. (T. 171-72).

On May 3, 2014, Judge Pollack entered High Point Hospital, where she remained until May 7, 2014, when she returned to full residential treatment at Shands. (T. 227; 266-67; 417-18; 515; Stip. ¶20). On June 6, 2014, she was accepted on scholarship by Daryl Strawberry Recovery Center, which picked her up from Shands in a "bed to bed" transfer (T. 380-82). By the time she completed the Strawberry program, Judge Pollack had 75 days of uninterrupted residential treatment. (T. 382). The Strawberry center then set up a detailed continuing care program for her to follow. (T. 387).

Judge Pollack was also referred to, and began intensive, outpatient treatment with "Recovery Unplugged," which created an individualized treatment plan just for her. (T. 495-96). She remained in this program through October 27, 2014, during which time she was randomly tested by urinalysis and breathalyzer. (T. 502). Her tox screen was sent to a high complexity lab that tests masking agents, which can be manipulated. All tests came up negative. (T. 500).

On September 4, 2014, against the advice of counsel, Judge Pollack pled guilty (instead of "no contest") to one count of DUI. (Resp. Ex. 6, pp.10-16; T. 338-39). She pled guilty because she wanted to accept full responsibility for her actions. (T. 341). She also apologized to the victim and the community. (Resp. Ex. 6, pp.11-12). Judge Pollack was adjudicated guilty, assessed court costs, a $500 fine, her driver's license was suspended for the minimum of six months, and she was sentenced to serve six months of probation, perform 75 hours of community service, and 60 days wearing a "scram" bracelet. (Resp. Ex. 6; p.14; JQC Ex. 19). Immediately afterwards, at the request of a colleague, Judge Pollack spoke publicly to drug court participants about her "fall from grace," and what it meant to own up to the consequences of her actions. (T. 465-75; Resp. Ex. 2).

The Hearing Panel heard from multiple, highly skilled specialists in different aspects of addiction and treatment. Experts agreed that: (1) relapse is part of the illness; (2) relapse is to be expected from anyone with an alcohol dependence issue; and (3) professionals are the most difficult to treat "because they outsmart you at every turn." (T. 283; 368; 397-98; 419-21; 426-27; 526).

Dr. Seeley, a Princeton-educated psychiatrist and addiction specialist opined that Judge Pollack had bottomed out, had no more wiggle room, had experienced a spiritual awakening, was in good recovery, and had sufficient layers in place to

maintain sobriety on the bench. (T. 423-25). Dr. Seeley admitted, however, that he had rendered a similar opinion on February 7, 2014, and was proven wrong. (T. 450).

Dr. Aldo Morales, who focuses on addiction psychiatry, has treated Judge Pollack for the last eight years. (T. 509-11). His treatment regimen for the judge currently includes medication for depression (Effexor, plus Abilify) and FDA-approved drugs to treat alcoholism (Antabuse and Naltrexone). Antabuse reacts adversely with alcohol, and acts as a deterrent, while Naltrexone diminishes the hold of alcohol. (T. 513-14). Dr. Morales also opined that Judge Pollack was doing well, motivated, and working on a strong recovery. (T. 515-18; 525). Dr. Morales' records, however, reflected that Judge Pollack was **already** on Antabuse, and had declined Naltrexone, at the time of her March 19 relapse. (T. 521-22).

Witnesses from all walks of life describe Judge Pollack as an inspiration, whose personal experience gives unique insight into the plight of those who appear before her in drug court. (T. 64; 70-73; 82; 192-93; 223; 232-33; 243; 273-74. Judge May testified that "being a judge is all important to her, and ... as a judge, she's done more good for people ... than most people in a lifetime have the opportunity to do." (T. 285; 224-25; 457-59; 503). Paul Pellinger, a certified addiction counselor, added that "Sometimes people possess skills you can't teach.

And ...there are countless, countless examples of people [who] ... would not be doing well, if it wasn't for people like Ms. Pollack." (T. 503).

At the time of the final hearing, Judge Pollack was clean and sober 195 days, and had received her six month chip from Alcoholics Anonymous. (T. 346-47; 354; 445). She (and others voicing support) indicated she had hit rock bottom with the DUI, no longer had the desire to drink, and was recommitted to remaining sober. (T. 344-45; 350-52). Judge Pollack sought additional remedial action, in lieu of removal. This included a new, five year FLA "dual diagnosis" contract with more stringent testing and FLA assuming the responsibility to report noncompliance to the FJQC or its designee. (R. 342-43; Resp. Ex. 7, ¶12 & 2). She also offered a signed (undated) resignation letter to be held by the FJQC, dated and immediately forwarded to the Governor if she ever drank again. (T. 342-45; 357).

The Hearing Panel believes that Judge Pollack is, in fact, committed to recovery. However, it cannot overlook and ignore the fact that she was equally committed when she executed the March 3, 2014 stipulation with the FJQC Investigative Panel. Judge Pollack's actions in taking the bench March 19, 2014, while impaired by alcohol, checking herself out of treatment, involvement in a DUI accident on May 1, 2014, and ensuing May 2, 2014 arrest, violated an existing

FLA contract and her prior stipulation. In addition, Judge Pollack still appears relatively fragile. Her relapse on March 19, 2014 was triggered when her son did not come out of his room to greet her. (T. 360-61). One of Judge Pollack's friends testified at this hearing that only ten days earlier she was reluctant to tell Judge Pollack she would be visiting a dying mutual friend without her, for fear of an adverse reaction. (T. 282).

CONCLUSIONS OF LAW

Canon 1 of the Florida Code of Judicial Conduct provides:

> **A Judge Shall Uphold the Integrity and Independence of the Judiciary**
>
> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 of the Florida Cody of Judicial Conduct provides, in pertinent part:

> **A Judge Shall Avoid Impropriety and the Appearance of Impropriety In all of the Judge's Activities**
>
> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3 of the Florida Code of Judicial Conduct provides, in pertinent part:

> **A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently**
>
> **A. Judicial Duties in General**
>
> The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the specific standards set forth in the following sections apply.
>
> **B. Adjudicative Responsibilities**
>
> * * *
>
> (4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

Canon 5 of the Florida Code of Judicial Conduct provides in pertinent part:

> **A Judge Shall Regulate Extrajudicial Activities to Minimize the Risk of Conflict With Judicial Duties**
>
> **A. Extrajudicial Activities in General.** A judge shall conduct all of the judge's extra-judicial activities so that they do not:
>
> * * *
>
> (2) undermine the judge's independence, integrity, or impartiality;
> (3) demean the judicial office;
> (4) interfere with the proper performance of judicial duties ...

Judge Pollack clearly violated all of these provisions of the Code. She initially took the bench under the influence of alcohol on December 17, 2013. As a result of this incident, she appeared before the Investigative Panel, agreed not to drink, and signed a stipulation which gave her the chance to remain on the bench as long as she complied with its conditions. On March 19, 2014, just 16 days after multiple layers had been put in place to ensure compliance, Judge Pollack again took the bench under the influence of alcohol. "Intoxication of a judge while performing judicial duties compromises respect for the judiciary." See In re. Doggett, 874 So.2d 805, 816 (La. 2004). A judge's persistent intoxication on the bench results in an irretrievable loss of public confidence in the judge's ability to carry out judicial functions. Id.

On May 1, 2014, just six weeks later, Judge Pollack left the facility in which she was enrolled for treatment and was arrested for DUI after causing an accident. Thus, the conduct at issue was not "isolated" in nature. See e.g. In re. Nelson, 95 So.3d 122, 124 (Fla. 2012); In re. Esquiroz, 654 So.2d 558, 559 (Fla. 1995); In re. Gloeckner, 626 So.2d 188 (Fla. 1993).

Judge Pollack's further action of driving under the influence "not only violated Florida's criminal law but also endangered the public," thereby

undermining public confidence in judicial integrity. See In re. Sheehan, 139 So.3d 290, 292 (Fla. 2014).

RECOMMENDED DISCIPLINE

Undisputed evidence demonstrates that Judge Pollack, with the support of deeply committed friends, the very best medical care, and the finest addiction recovery programs, has waged a valiant battle against the insidious disease of alcoholism with which she has struggled for decades. We admire her resolve, commend her apparent commitment to recovery, and wish her only success in this endeavor. We owe our allegiance however, to the people of Florida, not any individual judge. In re. Sloop, 946 So.2d 1046, 1056 (Fla. 2006). Public trust and confidence in the judiciary is, and must remain, our priority. According to undisputed expert testimony, the very nature of the disease and recovery, contemplates relapse, even among the most determined.

We further recognize that alcohol is a disease. It may explain Judge Pollack's behavior but it cannot excuse it. Judge Pollack is being disciplined for her public conduct on and off the bench, not for being an alcoholic. See 42 U.S.C.A. §12114(a), (c)(1), (2) & (4); 29 C.F.R. §1630.16 (b)(1), (2) & (4); Canon v. Clark, 1994 WL 549759 (S.D. Fla. 1994)(The ADA provides that a covered entity may prohibit the use of alcohol at the workplace, hold an employee suffering

from alcoholism to the same performance standards as other employees, and does not restrict the right to terminate an employee for alcohol use, even if performance or behavior is related to an employee's alcoholism); see also Little v. Federal Bureau of Investigation, 1 F.3d 255 (4th Cir. 1993); Mararri v. WCI Steel, Inc., 130 F.3d 1180 (6th Cir. 1997); Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995).

We are likewise not unmindful of Judge Pollack's dedicated service to the State of Florida as a judge, or her devotion to others facing similar addictions. By clear and convincing evidence, however, we find Judge Pollack presently unfit to remain on the bench. Her past actions simply pose an unacceptable future risk. Her energy is now best utilized if focused on her sobriety, her good health, and her recovery.

Accordingly, by an affirmative vote of at least two thirds, this FJQC Hearing Panel recommends Judge Pollack's removal as a County Court Judge for the 17th Judicial Circuit. Fla. Const. art V, §12(b); FJQC Rule. 19.

Done and Ordered this 5th day of January, 2015.

FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

By: /s/ Alan Bookman, Esq.
ALAN BOOKMAN, ESQUIRE
FJQC HEARING PANEL CHAIR
Emmanuel Sheppard & Condon, P.A.
30 S. Spring Street
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ABB@esclaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail this 5th day of January, 2015 to:

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Filing # 22275225 E-Filed 01/07/2015 02:47:35 PM

Pollack

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC14-985

INQUIRY CONCERNING A JUDGE,
THE HONORABLE GISELE POLLACK
NO.'s: 13-633, 14-151, 14-187

_____/

NOTICE OF FILING DOCUMENT

COMES NOW, GISELE POLLACK, by and through her undersigned counsel, and respectfully files this Notice of Filing Document, and attaches the following document:

Letter of Resignation, dated January 6, 2015, sent by Gisele Pollack to The Honorable Rick Scott, Governor of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Notice of Filing Document have been furnished via e-mail on this 7th day of January, 2015 to the following:

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Respectfully submitted,

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/s/ J. David Bogenschutz
BY:_____
J. David Bogenschutz, Esq.
Florida Bar No. 131174

LAW OFFICES OF BOGENSCHUTZ, DUTKO & KROLL, P.A.
600 S. ANDREWS AVE., SUITE 500 • FT. LAUDERDALE, FL 33301 • TEL: (954) 764-2500 • FAX: (954) 764-5040 • WEBSITE: WWW.BDKPA.COM

January 6, 2015

The Honorable Rick Scott
Governor of Florida
The Capitol
400 S. Monroe Street
Tallahassee, Florida 32399-0001

Re: Resignation

Dear Governor:

I herewith submit my resignation as County Court Judge of the 17th Judicial Circuit, in and for Broward County, Florida, effective immediately.

It has been my honor and pleasure to have served the citizens of Broward County in my capacity as a Judge for the past nine years, and I look forward to serving that same public in a different capacity.

Respectfully submitted,

Gisele Pollack

Flood

Supreme Court of Florida

No. SC14-1364

INQUIRY CONCERNING A JUDGE, NO. 13-344
RE: SUSAN B. FLOOD.

[November 6, 2014]

PER CURIAM.

In this case, we review the findings and recommendation of discipline of the Florida Judicial Qualifications Commission (JQC), recommending that Judge Susan B. Flood, Polk County Judge, receive the sanction of a public reprimand for violating Canons 1 and 2A of the Florida Code of Judicial Conduct. We have jurisdiction. See art. V, § 12, Fla. Const. For the reasons that follow, we approve the JQC's findings and recommendation of discipline.

I. BACKGROUND

This action stems from charges filed against Judge Flood arising out of an inappropriate relationship with her bailiff, over whom she exercised supervisory authority. The JQC's Notice of Formal Charges filed against Judge Flood recognized that a judge exercises "supervisory control" over her bailiff and alleged

that Judge Flood had a "friendship" with her bailiff that became so close that it created an "appearance of impropriety."

Ultimately, after Judge Flood testified before the Investigative Panel of the JQC, Judge Flood and the JQC entered into a stipulation, in which Judge Flood admitted to "violations of the Judicial Canons" based on "a relationship between the Judge and an individual over whom she had supervisory control." As is outlined in the JQC's Notice of Formal Charges and accepted in the stipulation by Judge Flood, she "entered into an inappropriate relationship with her bailiff," which was described as a "friendship" that "went beyond the fraternization that normally occurs in a professional workplace context."

The stipulation recites that, during the time Judge Flood maintained her relationship with her bailiff, "some judicial colleagues approached her with concerns over the level of friendship with someone over whom she exercised supervisory authority." In the stipulation, Judge Flood accepts "full responsibility" for her wrongdoing and acknowledges that such conduct should not have occurred. The stipulation states that Judge Flood "regrets and apologizes for her actions" and "has taken steps to ensure that there is no reoccurrence." The stipulation also notes Judge Flood's unblemished record as a county judge and her regular service as an acting circuit judge and concludes that the misconduct was an isolated incident and does not demonstrate an unfitness for office.

The stipulation incorporates the JQC's findings and recommendation of discipline, in which the JQC concluded that Judge Flood violated Canons 1 and 2A of the Code of Judicial Conduct. Considering Judge Flood's responsiveness, candor, and cooperation with its inquiries, the JQC recommended a public reprimand as the appropriate sanction for these violations.

II. ANALYSIS

Article V, section 12, of the Florida Constitution, provides that in cases of judicial misconduct, this Court "may accept, reject, or modify in whole or in part the findings, conclusions, and recommendations of the [JQC] and it may order that the . . . judge be subjected to appropriate discipline." Art. V, § 12(c)(1), Fla. Const. "This Court reviews the findings of the JQC to determine whether the alleged violations are supported by clear and convincing evidence, and reviews the recommended discipline to determine whether it should be approved." In re Woodard, 919 So. 2d 389, 390 (Fla. 2006). "Although this Court gives the findings and recommendations of the JQC great weight, the ultimate power and responsibility in making a determination to discipline a judge rests with this Court." In re Renke, 933 So. 2d 482, 493 (Fla. 2006) (citing In re Angel, 867 So. 2d 379, 382 (Fla. 2004)).

In its findings and recommendation of discipline, the JQC found that Judge Flood's conduct violated Canons 1 and 2A, which require a judge to act at all times

in a manner that upholds the integrity of the judiciary and to avoid the appearance of impropriety. Canon 1 states: "A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved." Canon 2A states: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

We have held that "where a judge admits to wrongdoing and the JQC's findings are undisputed, this Court will ordinarily conclude that the JQC's findings are supported by clear and convincing evidence." In re Diaz, 908 So. 2d 334, 337 (Fla. 2005). In this case, Judge Flood admitted to the alleged wrongdoing, and upon review, we determine that the JQC's findings are supported by clear and convincing evidence. Because we conclude that the findings of the JQC are supported by clear and convincing evidence, we give the findings "persuasive force and great weight" in our consideration of the JQC's recommended discipline. In re Maloney, 916 So. 2d 786, 788 (Fla. 2005).

The JQC concluded that Judge Flood's conduct was an isolated incident and does not demonstrate an unfitness for office. Judge Flood recognized the inappropriateness of her behavior, accepted full responsibility, and apologized for her actions. Judge Flood further recognized that "her actions have the effect of

lessening the public's confidence in the judiciary." In addition, not only has Judge Flood accepted "full responsibility for her actions that put her in violation of Canons 1 and 2A of the Code of Judicial Conduct," but she "has taken steps to ensure that there is no reoccurrence of situations similar" to what occurred in this case.

We agree that Judge Flood's conduct in having an "inappropriate relationship" with her bailiff, over whom she exercised supervisory authority, was clearly unacceptable. While we have not been provided with the details of this "inappropriate relationship," we accept the characterization by the JQC and Judge Flood's own stipulation that this relationship went beyond the "fraternization that normally occurs in a professional workplace." We agree that such improper conduct in the workplace is of greater concern when engaged in by judges, who are held to the high standards of the Code of Judicial Conduct.

We recognize, however, that in this case the misconduct was an isolated incident in an otherwise exemplary career as a judge. Judge Flood has admitted her wrongdoing, in particular that "her actions have the effect of lessening the public's confidence in the judiciary," and she has vowed that such misconduct will not be repeated. For all these reasons, we accept the JQC's recommendation of a public reprimand. Existing precedent suggests that a public reprimand is appropriate under these circumstances. See, e.g., In re Adams, 932 So. 2d 1025,

1027-28 (Fla. 2006) (approving public reprimand for a judge who admitted to having an inappropriate relationship with an attorney who was practicing before him; agreed that such conduct violated Canons 1, 2, and 3; expressed remorse; and apologized).

In this instance, we agree with the JQC's recommendation that, "in the interests of justice, the public welfare and sound judicial administration will be well served" by a public reprimand of Judge Flood. Judge Flood does not contest this recommendation of discipline.

III. CONCLUSION

For all these reasons, we conclude that there is clear and convincing evidence in support of the JQC's findings of fact as to both violations of the Code of Judicial Conduct, and we approve the stipulation entered into by Judge Flood and the JQC. Accordingly, we hereby command Judge Susan B. Flood to appear before this Court for the administration of a public reprimand at a time to be established by the Clerk of this Court.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Original Proceeding – Judicial Qualifications Commission

Ricardo Morales, III, Chair, and Michael Louis Schneider, General Counsel, Tallahassee, Florida,

for Judicial Qualifications Commission, Petitioner

John Wesley Frost, II of Frost Van den Boom, P.A., Bartow, Florida,

for Judge Susan B. Flood, Respondent

Filing # 17073429 Electronically Filed 08/13/2014 05:40:24 PM

Murphy

RECEIVED, 8/13/2014 17:43:43, John A. Tomasino, Clerk, Supreme Court

BEFORE THE
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE,
JOHN C. MURPHY, No. 14-255

SC14-____

NOTICE OF FORMAL CHARGES

TO: The Honorable John C. Murphy
Brevard County Judge
2825 Judge Fran Jamieson Way
Viera, Florida 32940-8006

The Investigative Panel of the Florida Judicial Qualifications Commission, at its meeting of August 1, 2014, 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:

On June 2, 2014, you became displeased with an Assistant Public Defender when he refused to waive speedy trial for a client he was representing.

1. You expressed your frustration by stating, "You know if I had a rock, I would throw it at your right now. Stop pissing me off. Just sit down. I'll take care of this. I don't need your help. Sit down."

2. In response to your belittling remarks to the Assistant Public Defender, he stated, "You know what? I'm the public defender. I have a right to be here and I have a right to stand and represent my clients."
3. You responded by loudly commanding, "I said sit down. If you want to fight, let's go out back and I'll just beat your ass."
4. When the Assistant Public Defender accepted your challenge, you left the bench and met him in the hall. All of the foregoing can be observed by the courtroom audio and video.
5. Once in the hallway the audio captures your even more profane remark, "Alright you, you want to fuck with me?" Sounds of scuffing can also be heard on the courtroom recording. The Assistant Public Defender then asks that you be arrested for grabbing and punching him.
6. When you returned to the courtroom, you continued to denigrate the Assistant Public Defender, stating, "I'm sorry, not all public defenders are like that." And you then proceeded to call 7 cases in which the defendants were represented by the public defender's office without the presence of their attorney. In those cases you induced a waivers of speedy trial in: *State v. Simkins*, 2014MM023696A, *State v. Angello-Rober*, 2014CT022931A, and *State v. Anderson*, 2014MM026219A. In State v. Spikes, 2014MM023644A you removed the public defender's office, took a plea and sentenced the defendant. In *State v. Samperi*, 2014MM018948A you removed the public defender from the case, then called the case back, took testimony from the

victim, changed the conditions of pretrial release and then reappointed the public defender for Mr. Samperi.

The foregoing conduct, if proved as alleged, also constitutes inappropriate conduct and violates Canons 1, 2A, 2B, 3A, 3B(2), 3B(4), and 5G of the Code of Judicial Conduct, and Article V, Section 13 of the Florida Constitution.

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 Special Counsel for the Judicial Qualifications Commission, and the General Counsel of the Commission.

Dated this 13th day of August, 2014.

JUDICIAL QUALIFICATIONS COMMISSION

/s/ Michael L. Schneider

By: Michael L. Schneider
Executive Director
Florida Bar No. 525049
mschneider@florida jqc.com
P.O. Box 14106
Tallahassee, Florida 32317
(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 e-mail to Larry G. Turner, Turner, O'Connor and Kozlowski, 102 NW 2nd Ave., Gainesville, Florida 32601, lgt@turnerlawpartners.com counsel for The Honorable James C. Murphy, this 13th day of August, 2014.

/s/ Michael L. Schneider

Michael L. Schneider
Executive Director

Murphy

Supreme Court of Florida

No. SC14-1582

INQUIRY CONCERNING A JUDGE, NO. 14-255 RE: JOHN C. MURPHY.

[December 17, 2015]

PER CURIAM.

This matter is before the Court for review of the recommendation of the Florida Judicial Qualifications Commission that Judge John C. Murphy be disciplined as follows: a public reprimand, suspension without pay for 120 days, a fine of $50,000 plus costs, continued participation in a mental health therapy program until successfully discharged, and completion of Phase I of the Judicial Education Courses in the Florida Judicial College New Judges Program at his own expense and without receiving continuing judicial education credit. We have jurisdiction. See art. V, § 12, Fla. Const. Pursuant to our constitutional authority, we reject the Judicial Qualifications Commission's recommendation and instead remove Judge Murphy from office for violations of the Code of Judicial Conduct and Rules of Professional Conduct by his misconduct on June 2, 2014.

Judge Murphy's misconduct includes the following: (1) threatening to commit violence against an assistant public defender; (2) engaging in a physical altercation with counsel; and (3) resuming his docket while defendants were without counsel. This egregious conduct demonstrates his present unfitness to remain in office. Furthermore, where a judge's actions erode public faith in the courts, removal is appropriate. Judge Murphy's grievous misconduct became a national spectacle and an embarrassment to Florida's judicial system. We conclude that, through his misconduct, Judge Murphy surrendered his privilege to serve in our court system.

BACKGROUND

The Florida Constitution establishes the Judicial Qualifications Commission (JQC), an independent entity with two parts, an Investigative Panel and a Hearing Panel, to investigate and hear allegations of professional misconduct by Florida judges. The Investigative Panel investigates alleged misconduct and files formal charges. The Hearing Panel subsequently hears evidence on the charges and makes findings, conclusions, and recommendations on both the misconduct and appropriate discipline. Art. V, § 12(b), Fla. Const.

We may accept, reject, or modify the Hearing Panel's findings, conclusions, and recommendations. Art. V, § 12(c)(1), Fla. Const. Although the Hearing Panel in this case recommended discipline short of removal, the Florida Constitution

gives this Court the responsibility to determine appropriate discipline, which includes removal from office. Id.; see In re Sloop, 946 So. 2d 1046, 1049 (Fla. 2006); In re Henson, 913 So. 2d 579, 589 (Fla. 2005).

On August 13, 2014, the JQC filed its Notice of Formal Charges against County Court Judge John C. Murphy of the Eighteenth Judicial Circuit in and for Brevard County for his behavior during court proceedings. A majority of the JQC's Investigative Panel found that probable cause existed for charges based on Judge Murphy's alleged misconduct of threatening violence against an assistant public defender, leaving the bench to meet the assistant public defender in the hall to engage in a physical scuffle, returning to the bench to call cases in which defendants were represented by the Public Defender's Office and were without the presence of their attorney, and inducing some of the defendants to waive speedy trial rights. The JQC asserted in its Notice of Formal Charges that Judge Murphy's conduct violated Canons 1, 2A, 2B, 3A, 3B(2), 3B(4), and 5G of the Code of Judicial Conduct.

On August 13, 2014, Judge Murphy filed his answer to the Notice of Formal Charges. Judge Murphy maintained that he did not become frustrated because the assistant public defender refused to waive speedy trial, but rather because counsel "repeatedly refused to make any announcement to the court regarding the wishes of several clients—whether it be to proceed to trial, to enter a plea, or to waive the

right to a speedy trial." Judge Murphy denied that he induced any defendant to waive speedy trial rights.

The Hearing Panel heard this matter on March 30 and March 31, 2015. A portion of the courtroom video from the incident was played for the Hearing Panel. The video showed Judge Murphy's verbal altercation with assistant public defender Andrew Weinstock after Mr. Weinstock refused to waive speedy trial for his client. Judge Murphy stated, "You know if I had a rock, I would throw it at your [sic] right now. Stop pissing me off. Just sit down." When Weinstock refused to sit down, asserting his right to stand and represent his clients, Judge Murphy responded, shouting: "I said sit down. If you want to fight, let's go out back and I'll just beat your ass." The two men left the courtroom and met in the hall.

Although there is no video of the events that occurred in the hallway, the courtroom audio captured Judge Murphy remarking, "Alright you, you want to fuck with me?" and sounds of a scuffle. Mr. Weinstock subsequently requested that Judge Murphy be arrested for hitting him twice in the face, but no arrest was made. There was no evidence, other than his own testimony, that Mr. Weinstock had been hit, and there is no video to confirm what occurred in the hallway. Upon Judge Murphy's return to the courtroom, he called the following cases in which the

defendants were represented by the Public Defender's Office, but no assistant public defender was present:

1. State v. Rounkles. Judge Murphy gave the defendant options, either set the charges for trial or waive speedy trial. After the defendant stated he wanted his case done as fast as possible, Judge Murphy set the case for trial.

2. State v. Samperi. After the defendant told the court that his lawyer had not returned his phone calls, Judge Murphy responded, "I'm sorry. Not all public defenders do that." Judge Murphy later suggested that "all of you that have a complaint about the public defender, if you'd call the Public Defender's Office and make the complaint or, even better, write a letter and send it to the Public Defender's Office . . . I think that would help." Judge Murphy asked the defendant if he wished to have the public defender removed from his case, to which the defendant said, "I think that's evident, sir." Judge Murphy removed the public defender and took testimony from the alleged victim in the case, the defendant's girlfriend, who wanted contact with the defendant. Judge Murphy lifted the no-contact order and instead ordered no unconsented contact. The defendant asked for a continuance. Judge Murphy set a new court date on the docket and reappointed the public defender.

3. State v. Simpkins. Judge Murphy announced the waiver of speedy trial for the defendant's violation of community supervision charge even though the

defendant did not state her intent to waive speedy trial nor did she request a continuance.

4. State v. Spikes. The defendant stated that he wanted to resolve his resisting arrest charge. Judge Murphy asked the defendant if he wanted to relieve the public defender and represent himself instead; the defendant answered in the affirmative and pled no contest to the charge. Judge Murphy accepted his plea and ordered him to pay court and investigative costs.

5. State v. White. Judge Murphy offered the defendant to have her DUI trial the following week or to waive speedy trial. The defendant asked for a speedy trial, which Judge Murphy so scheduled.

6. State v. Agnello. The defendant agreed to waive speedy trial after Judge Murphy told the defendant that he could either go to trial not knowing who his lawyer would be or ask for a continuance.

7. State v. Anderson. When asked by Judge Murphy what he wanted to do with his DUI case, the defendant said that he had "no idea what to do in this situation. I haven't had a chance to speak to my public defender. And, now, I don't have a public defender." Judge Murphy told the defendant that he might have a chance to talk to a public defender if he waived speedy trial. The defendant then waived speedy trial.

8. State v. Barbour. The defendant told the court that he was hoping to resolve his two counts of assault on a law enforcement officer and one count of disorderly conduct. Judge Murphy asked the State if it wanted to make him an offer. The State made an offer, but the defendant rejected it, stating that he did not understand the offer.

The Hearing Panel also heard testimony from several witnesses, including Judge Murphy and Andrew Weinstock. Suzanne Carter was seated in the back of the courtroom during the incident. When Judge Murphy and Mr. Weinstock entered the hallway, Ms. Carter saw Judge Murphy grab Mr. Weinstock's collar with his left hand and raise his right arm as if he were going to punch Mr. Weinstock. She did not see a punch land because the door closed. Ms. Carter heard "a bunch of punch, punch," and Judge Murphy using expletives, including "fuck." Ms. Carter recalled the courtroom deputy going into the hallway after the first or second punching sound she heard. In addition to what she believed were three punches, Ms. Carter also heard sounds of a scuffle.

Andrew Weinstock testified that he was assigned to Judge Murphy's courtroom about three months prior to the incident. Mr. Weinstock described his relationship with Judge Murphy as adversarial, high stress, and very mercurial. From time to time they would have testy exchanges. Mr. Weinstock recalled that on other occasions prior to the date of the incident, Judge Murphy had told him,

"Let's go out in the back hallway and discuss it." According to Mr. Weinstock, taking a lawyer into the hallway to chat is a regular occurrence in Brevard County, although it had only happened to him one other time with another judge about ten years before.

Mr. Weinstock stated that although Judge Murphy was "clearly angry" and said he was going to "beat [Mr. Weinstock's] ass," Mr. Weinstock did not think the Judge would follow through. Mr. Weinstock went into the hallway expecting to have a discussion in which Judge Murphy would yell at him and the two would come to an agreement about how to handle the remaining cases. Mr. Weinstock testified that he went through the door and into the hallway before Judge Murphy. Mr. Weinstock recalled Judge Murphy's left arm pinning him against the wall and alleged that he was punched twice with Judge Murphy's right arm. Mr. Weinstock further testified that before Judge Murphy could hit him a third time, two deputies pulled Judge Murphy off of him. Mr. Weinstock claimed that he had a bruise on his face which did not appear in the photographs taken afterwards. Mr. Weinstock denied punching Judge Murphy.

Judge Murphy testified that Mr. Weinstock was consistently rude to defendants and rude and disrespectful to Judge Murphy on a regular basis. Judge Murphy and Mr. Weinstock at times would have discussions in the courtroom or bench conferences, and had gone into the hallway on one prior occasion to discuss

whether appearance by a client at docket sounding was mandatory. Judge Murphy agreed that he was in a very high state of anger during the incident. Judge Murphy testified that he regretted his words and actions.

Judge Murphy recalled that he entered the hallway before Mr. Weinstock and alleged that Mr. Weinstock was the aggressor, hitting Judge Murphy in the chest. Judge Murphy remembered having two hands on Mr. Weinstock at all times and that he "only took defense actions." Judge Murphy recalled Deputy Byron Griffin separating the two combatants after a short scuffle during which Judge Murphy attempted to fend off Mr. Weinstock and force him to submit by swinging Mr. Weinstock off balance and using profanity.

Judge Murphy testified that he resumed his docket without Mr. Weinstock because Mr. Weinstock's clients were also his clients and because he wanted to make sure everyone received fair representation. When asked how they could be his clients, Judge Murphy said, "This is county court. It's people's court. . . . They're my people." Judge Murphy admitted that the defendants he dealt with after the incident were not pro se and that he treated them like pro se defendants. He also admitted that resuming with the defendants' cases was "clearly wrong" and waiting for a new public defender to arrive before proceeding would have been a better course of action.

Deputy Griffin testified that he did not think there would be a physical altercation, even though he heard Judge Murphy ask Mr. Weinstock if he wanted to fight and say that he would beat Mr. Weinstock's ass. Deputy Griffin testified that he saw Mr. Weinstock's hands on Judge Murphy's garments and Judge Murphy's hands on Mr. Weinstock's jacket. Deputy Griffin did not recall seeing or hearing either man punch the other. Deputy Griffin further testified that he immediately stepped into the hallway and put his hands between the men to separate them. They all shifted and hit the back wall, causing a thumping sound. Deputy Griffin opined that there was no opportunity from the time he moved towards the door to the time he went through it for either man to hit the other without Deputy Griffin knowing it.

Deputy Cheryl Martinez, who was assigned to an adjacent courtroom, exited her courtroom immediately after she heard shouting and a bang. She recalled seeing Judge Murphy and Mr. Weinstock screaming at each other with two hands each on the other's collar. Deputy Martinez observed Deputy Griffin separating the men. She did not see any punch or recall seeing an arm raised in anticipation of a strike. She recalled that Mr. Weinstock claimed he was punched two times in the face and wanted Judge Murphy arrested. Deputy Martinez observed no injuries or sign that Mr. Weinstock had been punched.

Following the incident, Judge Murphy contacted psychologist Dr. Ronsisvalle for counseling. Dr. Ronsisvalle testified that he met with Judge Murphy weekly or biweekly for cognitive behavioral therapy related to anger management beginning June 6, 2014. Dr. Ronsisvalle found that throughout their therapy sessions Judge Murphy appeared positive and humble, accepted responsibility and accountability for his actions, and labeled his misconduct as inappropriate. Dr. Ronsisvalle testified that Judge Murphy was initially confused about the incident and could not believe what he had done. Once he completed the course with Dr. Ronsisvalle, Judge Murphy requested additional sessions to try to better understand the emotions underneath his anger.

Dr. Ronsisvalle described a "perfect storm" occurring within Judge Murphy emotionally during incident: Judge Murphy was fatigued, his father had recently passed, and a defendant had recently been killed outside the courthouse. Dr. Ronsisvalle also stated that during the incident Judge Murphy was in fight or flight mode: his frontal lobe was shut down, adrenaline and cortisol were pulsing, and his amygdala was activated, interfering with his judgment. Referring to the phrase "fog of battle," Dr. Ronsisvalle explained that "many soldiers after the trauma do what? They go back to their duty post. That's what you do. You put your nose to the grindstone, and you—you do what you're called to do."

Dr. Ronsisvalle was confident that the incident was atypical for Judge Murphy. Dr. Ronsisvalle opined, in his best clinical judgment, that Judge Murphy could safely return to work and that he was not at risk to repeat this behavior because he showed a significant ability to understand his emotion, developed skills to cope with anger, and recognized that a perfect storm of emotions compromised his ability to function in that moment. Dr. Ronsisvalle concluded that Judge Murphy developed more control of his anger and was confident in his coping skills to handle similar situations in the future.

Dr. Scott Fairchild conducted a Comprehensive Psychological Evaluation and six therapy sessions with Judge Murphy in June 2014. Dr. Fairchild did not testify before the Hearing Panel but offered a report dated June 23, 2014. Dr. Fairchild found in his report that "the comprehensive psychological assessment reveals no evidence of a diagnosable Posttraumatic Stress Disorder."

Finally, the parties stipulated to the testimony that would be elicited if five more witnesses were called before the Hearing Panel, each of whom was expected to testify about Judge Murphy's good character and Mr. Weinstock's reputation as difficult and unprofessional. Additionally, there were 45 letters of support submitted to the JQC on Judge Murphy's behalf. Following the incident, Judge Murphy wrote apology letters to members of the legal community and residents of

Brevard County.[1] In his letter to the Public Defender of Brevard County, Judge Murphy specifically apologized to Mr. Weinstock.

In its May 19, 2015, written order, the Hearing Panel unanimously found Judge Murphy guilty of violating Canons 1,[2] 2A,[3] 3A,[4] 3B(3),[5] 3B(4),[6] 3B(7),[7]

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1. The apology letter to the residents of Brevard County can be viewed at http://media.cmgdigital.com/shared/news/documents/2014/06/30/Brevard_residents_letter.pdf.

2. "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved. . . ."

3. "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

4. "The judicial duties of a judge take precedence over all the judge's other activities. . . ."

5. "A judge shall require order and decorum in proceedings before the judge."

6. "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control."

7. "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . ."

3B(8),[8] and 5G[9] of the Code of Judicial Conduct, and Rule of Professional Conduct 4-1.1.[10] The Hearing Panel found that there was no clear and convincing evidence that Judge Murphy struck Mr. Weinstock and could not determine which of them initiated physical contact. The Hearing Panel unanimously recommended that Judge Murphy be disciplined as follows: a public reprimand, a 120-day suspension, a $50,000 fine, mental health therapy, and Judicial Education Courses in the Florida Judicial College New Judges Program.

In response to this Court's Order to Show Cause why he should not be removed, Judge Murphy submitted a response including a Department of Veterans Affairs (VA) finding of 30% disability based on Post Traumatic Stress Disorder (PTSD) resulting from combat deployment in Afghanistan. The VA found that Judge Murphy's PTSD manifests in "disturbances of motivation and mood, chronic sleep impairment, anxiety, occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress." Although this finding was not in evidence before the JQC Hearing or Investigative Panels, the JQC noted

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8. "A judge shall dispose of all judicial matters promptly, efficiently, and fairly."

9. "A judge shall not practice law. . . ."

10. This Rule provides that a lawyer shall provide competent representation to a client.

in its Reply that periods of significant stress are a common feature of trial judge duties and that this new diagnosis cuts against Judge Murphy's present fitness to serve.

ANALYSIS

First, we address the JQC's findings and determination that Judge Murphy violated Canons 1, 2A, 3A, 3B(3), 3B(4), 3B(7), 3B(8), and 5G of the Code of Judicial Conduct and Rule of Professional Conduct 4-1.1 as alleged. We then analyze the JQC's recommendation and appropriate discipline.

I. Findings and Determination of Guilt

This Court upholds JQC findings on alleged misconduct where supported by clear and convincing evidence. Sloop, 946 So. 2d at 1054. This standard of proof has been described as "more than a 'preponderance of the evidence,' but the proof need not be 'beyond and to the exclusion of a reasonable doubt.' " In re Kinsey, 842 So. 2d 77, 85 (Fla. 2003) (quoting In re Davey, 645 So. 2d 398, 404 (Fla. 1994)). Where the JQC's findings are undisputed and a judge admits misconduct, we generally conclude that the findings are supported by clear and convincing evidence. Id.; see also In re Diaz, 908 So. 2d 334, 337 (Fla. 2005); In re Andrews, 875 So. 2d 441, 442 (Fla. 2004). There is no dispute that Judge Murphy threatened violence, had a physical confrontation with Mr. Weinstock, and subsequently resumed his docket with defendants whose attorneys were not present.

Judge Murphy does not contend that the Hearing Panel erred in finding him guilty of violating the Judicial Canons and Rule of Professional Conduct. Therefore, we find the JQC's findings and its conclusion that Judge Murphy violated Canons 1, 2A, 3A, 3B(3), 3B(4), 3B(7), 3B(8), and 5G of the Code of Judicial Conduct, and Rule of Professional Conduct 4-1.1, supported by clear and convincing evidence. Accordingly, we approve the JQC's findings and conclusion.

II. Recommended and Appropriate Discipline

"While this Court gives the findings and recommendations of the JQC great weight, 'the ultimate power and responsibility in making a determination rests with this Court.' " Kinsey, 842 So. 2d at 85 (footnote omitted) (quoting In re Davey, 645 So. 2d at 404). Under the Florida Constitution,

> 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.

Art. V, § 12(c)(1), Fla. Const. "[D]iscipline is defined as any or all of the following: reprimand, fine, suspension with or without pay, or lawyer discipline." Art. V, § 12(a)(1), Fla. Const. Additionally, "[t]he supreme court may award costs to the prevailing party." Art. V, § 12(c)(2), Fla. Const.

The object of these proceedings is not to inflict punishment, but to determine a judge's fitness to serve. In re McMillan, 797 So. 2d 560, 571 (Fla. 2001). When considering fitness to serve, this Court must hold judges "to higher ethical standards than lawyers 'by virtue of their position in the judiciary and the impact of their conduct on public confidence in an impartial justice system.' " In re Hawkins, 151 So. 3d 1200, 1212 (Fla. 2014) (citing McMillan, 797 So. 2d at 571). This high standard of ethical and professional conduct is necessary because "[t]he judicial system can only function if the public is able to place its trust in judicial officers." In re Ford-Kaus, 730 So. 2d 269, 277 (Fla. 1999). Removal is proper when clear and convincing evidence is presented that the judge has engaged in "conduct . . . demonstrating a present unfitness to hold office." Art. V, § 12(c)(1), Fla. Const.; see also In re Albritton, 940 So. 2d 1083, 1088 (Fla. 2006). "Malafides, scienter or moral turpitude on the part of a justice or judge" is not necessary for removal from office. Art. V, § 12(c)(1), Fla. Const.

A. Present Fitness to Hold Office

We examine judicial misconduct for present fitness to hold office "from two perspectives: its effect on the public's trust and confidence in the judiciary as reflected in its impact on the judge's standing in the community, and the degree to which past misconduct points to future misconduct fundamentally inconsistent with the responsibilities of judicial office." Sloop, 946 So. 2d at 1055. To

preserve the integrity of the judiciary, a judge must observe a high standard of personal conduct, "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and be "patient, dignified and courteous" to every individual with whom the judge interacts professionally. Fla. Code of Jud. Cond. Canons 1, 3. We have repeatedly held that "[r]emoval is an appropriate discipline where the actions of the judge simply 'should erode confidence in the judiciary,' even where it does not appear that the public has lost confidence, and even where the Hearing Panel has recommended a lesser sanction than removal." Hawkins, 151 So. 3d at 1215 (quoting Sloop, 946 So. 2d at 1055 (emphasis in original)). See also In re Henson, 913 So. 2d at 588 (finding removal appropriate because "the respect of the public [is] essential to [the judiciary's] mission as the third branch of government."); In re LaMotte, 341 So. 2d 513, 518 (Fla. 1977) (finding removal proper even where misconduct does not appear to have shaken public faith in the judiciary). Even where a judge has an outstanding record, removal is the appropriate sanction for a judge whose misconduct is fundamentally inconsistent with the responsibilities of judicial office or strikes at the heart of judicial integrity. See, e.g., In re Graziano, 696 So. 2d 744, 749 (Fla. 1997); In re Johnson, 692 So. 2d 168, 172 (Fla. 1997) ("We cannot dispute Judge Johnson's otherwise unblemished judicial record."); In re Garrett, 613 So. 2d 463,

464 (Fla. 1993) (removing Judge Garrett based on one incident of petit theft despite an "unblemished career of public service").

Our inquiry into judicial misconduct must also consider its future implications on the offending judge's ability to serve. Our determinations of appropriate discipline are based in part on the likelihood of that misconduct reoccurring. Compare, e.g., In re Crowell, 379 So. 2d 107, 110 (Fla. 1979) (removing Judge Crowell for unfitness "substantially due to his tendency to lose his temper") and Sloop, 946 So. 2d at 1059 (removing Judge Sloop because "we [were] unconvinced that [he could] both effectively manage his temper and remain an effective jurist") with In re Wood, 720 So. 2d 506, 509 (Fla. 1998) (finding public reprimand appropriate given Judge Wood's candor and commitment to ongoing treatment for anger and stress management). This Court has found removal appropriate even where a judge seeks treatment for a medical condition related to his or her severe misconduct. See, e.g, Sloop, 946 So. 2d at 1056 (finding removal appropriate for arresting traffic defendants who were in the wrong courtroom as a result of being misdirected, where the judge blamed his conduct on his Attention Deficit Hyperactivity Disorder); Garrett, 613 So. 2d at 464 (finding removal appropriate for a one-time theft of electronics where the judge suffered from depression). Furthermore, a pattern of misconduct is not necessary for removal. See Sloop, 946 So. 2d at 1056; Garrett, 613 So. 2d at 464.

Focusing first on the effects on the public's trust in the judiciary, we must conclude that Judge Murphy is not presently fit to serve. Judge Murphy used profanity in an open courtroom and threatened violence against an attorney appearing before him. This is the sort of egregious conduct that erodes the public's confidence. It is without question that except for the June 2, 2014, incident, Judge Murphy has been a good judge. Notwithstanding his prior judicial performance, Judge Murphy's total lack of self-control became a national spectacle—an embarrassment not only to the judge himself but also to Florida's judicial system. Given the clear erosion of public confidence in the judiciary caused by his misconduct, removal is an appropriate sanction.

As to the likelihood of future misconduct, it is unclear whether Judge Murphy is likely to have another similar outburst. Although he immediately sought treatment and an underlying cause for his misconduct, this Court has found removal appropriate even where a judge takes steps to address mental health. See Sloop, 946 So. 2d at 1056; Garrett, 613 So. 2d at 464. We must also take note that Judge Murphy ultimately discovered an underlying cause of his misconduct: PTSD.

Although Judge Murphy's doctors indicated before the Hearing Panel that his anger and stress were being managed through treatment, these assurances conflict with the VA finding that Judge Murphy is 30% disabled based on PTSD

stemming from his combat deployment in Afghanistan. Dr. Ronsisvalle made no mention of PTSD in his testimony before the Hearing Panel, and Dr. Fairchild's report explicitly found no evidence of PTSD. In contrast, the VA found "[o]ccupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress." As the JQC indicated, a trial judge's duties frequently include periods of significant stress. The severity of Judge Murphy's behavior and the VA finding leave open the possibility of future misconduct. Based on the clear erosion of public faith in our court system caused by Judge Murphy's misconduct and the unmistakable possibility that he could have a similar outburst in the future, we must find that Judge Murphy is presently unfit to serve.

B. JQC Recommendation

In evaluating judicial misconduct, we generally place great weight on the recommendation of the Hearing Panel. However, this Court will not approve a recommendation for discipline short of removal for particularly egregious misconduct rendering a judge unfit for office. See, e.g., Sloop, 946 So. 2d at 1056; In re Renke, 933 So. 2d 482, 493 (Fla. 2006). Ultimately, the decision of whether to order removal rests with this Court. Kinsey, 842 So. 2d at 85.

In this case, the Hearing Panel's recommended discipline stops short of removal. However, the JQC, in its Reply to this Court's order to show cause,

argued that Judge Murphy's VA disability did not support his present fitness and described his misconduct as having "single-handedly caused the Florida judicial system to become a national embarrassment." Judge Murphy's "intemperate courtroom behavior not only damaged public confidence in him as a judicial officer but struck 'at the very roots of an effective judiciary, for those who are served by the courts will not have confidence in and respect for the courts' judgments if judges engage in this egregious conduct.' " In re Shea, 110 So. 3d 414, 418 (Fla. 2013) (quoting In re Schapiro, 845 So. 2d 170, 174 (Fla. 2003)). Given the erosion of public confidence caused by Judge Murphy's misconduct, we reject the JQC's recommendation of discipline in this case.

C. Appropriate Discipline

On June 2, 2014, Judge Murphy threatened an assistant public defender with violence in open court, challenged him to a physical fight, engaged in the threatened struggle in which the two men had to be physically separated by a deputy, and reassumed the bench to handle cases where the defendants were without the presence of their attorney. Because of Judge Murphy's appalling behavior, we conclude that there is clear and convincing evidence that Judge Murphy engaged in "conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office." Art. V, § 12(c)(1), Fla. Const. Judge Murphy's conduct is fundamentally inconsistent with the responsibilities of

judicial office and necessitates his removal. "[T]hrough his own actions culminating in the misconduct in this case, Judge [Murphy] has lost the public's confidence in his ability to perform his judicial duties in a fair, evenhanded, and even-tempered manner." Sloop, 946 So. 2d at 1059. Based on the foregoing, we conclude that appropriate discipline in this case demands that Judge Murphy be removed from office.

CONCLUSION

For the reasons set forth herein, we hereby remove Brevard County Judge John C. Murphy from that office.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, and POLSTON, JJ., concur.
PERRY, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Original Proceeding – Judicial Qualifications Commission

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