IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-198

INQUIRY CONCERNING A JUDGE, NO. 06-52
RE: CHERYL ALEMÁN

JUDGE ALEMÁN'S
MOTION FOR REHEARING

On Review of the Recommendations by the Hearing Panel of the JQC

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MOTION FOR REHEARING

Respondent Judge Cheryl Alemán files this Motion for Rehearing of this Honorable Court's opinion of September 29, 2008. The basis of this Motion is that this Honorable Court has overlooked or misapprehended the following points of fact or law:

1. TOTAL TIME LIMITS WHICH WERE SUFFICIENT TO FULLY ACCOMPLISH THE PREPARATION AND FILING OF WRITTEN MOTIONS TO DISQUALITY CANNOT, AS A MATTER OF LAW, BE FOUND TO BE "UNREASONABLE."

The record of the Braynen trial (the transcript and typed, filed motions) directly contradicts this Honorable Court's finding that the *total* time (including extensions) allowed by Judge Alemán to reduce two oral motions to writing was "unreasonable." Specifically, the record is *unequivocal* that the oral allegations at issue were completely reduced to fully fleshed and fully executed, typed motions, complete with case law and attached executed affidavits, *wholly within the alleged "unreasonable" total time limits decided upon by Judge Alemán*. [*See* Judicial Qualifications Commission Exhibits #4 and #5.]

Total time limits which were completely sufficient to fully accomplish each task at hand cannot, as a matter of law, be deemed "unreasonable."

2. THE RECORD IS COMPLETELY DEVOID OF ANY EVIDENCE TO SUPPORT THE FINDING THAT COUNSEL FOR DEFENDANT BRAYNEN WERE "FORCED TO CHOOSE" BETWEEN REPRESENTING THEIR CLIENT AND ABIDING BY THE JUDGE'S ORDER.

This Honorable Court's finding that counsel was "forced to choose" between diligently representing their client (by reducing one of the oral motions to writing) and abiding by the court's order (to appear timely) is unequivocally refuted by the record. It is uncontroverted in the record that, ***even after*** ***counsel disobeyed the court's order to appear timely and showed up 24 minutes late,*** **Judge Alemán *still* permitted and allowed sufficient time for the oral allegations to be reduced to writing**.

Not only did Judge Alemán not ***"force"*** counsel to *forfeit* filing the motions at issue, the record undisputedly shows that Judge Alemán actually did all she could ***to assist*** counsel in motions in representation of the defendant by assisting in expeditiously getting the motions at issue in proper form and filed. Specifically, the uncontroverted evidence is that Judge Alemán offered up the notary services of her judicial assistant [Braynen T. 382]; and even offered **twice**, ***personally***, to photocopy necessary documents for defense counsel [T. 384].

3. NO JUDGE HAS EVER BEEN FOUND GUILTY OF VIOLATING THE CODE OF JUDICIAL CONDUCT FOR THREATENING CONTEMPT WHEN IT IS UNDISPUTED THAT THERE WAS A CLEAR VIOLATION OF A COURT ORDER.

As a matter of law, no judge has ***ever*** been disciplined for "use" of contempt power which: (1) lacked any procedural defect; (2) at most, would have sought a formal explanation for an ***undisputed*** **violation of a court order** to appear timely in a judicial proceeding; and (3) was utterly devoid of all inappropriate tone, volume and demeanor.

This Honorable Court correctly states that judges have been disciplined for total abuses of contempt power when bad motives, bad demeanor and behavior, as well as a total lack of even a *scintilla* of due process accompany such judicial rulings where, as this Honorable Court pointed out, a judge: (1) summarily adjudicated guilty and jailed persons, ***without according any procedural due process*** [*See* In re Perry, 641 So.2d 366 (Fla. 1994) and In re Crowell, 379 So.2d 107 (Fla. 1979)]; (2) punished a litigant for writing a letter to the Governor, ***conduct which obviously violated no court order*** (and which was part of a ***pattern of 17 incidents of judicial misconduct***) [*See* In re Shea, 759 So.2d 631 (Fla. 2000)]; (3) threatened, in a ***"raised tone of voice"*** to adjudicate a prosecutor ***guilty of contempt unless she kept her "mouth shut" unless "invited" by the judge***

to speak [*See* In re Wright, 694, So.2d 734 (Fla. 1997)]; or (4) required a police officer to appear in a judge's chambers "to explain ***[the alleged] contemptuous conduct" of disturbing the judge's lunch at a public restaurant by failing to turn off his police radio*** [*See* In re Muszynski, 471 So.2d 1284 (Fla. 1985)].

However, ***never before*** has judicial discipline been inflicted on a judge who, using appropriate demeanor, after taking the time to consult with a judicial colleague, simply announced an *intention to issue* an order to show cause in a case ***where there is no dispute whatsoever in the record that a court order was, in fact, violated***.

Canon 3(B) (2) requires judges to make independent decisions without "fear of criticism." Most respectfully, if a judge, using ***appropriate demeanor***, may be disciplined for merely issuing (or stating an intention to issue) an order to show cause in a case where a lawyer's courtroom behavior ***undisputedly violated a court order***, what judge will ever be willing to enforce any of its orders, knowing that—not reversal of a judicial decision, but personal liability and discipline may now ensue?

If judges are made personally liable, through the costs and rigors of protracted litigation, and subjected to public discipline for merely attempting

to enforce their own orders, it will become too costly and too personally risky for judges ever to attempt to do so.

4. THERE IS NO EVIDENCE IN THE RECORD THAT THE REPRESENTATION OF DEFENDANT BRAYNEN WAS ADVERSELY IMPACTED BY JUDGE ALEMÁN'S ANNOUNCEMENT THAT DEFENSE COUNSEL WOULD BE REQUIRED TO SHOW CAUSE FOR THEIR FAILURE TO APPEAR TIMELY.

There is no evidence (clear and convincing or otherwise) in the Braynen transcript that the defendant's representation was adversely impacted **in even a *single*, tangible way** by the court's announcement that the lawyers would be required, at some point, to show good cause for their failure to appear timely in court, as everyone else was required to do. The actual transcript of the aborted Braynen proceeding reveals that *the only "palpable effect"* of the court's announced intention to require an explanation for counsel's refusal to appear timely in court while 71 jurors stood in the hallway waiting (for hours during the proceedings) was that *both counsel never again appeared late for court.*

Attorney Raticoff's self-serving conclusory assertion to the Commission, made ***two years after the Braynen trial,*** fails to identify even so much as a single "post-show-cause" change in his representation (other

than taking care to appear timely in court thereafter). Even the defendant himself ***three times*** **denied the existence of any ill "palpable effect" of the "show cause" announcement upon the "zealousness" and "100% focused" nature of the representation of his lawyers** [*See* Braynen T. 400, 491, 549]. The ***overwhelming*** **evidence** in the record absolutely belies any claim of "clear and convincing evidence" that Respondent Judge's announced intent to issue an order requiring counsel to explain their tardiness had any negative "palpable" impact on the representation defendant received.

The Braynen record (which was the only record before Respondent Judge when making the judicial decisions at issue) unequivocally reveals not so much as a single act of legal representation from which counsel refrained "for fear of being held in contempt." To the contrary, the record unequivocally shows that counsel continued, completely and appropriately unhindered and undeterred, in both substance and zealous demeanor, in their representation.

In sum, the record is unrebutted that Judge Alemán's time limits (including all extensions she granted) were absolutely and irrefutably sufficient to reduce all oral allegations (motions) to fully typed, executed motions. There is no evidence in the record that defense counsel failed to

adequately complete their written motions to disqualify. Time limits which are "sufficient" to accomplish the task cannot, as a matter of law, be "unreasonable."

Holding lawyers accountable to show up on time when everyone is waiting in a judicial proceeding, and merely ordering an explanation when they do not, *cannot*, as a matter of law, subject a judge to discipline. To do so would utterly chill judges' very ability to make independent decisions based upon the facts and the law, instead of upon fear of reprisals, thereby making it impossible to fulfill their constitutional duties and obligations under the Code of Judicial Conduct and Rules of Judicial Administration.

"The Code is **not** to be construed **to impinge on the essential independence of judges in making judicial decisions**." *See* Code of Judicial Conduct, Preamble.

WHEREFORE, Respondent Judge respectfully requests this Honorable Court to reconsider its previous opinion and find that disagreement with independent judicial rulings made, as these were, after consideration, consultation, and with appropriate demeanor, cannot constitute "unethical conduct" subject to personal liability and judicial discipline.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished to The Honorable Thomas B. Freeman, Chair, Hearing Panel, 14250 49th Street North, Clearwater, Florida 33762, by U.S. Mail; to Lansing C. Scriven, Esq., Special Counsel, 442 W. Kennedy Boulevard, Ste. 280, Tampa, Florida 33606, by U.S. Mail; to Michael Louis Schneider and Brooke S. Kennerly, Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303 by U.S. Mail; to John R. Beranek, Esq., Counsel to Hearing Panel, P.O. Box 391, Tallahassee, Florida 32301 by U.S. Mail; and to Marvin C. Barkin, Esq., Special Counsel, P.O. Box 1102, Tampa, Florida 33601 by U.S. Mail, on this _____ day of October, 2008.

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