IN THE SUPREME COURT OF FLORIDA

JUDGE MICHAEL E. ALLEN,

Petitioner,

v. Case No. SC08-618

THE JUDICIAL QUALIFICATIONS COMMISSION,

Respondent
_____/

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

The JQC, by its undersigned counsel, pursuant to this Court's order of April 4, 2008, files this response to the petition for writ of quo warranto and for relief pursuant to the all writs provision of the Florida Constitution.

INTRODUCTION

We begin with what this Court's own website tells the public about the JQC (http://www.floridasupremecourt.org/pub info/jqc.shtml):

Is the JQC a Part of the State Courts System Administered by the Chief Justice?

No. Article V, Section 12 of the state Constitution specifically creates the JQC as a body independent of the state courts and the other branches of government. The JQC makes its own rules but is funded by the Legislature. *The Supreme Court does not supervise the JQC, cannot investigate it, cannot fire or select its members, and cannot order it to perform any official act. [emphasis added]*

How can I Complain about the JQC?

Article V, Section 12, of the state Constitution creates the JQC and specifies that its members who are judges can be removed through impeachment by the House of Representatives with trial in the Senate. Members who are not judges may be removed through the Governor's power to suspend public officials in certain instances. The Governor's power is described in Article IV, Section 7. Thus, complaints about the JQC should be directed either to the House of Representatives or the Governor, or to both.

THIS COURT LACKS JURISDICTION

This Court derives its jurisdiction as to the JQC solely from the Florida Constitution, which empowers this Court to receive recommendations from the JQC and to accept, modify or reject such recommendations. In the present case petitioner does not challenge a recommendation of the JQC; rather, he seeks to short-circuit any JQC recommendation by interrupting the investigation and hearing process mid-stream. In short, he seeks this Court's interlocutory review of the merits of his motion to dismiss that the JQC denied. This Court lacks jurisdiction to consider the petition, and should not exercise jurisdiction - even if it exists - to avoid the precedent such interlocutory review would create.

The JQC is a constitutional body that Article 5, section 12(a) created. The JQC has the power to establish its own rules and procedures (subject to repeal). Fla. Const. Art. 5, sec. 12(a)(3) and (4). As this Court previously stated, "the JQC is a separate constitutional body and . . . this Court has only such authority over the

JQC as authorized by article V, section 12 of the Florida Constitution." *Petition of the Committee on Standards of Conduct Governing Judges*, 698 So. 2d 834 (Fla. 1997) (noting that the Court could not mandate that the JQC consider a judge's compliance with a Judicial Ethics Advisory Committee opinion as evidence of good faith).

Article 5, section 12(a)(5)(c) establishes this Court's relationship with the JQC. It empowers the Court to "receive recommendations" from the hearing panel and then to "accept, reject or modify in whole or in part the findings, conclusions, and recommendations of the commission" and to order the resulting discipline. At the request of the JQC's investigative panel, the Court also may suspend a justice or judge pending final determination of the JQC's inquiry, and the Court may award costs to the prevailing party. *Id.* at (1) and (2). These provisions do not place the interlocutory supervision of the operation or process of the JQC within the jurisdiction of this Court, and petitioner does not primarily rest his jurisdictional argument on these provisions.

Instead, petitioner asserts that this Court has jurisdiction to hear his petition and to grant relief through the Court's constitutional power to issue writs of quo warranto and the all writs power. Neither provision creates jurisdiction here.

Long-standing precedent establishes the writ of quo warranto as a means to challenge the power to hold office - not to challenge the jurisdiction of a

constitutional body. As this Court most recently stated, "[q]uo warranto is '[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed.' …It is the proper vehicle to challenge the 'power and authority' of a constitutional officer, such as the Governor." *Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc.*, 33 Fla. L. Weekly S172, n. 3 (Fla. March 13, 2008) (internal citations omitted). In *Crist*, this Court was asked to determine whether the Governor exceeded his constitutional authority by appointing regional counsel for criminal cases in which the public defender has a conflict. Similarly, in *Austin v. State*, 310 So. 2d 289 (Fla. 1975), this Court held that the writ of quo warranto was the proper vehicle to challenge or test the power and authority of a state attorney whom the Governor assigned to investigate a Commissioner of Education.

In each of these cases the Court used the writ of quo warranto to test the propriety of gubernatorial offices or appointments and therefore to test the authority of public officials to hold particular offices or capacities and ultimately to test the authority of the Governor. Here, while implicitly conceding that prohibition will not lie against the JQC, petitioner nevertheless seeks the functional equivalent with an attack on the "authority" of the JQC to proceed in this case. Petitioner asks this Court to determine whether the JQC is properly exercising its constitutional authority - not on the basis of offices or positions created - but on the

merits of the charges. Significantly, petitioner does not assert that the JQC is without jurisdiction. Rather, he asserts that the JQC cannot inquire into the motivation behind a written opinion. This assertion does not challenge the JQC's power to investigate or prosecute, generally; instead, it attacks the investigation based on petitioner's view of the nature of this investigation and prosecution. Such an assertion cannot invoke this Court's power to issue writs of quo warranto.

Petitioner's reliance on the all writs provision is similarly unavailing. Article V, section 3(b)(7) empowers this Court to issue "all writs necessary to the complete exercise of its jurisdiction." This Court repeatedly has held that the all writs provision "does not constitute a separate source of original or appellate jurisdiction." *Williams v. State*, 913 So. 2d 541 (Fla. 2005). Instead, it is an "aid to the Court" in exercising jurisdiction elsewhere conferred in the Constitution. *Id.* *See also Martinez v. State*, 970 So. 2d 342 (Fla. 2007); *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986 (Fla. 2004). As this Court long ago explained,

> [t]he question of jurisdiction must first be determined before any writ necessary or proper to the complete exercise of its jurisdiction can be issued. If there is no jurisdiction, then there is no authority or power to issue a writ to the complete exercise of a jurisdiction which does not exist. … The express power granted to this court to issue 'all writs necessary or proper to the complete exercise of its jurisdiction' has reference only to ancillary writs to aid in the complete exercise of the original or the appellate jurisdiction of the Supreme Court, and does not confer added original or appellate jurisdiction in any case.

Seaboard Air Line R. Co. v. Gay, 68 So. 2d 591, 594 (Fla. 1953).

Petitioner may argue that this Court's jurisdiction to receive recommendations from the hearing panel and then to accept, modify or reject such recommendations somehow implicates the all writs provision. Petitioner does not allege, however, that the JQC proceedings infringe on this Court's power to receive and determine the outcome of recommendations. *See, e.g.*, *Chiles v. Public Employees Relation Commission*, 630 So. 2d 1093 (Fla. 1994) (rejecting assertion of all writs jurisdiction to halt certification of bargaining unit for state employed attorneys where alleged conduct did not infringe or encroach on Court's jurisdiction over admission or discipline of attorneys). Instead, petitioner seeks to prevent this Court from ever receiving or determining any JQC recommendation by interfering with an on-going hearing process. Thus, petitioner's actions are the real threat to the ultimate jurisdiction of this Court.

In support of his jurisdictional assertions, petitioner also may rely on *Turner v. Earle*, 295 So. 2d 609 (Fla. 1974). In *Earle*, a circuit court judge sought a writ of prohibition to prevent the JQC from proceeding against him based on conduct occurring before he held an office within the jurisdiction of the JQC. This Court held that a writ of prohibition only could be issued to courts and therefore could not be applied to the JQC, but the Court exercised its all writs power in connection with its then-existing constitutional power to adopt rules regulating proceedings of

the JQC. Article 5, section 3(b)(4) of the 1973 version of the Florida Constitution provided that the "supreme court shall adopt rules regulating proceedings of the commission… ." This Court expressly based its jurisdiction to consider the requested relief on this rule making authority. *Id*. at 611-12.

Earle does not apply here because petitioner's challenge bears no relationship to the JQC rules or jurisdiction. Petitioner takes no issue with any matter of procedure. Instead, he challenges the nature of the charges. This is entirely different from the nature of the attack in *Earle*, which was based on a lack of retroactive jurisdiction. Furthermore, the basis of jurisdiction in *Earle* no longer exists. The current version of the Constitution expressly grants rule making authority to the JQC itself. Fla. Const. Art. V, sec. 12 (a)(4). Although this Court retains the power to repeal the JQC's rules (or part thereof) by a five justice concurrence, *see* Fla. Const. Art. 5, sec. 12 (a)(4), this Court has recognized that the JQC has the authority to adopt rules regulating its proceedings. *In re Rules of Florida Judicial Qualifications*, 364 So. 2d 471 (Fla. 1978). Thus, this Court no longer has the rule *making* authority it had when *Earle* was decided.

Even if this Court determines that it has jurisdiction over the present case, the Court should not exercise its discretion to consider it. In short, petitioner seeks nothing more than interlocutory review of the JQC's order denying his motion to dismiss that raised the same arguments. Petitioner seeks to stop a hearing process

based on his characterization of the charges and on his broad allegation that the motivation for a judicial opinion never can be a part of a JQC charge or inquiry. As set forth below, petitioner is wrong on the merits of his position, but as a preliminary matter it would be troublesome precedent to consider his arguments at this stage of the proceeding.

Nothing prevents petitioner from making these exact arguments when this Court receives and considers the JQC hearing panel's recommendation in this matter. Deferring consideration of these arguments allows the JQC process to be complete (which could result in an outcome favorable to petitioner), and this Court retains its right to have its usual review. It avoids the dangerous precedent of allowing judges under investigation to turn to this Court in an effort to halt the investigative and hearing process before it is completed and before all the evidence is in, and it protects the province of both the JQC and this Court.

Article 15, section 12(a)(1) and (c) and the JQC Rules (approved by this Court) including 3(b), 6(f), 7(a) and 20, establish the JQC's jurisdictional power, authority and responsibilities. The Constitution and Rules create the JQC, grant it jurisdiction, authorize it to investigate judges, establish separate investigation and hearing panels to provide due process and limit its disciplinary power to recommendations to this Court. For the Court to involve itself in that on-going process based upon an alleged lack of authority for the JQC to investigate one type

of judicial action over which it has jurisdiction – but which, in truth, is an attack on the merits – fosters judicial inefficiency. Moreover, such a precedent could result in every JQC investigation and proceeding being brought to this Court for substantive interlocutory review even though completion of the JQC process might result in dismissal of the charges.

Petitioner has failed to demonstrate jurisdiction in this Court, and he has wholly failed to explain why this Court should exercise its jurisdiction to grant extraordinary relief. There is no irreparable harm to petitioner from the hearing process. It is no different from that process applied to every other judge who has faced JQC charges. Petitioner has failed to explain why he cannot make the very same arguments when this Court reviews the JQC hearing panel's recommendations, when this Court undoubtedly has jurisdiction to entertain the arguments and, if the Court finds they have merit, apply such determinations to the recommendation as needed. On the record before the Court the petition should be denied for lack of jurisdiction.

THE MERITS

Petitioner argues that there is no precedent anywhere in the United States for sanctioning a judge "based on his or her reasons for writing a published opinion in a case before his or her court." (Petition at 9). In the present case, the JQC first asserts that Judge Allen's concurring opinion is, on its face, sanctionable

irrespective of his reasons for writing the opinion. It is sanctionable on its face because it publicly and falsely accuses a judicial colleague of corruption. Corruption is the ultimate judicial sin. It is a judicial capital offense. The JQC attaches a copy of its trial memorandum, which it incorporates herein. The trial memorandum outlines the fallaciousness of the concurring opinion on its face.

There is no precedent in Florida because this is apparently the first time in Florida history that an appellate judge has abused his opinion writing privilege by using it to perform a character assassination on a judicial colleague on a purportedly collegial court. The concurring opinion is biting, mean-spirited and malicious. Using innuendo and supposition, it accuses a fellow judge of corruption without supporting evidence.

The ultimate issue in this disciplinary matter is whether Judge Allen's "***motive or method*** does violence to the Canons of Judicial Ethics." *In Re Richard A. Kelly*, 238 So. 2d 565, 570 (Fla. 1970) (emphasis added). As to the ***method*** of criticism, publishing in the Southern Reporter a baseless charge of "payback" (i.e. a charge of corruption) on its face "does violence to the Canons of Judicial Ethics." *Id.* at 570, and *In Re Boyd* 308 So. 2d 13, 20 (Fla. 1975). *See* Canon 3D(1) and the commentary to the Canon (appropriate action would be reporting the violation to the appropriate authority).

A basic concept of American justice is that disputes are decided by

professional neutrals. The aim of the Code of Judicial Conduct is to foster that neutrality. This Court repeatedly has held that "the impartiality of the … judge must be beyond question." *In Re McMillan*, 797 So. 2d 560 (Fla. 2001). "This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. . . ." *Id.* at 571, quoting *State ex rel. Davis v. Parks*, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939). Judge Allen's concurring opinion is not a mere disagreement over a legal principle. It claims that Judge Kahn's role in the Childers appeal was dishonest and corrupt. It asserts that Judge Kahn was not neutral.

Publishing a concurring opinion that Judge Kahn cast his vote in an appeal to "pay back" someone for past favors does not comport with the command of Canon 2 that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." It is a grievous breach of the Canon.

The impropriety of Judge Allen's ***method*** is further illustrated by the following from *McMillan, supra*, at 572:

> When any person, and most especially a lawyer or judge, has reason to believe that public corruption exists at any level of government, that person is obligated to disclose such information to the appropriate authority without hesitation. *However, when charges are leveled without basis in fact, enormous harm is inflicted upon our public institutions by loss of confidence upon a public little equipped to sort out the valid from the invalid and*

campaign rhetoric from fact. [emphasis added]

While petitioner's ***method*** on its face does violence to the Canons, whether his ***motive*** "does violence to the Canons" presents an issue of disputed fact. The JQC has ample evidence that petitioner has for years harbored an intense, visceral dislike of his colleague, Judge Kahn; that petitioner's animosity rises to the level of personal hatred; and that he has acted against Judge Kahn out of personal animus. Petitioner, on the other hand, contends that his motives and actions were pure – so pure in his own mind that he had a right to burn down the First District Court of Appeal to save it.

Numerous factors bear on Judge Allen's motive. They include:

- No party asked Judge Kahn to recuse himself from the Childers appeal.
- The law concerning disqualification of appellate judges in Florida is established in *In Re: Estate of Carlton*, 378 So. 2d 1212, 1216-17 (Fla. 1979), which holds that each appellate judge or justice must determine for himself or herself both the legal sufficiency of a request seeking disqualification and the propriety of withdrawing in any particular circumstance. Recusal is left to the individual discretion and conscience of each judge or justice.
- There has never been any evidence of corruption, and Judge Allen admitted in his testimony before the JQC that he did not know whether the newspaper

articles he quoted at length in his concurring opinion were true.

- Judge Allen's professed concern – that the Childers decision was tainted by corruption – already was resolved when Judge Allen published his concurring opinion. The en banc court already had decided the case contrary to the three judge panel's initial unanimous decision in favor of Childers. So at the time of Judge Allen's public assertion of his colleague's corruption, there was no chance that the purported corruption would taint the court's decision.
- Numerous of Judge Allen's judicial colleagues have testified that Judge Allen harbors an intense personal dislike and animosity toward Judge Kahn that rises to the level of person hatred, and that Judge Allen's intense hostility toward Judge Kahn existed for several years before the Childers matter came to the Court.
- Judge Allen has regularly bad-mouthed Judge Kahn to his fellow judges, usually in profane terms.
- Even before Childers became an issue in the Court, Judge Allen organized opposition to electing Judge Kahn as Chief Judge, and then organized a campaign to have him removed as Chief Judge.
- Judge Allen spearheaded an effort personally to investigate Judge Kahn and put great pressure on the Office of State Court Administrator (OSCA) to

divulge records regarding Judge Kahn and even threatened the First DCA Marshal with his job if he told Judge Kahn (who was then the Marshal's boss) what Judge Allen was doing.

- Judge Allen denied, under oath, before the JQC that he had any personal animus toward Judge Kahn.
- This Court has held that the JQC, "as a constitutional body charged with the duty to investigate the state judiciary, has a right to expect absolute candor from the judges appearing before it." *In Re Davey*, 645 So. 2d 398, 405 (Fla. 1994).

Petitioner argues that all of the foregoing is of no import. Because petitioner's character assassination took the form of a concurring opinion, he claims that he is shielded from discipline. But there is no such thing as absolute immunity in our society. The doctrine of "judicial immunity" protects judges against suits for *money damages* for actions taken in a judicial capacity, as long as the actions were not taken "in a complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 9-12 (1991). But "judicial immunity" does not shield a judge from criminal liability, suits for injunctive relief, suits for attorneys fees authorized by statute or disciplinary proceedings. *See Cameron v. Seitz*, 38 F.3d 264, 276 (6th Cir. 1994) (when immunity bars a suit for money damages against a judge, there are other remedies for addressing alleged judicial misconduct, such as disciplinary

proceedings); *People v. Proffitt*, 865 P.2d 929, 932 (Colo. Ct. App. 1993) (although a judge's actions are insulated to some degree by judicial immunity, a judge's actions are subject to review by judicial oversight committees).

This Court has made it clear that a judge is simply not free to lash out critically at other people, particularly other judges. In *In Re Richard A. Kelly*, 238 So. 2d 565, 569-70 (Fla. 1970), this Court specifically dealt with a judge's criticism of other judges:

> Criticism is not neutral. When a judge sets himself up to criticize other judges, his criticism ultimately must be viewed as having been constructive or destructive in its impact. If he has been tempered and judicious, his criticism is likely to be, in its ultimate result, beneficial to the community which he serves – and it does not matter whether this constructive criticism is publicly or privately voiced. On the other hand, impetuous argument, or criticism taken by methods which prevent honest discussion and a fair rebuttal can be expected only to have a destructive result. No matter how bland or even wholesome the content, if the methods used raised suspicion of motives among the judges, and renders the courts all suspect to the public, the result can only be an increase in disrespect for law and order, an increase in lawlessness, a greater tendency among some of our citizens to let loose their tendencies to disorder.
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> * * *
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> Every man in public office hungers for public esteem, but no man has the right to buy this esteem with the stolen coin of other men's public reputations, not even a twice-elected member of the judiciary. (*Id.* at 573).

In *In Re Graham*, 620 So. 2d 1273 (Fla. 1993), this Court pointed out, among other things, that the alleged misconduct of others does not justify a judge's repeated departure from the guidelines established in the Code of Judicial Conduct; that a judge may not abuse judicial power to the detriment of individuals; that judges are required to make some sacrifices that other individuals are not called to make; and that a judge who refuses to recognize his own transgressions does not deserve the authority or command the respect necessary to judge the transgressions of others.

In *In Re Diaz*, 908 So. 2d 334, 337 (Fla. 2005), this Court noted that Canons 1 and 2 of the Code of Judicial Conduct may be construed to prohibit judges from making threatening or disparaging remarks about other judges. In *In Re Glickstein*, 620 So. 2d 1000 (Fla. 1993), this Court noted that "[n]either honest motives nor well-intentioned conduct . . . excuse less than strict compliance with the Code of Judicial Conduct." (*Id.* at 1002). This Court also noted that a judge's neutrality in everything he or she does is necessary to sustain the public's confidence in individual judges and in the judicial system as a whole. In *In Re Code of Judicial Conduct*, 603 So. 2d 494 (Fla. 1992), this Court ruled that judges should be held to even stricter ethical standards than attorneys; that judges must adhere to standards of probity and propriety higher than those deemed acceptable for others; and that

the Canons impose high standards and a heavy burden on those persons who accept judicial office. (*Id.* at 498-499).

In *In Re Schwartz*, 755 So. 2d 110 (Fla. 2000), Judge Alan Schwartz of the Third District Court of Appeal, notwithstanding numerous prior warnings to refrain from rude, impatient and discourteous remarks on the bench, orally abused a law professor and her intern students who were attempting to argue several criminal cases before the Third District. This Court administered a public reprimand. According to petitioner, if Judge Schwartz had delivered his abuse in a written opinion instead of orally he would have been immune from discipline.

The following cases from other jurisdictions include cases disciplining judges who criticize other judges. *E.g.*, *In Re Rome*, 542 P.2d 676, 685-686 (Kan. 1975); *In Re Mathesius*, 910 A.2d 594, 610-611 (N.J. 2006); *In Re Inquiry of Broadbelt*, 683 A.2d 543, 552 (N.J. 1996); *Broadman v. Commission on Judicial Performance*, 959 P.2d 715, 729 (Cal. 1998); *In Re Hill*, 8 S.W.3d 578, 583 (Mo. 2000); *In Re Barr*, 13 S.W.3d 525, 565 (Tex. Rev. Trib. 1998); and *Halleck v. Berliner*, 427 F.Supp. 1225, 1240-1241 (D.C.D.C. 1977).

Petitioner relies in part on *In the Matter of XYP*, 523 Pa. 411, 567 A.2d 1036 (1989). There, the Pennsylvania Judicial Inquiry and Review Board (JIRB) – the equivalent of Florida's JQC – declined to take any *formal* action against a judge who wrote a 62 page opinion and a supplemental 12 page opinion denying a

motion for recusal and lambasting defense counsel's conduct as insidious, malicious, unworthy, unprofessional, dishonest, unethical and the like. Although the JIRB declined to take *formal* action against the judge, it issued a letter of admonishment to the judge. The Supreme Court of Pennsylvania vacated the admonishment because the Court, rather than the JIRB, had the *exclusive* constitutional power to impose any sort of sanction on a judge. But the Court, while paying homage to the concept of judicial immunity, made the following clear (567 A.2d at 1039):

> Immunity is, of course, a solemn and sacred trust that should not be abused, and it is not to be regarded a license for the judiciary to engage in improprieties. *This Court will, in cases of flagrant and egregious abuse of this trust, initiate appropriate disciplinary proceedings.* [emphasis added]

Petitioner argues (Petition at 9-10) that the Montana Supreme Court in *State ex rel. Shea v. Judicial Standards Commission*, 198 Mont. 15, 643 P.2d 210 (1982) "rejected the only reported effort to sanction an appellate judge for his opinion …." The petitioner's analysis of *Shea* misses the mark.

The Montana Judicial Standards Commission (JSC) charged Justice Shea with failing to perform his share of the workload; with using his position as a Supreme Court Justice to intimidate some of his creditors; and with "conduct prejudicial to the administration of justice that brings the judicial office into disrespect." The JSC rejected the first two charges, but instituted proceedings

regarding the claim of "conduct prejudicial to the administration of justice that brings the judicial office into disrespect." The conduct charged involved a failure to pay approximately 60 parking tickets incurred over a period of a year and a half, and the use of "intemperate language" in a dissenting opinion. The "intemperate language" is quoted here in its entirety (643 P.2d at 213):

- "This court no more granted a fair review to defendant than the citizens of Pondera County could have given him a fair trial. The people of Montana can be well advised that there is no law in the State of Montana."

- "It is intellectual dishonesty for the majority not to recognize that the combination thereof is a radical departure from existing interpretations of constitutional law in this state * * * "

- "And this is not the only manner in which the opinion is rather slippery with the facts."

- "The dishonesty of the majority opinion is manifest * * * "

It is important to note what Justice Shea's "intemperate language" does not do. It does not accuse the majority of his colleagues of casting their votes to pay someone back for a favor. It does not accuse the majority of corruption or other form of venality. Instead, Justice Shea accused the majority of "intellectual dishonesty" when it radically departed from "existing interpretations of constitutional law in this state …." Charging someone with "intellectual dishonesty" by taking a view of the law different from Justice Shea is a far cry from charging someone with voting to decide a case with the corrupt motive of paying back for a past favor. Justice Shea disagreed in strong and "intemperate"

language with the majority's application of the law to the facts of that case. But Justice Shea did not cross the line and accuse his colleagues of corruption. That is a key distinction between the Montana case and the present case.

The devil is always in the details, and petitioner glosses over the details of the Montana case. The actual holding in *Shea* was two-fold:

- The Montana JSC proceeded against Justice Shea based on the JSC's Rule 9 which prohibited, among other things, "conduct prejudicial to the administration of justice that brings the judicial office into disrepute …." (643 P.2d at 215). The Montana Supreme Court concluded that Rule 9 of the JSC exceeded the constitutional power of the JSC because the Montana Constitution and statutes did not expressly give the Montana Supreme Court or the JSC power to censure, suspend or remove a justice for "conduct prejudicial to the administration of the justice that brings the judicial office into disrepute." The Montana Court noted that the only express constitutional basis for proceeding against Justice Shea was the constitutional prohibition of "willful misconduct in office." (*Id*. at 220-221). The Montana Supreme Court placed a narrow construction on "willful misconduct in office" that excluded "intemperate language."
- The second and simplest reason why the Montana Supreme Court found in favor of Justice Shea is that the complaint against him was not verified. The

lack of verification violated an existing statute and the JSC's own rule. Therefore, the Montana Supreme Court concluded that the proceeding was barred by that technicality. (643 P.2d at 223).

The *Shea* case is far from a sweeping pronouncement that petitioner can escape the strictures of the Code of Judicial Conduct by dressing up his character assassination in the form of a concurring opinion – a concurring opinion in an en banc proceeding that no other judge on the First District Court of Appeal was willing to join. Judicial immunity is not absolute. Petitioner crossed the line.

CONCLUSION

For the foregoing reasons, this Court should reject petitioner's effort to have this Court perform an interlocutory review of the merits of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. mail to Richard C. McFarlain, Esq., Carr Allison, 305 South Gadsden Street, Tallahassee, FL 32301; Guy Burnette, Jr., Esq., 3020 N. Shannon Lakes Drive, Tallahassee, FL 34309; Bruce S. Rogow, Esq., and Cynthia Gunther, Bruce S. Rogow, P.A., 500 East Broward Blvd., Suite 1930, Ft. Lauderdale, FL 33394; Sylvia Walbolt, Esq., Carlton Fields, P.A., P.O. Box 3239, Tampa, FL 33601; Hon. Paul Backman, Chairman, Hearing Panel, Broward County Courthouse, 201 S.E. 6th Street, Suite 5790, Ft. Lauderdale, FL 33301;

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