IN THE SUPREME COURT
OF FLORIDA

CASE NO. SC08-618

JUDGE MICHAEL E. ALLEN,

Petitioner,

v.

THE JUDICIAL QUALIFICATIONS COMMISSION,

Respondent.
_____/

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

INTRODUCTION

The JQC argues that: (1) this Court does not have jurisdiction to issue a writ to the JQC; (2) that if it does, it should not do so now; (3) that "Judge Allen's concurring opinion is, on its face, sanctionable irrespective of his reasons for writing the opinion" and that the opinion was motivated by "personal animus." Response, pp. 9-10, 12.

The JQC Response confirms that its inquiry improperly intrudes upon judicial independence and a writ should issue. No appellate opinion, on its face,

may be the subject of sanctions unless it contains crude, vulgar, racist or sexist language. No sanctioning body may search for the "reason" for a published opinion in order to sanction a judge. The late Chief Justice William Rehnquist's Symposium Remarks on "Judicial Independence" recounted the Senate's 1805 acquittal of Associate Justice Samuel Chase, saying:

> Nearly every act charged against him had been performed in the discharge of his official office . . . . [H]is acquittal] represented a judgment that impeachment should not be used to remove a judge for conduct in the performance of his official duties. The political precedent set by Chase's acquittal has governed that day to this: A judge's judicial acts may not serve as a basis for impeachment.

William H. Rehnquist. *Judicial Independence*, 38 U. Rich. L. Rev. 579, 588-89 (2004). That principle applies here. The JQC has overstepped its authority seeking to sanction Judge Allen for a judicial act and seeking to delve into his reasons for the judicial act.

JURISDICTION

No one disputes that the JQC is a separate constitutional body. But that does not mean that this Court has no authority to issue writs of quo warranto or a writ in aid of jurisdiction directed to the JQC.

The Article V, section 3(b)(4) language: "May issue . . . all writs necessary to the complete exercise of its jurisdiction," applies here because the Court has jurisdiction to review JQC actions, therefore the all writs provision is an "aid in the complete exercise of the original or the appellate jurisdiction of the Supreme Court . . . ." *Seaboard Airline R. Co. v. Gay*, 68 So. 2d 591, 594 (Fla. 1953).

The JQC seeks to distinguish *Turner v. Earle*, 295 So. 2d 609 (Fla. 1974), by saying that the Court "expressly based its jurisdiction to consider the requested relief [limiting the JQC's investigative power] on [it's] rulemaking authority. *Id.* at 611-12." Response, p. 7. But the JQC's extensive effort to distinguish *Turner v. Earle* (Response, pp. 6-7) proceeds from a flawed premise. While the Court's then applicable rulemaking authority *vis a vis* the JQC was invoked, the Court also relied upon its all writs jurisdiction, citing both the former Article V, section 12(c) rules provision "and Article V, 3(b)(4)" – all writs. *Turner*, 295 So. 2d at 611-12. Thus the Court *did not* expressly base its jurisdiction on rulemaking authority. Indeed, if that had been sufficient there would have been no need to resort to the all writs provision as a basis for jurisdiction.

The Court's authority to do more than simply receive recommendations from the JQC was confirmed in this case when, on February 21, 2008, it issued to the parties an Order to Show Cause "on or before March 7, 2008, why the records

regarding the Second Notice of Investigation should not be kept confidential pursuant to Article V, section 12(a) 4." The JQC did not assert a lack of jurisdiction to issue that Order, and it cannot advance a principled basis for precluding the all writs authority of this Court in this case.

Quo warranto is also a proper basis for relief. The JQC view of quo warranto is too narrow. It is *more than* "a means to challenge the power to hold office. . . ." Response, p. 3. The JQC recognizes the Court has utilized quo warranto "to test the authority of the Governor" (and other constitutional officers) (*id*. at 4), and this case is no different. Judge Allen does not challenge the general power of the JQC to investigate and prosecute; he questions only the authority of the JQC to investigate and prosecute the reason for a written appellate opinion. Thus the use of quo warranto here is to question the specific use of a power. Since "[t]esting the governor's power to call special sessions through quo warranto proceedings is . . . appropriate" (*Martinez v. Martinez*, 545 So. 2d 1338, 1339 (Fla. 1989)), then testing the JQC's power to investigate and prosecute the reason for an appellate opinion *via* quo warranto is also appropriate.

This Court has jurisdiction and the authority to act. Recognizing that possibility, the JQC asks that the Court let the process proceed, saying Judge Allen can make "these exact arguments when this Court receives and considers the JQC

hearing panel's recommendation in this matter." Response, p. 8.

That suggestion misses the point of the Petition. A multi-day parade of judges and court officials, and the e-mail exchanges among judges, all seeking to divine the reason an appellate judge may have written an opinion and the interpersonal relations of the judges and administrative staff of an appellate court, is unprecedented and will have a chilling effect on collegial decision making and decision writing. Deferring consideration of the issue presented by the Petition would permit an intrusion upon fundamental principles of judicial independence and an unauthorized incursion into the judicial process. No public policy can be served by a trial in this case. That the outcome may be favorable to Judge Allen is not relevant because the question is whether there should be a trial in the first place.

THE LAW

There is no merit to the JQC submission on "the merits," but more importantly, its diatribe and infantile assertions ("Judge Allen has regularly bad-mouthed Judge Kahn. . . .") (Response, p. 13), unintentionally proves why "motive" should not be the subject of a trial. The JQC bullet points, the false claim that the opinion asserted "corruption" (Response, pp. 10, 11, 12, 13), the hyperbole ("judicial capital offense," "burn down the First District Court of Appeal") (*id*. at

10, 12), and the inapposite authorities, show the JQC's insensitivity to the institutional damage that will be caused by trying to determine the reason for an appellate opinion.

We turn to the offered cases to demonstrate how far off base they are.

We were prescient in anticipating the JQC would rely on *In re Richard A. Kelly*, 238 So. 2d 565 (Fla. 1970) and *In re Graham*, 620 So. 2d 1273 (Fla. 1993). *See* Petition, pp. 12-13. But Michael Allen is no Richard Kelly, and Judge Allen's opinion cannot be equated with Judge Kelly's continuous campaign against lawyers and judges. Nor does *Graham* support an inquiry into the reasons for an appellate opinion. None of the cases cited by the JQC support its inquiry into a judge's thought process in order to try to find the reason for a published opinion.

Judge Diaz threatened a fellow judge in an anonymous e-mail. *In re Diaz*, 908 So. 2d 334 (Fla. 2005). Judge Glickstein publicly supported a Supreme Court Justice's retention. *In re Glickstein*, 620 So. 2d 1000 (Fla. 1993). Judge Schwartz berated a law professor and law student in an oral argument. *In re Schwartz*, 755 So. 2d 110 (Fla. 2000). So the Florida cases offer no support to the JQC. Nor do the out of state cases cited by the JQC. None of them involved discipline for a published appellate opinion.[1] The dearth of case support for the JQC's argument,

[1] *In the Matter of Mathesius*, 910 A.2d 594 (N.J. 2006) involved a judge who was critical of the jury from the bench and later in the jury room and was insulting

and denigrating of the jurors' service. *In re Broadbelt*, 683 A.2d 543 (N.J. 1996) involved a sitting municipal judge who appeared on television numerous times to comment on cases pending in other jurisdictions. *Broadman v. Commission on Judicial Performance*, 959 P.2d 715 (Cal. 1998) involved a judge who (1) induced a criminal defendant and his counsel to waive the time for sentencing for several months without telling the defendant's counsel that he intended to deprive the defendant of medical treatment, (2) attempted to influence the outcome of a civil action against an attorney while it was pending before another superior court judge, and (3) publicly commented on two pending cases. *In re Hill*, 8 S.W. 3d 578 (Mo. 2000) involved a judge using the prestige of his office to advance a private interest by writing an "open letter" to the newspaper criticizing a mayor and praising a

and its inapposite authorities, lends added support for granting the relief sought. Sometimes the strength of an argument can be measured by the lengths one goes to make it. Here the JQC is short on the law, reflecting the weakness of its

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police chief, urging citizens to support the chief. *In re Barr*, 13 S.W. 3d 525 (D.C. Tex. 1998) involved a judge making inappropriate sexual remarks and comments from the bench to women under his supervision, and issuing an unauthorized writ of attachment against a deputy and ordering his confinement. *Halleck v. Berliner*, 427 F.Supp. 1225, 1239 (D.C. 1977) held that the First Amendment does not apply to "statements" made by a judge.

In re Rome, 542 P.2d 676 (Kan. 1975) involved a magistrate's gratuitous poem following an order of probation – a poem that ridiculed the defendant prostitute ("The State of Kansas tried this young whore") and ended with this stanza: "From her ancient profession she'd been busted, and to society's rules she must be adjusted. If from all of this a moral doth unfurl, It is that Pimps do not protect the working girl!" *Id.* at 680-81. Offering *In re Rome* as its *lead case* for the proposition that "[t]he following cases from other jurisdictions include cases disciplining judges who criticize other judges" (Response, p. 17) bespeaks a dearth of both legal and literary acumen.

arguments.

Finally, the JQC's attempts to minimize the Pennsylvania and Montana Supreme Courts' endorsements of judicial independence (Response, pp. 17-21) confirm that there is no merit in the JQC's submission. The JQC says that Montana Supreme Court Justice Shea's harsh written opinion accusations of the "intellectual dishonesty" of his colleagues "did not cross the line and accuse his colleagues of corruption." Response, pp. 19-20. First, Judge Allen never accused Judge Kahn of "corruption." That the JQC repeatedly sees "corruption" in an opinion that neither states it nor implies it, is a matter for psychoanalysis, not legal analysis. Second, no parsing of the procedural aspects of *In the Matter of XYP*, 523 Pa. 411, 567 A.2d 1036 (Pa. 1989), or *State ex rel Shea v. Judicial Standards Commission*, 643 P.2d 210 (Mont. 1982), can escape the central themes of each case: that the decisional process of a judicial opinion must not be the subject of inquiry by a sanctioning body.

CONCLUSION

We come full circle to the lesson of the failed Samuel Chase case: "a judge's judicial acts may not serve as a basis for impeachment." William H. Rehnquist, *Judicial Independence*, 38 U.Rich.L.Rev. *supra* at 589. Perhaps that is the reason why none of the judges on the First District Court of Appeal (or any other Florida

judge) complained of the concurring opinion. *See* Petition, pp. 17-18. The JQC's Response offered no comment on that fact. It's silence on that point makes our point: the JQC should not be permitted to inquire into the reason for an appellate judge's published opinion and this Court should exercise its authority to preclude that inquiry.

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