BEFORE THE INVESTIGATIVE PANEL OF THE
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE NO. 09-48 and 08-162
RE: JUDGE ANA GARDINER

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NOTICE OF FORMAL CHARGES

TO: Honorable Ana Gardiner
Circuit Judge, 17th Circuit
Broward County Courthouse, Room 4910
201 S.E. Sixth Street
Ft. Lauderdale, FL 33301

YOU ARE HEREBY NOTIFIED that the Investigative Panel of the Florida Judicial Qualifications Commission, by the requisite vote, has determined, pursuant to Rule 6(f) of the Rules of the Florida Judicial Qualifications Commission, as revised, and Article V, § 12(b) of the Constitution of the State of Florida, that probable cause exists for formal proceedings to be, and the same are, hereby instituted against you to inquire into charges based on allegations that you violated Canons 1, 2A, 3B(7), 5A(1), 5A(2) and 5A(3) of the Code of Judicial Conduct, to wit:

1. You were the presiding Judge in the case of *State v. Loureiro*, Broward County Circuit Court, Case No. 04-15633-CF. *Loureiro* was a first degree murder trial which commenced on March 19, 2007, before a jury. The chief prosecuting attorney was Howard Scheinberg.

2. On March 23, 2007, you were at a dinner at Timpano's Chop House and Martini Bar on Las Olas Blvd. in Ft. Lauderdale, Florida. On that date, the *Loureiro* trial was ongoing, and the guilt phase of the trial was not concluded until March 27, 2007, when the jury returned a verdict finding Mr. Loureiro guilty of first degree murder. While present at Timpano's in the company of Judge Charles Kaplan (now deceased), Assistant State Attorney Howard Scheinberg, Sheila Alu, Luciana Caligari and Patricia Ybars, you participated along with Mr. Scheinberg in a discussion of the pending Loureiro murder trial, which discussion touched on, among other things, gory photographs admitted into evidence, the fainting of a juror and other matters relating to the trial. You have testified under oath that you did not participate in such a discussion of the Loureiro case.

3. After the meal at Timpano's was concluded, you, Mr. Scheinberg and others, continued the evening at the Blue Martini, another night spot in Ft. Lauderdale.

4. Almost immediately following the evening of March 23, 2007, you and Mr. Scheinberg began a close personal relationship in which Mr. Scheinberg became your friend and confidant, and you had frequent communications with him.

5. On March 27, 2007, the jury found Mr. Loureiro guilty of first degree murder.

6. The penalty phase of the Loureiro trial occurred on April 30 and May 1, 2007, a little over a month after the jury returned the guilty verdict. At the conclusion of the penalty phase, the jury brought in a recommendation of death

for Mr. Loureiro. Mr. Scheinberg was the chief prosecutor at the penalty phase of the trial.

7. On August 24, 2007, you followed the jury's recommendation and sentenced Mr. Loureiro to death. Mr. Scheinberg was the chief prosecutor at the sentencing.

8. During the period between March 23, 2007, when you began your close personal relationship with Mr. Scheinberg, and August 24, 2007, the date you imposed the death penalty on Mr. Loureiro, your phone records reveal, and you do not dispute, that you had 949 telephone calls with Mr. Scheinberg and 471 text messages, for a total of 1,450 separate communications over a period of 155 calendar days. That averages 9.35 communications per day between you and Mr. Scheinberg, 7 days a week.

9. On April 30 and May 1, 2007, during the penalty phase of the trial, you had a total of 12 communications with Mr. Scheinberg, including 10 telephone and 2 text messages.

10. On August 23-25, 2007, which included the date before, the date of and the date after the sentencing, you had 19 telephone conversations and 25 text messages with Mr. Scheinberg, for a total of 44 communications on those three days.

11. You did not reveal your close personal relationship with Mr. Scheinberg to Mr. Loureiro's defense counsel, Michael Tenzer, who has indicated that such a disclosure to him would have caused him to move to recuse

you as the judge on the Loureiro case and who would have also moved for a mistrial.

12. On April 30, 2009, pursuant to the Florida Supreme Court's relinquishment of jurisdiction of the Loureiro appeal for discovery regarding your relationship with Mr. Scheinberg, you and Mr. Scheinberg both testified in deposition about the nature and extent of your relationship during the Loureiro murder trial.

13. As a result of that testimony, and to protect the integrity of the judicial process, the Broward County State Attorney recommended that Mr. Loureiro's murder conviction be vacated. The murder conviction was vacated, and Mr. Loureiro must now be tried a second time for murder.

14. Your relationship with Mr. Scheinberg continued beyond the sentencing date of Mr. Loureiro. For example, during the period March 31, 2008, through the end of August, 2008, you had 1,166 telephone calls with Mr. Scheinberg and 2,222 text messages, for a total number of communications of 3,388. During that 154 day period, you averaged 22 communications per day with Mr. Scheinberg, which is almost one communication per hour for each 24 hour day.

15. On November 13, 2008, you appeared before the Hearing Panel of the Judicial Qualifications Commission pursuant to a formal notice of investigation, a copy of which is attached as Exhibit A.

16. The subject of that notice of investigation and of the investigative panel questioning of you on November 13, 2008, was the evening of March 23,

2007, at Timpano's, and your discussions with and relationship to Mr. Scheinberg.

17. At that meeting, a Panel member asked you: "Could you explain the relationship with Howard Scheinberg since 1987?" This question called for an explanation of your relationship with Mr. Scheinberg from 1987 to the date the question was asked, November 13, 2008. Your answer to the question made no mention of your close personal relationship and the high volume of telephone communications and text messages between you and Mr. Scheinberg after March 23, 2007. Your answer was therefore misleading and demonstrates a lack of candor toward the Commission.

18. The same Panel member asked this follow-up question: "Again, just to clarify, my understanding is that you - - during the time your were a judge and he was a prosecutor, you did not have any kind of social relationship with Howard Scheinberg?" And your answer was: "If I saw him maybe at one retirement - - they gave they give plaquings [sic] to the younger prosecutors when they leave after three years. He could have been at a plaquing [sic] where the attorneys and the judges go. But I don't ever remember even sitting with him and socializing." This was a misleading answer because it failed to reveal the personal relationship and the thousands of calls and text messages between you and Mr. Scheinberg between March 23, 2007, and the date of the November 13, 2008, hearing before the Investigative Panel. Your answer demonstrates a lack of candor toward the Commission.

19. These acts violated Canons 1, 2A, 3B(7), 5A(1), 5A(2) and 5A(3) of the Code of Judicial Conduct and the oath you took before testifying before the Investigative Panel.

20. These acts, if they occurred as alleged, would impair the confidence of the citizens of this State and the integrity of the judicial system and in you as a judge; would constitute a violation of the Canons of the Code of Judicial Conduct; would constitute conduct unbecoming a member of the judiciary; would demonstrate your unfitness to hold the office of judge; and would warrant discipline, including, but not limited to, your removal from office and/or any other appropriate discipline recommended by the Florida Judicial Qualifications Commission.

You are hereby notified of your right to file a written answer to the above charges made against you within twenty (20) days of service of this notice upon you.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Formal Charges was furnished to William R. Scherer, Esq., Counsel to the Respondent, Conrad and Scherer, LLP, 633 S. Federal Highway, Fort Lauderdale, FL 33301, by U.S. Mail this _____ day of March, 2010.

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Brooke S. Kennerly Executive Director
Florida Judicial Qualifications Commission