

**BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION**

INQUIRY CONCERNING A JUDGE
NO.14-488

CASE NO. : SC15-1746
RE : KIM SHEPARD

MOTION IN LIMINE
TO DISMISS ALL ALLEGED VIOLATIONS OF
CANON 1 AND CANON 2 OF THE CODE OF JUDICIAL
CONDUCT

COMES NOW, the Respondent, by and through her undersigned attorney, and respectfully moves in limine to dismiss all charges asserting that any of the conduct set forth in the Amended Notice of Formal Charge, violated Canon 1 or Canon 2A, of the Code of Judicial Conduct, and in support thereof would show :

1. The alleged conduct, supposedly violative these Canons, is specifically set forth in the Amended Notice Of Formal Charge. That conduct, as set forth, refers only to the appearance of four particular sentences regarding the respondent's character and integrity, directly quoted and properly attributed to the entity that authored them, which appeared on a single postcard distributed while the Respondent was a *candidate for judicial office*.
2. There are no allegations contained in the Amended Notice Of Formal Charge related to the Respondent's conduct while serving as a *judge*.
3. The only alleged conduct contained in the Amended Notice Of Formal Charge relates to actions supposedly taken while the Respondent was a *candidate* for judicial office.
4. The allegations in Amended Notice Of Formal Charge do not relate to, or even implicate any conduct *as a judge*.
5. The express terms of Canons 1, 2A, the preamble to the Code Of Judicial Conduct, as well as the decisional precedents of the J.Q.C. itself, make it unmistakably clear that these two Canons apply exclusively to *judges* – not *candidates for judicial office*.

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6. While these Canons are often and wrongly charged when, in fact, there are no allegations of misconduct while being a judge, to support them, the Florida Supreme Court has been absolutely clear as to the inapplicability of Canons 1 and 2 to alleged conduct engaged in by non-incumbent judicial candidates.
7. In *In re Kinsey*, 842 So. 2d 77, **85** (Fla. 2003), the Florida Supreme Court squarely addressed this issue and determined that Canons 1, 2, and 3 of Code of Judicial Conduct **do not apply** to judicial candidates.
8. In *In re Kinsey*, the majority opinion, of the Florida Supreme Court made their position clear :

“As an initial assertion, Judge Kinsey posits that she should not be found guilty of violating Canon 1, Canon 2A, Canon 3B(5), and Canon 3B(9) **because Canon 7 is the only Canon applicable to the charges. We agree.**” *In re Kinsey*, 842 So. 2d 77, **85** (Fla. 2003) (Emphasis supplied).
9. The majority of the Florida Supreme Court, which included six of the seven justices then sitting, went on to make their holding explicit and unequivocal, saying :

“Canons 1, 2, and 3, however, are directed only to a judge and hence **cannot** constitute an independent violation as to a judicial candidate who is not yet a judge.” *In re Kinsey*, 842 So. 2d 77, **85** (Fla. 2003) (Emphasis supplied).
10. No subsequent decision of the Florida Supreme Court or amendment to the Code of Judicial Conduct has overturned, modified, or limited Kinsey’s holding on this point.¹
8. Additionally, hearing panels of the J.Q.C. have repeatedly made this point clear to J.Q.C. prosecutors by granting motions to dismiss on the basis of the authority of *In re Kinsey*, 842 So. 2d 77, **85** (Fla. 2003). See : *In re Decker* (Filing #14598430 S. CT. Case Number SC14-383 2014) (The Honorable Krista Marks, Chair).
9. Nonetheless, these Canons are repeatedly charged by the J.Q.C., in direct contravention of its own standards, ethics, rules, and precedents without any allegation to support their inclusion in a Notice Of Formal Charge directed to alleged conduct supposedly engaged in while a respondent was simply a *candidate* for judicial office.

10. Because all pleadings become public with the filing of a Notice Of Formal Charge against a successful judicial candidate, who then *becomes* a duly elected, sitting judge, and because any such filing predictably garners the acute and widespread attention of the press, inclusion of these canons in a Notice Of Formal Charge when there are **no** allegations of judicial misconduct occurring while actually serving on the bench, is contrary to and undermines the very objective the Canons set out to achieve, namely, public respect for the judiciary.
11. Such wrongful inclusion, unjustifiably and irreversibly damages the reputation of the judiciary in general, and of the targeted judge in particular.
12. Routinely and indiscriminately charging violations of judicial canons that clearly **do not apply** to campaign conduct in general, and more importantly, clearly **do not apply** to the specific campaign conduct alleged, not only diminishes the newly and duly elected judge's stature in the community and authority on the bench at the crucial moment the new judge steps into office, but such a practice has the effect, of undermining that judge's ongoing effectiveness by immediately crippling them in the assumption and performance of their constitutional duties.
13. When such an approach is indulged or tolerated by the JQC, such a practice has the effect, in and of itself, of annihilating the very "*integrity and independence of the judiciary*" the JQC is ostensibly charged with safeguarding and of eviscerating, rather than promoting "*public confidence in the integrity and impartiality of the judiciary*". It also has a very real and definitive chilling effect on the First Amendment rights retained even by candidates for judicial office.
14. Further, such a practice has the additional effect of undermining and deflating a newly elected, wrongly charged judge's confidence in the very system of justice and those administering it, that *that judge was herself* was elected to uphold.
15. Beyond the personal, professional and public damage caused to the judiciary and the individual judge, and perhaps most importantly, wrongly charging violations of Canons that clearly **do not apply**, has the effect of diminishing the stature of **the court** before litigants with pending cases in front of the wrongly charged, duly elected, judge. This is the very consequence the Canons themselves seek to avoid.

16. Prosecutors, including those acting on behalf of the J.Q.C. are under a special duty to “***refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause***” Rule 4-3.8 (a) Rules Regulating The Florida Bar. The same logic would apply to disciplinary prosecutions by the J.Q.C. that exercise the full and awesome power of the Florida Supreme Court against a duly and constitutionally elected judge. Even more so, since allowing such unfounded charges to be brought against a duly qualified, constitutionally elected judge would have the effect of undermining and compromising the constitutional rights and choice of the voting public.
17. There can be no probable cause to charge a violation of a canon of judicial conduct which the Florida Supreme Court has already squarely held does not apply to the campaign conduct of non-incumbent candidates for judicial office. This is especially true, where a JQC prosecutor was of record in cases where the precedent established by The Florida Supreme Court was applied by the JQC.
18. Surely such a habit cannot bolster “public confidence in the system of justice” we all subscribe to.
19. In its reply to the Respondent’s Answer and Affirmative Defenses, which requested that Canons 1 and 2 be stricken from the Notice Of Formal Charges, counsel for the JQC quoted the **lone dissent** in *In Re : Kinsey* as authority for his charging decision.
20. The **majority of the Kinsey court, however** on the express point addressed by this motion, **included six of the seven members** of the Florida Supreme Court.
21. Next, counsel for the JQC, tried to imply that the **dissent** he referenced, had “*won the day*” and was now the law of Florida : “*because in the intervening years since the Kinsey case was decided, the same Court has accepted formal charges and dispensed discipline against first-time judicial candidates who were charged with violating Canons 1 and 2.*” Counsel for the JQC then cited *In re: Krause, 141 So. 3d 1197 (Fla. 2014)*, in support of his representation to the hearing panel.

22. Counsel for the JQC then went on to cite yet another case : *In re: Griffin*, 167 So. 3d 450 (Fla. 2015) as additional support for the proposition that the Florida Supreme Court had receded from its earlier MAJORITY holding in the *Kinsey* case, and that *Kinsey* was no longer authoritative and good law.
23. Counsel for the JQC then proclaimed that “*the Florida Supreme Court [had] shifted its view of how Canons 1 through 6 apply to judicial candidates*” and finally “*submit[ted] to the Hearing Panel that the legal landscape has shifted in the twelve years since the Kinsey decision, and that recent cases... demonstrate that the judiciary has adopted Justice Lewis’ view*”.
24. What counsel for the JQC did not disclose to the hearing panel about either the *In re: Krause* or *In re: Griffin* decisions, however, was the material fact that BOTH decisions were taken up by the Florida Supreme Court only **after** the accused judges in those cases entered into early STIPULATIONS in the investigative panel phase of the proceedings before the JQC, admitting to all the violations alleged by the JQC, even those erroneously charged
25. Generally, those stipulations were admissions to the certain conduct alleged by the JQC without close examination as to the particular applicability of the specific canons charged to the conduct alleged.
26. The Florida Supreme Court merely accepted the agreed stipulations of the parties. Where parties by stipulation prescribe issues on which case is to be tried, parties are estopped from thereafter asserting that case was submitted on wrong theory. *Esch v. Forster* 123 Fla. 905 (Fla.1936) When a case is tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and appellate courts, and no other or different facts will be presumed to exist. *Troup v. Bird* 53 So.2d 717 (Fla. 1951). *Green v. Life and Health Of America* 704 So.2d 1386 (Fla. 1998).
27. In fact, undersigned counsel has not come across any case by the Florida Supreme Court decided since *Kinsey*, in which “*the same Court has accepted formal charges and dispensed discipline against first-time judicial candidates who were charged with violating Canons 1 and 2*” for campaign conduct, that was NOT founded on a stipulation by the accused judge.¹

28. In addition, there has been no change to the Canons Of Judicial Conduct themselves in the thirteen years since Kinsey was decided, that codified or attempted to codify Justice Lewis' dissenting opinion in that case, much less "*demonstrate that the judiciary has adopted Justice Lewis' view*".
29. Rule 4-3.3(1)(3) of the Rules Regulating the Florida Bar addresses the candor required by lawyers in front of tribunals, and requires lawyers to disclose contrary law or facts that the lawyer knows or should know of. It seems reasonable to request that counsel for the JQC be held to at least the same level of candor the JQC demands of counsel for an accused judge or judge in proceedings before the hearing panel.
30. Accordingly, the practice of routinely charging successful, non-incumbent judicial candidates with violations of those judicial canons that counsel for the J.Q.C. knows or should know expressly **do not apply** to the supposed campaign conduct alleged to be improper in the Notice of Formal Charges should not be condoned, permitted or allowed to continue.

WHEREFORE, in light of the foregoing, all reference to any alleged violations of Canons 1 and Canon 2A, set forth in the Amended Notice Of Formal Charge should be stricken from the pleadings and dismissed against the respondent.

¹ See : Roberts v. Brown, 43 So. 3d 673, 683 (Fla. 2010) ("Had we intended to overrule our prior declaration... we would have done so in a more definite and express manner than the aforementioned language...."); Willis v. Gami Golden Glades, LLC, 967 So. 2d 846, 875 (Fla. 2007) ("[W]e do not recede from our cases *sub silentio*."); Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002) ("We take this opportunity to expressly state that this Court does not intentionally overrule itself *sub silentio*.").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished in open court to the following this 19th day of April, 2016:

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