

**BEFORE THE HEARING PANEL OF THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA**

INQUIRY CONCERNING A JUDGE,
HON. KIM SHEPARD,
No. 14-488 _____ /

SC15-1746

**JUDGE SHEPARD'S
RESPONSE TO THE ORDER TO SHOW CAUSE**

FACTUAL BACK GROUND

On August 26th, 2014, Judge Shepard was elected to the position of Circuit Court Judge for the Ninth Judicial Circuit covering Orange and Osceola counties in Florida. She defeated incumbent Child Support Hearing Officer, Norberto Katz, by margins of roughly 60% to 40% in Orange county and 63% to 37% in Osceola county. Mr. Katz had previously been suspended from the practice of law by the Florida Supreme Court for ethics violations and misconduct including, specifically : engaging in conduct which [was] unlawful, and contrary to honesty and justice, making a false statement of material fact or law to a third person, knowingly making a false statement of fact in the course of a disciplinary matter and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. (**Record:** Notice Of Formal Charge, September 24th, 2015, Amended Notice Of Formal Charge January 8th, 2016, **JQC Exhibit 10**, The Florida Bar v. Norberto Katz Case No. 83,857) Judge Shepard entered the race on May 2nd 2014, approximately 2 hours before qualifying closed. (**JQC Hearing Panel Findings And Recommendations** p.6 pp.1)

RECEIVED, 07/31/2016 10:48:29 PM, Clerk, Supreme Court

The election was held on August 26th, 2014. Immediately following the election, a complaint was filed with the JQC, alleging an assortment of campaign misconduct in violation of the Code Of Judicial Conduct. After review by the JQC's Investigative Panel, however, all alleged campaign violations were **dismissed**, except one. The JQC then initiated these proceedings alleging that candidate Shepard's use of four **true** statements regarding Ms. Shepard's earned and established reputation for **character** and **integrity** was improper.

During the election, for over two months of a three month 26 day campaign, candidate Shepard circulated as her exclusive campaign material, a **full reproduction** of an article authored and published by the Orlando Sentinel titled "Shepard, with Enthusiasm" which not only provided evidence of candidate Shepard's prior public service and work as a legislator **but also** contained effusive and laudatory comments on Ms. Shepard's earned and established reputation for the inherent and abiding qualities of **character** and **integrity**. (**JQC Exhibit 12**) (**T.T.** The reproduced article was stamped with the appropriate campaign disclaimer and any reference to party affiliation was redacted as required. (**JQC Exhibit 12**) In the dead center of that article, in a large graphic were the words "**VOTE '94**" and "**House District 36**", in large, bold face type. (**JQC Exhibit 12**).

In addition, candidate Shepard circulated two campaign postcards in support of her candidacy. The first was titled "Life Of Service" and this postcard was a survey and visual collage that presented a representative sample of Ms. Shepard's life and work experiences, judicial philosophy, and qualities of character. (**JQC Exhibit 9**) It introduced candidate Shepard to the public, provided a rationale for her candidacy and highlighted her philosophy, reputation, and broad work experience amassed over the course of her lifetime. (**T.T. p.52 lns.5-11**) (**JQC Exhibit 9**).

It included, for example, a childhood photograph and a picture of Ms. Shepard's parents along with references to her former work as a child abuse investigator, emergency medical technician, prosecutor, and business focused attorney, among other things. (JQC Exhibit 9) Prominently displayed on that postcard, directly under the title, "Life Of Service" was the rationale and justification for her candidacy : "Kim Shepard has spent her entire life serving others and building a **reputation for integrity, independence, honesty, diligence, service, competence and compassion...**" (JQC Exhibit 9).

The postcard offered a statement of philosophy and included relevant work experience, evidence of service and the enduring qualities of character upon which candidate Shepard's candidacy rested. (JQC Exhibit 9) Due to space limitations, it did not, and could not, include all of candidate Shepard's life and work experience or accomplishments. Nor, could it reproduce in its entirety, the Orlando Sentinel article titled "Shepard, with enthusiasm".

Included on the "Life Of Service" postcard was a graphic depiction of a portion of the previously, fully reproduced Orlando Sentinel article. (JQC Exhibit 9) The graphic depiction looked like a folded copy of a newspaper, it reproduced the title "Shepard, with enthusiasm" and used a font and layout suggestive of a newspaper masthead. (JQC Exhibit 9) Because that particular graphic depiction resembled the actual newspaper article and described public service of a particular nature and limited duration, it included both the date "Election 1994" and several references to Ms. Shepard's public service as a legislator. (JQC Exhibit 9)

Notably, the graphic depiction did not include or reproduce the word "ENDORSEMENT" which was displayed in all capital letters in the dead center of the original article. (JQC Exhibit 9) It did not include the word "endorsement", because the intent was not to convey that Ms. Shepard had previously been "endorsed" at some time during her "life of service", but rather, to use a graphic depiction of the article on that postcard to illustrate Ms. Shepard's prior

performance in public office, her approach to public service, and her earned reputation for character and integrity. It was also used to provide evidence of that service, performance, and reputation. The graphic depiction did not imply an official candidate endorsement in the instant judicial race by the Orlando Sentinel. (JQC Exhibit 9) It was included to illustrate, in a visually interesting way, the **facts** that Ms. Shepard had served in public office, in a specific role, at a particular time in her life, how she had performed in that role, and **also**, that she possessed a recognized reputation for character and integrity. (JQC Exhibit 9).

The graphic depiction of the specific, titled article on the “Life Of Service” postcard, illustrated and provided evidence of the candidate’s prior public service, and work as legislator and placed the specific reference to public service and legislative work in context relative to a lifetime of other work and service. (JQC Exhibit 9) The graphic depiction also contained some, but not all, of the laudatory comments regarding Ms. Shepard’s enduring qualities of character and abiding reputation for integrity included in the previously, fully reproduced Orlando Sentinel article.(JQC Exhibit 12 and 9) The “Life Of Service” postcard was circulated to a large, master group of registered voters in Orange and Osceola counties. (T.T. p.50 ln.11- p.51 ln.6).

The second postcard, titled “Proven Integrity” (JQC Exhibit 10) was circulated to a much smaller subset of the same group of registered voters who had already received the “Life Of Service” postcard. (T.T. p.50 ln.11- p.51 ln.6) Unlike the “Life Of Service” postcard which introduced Ms. Shepard’s broad work history, previous public service, and philosophy, the “Proven Integrity” postcard, was designed to emphasize the fundamental rationale for Ms. Shepard’s candidacy : that she had a recognized **reputation for integrity, independence, honesty, diligence, service, competence and compassion** and to contrast that reputation with the reputation that had been earned by her opponent. (T.T. p.52 lns.11-13).

On the front of the “Proven Integrity” postcard, directly adjacent to a panel displaying the words “Proven Integrity” was a small section containing four **true** statements regarding Ms.

Shepard’s character and integrity. Those statements were :

“Ms. Shepard has done well.
She has worked hard.
She has kept her promises.
She has maintained her integrity.”

Underneath those four **true** statements, was a hyphen followed by an attribution :

-The Orlando Sentinel

The JQC challenged this specific portion of the “Proven Integrity” postcard, which was narrowly focused on a side-by-side contrast between the candidates’ respective and established reputations for the **abiding qualities of character and integrity**, and the instant proceedings ensued. (**Record:** JQC Amended Notice Of Formal Charge January 8th, 2016) (**JQC Exhibit 10**) (**T.T.** p.24 ln.19-20).

PROCEEDURAL BACKGROUND

On, January 12th, 2015, the JQC served a notice of investigation on Judge Shepard regarding the conduct of the campaign. On September 24th, 2015, eight months later, the Investigative panel of the JQC, through counsel, Alex Williams, issued a Notice Of Formal Charge, against Judge Shepard alleging a **single** transgression : that the four **true**, accurately attributed statements regarding Ms. Shepard’s **character and reputation for integrity** contained in the “Proven Integrity” postcard were a “mendacious” attempt to “knowingly misrepresent” that she had obtained the official candidate endorsement of the Orlando Sentinel in the instant judicial race. (**Record:** Notice Of Formal Charge, September 24th, 2015, Amended Notice Of Formal Charge, January 8th, 2016).

The Notice Of Formal Charge set forth a series of Canons allegedly violated by the described conduct, including Canon 1, Canon 2(A), Canon 7(A)(3)(b), Canon 7(A)(3)(c), Canon 7(A)(3)(d), and Canon 7(A)(3)(e)(ii). (**Record:** Notice Of Formal Charge, September 24th, 2015, Amended Notice Of Formal Charge, January 8th, 2016) Violation of all of these Canons were charged, despite the fact that, even after more than eight months of investigation, there were **absolutely no allegations** of **any** conduct that occurred after Judge Shepard had assumed office, **nor any allegations that anyone**, other than candidate Shepard, was responsible for the conduct set forth in the Notice Of Formal Charge. (**Record:** Notice Of Formal Charge, September 24th, 2015, Amended Notice Of Formal Charge, January 8th, 2016, **JQC Hearing Panel Findings And Recommendations**, p.20 lns.11-14) Still, because violations of these clearly inapplicable Canons were charged, Judge Shepard has had to defend against them throughout these proceedings.

On October 12th, 2015, counsel for Judge Shepard moved to extend the time to respond to the Notice Of Formal Charge by responsive motion or pleading.

No order was ever entered by the JQC on the Motion To Extend Time or establishing a new date to file a responsive pleading.

Instead, on October 20th, 2015, an order setting a status conference for November 10th at 1:00 pm was issued by the Chair of the Hearing Panel.

On November 10th, the Hearing Panel Chair continued the status conference until November 16th at 1:30, filing a written order reflecting her ruling on November 12th, 2015.

On November 17th, 2015, the respondent, through counsel filed a written demand for discovery, a motion for more definite statement, and a motion to strike, as well as a request for hearing on the two motions. Also on November 17th, the Hearing Panel Chair denied respondent counsel's request for hearing on the motion to strike and for more definite statement.

On the same day, the Hearing Panel Chair finally issued an “Order On Pending Motions” granting the respondent’s motion to extend time and ordering the respondent to serve her answer to the formal charges on or before November 24th, 2015.

Also on November 17th, 2015, the Hearing Panel Chair issued an order setting the final evidentiary hearing on the pending charge for February 3rd, 2016.

On November 24th, 2015, the JQC, through counsel Alex Williams, responded to Judge Shepard’s Motion For More Definite Statement, refusing to state with specificity what particular conduct violated which particular Canon. Instead, Counsel Williams reiterated :

*“The passage immediately following Paragraph 4 lays out the misconduct alleged. Specifically, that segment informs the Respondent that, “[Y]our use of misleading campaign materials was inappropriate and unsuitable for a candidate seeking judicial office. **Additionally, your actions constitute a breach of Canons 1, 2A, 7A(3)(b), 7A(3)(c), 7A(3)(d), and 7A(3)(e)(ii).**”*

*In essence, **the allegation refers to Judge Shepard’s mistaken or intentional use of a misleading advertisement in the context of her judicial campaign.**”*

(Emphasis Supplied)

Counsel Williams’ response is expressly contrary to the hearing panel chair’s ruling in **In Re Miller**, SC07-1985 Number 06-432, Order On Respondent’s Motion To Dismiss and For More Definite Statement, February 29th, 2008). In **Miller**, the hearing panel chair **granted** the request for a more definite statement finding, specifically:

*“The Motion to Dismiss is **GRANTED**, as the charging document fails to fully inform the Respondent of the **specific conduct**, acts or failure to act **which violate** standards of conduct or canons of ethics to which the Respondent is sworn. The charging document also fails to site specifically **which Canon**, rule or standard has been violated.”*

In responding to Judge Shepard's Motion To Strike, Counsel Williams asserted that :

“The specific language that the Judge objects to in Paragraph 1 of the Notice of Formal Charges is central not only because it provides important ‘context’ to Judge’s judicial campaign, but because the specific content of the Orlando Sentinel’s eventual endorsement of Judge Shepard’s opponent is similar in content and character to the 20-year-old endorsement republished by the Respondent.”

(Emphasis Supplied)

On December 2nd, 2015, the Hearing Panel Chair denied both Judge Shepard's Motion To Strike and Motion For More Definite Statement.

On December 8th, 2015, Judge Shepard, through counsel, filed her answer to the Notice Of Formal Charge and affirmative defenses.

In her answer, Judge Shepard, through counsel, requested that all alleged violations of Canons 1, 2(A), 7(A)(3)(c), 7(A)(3)(d) and portions of Canon 7(A)(3)(b) be dismissed and stricken from the Notice Of Formal Charges because there were absolutely **no factual allegations or legal authority** to even arguably establish probable cause as to their violation.

On December 16th, 2015, Judge Shepard's substituted counsel filed both a Notice Of Appearance his Motion To Continue the final evidentiary hearing scheduled for February 3rd, 2016, citing his unavailability from December 29th, 2015 to January 12th, 2016 as he was scheduled to be in Europe during those dates.

On December 16th, 2015, the Hearing Panel Chair first granted the motion for substitution and then denied the request for a continuance.

On December 18th, 2015, the JQC, through counsel Alex Williams, responded to Judge Shepard's Answer and Affirmative Defenses and, rather than dismissing the unsupported, alleged violations as requested, replied that the use of affirmative defenses in the context of a formal JQC proceeding was "inappropriate".

Counsel Williams argued that because an informal "constitutionally authorized" investigative "body" had "already" conducted a "thorough" review of the "facts", their finding of "probable cause" that certain, specific conduct may have, in some way, violated some Canon of Judicial Conduct, an accused Judge should be precluded from asserting an affirmative defense to attack any legally and factually unsupported charges in subsequent formal proceedings against them.

On December 22nd, 2015, Judge Shepard, through counsel, served a notice of taking Deposition of the JQC's witness. On December 29th, 2015 Judge Shepard, through counsel, served her First Request for Admissions On The JQC and on December 31st, 2015, Judge Shepard, through counsel, served her First Request For Production and First Interrogatories on the JQC.

On January 8th, 2016, Alex Williams, as counsel for the JQC, filed their notice of serving objections and answers to Judge Shepard's Request For Admissions and First Interrogatories. Additionally, on that date, Counsel Williams filed the JQC's notice of

serving objection, Motion To Strike or Motion For Protective Order in response to Judge Shepard's First Request For Production.

The gravamen of Counsel Williams' objections to Judge Shepard's various requests for meaningful discovery was that the JQC did not have to disclose any of the documents conversations, witness statements or other evidence gathered in support of the single allegation actually contained in the Notice Of Formal Charge against Judge Shepard because all documents, witness statements and conversations, whether communicated before, or after, the date the Notice Of Formal Charge was actually filed, were privileged from disclosure as part of the JQC's initial investigative process. Counsel Williams cited In Re Grazziano 696 So.2d 744 (Fla. 1997), and Fla.Const. Art. V, Section 12(a)(4); FJQC 12(a); Fla.R.J.Admin. 2.420(3)(A) in support of his argument.

Likewise, Counsel Williams argued that an accused Judge had absolutely no right to inquire into matters that might demonstrate the bias, motive, or personal knowledge, perception, or prejudice of a witness listed by the JQC in formal proceedings against them.

Also, on January 8th, 2016, Alex Williams, as counsel for the JQC filed an Amended Notice Of Formal Charges against Judge Shepard, reasserting the previously alleged violations of Canons 1, 2(A), 7(A)(3)(b), 7(A)(3)(c), 7(A)(3)(d), and Canon 7(A)(3)(e)(ii). (**JQC Exhibit 1**)

The Amended Notice Of Formal Charges recited no new factual allegations but added an alleged violation of Florida Bar Rule 4-8.2(b) which requires all candidates for

judicial office to comply with the “applicable” Canons of Judicial Conduct. (JQC Exhibit 1).

The Amended Notice Of Formal Charge **deleted the exhibits and attachments** that were attached to the original Notice Of Formal Charge filed on September 24th, 2014. It did **not** include any postcard allegedly produced by candidate Shepard during the 2014 judicial campaign.

The Amended Notice Of Formal Charge filed on January 8th, 2016 was never subsequently amended.

On January 11th, 2016 while Judge Shepard was recovering from a recent hospitalization and still suffering from acute neurological symptoms, Judge Shepard’s mother suddenly died. The death of Judge Shepard’s mother was particularly traumatizing, in that, her mother collapsed in front of her and Judge Shepard had, herself, performed CPR and mouth-to-mouth in an attempt to resuscitate her, which failed.

On January 12th, 2016, the JQC filed its Notice Of Final Hearing scheduling the final hearing for February 3rd, 2016.

On January 14th, 2016, Judge Shepard’s Counsel filed his Motion To Withdraw as Counsel.

No Notice Of Hearing was ever filed on Judge Shepard's Counsel's Motion To Withdraw.

On January 15th, 2016, less than 24 hours after it was filed, the Hearing Panel Chair considered and ruled on Judge Shepard's Counsel's Motion To Withdraw at a telephonic hearing.

The Hearing Panel Chair granted Judge Shepard's Counsel's Motion to Withdraw over the Judge Shepard's written objection and request that the case not be continued, and sua sponte, ordered a continuance of the final hearing for 30-45 days.

On January 19th, 2016, The Hearing Panel Chair filed its written order memorializing its ruling at the January 15th telephonic hearing.

On January 20th, 2016 attorney Scott Richardson was substituted as counsel for the JQC, replacing Alex Williams.

On February 19th, 2016, Judge Shepard's new counsel filed a Motion To Dismiss renewing Judge Shepard's initial request that the alleged violations of Canons 1 and 2(A) **for which there was no legal or factual support** be dismissed and references to those violations be stricken from the Amended Notice Of Formal Charges.

On February 22nd, 2016, the Hearing Panel Chair denied Judge Shepard's Motion To Dismiss Canons 1 and 2(A).

On February 22nd, 2016, Judge Shepard, through counsel, filed a Motion For Leave To Amend and an Amended Motion To Dismiss Canons 1 and 2(A), with a corrected date on the certificate of service.

On February 25th, 2016, the Hearing Panel Chair again denied Judge Shepard's Motion To Dismiss Canons 1 and 2(A).

On March 3rd, 2016, Judge Shepard, through counsel, filed a Motion For Review By The Full Hearing Panel Of The Chair's Disposition Of Respondent's Amended Motion To Dismiss Canons 1 and 2(A).

On March 8th, 2016, the full hearing panel affirmed the Hearing Panel Chair's denial of Judge Shepard's Amended Motion To Dismiss Canons 1 and 2(A). Notably, hearing panel member, Judge Krista Marx, who affirmed the Chair's denial of Judge Shepard's Amended Motion To Dismiss Canons 1 and 2(A), had, herself, on June 9th, 2014, while serving as hearing panel chair in *In Re Decker*, granted Judge Decker's motion to dismiss Canons 1 and 2(A) on the same grounds as argued in Judge Shepard's Amended Motion To Dismiss Canons 1 and 2(A).¹

¹ “The **Chair(Judge Krista Marx)** recognizes as a matter of law that **Canons 1, 2, and 3 of the Code of Judicial Conduct are directed only to a judge and hence cannot constitute grounds for formal charges for alleged violations by a judicial candidate**. In re Kinsey, 842 So. 2d 77 (2003) so holds. As such, the Motion to Dismiss all alleged violations of Canons 1, 2, and 3 in the Amended Notice of Formal Charges is granted.” Filing # 14598430 Electronically Filed **06/09/2014 04:50:45 PM RECEIVED**, 6/9/2014 16:53:43, John A. Tomasino, Clerk, Supreme Court (Clarification As To “Chair”, and Emphasis Supplied)

On March 14th, 2016, following the repeated denials of her Motions To Dismiss Canons 1 and 2(A) of the Amended Notice Of Formal Charges, Judge Shepard, through counsel, filed her Answer and Affirmative Defenses To the Amended Notice Of Formal Charges filed by the JQC.

On March 21st, 2016, Judge Shepard, through counsel, moved to compel the JQC to provide the discovery requested December 29th, 2015.

On March 23rd, 2016, the Hearing Panel Chair denied Judge Shepard's Motion To Compel Discovery.

On April 8th, 2016, at the final hearing in this cause, Judge Shepard moved in limine, again to dismiss Canons 1, 2(A), 7(A)(3)(c), 7(A)(3)(d) **for which there was still no legal or factual support**. Judge Shepard also renewed her motion to strike the same prejudicial language from the Amended Notice Of Formal Charges that was present in the original Notice of Formal Charges. (T.T. p. 12 ln 23 – p.13 ln.10) Judge Shepard argued the motions to dismiss orally at the beginning of the hearing and had the written motions with her at the hearing, but the Hearing Panel Chair failed to introduce the written motions as part of the record. Judge Shepard renewed all of these motions at the conclusion of her case in chief. (T.T. p 198 ln.1- p.199 ln.18).

On April 8th, 2016, the Hearing Panel Chair refused to rule on the several motions to dismiss Canons 1, 2(A), 7(A)(3)(c), 7(A)(3)(d) **for which there was clearly, still no legal or factual support**, and reserved, even after the all of the evidence was in and

arguments were concluded. The Hearing Panel Chair also denied Judge Shepard's request to strike the prejudicial language from the Amended Notice Of Formal Charges.(T.T. p.13 ln.10, p. 199 lns.10-17)² On April 8th, 2016, Judge Shepard was consequently forced to defend against the alleged violations of all the Canons charged in the Amended Notice Of Formal Charge.

The JQC did not provide Judge Shepard their exhibit book until moments before the final hearing commenced.

As a result, Judge Shepard was also forced to defend to the Hearing Panel, matters raised by certain JQC's Exhibits which were improperly included in their exhibit book, over previously sustained objection, (**Record:** Order On Respondent's Motion To Compel And Objections To The JQC's List Of Exhibits, March 23rd, 2016, T.T. p. 82 ln.9- p.83 ln.8, p.153 ln.21- p.157 ln.21, p.191 ln.2 – p.194 ln.7, p.194 ln. 23- p.195 ln. 3) and which referred to matters that had been thoroughly considered and dismissed by the

JQC Investigative Panel, (**JQC Exhibits 5 and 8**), and ruled to be privileged by the

² The specific language objected to, which was included both the Notice Of Formal Charge and the Amended Notice Of Formal Charge was : "They [the Orlando Sentinel] noted that he [Mr. Katz] had diligently worked to rebuild his reputation and had become **chair of the Bar's family law section** and **had been endorsed by 18 past Orange County Bar presidents**, a **clear indication that he had regained his good standing within the legal community**. (Emphasis Supplied) This language had absolutely nothing to do with whether or not candidate Shepard had allegedly violated a Canon of judicial conduct by quoting four particular statements made about her character and reputation for integrity and accurately attributing the statements to the source from which they came.

Hearing Panel Chair (**Record:** Order Granting Motion To Quash Subpoena Ducas Tecum And For Protective Order, January 11th, 2016 at p.1 pp. 2, Order On Respondent's Motion To Compel And Objections To The JQC's List Of Exhibits, March 23rd, 2016).

On June 9th, 2015, the hearing panel of the JQC found Judge Shepard **not guilty** of violating Canons 1, 2(a), 7(A)(3)(c), 7(A)(3)(d) because "...these provisions of Canon(sic) are **inapplicable to the facts.**" "There was **no allegation or proof...**" to ever support initiating those charges. (**JQC Hearing Panel Findings And Recommendations** p.20 lns.11-13)(Emphasis Supplied). The hearing panel found Judge Shepard guilty of violating Canon 7(A)(3)(e)(ii), and as a result, also guilty of violating a particular portion of Canon 7(A)(3)(b) and Rule 4-8.2 of the Rules Regulating the Florida Bar.

OVERVIEW OF ARGUMENT

The JQC brought formal charges against Judge Shepard on the theory that in one particular section of a single postcard issued during her 2014 judicial campaign, she reproduced four **true** statements related to her **character** and reputation for **integrity**, correctly attributed those statements to the source from which they came, but failed to identify the specific year in which the statements were originally made and failed to specify that the statements were, at one time, included in an earlier enthusiastic endorsement of Ms. Shepard's exemplary performance in public office as a legislator. (**JQC Exhibit 12**) Those two particular "omissions", the JQC argues, provide "clear and convincing" evidence that candidate Shepard "knowingly misrepresented" that she had obtained the "official candidate endorsement" of the Orlando Sentinel in the 2014 judicial election, in violation of the "other fact" clause of Canon 7(A)(3)(e)(ii).

The Investigative Panel Of The JQC previously reviewed all campaign communications and materials utilized by candidate Shepard during her 2014 bid for judicial office and found no probable cause as to any other item. Accordingly, no other language, section or portion of any other campaign postcard, material, or communication utilized by candidate Shepard during the 2014 judicial contest is at issue in these proceedings. (**Record:** Amended Notice Of Formal Charge, January 8th, 2016).

The challenged section on a single postcard, draws a straight, side-by-side comparison of the candidates' respective reputations for character and integrity and is positioned directly adjacent to a panel emblazoned with the words : “Proven Integrity”, in approximately 25 point, bold face type. (**JQC Exhibit 10**) The four true statements utilized to draw the comparison, comment on Ms. Shepard's earned reputation for faithful performance of her duties, fidelity to her promises, strong work ethic, and integrity. (**JQC Exhibit 10**)

That section does not attempt to contrast the respective candidates' resumes, professional experience or prior public service. (**JQC Exhibit 10**) The challenged section, does not utilize a newspaper graphic, (**JQC Exhibit 10**) does not use a masthead news font to suggest a newspaper headline, (**JQC Exhibit 10**) does not use the title of the previously published endorsement, (**JQC Exhibit 10**), does not utilize a graphic illustration or layout designed to create the impression of a partially reproduced newspaper endorsement (**JQC Exhibit 10**) and does not use the words “endorsement”, “2014”, “for 2014”, “endorsed by”, “selected by”, “chosen”, “the paper's choice”, “editors' choice” or any other language, at all, that could suggest an actual, “official candidate endorsement” in the 2014 judicial race. (**JQC Exhibit 10**).

Nevertheless, the JQC has interpreted the failure to cite the specific year Judge Shepard's character was first publically recognized and to include a reference to her previous legislative experience in that particular section of the “Proven Integrity” postcard, as a “knowing

misrepresentation” of an “other fact” prohibited by Canon 7(A)(3)(e)(ii). (**JQC Hearing Panel Findings And Recommendations** p.20 ln.17).³ Because, the JQC reasons, in *their* view, Judge Shepard “violated” Canon 7(A)(3)(e)(ii), then she also violated a particular portion of Canon 7(A)(3)(b) which asserts that a candidate for judicial office “shall act in a manner consistent with the... ‘integrity’... of the judiciary”. (**JQC Hearing Panel Findings And Recommendations** p.20 ln.18)

The JQC Hearing Panel did not find that candidate Shepard had failed to “maintain the dignity appropriate to judicial office” and did not find that candidate Shepard had acted in a manner inconsistent with the “impartiality... [or] independence of the judiciary”. (**JQC Hearing Panel Findings And Recommendations** p.20 ln.18- p.21 ln.1) The JQC then concludes that because, in their estimation, Judge Shepard “violated” Canon 7(A)(3)(e)(ii), and consequently, Canon 7(A)(3)(b) she also violated Rule 4-8.2 Rules Regulating the Florida Bar, which requires candidates for judicial office to comply with the “applicable” Canons Of Judicial Conduct. (**JQC Hearing Panel Findings And Recommendations** p.21 ln.2).

It is important to recognize, at the outset, that unless Canon 7(A)(3)(e)(ii) is fully constitutional on its face, not overbroad and not vague, and also fully constitutional as applied to the four truthful, accurately attributed, statements about candidate Shepard’s reputation for

³ There is no allegation contained in the Amended Notice Of Formal Charge that candidate Shepard knowingly misrepresented either her “identity”, “qualifications”, or “present position” under Canon 7(A)(3)(e)(ii). None of the terms used in Canon 7(A)(3)(e)(ii) are defined elsewhere in the Code Of Judicial Conduct. The only legal “qualification” for the office of Circuit Court Judge in Florida is 5-year membership in the Florida Bar. (Article V, section 8 of the Florida Constitution) A candidate for Circuit Court Judge does not even have to live in the circuit they seek to work in, until they assume office. (Miller v. Mendez 804 So.2d 1243 (Fla. 2001)).

character and integrity, there is no need for this Court to examine whether the record supplies “clear and convincing” evidence of a “violation” of that Canon Section.

It is equally important to recognize, that unless this Court concludes that Canon 7(A)(3)(e)(ii) is enforceable against those particular, four **true** statements in the one section of the “Proven Integrity” postcard targeted by the JQC for discipline, the other two alleged “violations”, namely 7(A)(3)(b)’s requirement to act in a manner consistent with the ‘integrity of the judiciary’ and the Bar’s professional conduct Rule 4-8.2’s requirement that judicial candidates comply with the “applicable” Canons Of Judicial Conduct, cannot stand.

This is so because, unless Canon 7(A)(3)(e)(ii)’s restriction on judicial campaign speech, as well as its “other fact” clause, are both facially constitutional and constitutional as applied, and neither are either overbroad or vague, Canon 7(A)(3)(e)(ii) cannot be enforced against the specific statements or any alleged omissions set forth by the Amended Notice Of Formal Charge. *Weaver v. Bonner*, 309 F.3rd 1312(11th Cir. 2002). Likewise, unless there is an enforceable violation of Canon 7(A)(3)(e)(ii), or some other substantive canon section **specifically alleged** in the Amended Notice Of Formal Charge, there can be no resulting violation of Canon 7(A)(3)(b)’s hortatory requirement that judicial candidates “...act in a manner consistent with the... ‘integrity’ ... of the judiciary”.

Without some specific factual allegation, contained in the Amended Notice Of Formal Charge that defines the particular “act” that is “inconsistent” with the otherwise undefined “integrity of the judiciary”, the language of Canon 7(A)(3)(b) which the JQC seeks to enforce against Judge Shepard is, by definition, “vague”, “overbroad”, unconstitutional and therefore, unenforceable. If there is no enforceable violation of one of the particular Canons set forth in the

Amended Notice Of Formal Charge, there can be no violation of Rule 4-8. 2 Rules Regulating the Florida Bar.

Canon 7(A)(3)(e)(ii) requires judicial candidates not to “knowingly misrepresent” an “other fact” about themselves or their opponents. It does not require judicial candidates to guarantee the uniformity and unanimity of public perception or to completely eliminate the potential for personal interpretation. The knowledge required by the canon section must be possessed by the judicial candidate charged with the violation. What a particular judicial candidate “knows” about a “fact” at any given time, is different from what their opponent “knows”. It is also different from what any member of the public “knows” and different from what a JQC panel member supposedly “knows” two years after an election has taken place. Likewise, what a particular judicial candidate “knows” to be the “fact” they are “representing” can differ considerably from the “fact” an opponent perceives or believes is being represented.

A judicial candidate who “knows” they have “done well”, “worked hard”, “kept their promises”, and “maintained their integrity” and also “knows” that the Orlando Sentinel has said so, cannot properly or justly be charged with “knowingly” “misrepresenting” the actual facts that they have “done well”, “worked hard”, “kept their promises” and “maintained their integrity”, or that Orlando Sentinel said precisely that. The supposed “knowing misrepresentation” of any “other fact” not expressly stated, is not actual, but imagined or presumed. This is especially so, when absolutely no evidence is introduced into the record that the judicial candidate has not “done well”, not “worked hard”, not “kept their promises”, or not “maintained their integrity” and the only evidence that is introduced, is that they have (T.T. p.117 ln.4-p.126 ln.20).

Accordingly, while a particular judicial candidate’s “knowledge” of an actual “other fact” may be inferred from that candidate’s own behavior and statements, it cannot be inferred about a “presumed or imagined other fact”. It also cannot be inferred from what others claim to “know”

about the alleged “other fact”. A candidate’s attributable “knowledge” under the canon, cannot be based on the testimony of a single witness regarding his “interpretation” of a communication, or his “belief” about that candidate’s “knowledge”. This is especially true where, the only witness offered, has **no personal knowledge** of the judicial candidate’s contemporaneous statements or behaviors. (T.T. p. 99 ln.21-p.101 ln.15)

Neither, can a judicial candidate fairly be charged with the same “knowledge”, in the moment, as a JQC panel member has, reviewing the candidate’s conduct well after the events, with the benefit of hindsight and the resources to fully investigate the alleged “fact” in question. Hence, a “belief” about an alleged “fact” cannot serve as the basis for a prosecution dependent on a “knowing misrepresentation” of an actual “fact”. This is so, no matter how strongly that “belief” is held, by whom, or how contagiously that “belief” is later adopted by or invited to infect JQC panel members.

On the facts presented in this case, Canon Section 7(A)(3)(e)(ii) is unconstitutional not only on its face, it is unconstitutional as applied to Judge Shepard and the particular judicial campaign speech targeted by the JQC. Further, the section’s “other fact” restriction is both constitutionally overbroad and vague and therefore, unenforceable. The JQC’s prosecution of Judge Shepard for a violation of Canon Section 7(A)(3)(e)(ii) violates Judge Shepard’s constitutional rights to free speech and due process, in violation of the First, Fifth, Ninth and Tenth and Fourteenth amendments to the U.S. Constitution and the guarantees of equal civil and political rights secured by Article I Sections 1, 2, 4, 5, 9, Article VI Section 1 and other provisions of the Florida Constitution.

The JQC’s prosecution of Judge Shepard for a violation of Canon Section 7(A)(3)(e)(ii) also violates the voters’ rights to the benefits of free speech and due process, in violation of the First, Fifth, Ninth and Tenth and Fourteenth amendments to the U.S. Constitution and the

guarantees of equal civil and political rights secured by Article I Sections 1, 2, 4, 5, 9, Article VI Section 1 and other provisions of the Florida Constitution.

Likewise, Canon Section 7(A)(3)(b)'s hortatory language requiring judicial candidates to "...act in a manner consistent with the... 'integrity'... of the judiciary" is both vague and overbroad and unconstitutional as applied to Judge Shepard. Like the hortatory language of Canon 1 of the Code, there must be some other specific violation of a constitutional and enforceable code section that is contained in the Amended Notice Of Formal Charge to support an alleged violation of this canon section in order for it to be enforced. Otherwise, its attempted enforcement violates both Judges Shepard's and the public's rights to free speech, free association and due process, in violation of the First, Fifth, Ninth and Tenth and Fourteenth amendments to the U.S. Constitution and the guarantees of equal civil and political rights secured by Article I Sections 1, 2, 4, 5, 9, Article VI Section 1 and other provisions of the Florida Constitution. Here, there is none.

As Justices Canady and Polston have recently observed, *"[the] principle of judicial restraint has no proper application where the constitutional challenge is to a judicially adopted rule which trenches on constitutional rights. This Court was responsible for the adoption of Canon 7... and is responsible for its continuing existence. To the extent that Canon 7... infringes on speech rights protected by the First Amendment, this Court bears responsibility for the ongoing constitutional violation. When presented with a case which properly presents a constitutional challenge to a rule we have adopted, we should not decline to address it but should use the opportunity to ensure that we have exercised our rule-making power in a way that is consistent with constitutional requirements. If Canon 7...violates the First Amendment, Florida state judges who wish to vindicate their First Amendment rights should not be required*

to seek relief in federal court or in state circuit court while the Florida Supreme Court remains silent.” In Re Turner 76 So.3d. 989, 910-911(Fla.2011) (Edits Supplied)

If, despite the compelling authority to the contrary, this Court concludes that Canon 7(A)(3)(e)(ii) and its “other fact” clause are both ostensibly constitutional, and constitutional as they have been applied against the judicial campaign speech at issue, and further finds that neither Canon 7(A)(3)(e)(ii) nor its “other fact” clause are either overbroad or vague, then this Court must also find that the record supplies “clear and convincing” evidence that candidate Shepard affirmatively and “knowingly” misrepresented that she had obtained the “official candidate endorsement” of the Orlando Sentinel in the judicial race of 2014. Otherwise, none of the alleged “violations” found by the hearing panel of the JQC can stand, and they must all be overturned.

In addition, before the Court can affirm the proceedings below, it must consider whether Judge Shepard’s substantive or procedural due process rights have been violated under either the Florida or U.S. Constitutions. If so, the findings and recommendations of the JQC hearing panel must likewise, be rejected. Even under the relaxed expectations for due process typically applied to judicial disciplinary hearings, the record establishes that the minimum requirements of due process guaranteed by the U.S. and Florida Constitutions were not met and both Judge Shepard’s procedural and substantive due process rights were violated.

The Court must also review the appropriateness of the hearing panel’s recommended discipline. Here, their recommendation is completely disproportionate to the single offense alleged, unjustifiably severe and wholly inconsistent with prior precedent. The hearing panel’s recommended discipline is therefore arbitrary, capricious, without justification and should be disapproved. As the Preamble To The Code Of Judicial Conduct makes clear :

“It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.”

So long as the state selects its judiciary through constitutionally mandated judicial elections, judicial candidates must be afforded the requisite, constitutionally protected “breathing space” to articulate **true** statements about their reputations for **character** and **integrity** and to contrast their reputations with their opponents’ reputations without being subjected to years of anonymously initiated and cloaked investigations, public trial, the destruction of their personal and professional reputations and professional discipline proceedings, including potential suspension or removal from duly elected office. **Republican Party v. White**, 536 U.S. 765 (2002), **Weaver v. Bonner**, 309 F.3rd 1312(11th Cir. 2002).

STANDARD OF REVIEW

This Court’s review of the proceedings below is de novo. **In Re Grazziano** 696 So.2d 744, 753. The applicable constitutional test for restrictions on judicial campaign speech is strict scrutiny. **Republican Party v. White**, 536 U.S. 765 (2002) **Weaver v. Bonner**, 309 F.3rd 1312(11th Cir. 2002) **Williams-Yulee v. The Fla. Bar**, 135 S. Ct. 1656, 1665 (2015). In order for Canons 7(A)(3)(e)(ii) and 7(A)(3)(b) to pass constitutional muster, each section and each restrictive portion thereof, must serve a defined and compelling interest and each must also be narrowly tailored to accomplish that interest, utilizing the least restrictive means to achieve the clearly defined objective. **Republican Party v. White**, 536 U.S. 765 (2002), **Weaver v. Bonner**, 309 F.3rd 1312(11th Cir. 2002) **Williams-Yulee v. The Fla. Bar**, 135 S. Ct. 1656, 1665 (2015)

("In sum, we hold today what we assumed in *White*: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest."). "[A] person does not surrender [her] constitutional right to freedom of speech when [s]he becomes a candidate for judicial office." *ACLU of Fla., Inc. v. The Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D.Fla.1990).

In addition, both the Canon's section and its specific restrictive provision must each be "narrowly tailored" to achieve the compelling purpose for which the particular section and restrictive provision were designed, and neither can be overbroad in their reach or vague in their terms. The way in which a restriction on core political speech is drawn must be the least restrictive means to accomplish the asserted compelling interest. *Republican Party v. White*, 536 U.S. 765 (2002), *Weaver v. Bonner*, 309 F.3rd 1312 (11th Cir. 2002), *U.S. v. Alvarez*, 132 S.Ct. 2537, (2012).

I.

FIRST AMENDMENT VIOLATIONS

UNDEFINED "OTHER FACT" CLAUSE OF CANON 7(A)(3)(e)(ii) DOES NOT SERVE A COMPELLING INTEREST

Canon 7(A)(3)(e)(ii)'s prohibition against a judicial candidate's knowing misrepresentation of an "other fact" does not serve a compelling interest when "other fact" is not clearly defined, or at least limited to "facts" directly bearing on judicial impartiality, independence, integrity, or legal qualification. While this Court may conclude that there is a "compelling interest" behind the Code Of Judicial Conduct, as a whole,⁴ or that there is a

⁴ "The Code Of Judicial Conduct establishes standards for ethical conduct of judges. It consists of **broad statements** called Canons, **specific rules** set forth in

“compelling interest” broadly served by one of its Canons, there must also be an articulable “compelling interest” served by the particular section of the Canon and portion thereof, which seeks to restrict the core political speech of judicial candidates. There can be no “compelling interest” served by an undefined, restrictive provision such as the one here, because without knowing what the provision is aimed at, it is impossible to discern or articulate what interest is promoted by its inclusion.

While the appellate courts have given little guidance and have apparently devoted even less analysis to what, exactly, a “compelling interest” is by way of definition, origin, characteristics, or composition, they have repeatedly lamented the failure of other courts to do so. The only parameter regularly assigned to a “compelling interest” is one of priority, as an interest of “the highest order”. ***Republican Party v. White***, 536 U.S. 765 (2002).

At a minimum, a constitutionally “compelling interest” should be clear, fixed and achievable through the consistent operation of the restrictive provision. A legitimate “compelling interest” is not one that might possibly be imagined on occasion, but rather, one that is constant, steadfast and enduring. A “compelling interest” should not be a movable goalpost, but rather, a polestar, providing dependable guidance for those trying to chart and navigate a permissible course of conduct. Once identified, the compelling interest served by a particular restriction on otherwise constitutionally protected conduct or speech should not randomly multiply, expand and contract, or shift with the wind and articulations that change depending on the composition of the restricting authority.

CANON 7(A)(3)(e)(ii)’s “OTHER FACT” CLAUSE
IS NOT NARROWLY TAILORED

Sections under each Canon, a Definitions Section, an Application Section and a Commentary.”

In order to be constitutionally sound, both Canon 7(A)(3)(e)(ii) and its “other fact” clause must only prohibit or attempt to discipline false statements, and then, only those false statements that are made with knowledge of their falsity or with reckless disregard as to whether the targeted statement is false. *Republican Party v. White*, 536 U.S. 765 (2002), *Weaver v. Bonner*, 309 F.3rd 1312(11th Cir. 2002). Even then, content based intrusions on free speech must be carefully scrutinized. As the U.S. Supreme court, and Justices Kennedy, Roberts, Ginsberg and Sotomayor reasoned in *U.S. v. Alvarez*, 132 S.Ct. 2537(2012):

“...In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as “startling and dangerous” a “free-floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits.” United States v. Stevens, 559 U.S. 460, —, 130 S.Ct. 1577, 1585, 176 L.Ed.2d 435 (2010)....”

“...Content-based restrictions on speech have been permitted only for a few historic categories of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called “fighting words,” child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent.

Absent from these few categories is any general exception for false statements. The Government argues that cases such as Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52, 108 S.Ct. 876, 99 L.Ed.2d 41, support its claim that false statements have no value and hence no First Amendment protection. But all the Government's quotations derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement. In those decisions the falsity of the speech at issue was not irrelevant to the Court's analysis, but neither was it determinative. These prior decisions have not confronted a measure, ...that targets falsity and nothing more.”...(Internal Citations Omitted, Edits Supplied)

“...Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood....”

“...The Government thus seeks to use this principle for a new purpose. It seeks to convert a rule that limits liability even in defamation cases where the law permits recovery for tortious wrongs into a rule that expands liability in a different, far greater realm of discourse and expression. That inverts the rationale for the exception. The requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery in certain defamation cases exists to allow more speech, not less. A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it....”(Emphasis Supplied)

“...The Government's three examples of false-speech regulation that courts generally have found permissible do not establish a principle that all proscriptions of false statements are exempt from rigorous First Amendment scrutiny.”...

“...While there may exist “some categories of speech that have been historically unprotected,” but that the Court has not yet specifically identified or discussed, United States v. Stevens, 559 U.S. 460, —, 130 S.Ct. 1577, 1586, 176 L.Ed.2d 435, the Government has not demonstrated that ‘false statements’ should constitute a new category. Pp. 2543 – 2547.”(Emphasis and Internal Quotes Supplied, Internal Citations Omitted)...

“...The Court applies the “most exacting scrutiny” in assessing content-based restrictions on protected speech.”...

“...In addition, when the Government seeks to regulate protected speech, the restriction must be the “least restrictive means among available, effective alternatives.”...

“...The Government points to no evidence supporting its claim that the public's general perception... is diluted by false claims...it has not shown, and cannot show, why counterspeech...would not suffice to achieve its interest.”...(Emphasis and Edits Supplied)

“...The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.”...

“...This opinion...rejects the notion that false speech should be in a general category that is presumptively unprotected....”(Emphasis and Edits Supplied)

“...Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.”...

Justices Kagan and Bryer concurred and went even farther in their rejection of such restraints.

*“...Although the Court has frequently said or implied that false factual statements enjoy little First Amendment protection, see, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 94 S.Ct. 2997, 41 L.Ed.2d 789, those statements cannot be read to mean “no protection at all.” False factual statements serve useful human objectives in many contexts. Moreover, the threat of...prosecution for making a false statement can inhibit the speaker from making true statements, thereby “chilling” a kind of speech that lies at the First Amendment's heart. See id., at 340–341, 94 S.Ct. 2997. And the pervasiveness of false factual statements provides a weapon to a government broadly empowered to prosecute falsity without more. Those who are unpopular may fear that **the government will use that weapon selectively against them, say by...ignoring members of other political groups who might make similar... claims.**”... (Emphasis and Edits Supplied)*

Even while dissenting in the ultimate result, Justices Alito, Thomas and Scalia observed :

“...While we have repeatedly endorsed the principle that false statements of fact do not merit First Amendment protection for their own sake, we have recognized that it is sometimes necessary to “exten[d] a measure of strategic protection” to these statements in order to ensure sufficient “ ‘breathing space’ ” for protected speech. Gertz, 418 U.S., at 342, 94 S.Ct. 2997 (quoting NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963))....

*...And we have imposed “[e]xacting proof requirements” in other contexts as well when necessary to ensure that **truthful** speech is not chilled... Brown v. Hartlage, 456 U.S., at 61, 102 S.Ct. 1523 (sustaining as-applied First Amendment challenge to law prohibiting certain “factual misstatements in the course of political debate” where there had been no showing that the disputed statement was made “other than in good faith and without knowledge of its falsity, or ...with reckless disregard as to whether it was false or not”). All of these proof requirements inevitably have the effect of bringing some false factual statements within the protection of the First Amendment, but this is justified in order to prevent the chilling of other, valuable speech....*

*...These examples by no means exhaust the circumstances in which false factual statements enjoy a degree of instrumental constitutional protection. On the contrary, **there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth....***

*...Even where there is a wide scholarly consensus concerning a particular matter, **the truth is served by allowing that consensus to be challenged without fear of reprisal. Today's accepted wisdom sometimes turns out to be mistaken.** And in these contexts, “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’ ” New York Times v. Sullivan, supra, at 279, n. 19, 84 S.Ct. 710 (quoting J. Mill, *On Liberty* 15 (R. McCallum ed.1947))...*

*...Allowing the state to proscribe false statements in these areas also opens the door for **the state to use its power for political ends.** Statements about history illustrate this point. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation? While our cases prohibiting viewpoint discrimination would fetter the state's power to some degree, see R.A.V. v. St. Paul, 505 U.S. 377, 384–390, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (explaining that the **First Amendment does not permit the government to engage in viewpoint discrimination under the guise of regulating unprotected speech**), **the potential for abuse of power in these areas is simply too great.**”...(Emphasis Supplied, Internal Citations Omitted).*

The 11th Circuit struck down a similar effort to punish judicial campaign speech, where a Georgia judicial canon attempted to prohibit “**true** statements that [were] misleading or deceptive or [which] contained a material misrepresentation or omit[ted] a material fact or create[d] an unjustified expectation about results”. *Weaver v. Bonner*, 309 F.3rd 1312, 1320 (11th Cir. 2002) In so doing, the 11th Circuit specifically rejected the argument that “...speech by judicial candidates is entitled to less protection than speech by legislative and executive candidates...”, and therefore, a more lenient standard of review should be applied to restrictions on speech in judicial elections. *Weaver v. Bonner*, 309 F.3rd 1312, 1321 (11th Cir. 2002) citing *Republican Party v. White*, 536 U.S. 765 (2002).

In reaching their decision in *Weaver*, the 11th Circuit found support from the U.S. Supreme Court’s decision in *Brown v. Hartlage*, 456 U.S. 45 and the reasoning articulated by the Alabama Supreme Court in *Butler v. Ala. Judicial Inquiry Comm’n* 802 So.2d 207 (Ala. 2001)(*Butler II*) and the Michigan Supreme Court in *In re Chmura*, 608 N.W.2d 31, (Mich.2000).

In *Butler II*, the Alabama Supreme Court struck down Alabama’s judicial canon 7(B)(2) because it prohibited “...**true** statements that a reasonable person would find misleading or deceptive.” *Weaver v. Bonner*, 309 F.3rd 1312, 1322 (11th Cir. 2002).⁵ In *Chmura*, The Michigan Supreme Court struck down a judicial canon that attempted to punish judicial

⁵ Alabama's Canon 7(B)(2), which was held unconstitutional in *Butler II*, read as follows: “During the course of any campaign for nomination or election to judicial office, a candidate shall not [p]ost, publish, broadcast, transmit, circulate, or distribute false information concerning a judicial candidate or an opponent, either knowing the information to be false or with reckless disregard of whether the information is false; or post, publish, broadcast, transmit, circulate, or distribute true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person.” *Butler II*, 802 So.2d at 213 (quoting Ala. Canons of Judicial Ethics Canon 7(B)(2)).

campaign speech that “...omits a fact necessary to make [even] a [true] statement considered as a whole, not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve” In re Chmura, 608 N.W.2d 31,36 (Mich.200)⁶

As the Michigan Supreme Court explained in In re Chmura, 608 N.W. 2d 31, 33 n.7 (Mich.):

“...A rationale for judicial elections is that meaningful debate should periodically take place concerning the overall direction of the courts and the role of the individual judges in contributing to that direction. Such debate is impossible if judicial candidates are overly fearful of potential discipline for what they say. By chilling this debate, [the provision] impedes the public's ability to influence the direction of the courts through the electoral process.”...

“Impressions” are not “facts”. Even “facts” change with the increase of understanding and knowledge. It was once, and for a long time in human history, considered irrefutable that the Earth was the center of the solar system, that the Sun revolved around the Earth. Moreover, what is considered or reported as a “fact” changes with the introduction of perspective.⁷ Artists, psychologists and philosophers have known this for eons.⁸

⁶ Michigan's Canon 7(B)(1)(d), which was found unconstitutional in In re Chmura, was nearly identical to Georgia's Canon 7(B)(1)(d). It provided that a candidate for judicial office “should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.” In re Chmura, 608 N.W.2d at 36 (quoting Mich.Code of Judicial Conduct Canon 7(B)(1)(d)).

⁷ See White/Gold v. Blue/Black dress controversy. (Tumbler 2015)

⁸ “There are no facts, only interpretations.” from Nietzsche's *Nachlass*, A. Danto translation.

“There is *only* a perspective seeing, *only* a perspective "knowing"...” from Nietzsche's *Nachlass*, A. Danto translation.

Because it is not narrowly drafted, Canon 7(A)(3)(e)(ii)'s "other fact" restriction could be applied by a particularly motivated JQC, to a judicial candidate's "negligent or inadvertent" but "knowing" misstatements as well as "intentional", knowing misstatements. The canon's limiting language, "...about themselves or their opponent", is of little or no additional help. The restrictive provision could be still be used to prosecute a judicial candidate for anything from acknowledging or denying their own status as a "child of God" (as opposed to their biological parents), to referring to their own "five" senses as "all" the senses they possess, even while dedicating those senses to upholding the law,⁹ or for claiming to have a "photographic" memory¹⁰. Conversely, a judicial candidate could not be prosecuted under the Canon, for claiming their opponent is less complex than common moss,¹¹ simpler than a water flea,¹² less intelligent than a "brainless" amoeba¹³ and has the DNA of a Neanderthal¹⁴ and a Chimp¹⁵.

Enemies of truth.-- Convictions are more dangerous enemies of truth than lies. From Nietzsche's *Human, all too Human*, s.483, R.J. Hollingdale translation.

⁹ Cerretani, Jessica (Spring 2010) "Extra Sensory Perceptions". Harvard Medicine. Harvard College.

¹⁰ Foer, Joshua (April 27, 2006). "Kaavya Syndrome: The Accused Harvard Plagiarist Doesn't Have A Photographic Memory. No One Does". Slate. Archived from the original on 2013-07-02. Retrieved January 20, 2013

¹¹ Moss Beats Human: Simple Moss Plants Outperform Us By Gene Number, Albert-Ludwigs-Universität Freiburg Science Daily, August 5th, 2013.

¹² Human Genome Shrinks To Only 19,000 Genes : Biologists Once Thought Humans Had 2 Million Genes. Now It Turns Out We Have Fewer Than Nematode Worms, (The Physics arXiv, January 3rd, 2014)

¹³ How Brainless Slime Molds Redefine Intelligence (Ferris Jabr, Scientific American, November 7th, 2012)

¹⁴ A team of researchers sequenced the Neanderthal genome in 2010. When they

CANON SECTION 7(A)(3)(e)(ii)’s “OTHER FACT” CLAUSE AND CANON 7(A)(3)(b)’s

“INTEGRITY OF THE JUDICIARY” CLAUSE ARE OVERBROAD

Canon (7)(A)(3)(e)(ii)’s “other fact” clause is overbroad. An overbreadth challenge is based on a statute’s “possible direct and indirect burdens on speech.” **United States v. Acheson**, 195 F.3d 645, 650 (11th Cir.1999) (quoting Am. Booksellers v. Webb, 919 F.2d 1493, 1499-1500 (11th Cir.1990)). The overbreadth doctrine “permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when ‘judged in relation to the statute’s plainly legitimate sweep.’ ” **City of Chicago v. Morales**, 527 U.S. 41, 52, 119 S.Ct. 1849, 1857, 144 L.Ed.2d 67 (1999) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612-15, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)).

The overbreadth doctrine is designed to protect “the public from the chilling effect such a statute has on protected speech ; the court will strike down the statute **even though** the governmental entity enforced the statute against those engaged in “**unprotected**” activities.” **Acheson**, 195 F.3d at 650 (quoting Nationalist Movement v. City of Cumming, 934 F.2d 1482, 1485 (11th Cir.1991) (Tjoflat, J., dissenting)). As the Supreme Court articulated in **Thornhill v. Alabama**, U.S. 88 (1940) a “chilling effect on protected conduct might occur with a statute which “does not aim specifically at evils within the allowable area of state control but, on the

compared it to humans, they determined that most humans living outside of Africa have about 1–4% Neanderthal DNA. The Neanderthal In Us (Press Release May 7th, 2010) Barbara Abrell, Executive Editor Max Plank Institute For Evolutionary Anthropology

¹⁵ Initial Sequence Of The Chimpanzee Genome And Comparison With The Human Genome (The Chimpanzee Sequencing and Analysis Consortium, Nature, Vol 437, pp.69-87)

contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press”. (Emphasis Supplied)

By including the “other fact” clause in Canon 7(A)(3)(e)(ii)’s list of prohibited “knowing misrepresentations” the provision actually widens the sweep of the restriction far beyond those particular facts (identity, qualification, and present position) which actually *might* have an articulable role in achieving an identified, compelling state interest. It punishes judicial campaign speech for the misrepresentation of any fact, at all.

The undefined “other fact” provision also shrouds the target of the restriction in an impenetrable fog of uncertainty. The search for a violation becomes a snipe hunt designed for the gullible rather than the marksman. Similarly, if a boat is chartered to fish for sardines, but utilizes a whale net to troll through the ocean looking for them, the catch may yield nothing of what was intended and instead, harvest a protected and endangered species. Not only does the desired delicacy easily escape capture, but doubt is cast on the charter’s original, articulated purpose in light of the yield. A finer mesh is required to cull the professed and intended haul, without ensnaring the public’s right to natural discovery of important information or producing the orchestrated captivity of a revered freedom.

There are many innocuous “other facts” about oneself or one’s opponent which could be “knowingly” and negligently “misrepresented” in a judicial campaign, that would have little or no noticeable implication for the “dignity”, “integrity”, “impartiality”, or “independence” of the judiciary or the public perception of the judiciary. Attempting to capture and punish all such statements, innocuous and damaging alike, undermines the credibility of the “compelling interest” behind the restriction. The chilling effect on core political speech also deprives the public of access to potentially important information from which to make an informed electoral choice.

Because the alleged violation of Canon 7(A)(3)(b)’s hortatory language “shall act in a manner consistent with the... ‘integrity’ ... of the judiciary” is derived from the purported violation of (7)(A)(3)(e)(ii)’s overbroad “other fact” clause, canon 7(A)(3)(b)’s “integrity of the judiciary” clause is also unconstitutionally overbroad .

**CANON SECTION 7(A)(3)(e)(ii)’s “OTHER FACT” CLAUSE AND
CANON 7(A)(3)(b)’s “INTEGRITY OF THE JUDICIARY” CLAUSE ARE VAGUE**

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the modern U.S. Supreme Court articulated three reasons that overly vague statutes and rules are unconstitutional. First, as a matter of due process, the law should provide fair warning, providing a “person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly.” *Id.* at 108. Second, the law must provide “explicit standards” to law enforcement officials, judges, and juries so as to avoid “arbitrary and discriminatory application.” *Id.* Third, where First Amendment freedoms are involved, a vague statute can “inhibit the exercise of [those] freedoms,” leading citizens to “steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” *Id.* at 109.

The last point is important. The U.S. Supreme Court has consistently said that the void-for-vagueness doctrine will be applied with greater strictness where First Amendment freedoms are concerned. As they explained, “[s]tandards of permissible statutory vagueness are strict in the area of free expression. . . . *NAACP v. Button*, 371 U.S. 415, 432-33 (1963).

The vagueness doctrine has been applied to judicial disciplinary canons to invalidate canon sections that include terms that “...*did not place [an accused judge] ... on sufficient notice as to what is proscribed conduct.*” *Griffen v. Arkansas Judicial Discipline and Disability Commission*, 335 Ark. 38, 130 S.W.3d 524 (2003). In *Griffen*, the Arkansas Supreme Court was

called upon to interpret an exception within its Canon 4(C)(1) which found the term, “judge’s interest”, not sufficiently clear to avoid the constitutional invalidation of the canon which contained it. *Id.* at 54,534. The canon provided :

Canon 4C(1): “A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or *except when acting pro se in a matter involving the judge or the judge’s interests.*” (Emphasis Supplied)

In striking down the canon, the Arkansas Court was firm. “*When we consider the various arguments and interpretations made by the Judicial Commission and Judge Griffen, we are convinced that the “judge’s interests” exception in Canon 4C(1) is not clear. Without question, it provided no standard or test to govern Judge Griffen’s conduct...*”. *Id.*, at 54,534. The court then rejected the judicial and human temptation to “simplify” the required analysis in a critique of the arguments offered in support of Judge Griffen’s prosecution.

“*Boiled down to its essence, the arguments... are (1) Canon 4C(1) is clear to **them**; (2) this court adopts the canons, so they **must** be clear; and (3) even if Canon 4C(1) is not clear, Judge Griffen’s conduct was so egregious that it **must** be a violation.*”(Emphasis Supplied) *Id.*, at 57, 536.

The Arkansas Supreme Court then continued their rebuke of that analytical approach: “[n]or do the[y] concern themselves with the First Amendment and the fact that Canon 4C(1) with the standardless “judge’s interests” exception is neither sufficiently defined nor narrowly tailored so as not to restrict legitimate free speech.” The Arkansas court ultimately concluded that those promoting the prosecution of the judge :

“...*essentially proclaim that **they** know a violation when **they** see one but offer no guidance on how to extend that special knowledge to others. Without that guidance, **we** are at a loss... **We** simply cannot tell from[the]Canon....*” (Emphasis Supplied) *Id.*, at 57, 536.

The *Griffen* court cogently explained the appropriate remedy. “...[T]his court is forever amending its Rules of Professional Conduct, its Rules of Criminal Procedure, its Rules of Civil

Procedure, its Rules of Evidence, and so forth in an effort to update those rules but also to bring better clarity. And that is precisely what needs to be done with [this] Canon.” Id., at 57, 536.

The Griffen court was equally eloquent in reflecting on the responsibility of judges and Courts in reviewing and applying their own approved canons of judicial conduct.

*“We perceive that our overarching duty on this court is to follow the law. This includes adherence to the cornerstone principles of adequate notice of what constitutes impermissible conduct and closely defined parameters when infringement on free speech is involved. Both principles are interwoven in this case and determine its outcome. **Far from failing the judiciary and the people of this state..., we have done exactly what is expected of us.” Id., at 57-58, 536.** (Emphasis Supplied) So too, did Judge Shepard.*

The Florida Supreme Court, also, has recognized its own important role and responsibility in reviewing the Canons governing judicial behavior and the conduct of the JQC in enforcing them. Quoting from Justice Ervin’s, dissent in Dixon v. State, 283 So.2d 1 (Fla.1973), the majority in In Re Taunton 357 So.2d. 172, 178 observed:

“It is our duty as judges sworn to uphold the nation’s constitution to apply national constitutional standards with clinical objectivity in this matter, without catering to popular clamor or the vagaries of provincialism, local pressures, emotion or passion.”

Canon (7)(A)(3)(e)(ii)’s vague “other fact” clause provides no clear guidance or fair warning to judicial candidates of even extraordinary intelligence as to what the JQC will determine to be an “other fact” about themselves or their opponent on any given day. This prosecution illustrates the point. Accordingly, there is no reasonable opportunity for a judicial candidate to know what is prohibited, so that she may act accordingly. Moreover, far from providing “explicit standards” to officials and judges so as to avoid “arbitrary and discriminatory application” and enforcement against otherwise constitutionally protected speech, the section provides no standards at all.

The vague “other fact” clause swings the door wide open to selective enforcement, arbitrary misapplication of the canon and other mischief. This is especially true, when the JQC itself, operates as an independent, constitutionally authorized body with no real oversight of its daily activities and where review of the JQC’s procedural and non-final decisions by this Court is severely curtailed by its own rules designed to “simplify” the process. (See **FJQCR 21(a)**). Reputations, lives and careers can be completely destroyed by the misapplication of a vague rule of judicial conduct while waiting for review by this Court. More importantly, in the interim, the authority of the court and the public perception of the judiciary are undermined by lingering allegations associated with the misdirected prosecution occasioned by a vague rule.

No less important, is the impact on first amendment freedoms, owing to both the judicial candidate and the public, because, a judicial candidate seeking to avoid the risk of an unpredictable prosecution by the JQC and the attendant expense and personal turmoil associated with it, will be cowed into silence and subservient submission even where they have a good faith belief that they are in compliance with the requirements of the Code. As a result, the public will be deprived of its inherent right to receive, weigh and test important information from which to make an advised vote in a judicial election.

Because the alleged violation of Canon 7(A)(3)(b)’s hortatory language “shall act in a manner consistent with the... ‘integrity’... of the judiciary” is derived from the purported violation of (7)(A)(3)(e)(ii)’s vague “other fact” clause, canon 7(A)(3)(b)’s “integrity of the judiciary” clause is also unconstitutionally vague .

CANON 7(A)(3)(e)(ii) AND CANON 7(A)(3)(b)
ARE UNCONSTITUTIONAL AS APPLIED

Only if the Court finds that Section 7(A)(3)(e)(ii) and its “other fact” restriction have also been properly applied to the four **true**, accurately attributed statements about candidate Shepard’s reputation for character and integrity, contained in one section of one campaign postcard, does this Court need to examine the record to determine whether it contains “clear and convincing” evidence of a violation of Section 7(A)(3)(e)(ii).

In considering whether 7(A)(3)(e)(ii) has been properly applied to the four **true** statements at issue in this case, the Court should remember that “[t]he Canons and Sections are rules of reason and should be applied consistent with constitutional requirements and... decisional law...in the context of all relevant circumstances.” (Preamble to The Code Of Judicial Conduct).

Some of the important relevant circumstances regarding the four **true** statements appearing on the “Proven Integrity” postcard targeted by the JQC in this case include, but are not limited to, the facts that : **1)** the four statements about candidate Shepard’s reputation for character and integrity are **true** **2)** those **true** statements have never been retracted by the source that authored them, not even when that source endorsed candidate Shepard’s opponent based on their preference for his experience (**Respondent’s Exhibit 1**) **3)** the campaign repeatedly disclosed the origin of those four **true** statements throughout the campaign **4)** the Orlando Sentinel had published its actual, “official candidate endorsement” twice (**Respondent’s Exhibits 1 and 2**) **5)** The Orlando Sentinel’s circulation far exceeds the distribution of either campaign postcard (**Respondent’s Exhibit 5**) **6)** candidate Shepard’s opponent was also disseminating and amplifying the fact that **he** had received the Orlando Sentinel’s “official candidate endorsement” in the 2014 judicial race **7)** the challenged postcard is titled “Proven Integrity” not , for example, “Community Endorsements” (**JQC Exhibit 10**) **8)** no graphic depiction or illustration is used to present the four **true** statements about the candidate’s

character and integrity (JQC Exhibit 10) 9) the four true statements about the candidate's character and integrity, appear directly adjacent to a panel emblazoned with the words "Proven Integrity" 10) the section does not reproduce a newspaper like graphic(JQC Exhibit 10) 11) the section does not use the title of the previously published Orlando Sentinel article, (JQC Exhibit 10) 12) the section does not reproduce the title of the 2014 article announcing the Orlando Sentinel's "official candidate endorsement" in the judicial race 13) the section does not use a news masthead font to suggest a newspaper headline, (JQC Exhibit 10) 14) does not utilize a layout designed to create the impression of a reproduced newspaper endorsement (JQC Exhibit 10) 15) does not use the words "endorsement", "endorsed by", "selected by", "chosen", "the paper's choice", "2014", "for 2014", "editors' choice" or any other language, at all, that could suggest an actual, "official candidate endorsement" in the judicial race. (JQC Exhibit 10) The only language included on the entire postcard, and specifically, that portion of the postcard challenged by the JQC, that references the Orlando Sentinel at all, is the accurate attribution to the Orlando Sentinel as the source of the four, true, character statements.

Here, Canon 7(A)(3)(e)(ii) is unconstitutionally applied to punish four true statements regarding Ms. Shepard's abiding reputation for character and integrity. The observations about Ms. Shepard's character and reputation were properly attributed to the source that made them. That source has never once retracted any part of those observations; not in the intervening years since making them, not when they endorsed her opponent in the 2014 judicial race, not when they personally interviewed her to determine her reasons and qualifications for seeking the bench, not in the articles published during the 2014 judicial election, not even in any of the many stories written after these allegations were brought. Never.

Neither, is there any evidence in the record to establish that any of the observations are *not* true. The only evidence in the record is that the integrity and qualities of character identified

in Ms. Shepard that she brought to public service early on in her career, have continued though a lifetime of service and professional accomplishment unabated, and persist today. (**Respondent's Exhibit 4, T.T.** p.118 ln. 1-2, p.122 lns.16-23, p.123 lns.11-p.124 ln.4, p.125 lns.16-19, p.126 ln.1, 5-11, p.147 lns.15-16 and ln.25-p.148 ln.2).

Because the alleged violation of Canon 7(A)(3)(b)'s hortatory language "shall act in a manner consistent with the... 'integrity'... of the judiciary" is derived from the unconstitutional application of (7)(A)(3)(e)(ii)'s "other fact" clause, canon 7(A)(3)(b)'s "integrity of the judiciary" clause is also unconstitutionally applied to the four **truthful** observations regarding Ms. Shepard's abiding reputation for character and integrity.

**ALLOWING THE JQC TO PROSECUTE SUCCESSFUL JUDICIAL CANDIDATES FOR
CAMPAIGN SPEECH UNDER CANON 7(A)(3)(e)(ii) ESTABLISHES
A DANGEROUS PRECEDENT**

The Court should also be mindful that "[t]he Code is not to be construed to impinge on the essential independence of judges..." and that "...the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage...". Fifty-three times in The Code Of Judicial Conduct, the vital importance of a truly independent and impartial judiciary is underscored. When, on occasion, that aspiration is actually fulfilled, the Code should not be anonymously utilized to undermine the achievement. **Levey v. Dijols** 990 So.2d 688 (Fla.4th DCA, 2008), **Fladell v. Palm Beach County Canvassing Bd.**, 772 So.2d 1240, 1242 (Fla.2000). Likewise, invocation of the Canons and use of the JQC process should never be

permitted to settle political scores, vindicate powerful interests, or soften a disfavored target. The Court has often recognized its responsibility to oversee the conduct of proceedings initiated by the JQC. As this court said, “[i]t is the responsibility of this Court to review the proceedings before the Judicial Qualifications Commission in the light, and under the guidance, of these rules.” ***In Re LaMotte*** 341 So.2d 514, 516. (Fla. 1977)

Attention to these cautions in the Preamble to the Code Of Judicial Conduct is even more imperative when the Code is invoked to challenge core political speech regarding the reputation for **character** and **integrity** of a judicial candidate. This is so, because a judicial candidate’s established reputation for character and integrity is essential information in the context of a judicial election and voters have a fundamental right to that information. Even more so, because in a judicial election, a judicial candidate’s reputation for character and integrity is one of the few permitted areas of candidate speech explicitly recognized by this Court. ***In re Kinsey*** 842 So.2d 77, 89 (Fla.2003).

If the Code can be invoked as a tactic to undermine or overturn a constitutionally mandated judicial election, especially if it can be invoked to prevent a judicial candidate from discussing their own, earned reputation for character and integrity, or from correctly identifying those who have recognized that character and integrity, then the chilling effect on all judicial candidate speech will be severe and the public will be unconstitutionally deprived of essential information from which to make an informed electoral choice.

The Code, itself recognizes this danger. The Canons are not written, or intended to be interpreted, as rules of “strict liability” or to be a hidden snare for judges who arrive at the bench through constitutionally mandated judicial elections. As the 11th Circuit recognized in ***Weaver***, the chilling effect of... “absolute accountability” to the JQC and the threat of discipline for the use of **true** statements someone may perceive as “misleading” during a judicial campaign, is

“incompatible with the atmosphere of free discussion contemplated by the First Amendment”.

Weaver v. Bonner, 309 F.3rd 1312, 1319 (11th Cir. 2002). “For fear of violating these broad prohibitions, candidates will too often remain silent even when they have a good faith belief that what they would otherwise say is truthful”. **Weaver v. Bonner**, 309 F.3rd 1312, 1320 (11th Cir. 2002).

Additionally, without closer safeguards and clearer standards, unsuccessful judicial candidates or their supporters *could* be tempted to utilize the low-risk opportunity to anonymously invoke the JQC process to allege campaign improprieties, as a regular or preferred method of redressing an electoral loss. If so, the practice, in turn, could have a systemic impact on the public perception of the judiciary, as well as serve as a powerful deterrent to well qualified candidates for the bench who might not enjoy the insular popularity of lesser qualified candidates.

Accordingly, “[t]he Canons and Sections are rules of reason. They should be applied **consistent with constitutional requirements**, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is not to be construed to impinge on the essential independence of judges...” (Preamble to the Code Of Judicial Conduct).

II.

DUE PROCESS VIOLATIONS

Judge Shepard’s substantive and procedural due process rights were also violated by the proceedings before the JQC. First, the JQC initiated and prosecuted formal disciplinary proceedings against Judge Shepard alleging violations of four judicial canons, specifically

Canons 1, 2(A), 7(A)(3)(c), and 7(A)(3)(d), for which there could be no probable cause, not only because there were never any factual allegations to support them, (nor were any such allegations contained in either the Notice Of Formal Charge filed on September 24, 2015 or in the Amended Notice Of Formal Charge filed on January 8th, 2016) but also because, there was **no legal authority** for them. This Court has previously and unequivocally ruled that Canons 1 and 2 **do not apply** to the campaign conduct of non-incumbent judicial candidates. **In re Kinsey** 842 So.2d 77, 89 (Fla.2003). Counsel and Special Counsel for the JQC, members of the both the investigative and hearing panels and their Chairs all were well aware that there were no factual allegations **nor** legal authority establishing or suggesting violations of these canons, yet they charged and prosecuted Judge Shepard for their alleged violation, anyway.

Repeated requests to dismiss these clearly “inapplicable” alleged violations for which there were “no allegations or proof” were denied. (**Record:** Judge Shepard’s Answer and Affirmative Defenses, December 8th, 2015, Response of The Florida Judicial Qualifications Commission To Judge Shepard’s Answer and Affirmative Defenses, December 18th, 2015, Amended Notice Of Formal Charge, January 8th, 2016, Respondent’s Motion To Dismiss, February 19th, 2016, Order Denying Respondent’s Motion To Dismiss, February 22nd, 2016, Respondent’s Amended Motion To Dismiss, February 22nd, 2016, Order Granting Respondent's Motion For Leave To Amend And Denying Amended Motion To Dismiss, February 25th, 2016, Motion For Review By The Full Hearing Panel Of The Chair's Disposition Of Respondent's Amended Motion To Dismiss March 3rd, 2016, Hearing Panel Order Affirming Chair’s Denial Of Respondent's Amended Motion To Dismiss, March 8th, 2016, Respondent’s Answer And Affirmative Defenses To The Amended Notice Of Formal Charge, March 14th, 2016, Motions In Limine To Dismiss Canons 1, 2(A), 7(A)(3)(c), 7(A)(3)(d), April 8th, 2016, **T.T.** p. 12 ln 23 – p.13 ln.10, p 198 ln.1- p.199 ln.18, and **JQC Hearing Panel Findings And Recommendations**

p. 20 ln.12-13) Accordingly, Judge Shepard had to defend these allegations through the final hearing.

There was no effort at the beginning of the final hearing to formally to amend the Amended Notice Of Formal Charge nor, at the hearing's conclusion, to conform the pleading with the evidence presented. (Conformation not permitted in JQC Proceedings. **In Re Taunton** 357 So.2d. 172 at Footnote 2)

Second, through the prepared testimony of the JQC witness at the final hearing on April 8th, 2016, the JQC suddenly introduced unidentified alleged violations the judicial canons based on the JQC's Exhibit 8, (**T.T.** p. 82 ln.9- p.83 ln.8, p.153 ln.21- p.157 ln.21, p.191 ln.2 – p.194 ln.7, p.194 ln. 23- p.195 ln. 3) despite the fact that no allegations concerning it were ever included in the Notice Of Formal Charge or Amended Notice Of Formal Charge, nor was it attached to either pleading. (**Record:** Notice Of Formal Charge, September 24th, 2015, Amended Notice Of Formal Charge, January 8th, 2016, **JQC Exhibit 1**).

In fact, there were no exhibits attached or incorporated by reference to the Amended Notice Of Formal Charge. (**Record :** Amended Notice Of Formal Charge, January 8th, 2016). Yet, at the final hearing, the JQC produced its exhibit book and distributed it to the hearing panel members containing JQC Exhibit 8. By JQC Counsel Williams' own admission, the Investigative Panel of the JQC had "already" conducted a "thorough" review of the "facts" regarding JQC Exhibit 8, and found "no probable cause" that it violated any Canon of Judicial conduct. (**Record:** Response of the Florida Judicial Qualifications Commission To Judge Shepard's Answer And Affirmative Defenses, December 18th, 2015, p.2 lns.10-13) On March 21st, 2016, Judge Shepard, through counsel, objected to the introduction of JQC Exhibit 8 and to any reference to it during the final hearing, as a violation of section§ 90.403 Florida Statutes and

Fla.Const. Art. V, Section 12(a)(4); FJQC 12(a); Fla.R.J.Admin. 2.420(3)(A), among other objections. (**Record** : Respondent's Objections To The JQC's List Of Exhibits, March 21st 2016)

On March 23rd, 2016, referring to JQC Exhibits 3 and 4, Hearing Panel Chair, Downs ordered the JQC to "...redact reference, if any, to charges on which probable cause was not found" based on the objections made in Judge Shepard's "Objections To JQC List Of Exhibits" filed on March 21st, 2016. Presumably, the same logic would apply to other exhibits "...on which probable cause was not found". (**Record** : Order On Respondent's Motion To Compel And Objections To The JQC's List Of Exhibits, March 23rd, 2016)

Also on March 23rd, 2016, Judge Shepard's counsel realized he had inadvertently mis-numbered the listed exhibits in "Respondent's Objections To JQC List Of Exhibits" filed on March 21st, 2016. He then moved the Chair to correct the previously filed list of objections and reconsider an objection to JQC Exhibit 8 **on the same grounds as** cited for JQC Exhibits 3 and 4. On March 24th, 2016, Hearing Panel Chair, Downs overruled the objection. (**Record** : Motion For Reconsideration Of Respondent's Objections To Exhibits 7 & 8 Of JQC's Prehearing Statement, March 23rd, 2016, Order On Respondent's Objection To JQC Exhibit 5, And Respondent's Motion For Rehearing. March 24th, 2016).

At the final hearing, because the JQC included Exhibit 8 in the notebooks it distributed to the hearing panel members, Judge Shepard was forced to defend against an exhibit which was previously considered by the investigative panel, and for which no probable cause had been found. (**T.T.** p.153 lns.21- p.154 ln.14 p.155 ln.5 and ln.12-ln.22, p.156 ln.3 p.157 ln.11, p.191 ln.2-p.192 ln.18-p.194 ln.7)

Third, at the final hearing, the JQC also improperly introduced JQC Exhibit 7 despite Judge Shepard's objection through counsel on March 21st, 2016. (**Record** : Respondent's Objections To The JQC's List Of Exhibits, March 21st 2016, Motion For Reconsideration Of

Respondent's Objections To Exhibits 7 & 8 Of JQC's Prehearing Statement, March 23rd, 2016)

No allegations related to JQC Exhibit 7 were ever part of the Notice Of Formal Charge or

Amended Notice Of Formal Charge filed in this case, nor was it attached to either pleading.

(Record: Notice Of Formal Charge, September 24th, 2015, Amended Notice Of Formal Charge,

January 8th, 2016, **JQC Exhibit 1)** JQC Exhibit 7 had absolutely no bearing on the judicial

campaign of 2014. No questions were asked about JQC Exhibit 7 at the final hearing. Nothing in

JQC Exhibit 7 tended to establish or refute any of the allegations contained in the Amended

Notice of Formal Charge. Its introduction violated § 90.403 Florida Statutes and Fla.Const. Art.

V, Section 12(a)(4); FJQC 12(a); Fla.R.J.Admin. 2.420(3)(A).

Fourth, at the final hearing, the JQC also improperly introduced JQC Exhibit 5 despite

Judge Shepard's objection through counsel on March 21st, 2016. **(Record :** Respondent's

Objections To The JQC's List Of Exhibits, March 21st 2016) No allegations related to JQC

Exhibit 5 were ever part of the Notice Of Formal Charge or Amended Notice Of Formal Charge

filed in this case, nor was it attached to either pleading. **(Record:** Notice Of Formal Charge,

September 24th, 2015, Amended Notice Of Formal Charge, January 8th, 2016, **JQC Exhibit 1)**

JQC Exhibit 5 had absolutely no bearing on the judicial campaign of 2014. No questions were

asked about JQC Exhibit 5 at the final hearing. Nothing in JQC Exhibit 5 tended to establish or

refute any of the allegations contained in the Amended Notice of Formal Charge. Its introduction

violated § 90.403 Florida Statutes and Fla.Const. Art. V, Section 12(a)(4); FJQC 12(a);

Fla.R.J.Admin. 2.420(3)(A).

Fifth, at the final hearing, on cross examination, and despite repeated objection, counsel for the JQC improperly introduced evidence excluded by § 90.404 and § 90.403 Florida Statutes.

(T.T. p.138 ln. 20- p. 139 ln.20, p.140 ln.4- p.143 ln.12)

Sixth, Judge Shepard was repeatedly denied a meaningful opportunity to obtain discovery and cross examine the JQC's witness regarding his understanding of the central allegation with which Judge Shepard was charged. (T.T. p.86 ln.20- p.87 ln.24, p.90 ln.22-p.91 ln.18,p.94 ln.21- p.95 ln.16, p.97 lns.3- p.98 ln.16, p.100 ln.15- p. 101 ln.15, p.105 ln.3- 6, p.106 ln.3-15, p.107 ln.24- p.108 ln.13, p.113 ln.12-24) Judge Shepard was wrongfully denied discovery pertaining to the specific allegations contained in the Notice Of Formal Charge and Amended Notice Of Formal Charge. Judge Shepard, through counsel sought discovery in the form of requests for admissions, interrogatories and requests for production. Nearly every request was denied on the authority of **In Re Grazziano** 696 So.2d 744 (Fla. 1997), and Fla.Const. Art. V, Section 12(a)(4); FJQCR 12(a); Fla.R.J.Admin. 2.420(3)(A). (**Record:** Notice Of Serving The Answers And Objections Of The Florida Judicial Qualifications Commission To The Respondent's First Request For Admissions, January 8th, 2016, Notice Of Serving The JQC's Response, Objection, And Motion To Strike, Or Alternatively, Motion For Protective Order Against Judge Shepard's First Request For Production, January 8th, 2016, Notice Of Serving The JQC's Response And Objections To Respondent's First Interrogatories, January 8th, 2016, Order Granting Motion To Quash Subpoena Duces Tecum And For Protective Order, January 11th, 2016 Order On Respondent's Motion To Compel And Objections To The JQC's List Of Exhibits. March 23rd, 2016).

As a result, Judge Shepard was prejudiced in her defense of this action by not being allowed to discover prior witness statements of the JQC's hearing witnesses, pursuant to Rule 12(b) and 12(c) FJQCR, or to discover the transcripts which could have been used for impeachment at the final hearing, or to uncover bias and improper motives through a properly prepared deposition of those witnesses, and by not to being able test the perception, personal knowledge, or recollection of those witnesses with benefit of those prior statements, or to

discover any other witnesses interviewed during the JQC's investigation of the allegation underlying the Amended Notice Of Formal Charge that might provide support for Judge Shepard's defense or cast doubt on the JQC's evidence and theory of prosecution.

This Court has recognized and previously, repeatedly, explained to the JQC that materials and information related to the initiation and investigation of any allegation contained in the actual Notice Of Formal Charge or Amended Notice Of Formal Charge only remains confidential **until** the Notice Of Formal Charge is filed. Additionally, this Court has made clear that "... Rule 12(b) allows an accused judge to have **full access** to the evidence upon which formal charges are based." **In Re Grazziano** 696 So.2d 744,751(Fla.1997) The Court again reiterated this requirement in **In Re Holloway**, No. 00-143, Supreme Court Case No. SCOO-2226. Specifically, the Florida Supreme Court determined that witness statements made to the JQC's investigator must be provided to the accused judge if the statements or statement summaries were used to find probable cause on the charge contained in the Notice Of Formal Charge.

In **Holloway**, Special Counsel refused to turn over summaries of witness statements made to the JQC investigator, claiming that the summaries were privileged. As a result, Judge Holloway filed a Motion to Compel with the Hearing Panel which was denied. (**See Holloway : Motion to Compel**, dated January 31st, 2001 and the Hearing Panel's Order on the Motions for Protective Order and to Compel, dated February 20th, 2001). Thereafter, Judge Holloway filed her Motion to Compel with the Florida Supreme Court on February 21st, 2001. (**See Holloway : Motion to Compel**, dated February 21st, 2001) On February 22nd, 2001, the Supreme Court requested the JQC to file a response within one working day to the respondent's Motion to Compel. (**See Holloway : Florida Supreme Court Order**, Dated February 22nd, 2001).

The JQC filed a nine-page response arguing that the witness statements were prepared in anticipation of litigation, and were thus protected by the work-product doctrine. In addition, Special Counsel asserted that the witness' interviews given to the JQC's investigator and the resulting witness statements did not fall within the purview of Rule 12(b) because they were not "statements" as defined by Florida Rules of Civil Procedure. (See Holloway : JQC's Motion in Opposition, dated February 23rd, 2001). The same day the JQC filed its response, the Florida Supreme Court entered its Order granting Judge Holloway's Motion to Compel and ordered the JQC to produce **all** statements used to determine probable cause. (See Holloway : Florida Supreme Court Order Dated February 23rd, 2001). Clearly, this Court has, itself, recognized the “essential fairness” required in the proceedings before the JQC when it ordered such witness statements, investigative interviews and privilege log turned over to the accused judge. (See Holloway : Florida Supreme Court Order Dated February 23rd, 2001).

Information and materials on matters for which the Investigative Panel of the JQC found no probable cause, remain confidential in perpetuity. However, denying an accused judge the right to confront and cross examine their accuser on allegations actually made part of a Notice Of Formal Charge violates the due process guarantees of the U.S. Constitution and Florida Constitution.

While a presiding officer is admittedly given great latitude in the conduct of a disciplinary hearing, they must still comply with fundamental expectations of fairness and impartiality. Due to the hearing panel Chair's failure to require equal adherence to established rules of evidence and procedure, from the JQC and its witness, as required of Judge Shepard and her witnesses, Judge Shepard was effectively denied a full and fair opportunity to test the JQC's witness' perception, personal knowledge or recollection, to establish the foundation for his perspective of the challenged language or his asserted “knowledge” of candidate Shepard's

“knowledge”, and establish the basis for or uncover and reveal any improper bias behind the witness’ testimony or circumstantial and perceptual bias behind his conclusions. At one point, the Chair even permitted the witness to cross-examine from the witness stand as if he was the JQC’s designated prosecutor, over even the strenuous objection of Judge Shepard. (T.T. p.100 ln.15-p.101 ln.15)

Even in the context of a JQC proceeding, a judge does not forfeit the right to either procedural or substantive due process. **In Re Taunton**, 357 So.2d 172, 181(Fla. 1978). The Florida Constitution affords even more due process protection than does the U.S. Constitution. (Article 1, Section 9 Florida Constitution) (**Department Of Law Enforcement, Appellant v. Real Property, Etc., Appellee**, 588 So.2d 957, 960 (Fla 1991)¹⁶ **Traylor v. State**, 596 So.2d 957 (Fla. 1992)¹⁷

¹⁶ At **960**. “The basic due process guarantee of the Florida Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law.” Art. I, § 9, Fla. Const. Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government. To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of that individual's right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights. Substantive due process may implicate, among other things, the definition of an offense, *see State v. Bussey*, 463 So.2d 1141 (Fla.1985); *Baker v. State*, 377 So.2d 17 (Fla.1979); the burden and standard of proof of elements and defenses, *see, e.g., State v. Cohen*, 568 So.2d 49, 51 (Fla.1990); the presumption of innocence, *see State v. Rodriguez*, 575 So.2d 1262 (Fla.1991); *State v. Harris*, 356 So.2d 315, 317 (1978); vagueness, *see, e.g., Perkins v. State*, 576 So.2d 1310 (Fla.1991); *Bussey*; *State v. Barquet*, 262 So.2d 431, 436 (Fla.1972); the conduct of law enforcement officials, *see Haliburton v. State*, 514 So.2d 1088 (Fla.1987); *State v. Glosson*, 462 So.2d 1082 (Fla.1985); the right to a fair trial, *see Kritzman v. State*, 520 So.2d 568 (Fla.1988); and the availability or harshness of remedies, *see In re Forfeiture of 1976 Kenworth Tractor Trailer Truck*, 576 So.2d 261 (Fla.1990); *Roush v. State*, 413 So.2d 15

While proceedings before the IQC are intended to be simplified, they must still comply (Fla.1982)....”

At **960**. “...Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue. Procedural due process under the Florida Constitution guarantees to every citizen the right to have that course of legal procedure which has been established in our judicial system for the protection and enforcement of private rights. It contemplates that the defendant shall be given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure, before judgment is rendered against him. *State ex rel. Gore v. Chillingworth*, 126 Fla. 645, 657–58, 171 So. 649, 654 (1936) (citations omitted); *accord, e.g., Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972) (procedural due process under the fourteenth amendment of the United States Constitution guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner)....”

¹⁷ At **962**. “...In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling. *See* Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L.Rev. 707, 709 (1983)....

“...Federal and state bills of rights thus serve distinct but complementary purposes. The **federal Bill of Rights** facilitates political and philosophical homogeneity among the basically heterogeneous states by **securing**, as **a uniform minimum**, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The **state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom** of each insular state population within our nation.... (Emphasis Supplied)

“...When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein.”...

At **963**. “We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.

The text of our Florida Constitution begins with a Declaration of Rights—a series of rights so basic that the framers of our Constitution accorded them a place of special privilege. These rights embrace a broad spectrum of enumerated and

with ordinary notions of consistency and fairness. In Re Taunton, 357 So.2d 172, 181(Fla. 1974). These rights are not implied liberties that conjoin to form a single overarching freedom: They protect each individual within our borders from the unjust encroachment of state authority—from whatever official source—into his or her life. Each right is, in fact, a distinct freedom guaranteed to each Floridian against government intrusion. Each right operates in favor of the individual, against government. This Court over half a century ago addressed the fundamental principle of robust individualism that underlies our system of constitutional government in Florida:

It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do. These Declarations of Rights ... have cost much, and breathe the spirit of that sturdy and self-reliant philosophy of individualism which underlies and supports our entire system of government. No race of hothouse plants could ever have produced and compelled the recognition of such a stalwart set of basic principles, and no such race can preserve them. They say to arbitrary and autocratic power, **from whatever official quarter it may advance to invade these vital rights of personal liberty** and private property, “Thus far shalt thou come, but no farther.”... (Emphasis Supplied)

State ex rel. Davis v. City of Stuart, 97 Fla. 69, 102–03, 120 So. 335, 347 (1929). No other broad formulation of legal principles, whether state or federal, provides more protection from government overreaching or a richer environment for self-reliance and individualism than does this “stalwart set of basic principles.”

Under our Declaration of Rights, each basic liberty and each individual citizen has long been held to be on equal footing with every other:

Every particular section of the Declaration of Rights stands on an equal footing with every other section. They recognize no distinction between citizens. Under them every citizen, the good and the bad, the just and the unjust, the rich and the poor, the saint and the sinner, the believer and the infidel, have equal rights before the law.

Boynton v. State, 64 So.2d 536, 552–53 (Fla.1953). Each right and **each citizen, regardless of position, is protected with identical vigor from government overreaching, no matter what the source.** *Id.* at 552. (Emphasis Supplied)...

Special vigilance is required where the fundamental rights of Florida citizens suspected of wrongdoing are concerned, for here society has a strong natural inclination to relinquish incrementally the hard-won and stoutly defended

1978). At a minimum, this should mean that the rules followed and standards applied by the JQC in the conduct of its proceedings, from investigation to the rendering of its findings and recommendations, should be consistent within the case, and from case-to-case.¹⁸ It should also mean that the JQC panel members and professional staff adhere to, and are bound by, the same ethical standards they apply in reviewing the conduct before them. JQC prosecutors should be bound by the same rules of professional conduct that apply to lawyer prosecutors generally.

The rules of evidence and procedure that will be followed by the JQC should not have to be divined “in the moment” based on some particular person’s subjective notion of what the words “otherwise improper” mean in Rule 12 FJQCR. The procedural preference for “latitude, flexibility and simplicity” should not be permitted to supplant the constitutional bedrocks of fairness, impartiality and consistency in the conduct of JQC proceedings. Otherwise, rather than

freedoms enumerated in our Declaration in its effort to preserve public order. Each law-abiding member of society is inclined to strike out... reflexively by constricting the constitutional rights of all citizens in order to limit those of the suspect—each is inclined to give up a degree of his or her own protection from government intrusion in order to permit greater intrusion into the life of the suspect. The framers of our Constitution, however, deliberately rejected the short-term solution in favor of a fairer, more structured system...”

¹⁸ “Due process, guaranteed by Article I, Section 9, Florida Constitution, contemplates notice that an act is a [disciplinary] offense at the time it is committed. Any other conclusion would expose judicial officers to the unfair and untenable situation in which even innocent acts of today could someday be declared improper and subject them to punishment.... **We cannot approve a rule that would permit a review of every judge’s past conduct each time a change in the [composition of the JQC] occurs to determine whether innocent conduct of the past has been converted into grounds for discipline under the new [regime].** Judicial officers are justified in relying on the current rule and in conducting themselves accordingly.” (Edits and Emphasis Supplied)

serving an essential function in maintaining an independent, impartial, and ethical judiciary, the JQC, itself, and its actions are liable to being seen as capricious, arbitrary and unjust.

III.

NO “CLEAR AND CONVINCING” EVIDENCE

Clear and convincing evidence has been defined evidence which is “positive, precise, and explicit” and which must contain both qualitative and quantitative standards. **Slomowitz v. Walker** 429 So.2d 797 (Fla.4th DCA 1983). “The evidence must be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.” **Slomowitz v. Walker** 429 So.2d 797 (Fla.4th DCA 1983) **In Re Davey** 645 So.2d 398 (Fla. 1994).

Because of the serious and irreversible consequences that result from certain legal proceedings, “clear and convincing evidence” is the kind of evidence that is required before action is taken by a court. It is the kind of evidence that is so clear and uncontroverted, so great and of such magnitude that “clear and convincing” is the standard applied to permanently sever the natural parent child relationship, **Kingsley v. Kingsley** 623 So.2d 780,785 (Fla. 5th DCA 1993) **In Re Adoption of Baby E.A.W.** 658 So.2d 961 (Fla. 1995) **Santosky v. Kramer** 455 U.S.745, 746 (S.Ct.1982) discontinue hydration and nutrition to a terminally ill patient, **Cruzan by Cruzan v. Director, Missouri Dept. of Health** 497 U.S. 261 (S.Ct.1990) involuntarily

commit a patient to a mental hospital **In Re Smith** 342 So.2d. 491 (Fla. 1977), or discontinue life support. **In Re Guardianship Of Barry** 445 So.2d. 365,372 (Fla. 2nd DCA, 1894).

In the instant case, the record does not establish clear and convincing evidence that candidate Shepard knowingly misrepresented that she had obtained the Orlando Sentinel's official candidate endorsement in the judicial contest of 2014. Only when the record first establishes clear and convincing evidence of a formally charged, enforceable violation of Canon of Judicial conduct, does this Court give "great weight" to the findings and recommendations of the JQC Hearing Panel. **In Re Frank** 753 So.2d. 1228, 1234 (Fla.2000) Even then, this Court retains the ultimate responsibility for determining both culpability as to the violations charged and the appropriate discipline, if any, for any violations found. **In Re Davey** 645 So.2d 398, 404 (Fla. 1994).

After almost two years of relentless investigation, depositions and discovery, the JQC called only one witness against Judge Shepard. (T.T. p.65 lns.19-21) Far from establishing that candidate Shepard "knowingly misrepresented" an "other fact", that witness could only testify to their own, unqualified, non-expert opinion and perception of the targeted language. Even then, the witness testified that they were not "misled" by the postcard in question. (T.T. p.69 lns.4-6, p.85 ln.4 – p.85 ln.17 and p.90 lns.6-9) That witness testified that they knew who had obtained the Orlando Sentinel's official candidate endorsement in the judicial race. (T.T. p.69 ln.4-6, p.85 lns.4 – p. 85 ln.17 and p.90 ln. 6-9) That witness testified that they knew that candidate Shepard did not have the Orlando Sentinel's official candidate endorsement in the judicial race.

Contrary to the JQC's theory that candidate Shepard knowingly misled the public to believe she had obtained the Orlando Sentinel's official candidate endorsement in the judicial race because she: **1)** failed to include a date when the statements about her character and reputation for integrity were first authored and **2)** failed to include in the presentation of the four

true statements about her reputation for character and integrity, a specific reference to her previous legislative service, the JQC’s own witness specifically testified, that the absence of a date in the targeted section of the postcard was not “part of [his] problem” with challenged language. (T.T. p.88 lns.19 – 21). The witness also testified that he “knew that [candidate Shepard] had run for the legislature at one time but that Katz had the endorsement for this race”. (T.T. p.90, lns.7-8).

The point of the whole inquiry and proceeding, as the witness understood it, both at the time of his deposition and at the final hearing was that candidate Shepard “[claimed] authorship from the Orlando Sentinel” for the four true statements targeted by the JQC for prosecution. (T.T. p.80 lns.18-20 and p.86 lns.9-10). According to the JQC’s witness, the mere fact that the Orlando Sentinel was accurately identified as the author of the statements, meant to him, that candidate Shepard had “lied” and represented that she had received the Orlando Sentinel’s official candidate “endorsement” in the 2014 judicial contest. (**Respondent’s Exhibit 7** p. 11 lns.22-25 and p.12 lns.1-2) (T.T. p.84 lns.6-7,9,11).

Despite being a practicing criminal defense lawyer for 46 years, the JQC’s witness gave addled, confused, conflicting, imprecise testimony regarding his recollection of the campaign. (**Respondent’s Exhibit 7** p.7 ln.18-p.8 ln.2, p.16 ln.4-6) (T.T. p.71 ln.6,8 p.73 lns.3-5, lns.8-10,12, p.74 ln.2-p.75 ln.9) He did not remember whether candidate Shepard’s opponent was a “magistrate” or a “child support hearing officer”. (T.T. p.109 ln.21-22, p.110 lns.2-3) He found the use of a photograph of candidate Shepard’s parents in the “Life Of Service” postcard, “deceptive” (**JQC Exhibit 9**) (Respondent’s Exhibit 7 p.9 lns.7-8).

He testified to firm conclusions about matters of which he admittedly had no actual knowledge. (T.T. p.93 lns.10-11 and 18-20, p.94 lns.5-6) For example, he was unfamiliar with candidate Shepard’s opponent’s disciplinary record but nevertheless, “knew” candidate Shepard

had “lied” about it on a campaign mailer. Reviewing that same mailer and the actual facts upon which it was based, the Investigative Panel of the JQC reached the opposite conclusion. As Counsel for the JQC pointed out in his response to Judge Shepard’s Answer and Affirmative Defenses, the Investigative Panel of the JQC had “...already conducted thorough review of the relevant facts and made a specific finding...” (**Record:** Response Of The Florida Judicial Qualifications Commission To Judge Shepard’s Answer And Affirmative Defenses, December 18th, 2015) that candidate Shepard did **not** misrepresent her opponent’s disciplinary record. Accordingly, no such allegation was included in the JQC’s Amended Notice Of Formal Charge. (**JQC Exhibit 1**).

The JQC’s witness was also evasive when asked to answer basic questions about what, from his perspective, constituted a “lie”. (**T.T.** p. 94 ln.20, p.95 ln.1-p.96 ln.15, p.97 ln.3- p.98 ln18, p.98 ln. 20- p.99 ln.7, p.108, lns.14-17, and ln.20 – p.109, ln.23). He testified that the omission of both the date and the context of four quoted lines followed by an attribution, evident in the campaign literature of candidate Shepard’s opponent were not deceptive, misleading or a “lie”. (106 lns.17-21, p.107 lns.5-21 and ln.24-p.108 ln.8, p.108 lns.14-17, p.108 ln.20- p.109 ln. 14). Nonetheless, the witness testified that the very same “omissions” alleged to exist on candidate Shepard’s postcard were a “misrepresentation...obviously deceit and a lie”. (**T.T.** p. 109 lns.16-17).

The witness found the opponent’s omissions excusable and understandable because the witness didn’t expect the opponent to “...shine a flashlight on his previous disciplinary action” or his suspension from the practice of law, because **those** “other facts” were not some of his “sterling accomplishments”. (**T.T.**105 ln.19- p.106 ln.2) “People...” the witness testified, “were willing to overlook or forgive or excuse” the opponent’s past “mistake” (**T.T.** p.109 lns.16-23). The witness also testified that he had **no personal knowledge** as to how the challenged section

of the postcard was created, nor its actual purpose. Instead, the witness relied exclusively on his own perception, to divine that the four statements about candidate Shepard's reputation for character and integrity were "obviously" a "misrepresentation" of an official candidate endorsement, rather than true statements about candidate Shepard's reputation for character and integrity compared side-by-side with four equally true statements regarding her opponent's reputation for character and integrity (T.T. p.99 lns.21-25, p.100 lns.1-10)

The JQC's witness did not testify as an expert. (Respondent's Exhibit 7p.10 lns.16-25)
He admitted that he had not examined the Canons of Judicial Conduct or considered them before testifying for the JQC. (p.111 ln.3-20, p.111 ln.24-p.112 ln.3)

ERRONEOUS ASSUMPTIONS, FAULTY LOGIC, WEAK REASONING

The JQC's theory of a violation is premised on several unacknowledged and erroneous assumptions :

First, inherent qualities of character and integrity evaporate or dilute over time, and therefore, any reference to them in the course of a judicial campaign, must be "date stamped" or else constitute a "knowing misrepresentation" in violation of Canon 7(A)(3)(e)(ii).

Second, inherent qualities of character and integrity are "situational" in nature and therefore, any reference to their recognition by others must be "contextualized" or else constitute a "knowing misrepresentation" in violation of Canon 7(A)(3)(e)(ii).

Third, if statements about a person's character and reputation for integrity are at some time published in an endorsement for a public office, and that person later becomes a candidate for judicial office, that person can never reference those statements, made about their own character and reputation for integrity, apart from the previously published endorsement without violating Canon 7(A)(3)(e)(ii).

Fourth, earned recognition of lifelong qualities of character and integrity can only be accurately attributed, in the course of a judicial campaign, **if** the author of that recognition is someone other than a newspaper, or else that attribution will constitute a “knowing misrepresentation” of an “official candidate endorsement” in violation of Canon 7(A)(3)(e)(ii).

Fifth, if statements are publically authored and not retracted regarding a particular judicial candidate’s inherent and abiding qualities of character and integrity, and that author, for other reasons, later endorses that judicial candidate’s opponent in a particular race, any attribution to that author of the statements made by that author, regarding that judicial candidate’s character and integrity constitutes a “knowing misrepresentation” in violation of Canon 7(A)(3)(e)(ii).

Sixth, Canon 7(A)(3)(e)(ii)’s prohibition against the “knowing misrepresentation” of an “other fact” applies to **true** statements of observation and evaluation, actually made by the author credited with making them, regarding a judicial candidate’s reputation for character and integrity.

Seventh, all campaign postcards issued during a judicial campaign are derivative and repetitive rather than original, independently created communications having distinct purposes.

Eighth, alleged “deliberate” action “clearly and convincingly” establishes a “knowing” misrepresentation.

Ninth, in order to comply with the Canons Of Judicial Conduct, all campaign postcards issued during a judicial campaign must have the same purpose and utilize the same exact information.

Tenth, a judicial candidate cannot include on any campaign postcard, particular language aimed at particular purpose, without also including all other language included on a different campaign postcard for a different purpose.

Eleventh, all postcards issued during a judicial campaign must be designed by specific reference to a single “master” postcard, from which no deviations are permitted without constituting a “knowing misrepresentation” in the subsequent postcard, prohibited by 7(A)(3)(e)(ii).

Twelfth, the failure to include all information present on a previously issued campaign postcard in a subsequent campaign postcard issued for a different purpose is, in and of itself, “clear and convincing” evidence of a judicial candidate’s “knowing misrepresentation” of an “other fact” subject to violation of 7(A)(3)(e)(ii).

Thirteenth, a “supposed omission” is the same thing as a “knowing misrepresentation”.

Fourteenth, to identify an alleged “misrepresentation”, in violation of 7(A)(3)(e)(ii), a JQC panel should consider only the express language of the section challenged, in isolation from any previous disclosures by the judicial candidate in the course of their campaign. The JQC panel should also not consider what information was otherwise known to the voters through the opponent’s campaign, or generally.

This, the JQC argues, is because “a voter should not be required to read the fine print in an election campaign flyer to correct a misrepresentation contained in large, bold letters.” In re Kinsey, 842 So. 2d 77, 90.

When correct information is presented by a judicial candidate to voters in “large, bold letters” a JQC panel should ignore that disclosure, assume the voter is in a hermetically sealed bubble, and focus on “the fine print” targeted by the JQC’s Amended Notice Of Formal Charge to find and impute a “knowing misrepresentation”. (T.T p.37 lns.16-24)

Conversely, however, in order to establish that a supposed “deliberate omission” was intended to mislead, panel members should focus on other, more comprehensive campaign materials, look for deviations from that material and the targeted material, presume any such

deviation constitutes a “deliberate omission” by the judicial candidate, and conclude that the alleged “deliberate omission” is “clear and convincing” proof that the supposed resulting “misrepresentation” was therefore, “knowingly” made.

Fifteenth, a “deliberate” omission can be logically inferred from an original, independent design having a particular purpose.

Sixteenth, a “clear and convincing” “knowing misrepresentation” of an “other fact” can be logically inferred from an alleged “deliberate” omission of language or facts not germane to the particular purpose of an original, independently designed campaign communication.

Seventeenth, the intended purpose of specific language included on single a campaign postcard targeted by the JQC as a violation of Canon 7(A)(3)(e)(ii) can be “clearly and convincingly” established through the refuted, non-expert, testimony of a single lay witness, with no personal knowledge of the facts of the challenged postcard’s creation or purpose, simply regarding his *personal perception* and reaction to that language.

Eighteenth, in order to avoid discipline pursuant to Canon 7(A)(3)(e)(ii), a candidate for judicial office must do more than not “knowingly misrepresent” actual facts in their campaign publications. They must also include every “other fact” that any voter might deem essential to their personal ability to accurately interpret the particular facts actually presented.

Nineteenth, if a judicial candidate seeks to avoid prosecution by the JQC for an alleged violation of 7(A)(3)(e)(ii), they must guarantee that all of their communications are designed so that no one (voter, non-voter, intended recipient, unintended recipient, opposition supporter) could later claim to be “confused”, “misled” or that the communication was a “knowing misrepresentation” of an “other fact” based on whatever message that person, individually, may *perceive* is being communicated.

And finally, at the time any campaign communication is produced, Canon 7(A)(3)(e)(ii) requires every judicial candidate to ensure that the presentation of any facts, or **true** statements, anticipates the particular design preferences and accounts for the potential perception of every individual voter and a majority of an undesignated JQC hearing panel who may later review a particular communication, or else be subject to the enormous expense of defending a two year long prosecution, recommended public reprimand and potential suspension from constitutionally elected judicial office.

THE JQC HEARING PANEL'S FINDINGS AND RECOMMENDATIONS

At the outset, rather than squarely addressing the single issue contained in the Amended Notice Of Formal Charge, JQC Hearing Panel's "Findings and Recommendations" attempts throughout, to introduce extraneous and immaterial matters in an effort to distract this Court's attention from the legitimate and inescapable considerations outlined above. As an example, fully the first five pages of the JQC's findings are devoted to a discussion the appearances of Judge Shepard's counsel, the content of a pleading which is **not** any part of even the Amended Notice Of Formal Charge and a selective recitation of the procedural history of the case.

The JQC hearing panel's purpose for including these matters is unclear unless to prompt inferences or suggest a perspective for this Court's impartial review, since none of those matters are properly before the Court. As none of these matters bear on Judge Shepard's culpability for the single allegation actually contained in the Amended Notice Of Formal Charge, any suggested inference should be ignored. This Court is well capable of reviewing the procedural record on its own, understanding that no negative inference can or should be drawn from the withdrawal of counsel required or necessitated for any number of reasons¹⁹, separating actual issues from

¹⁹ Contrary to the JQC's implication, Mr. McDonnell appeared in support of Judge

implied ones and focusing on the serious constitutional concerns presented by this case.

Accordingly, these superfluous recitations will not be belabored or specifically addressed here.

Turning to the “findings of fact”, the JQC starts their thoughtful and careful review of the transcript and other evidence by asserting “Ms. Shepard knew that Mr. Katz had been previously disciplined for ethics violations because...”. Then, the JQC erroneously quotes Judge Shepard as stating “[a]t that time, Mr. Katz and I were engaged in litigation as opposing counsel”. They then cite to “JQC Ex.6, March 12, 2016, 6(b) hearing, p.151”. In fact, this was **not ever** a statement made by Judge Shepard. It was a comment made by Mr. Gonzalez, Judge Shepard’s counsel, about his own interactions with Mr. Katz.

The hearing panel’s findings of fact then recite the Orlando Sentinel’s official candidate endorsement of Mr. Katz in the 2014 judicial race. (**JQC Hearing Panel’s Findings and Recommendations** p.7 ln.11-p.8 ln.17) Notably, the official candidate endorsement is **not** based on an assessment of Mr. Katz’s character or integrity but rather, on his “experience” which the Orlando Sentinel “prefer[red]”. It was also apparently based on Mr. Katz’ “regained” “good standing within the legal community” as evidenced by his “endorsers include[ing] 18 past Orange County Bar presidents” despite the previous “specific” findings of this Court that Mr. Katz had :

1. “Engag[ed] in conduct which is unlawful or contrary to honesty and justice”
2. Made a “false statement of material fact or law to a third person”
3. “Knowingly [made] a false statement of material fact in connection with disciplinary matter”

4. “Engag[ed] in conduct involving dishonesty, fraud, deceit or misrepresentation”

Shepard at the final hearing on this matter, offered his encouragement, and has not wavered in his belief in the correctness of Judge Shepard’s position or her innocence.

The Orlando Sentinel also endorsed Mr. Katz because they said “[w]e don’t think...” Mr. Katz’ suspension from the practice of law, “...should carry with it a lifetime ban from the bench”.

It is also unclear why the JQC finds the Orlando Sentinel’s assertion that “Mr. Katz had “regained” his good standing” “central”, “material” and “relevant” to the Amended Notice Of Formal Charge and a “necessary part of the JQC’s case”, but the fact that Ms. Shepard has never lost her “good standing” to be unimportant. (**Record:** Response Of The Florida Judicial Qualifications Commission To Judge Shepard’s Motion To Strike, November 24th, 2015 p.2 lns.10,16) Equally puzzling, is why the JQC finds the language of the Orlando Sentinel’s official candidate endorsement of Mr. Katz in the 2014 judicial race in any way “similar in content and character” to the Orlando Sentinel’s prior endorsement of Ms. Shepard. (**Record:** Response Of The Florida Judicial Qualifications Commission To Judge Shepard’s Motion To Strike, November 24th, 2015 p.2 lns.10,16, **JQC Exhibit 12, JQC Exhibit 13**)

The fact that Mr. Katz was endorsed by “18 past Orange County Bar presidents” has been made much of by the JQC throughout these proceedings. (**Record:** See original Notice Of Formal Charges, p.2 September 24th, 2015 and Amended Notice Of Formal Charges January 8th, 2016). This is despite the fact, that the endorsement of Mr. Katz by “18 past Orange County Bar presidents” is of absolutely no legal relevance to the allegation contained in the original Notice or Amended Notice Of Formal Charge, is not probative of any issue before the Commission or this Court, and despite the fact that pursuant to §90.403 Florida Statutes its introduction and demonstrably prejudicial effect on these proceedings clearly outweighs any imagined “relevance”. Still, the hearing panel Chair denied repeated requests to strike this language from the pleadings and proceedings (**Record:** Notice Of Formal Charge September 24th, 2015, Amended Notice Of Formal Charge January 8th, 2016, JQC Response to Respondent’s Motion

To Strike, November 24th, 2015 p. 2 pp.2, Order Denying Respondent's Motion To Strike **JQC Hearing Panel Findings and Recommendations** p.16 pp.2)(Compare Record: Order On Respondent's Motion To Strike, **T.T.** p. 11 ln.13 –p.12 ln.2., p.12 ln.23-p.13 ln.10, p.199 lns.10-17)

Directly contrary to the hearing panel's apparent finding, it was the JQC, itself, that introduced Mr. Katz's "qualifications to become a judge", and "conduct" and consistently defended their inclusion in these proceedings despite Judge Shepard's repeated attempts, through counsel, to remove any consideration of them. (**Record**: Notice Of Formal Charge, Amended Notice Of Formal Charge, Respondent's Motion To Strike, Order On Respondent's Motion To Strike, Respondent's Second Motion To Strike, Order On Respondent's Second Motion To Strike, Respondent's Motion In Limine To Strike, Order On Respondent's Motion In Limine To Strike, and **T.T.** p. 11 ln.13 –p.12 ln.2., p.12 ln.23-p.13 ln.10, p.199 lns.10-17).

On the one hand, the hearing panel finds that "[d]uring the course of these proceedings, Judge Shepard repeatedly tried to shift the focus from her conduct to that of her opponent, his qualifications to become a judge, and his campaign literature." (**JQC Hearing Panel Findings and Recommendations** p.14 pp.1) On the other hand, the JQC, itself, insisted that these very considerations were "...central ..." because they provide "...important 'context' to the Judge's judicial campaign..." and that they were "...material, relevant, and a necessary part of the JQC's case". (**Record**: JQC Response To Judge Shepard's Motion to Strike p.2 pp.2,3). (Emphasis Supplied). The result was, that the JQC was permitted to introduce and preserve in the record, highly prejudicial information with no probative value to the matters actually under consideration, but Judge Shepard was denied any meaningful opportunity to mitigate that prejudicial effect through unimpeded cross examination of their witness on that same

information. (T.T. p. 94 ln.23- p.99 ln. 7, p.105 ln. 19- p.106 ln.15, p.107 ln.24 – 108 ln.13, p.154 ln.2- 157 ln.21)

Essentially, the JQC’s position throughout these proceedings has been that it is entirely “permissible” for the JQC to introduce prejudicial material whenever they wish to imply their preferred caricature of Judge Shepard’s personality and demeanor (**JQC Hearing Panel Findings and Recommendations** p.3 pp.3-p. 4 pp.2) or to suggest that the voters wrongly elevated her to the position of judge, over Mr. Katz who had chaired the “Bar’s family law section”, “regained” his “good standing within the legal community” (which candidate Shepard never “lost”), and was endorsed by “18 past Orange County Bar presidents”.(**JQC Hearing Panel Findings and Recommendations** p.8). However, it is “impermissible” for Judge Shepard to challenge, through proper motion, or in any other way, that prejudicial material.

Next, while finally acknowledging that the postcard containing the challenged language “**compared** Kim Shepard to her opponent in multiple categories” (Emphasis Supplied) the JQC then, again, wrongly identifies the location of the questioned language, indicating that it was on the “back” rather than the **front** of the postcard titled “Proven Integrity” (**JQC Hearing Panel Findings And Recommendations** p.8)

The JQC hearing panel findings then assert that the four **true** statements regarding candidate Shepard’s reputation for character and integrity included on the postcard,laid side-by-side next to four **equally true** statements concerning her opponent’s reputation for character and integrity, and positioned directly adjacent to panel emblazoned with the words “Proven Integrity”, were deceptive because candidate Shepard did not also include the “1994 date” of an earlier endorsement which had included them and a “reference to Ms. Shepard’s legislative service”. The findings also assert that candidate Shepard should have “date stamped” the statements about her character and reputation as “twenty years old and made in connection with

a 1994 legislative race, not the current judicial race”. Notably, the hearing panel’s findings, display the four lines at issue **not** as they appeared on the actual “Proven Integrity” postcard, as four distinct lines, with a return after each line, but as if written continuously. (**JQC Exhibit 10, JQC Hearing Panel Findings and Recommendations** p. 8).

Then the findings turn to testimony of the JQC’s witness. The hearing panel “finds” that the witness “believed” that the section of the “Proven Integrity” postcard was “untruthful”, “deceptive” and “intended to deceive the public”. (**JQC Hearing Panel Findings and Recommendations** p.9 ln.11) They quote the witness stating his belief that the included language was “purposefully edited” (**JQC Hearing Panel Findings and Recommendations** p.9 pp.2 ln.3 referring to the witness’ testimony at **T.T.** 68-69, 99)(Emphasis Supplied) and reiterating his belief that four lines regarding candidate Shepard’s reputation for character and integrity were “a lie intended to deceive the voters in a judicial election. ” (**JQC Hearing Panel Findings and Recommendations** p.9 pp.2 ln.3 referring to the witness’ testimony at **T.T.** 88,105)(Emphasis Supplied).

In a footnote, the findings refer to a “witness” the JQC did not call at the final hearing, to bolster the testimony of the actual witness they did call. This exemplifies the tactics utilized by the JQC throughout these proceedings. First, the footnoted “witness” was not even a registered voter in either Orange or Osceola County, did not live in either Orange or Osceola county, (**Respondent’s Exhibit 6** p. 5 ln.25- p.26 ln.1)²⁰ and was not an intended recipient of any campaign communication during the 2014 judicial contest. He did not receive any postcard from candidate Shepard. (**Respondent’s Exhibit 6** p. 5 ln.3) Second, he was not qualified as an expert. (**Respondent’s Exhibit 6** p. 32 ln.23- p.33 ln. 15) and had no personal knowledge of

²⁰ Campaign publications are not mailed to “offices”. They are mailed to the residential addresses of registered voters within the geographic boundaries of the election. One can only be a registered voter in the county in which they reside.

candidate Shepard's campaign. (**Respondent's Exhibit 6** p. 9 lns.24-25) Counsel for the JQC nevertheless, listed him as a "witness". Third, he was the "long-term colleague", friend and frequent business partner of the JQC's witness. (**Respondent's Exhibit 6** p. ln. 3-4)

The findings consistently presume that the "Proven Integrity" postcard is an "edited down" version of the previous "Life Of Service" postcard, though the record evidence establishes the exact opposite. (**T.T.** p. p.51 ln.24- p.52 ln.13, p.57 lns.2-8) As a result, the findings refuse to acknowledge what is patently obvious from even a cursory review of the two separate mailers. Two distinct and different postcards were created by the campaign for two very different purposes. While insisting that language was "omitted" and "removed" from the Life Of Service postcard to create the "Proven Integrity" the findings likewise refuse to recognize what is equally obvious with only momentary reflection : the "Proven Integrity" did not "omit" statements about "legislative service" from the "Life Of Service" postcard, it **included true**, timeless statements about reputation for **character** and **integrity**.

The "Proven Integrity" postcard was not merely a derivative reprinting of the "Life Of Service" postcard that failed to include all the same information produced on that first postcard. Contrary to the skewed perspective adopted by the hearing panel's findings, the record establishes that "Life Of Service" postcard was not a template for the "Proven Integrity" postcard that was "mendaciously" altered before printing, as the JQC has consistently tried to argue. (**T.T.** p. p.51 ln.24- p.52 ln.13, p.57 lns.2-8) The "Proven Integrity" postcard was designed independently, for an entirely different purpose, without any particular reference to the previous "Life Of Service" postcard. (**T.T.** p. p.51 ln.24- p.52 ln.13, p.57 lns.2-8)

There is no requirement that a subsequent campaign mailing include everything that may have appeared on an earlier campaign mailing. On the "Proven Integrity" postcard there was also no reference to candidate Shepard's parents, or the statements regarding judicial philosophy that

appeared on the earlier “Life Of Service” postcard. Yet, the findings do not allege that candidate Shepard “knowingly misrepresented” or “concealed” her ancestry, nor did the JQC’s witness testify that a similar “omission”, “concealed” the candidate’s judicial philosophy. (T.T. p. 89 lns.18-19).

As the Court stated in **In Re Taunton** 357 So.2d 172,178 (Fla. 1978), “[e]very judicial officer is the sum of [her] past. When [s]he dons [her] robe and ascends to the bench, [s]he is not divested of the effects of [her] previous training, education and real life experiences. [S]he takes [her] official office as a human being...[s]he will have adopted firm ideas and developed a conscience. **We do not ask that [s]he abandon those accumulated individual qualities so that [s]he might conform to some predetermined norm. ...[S]he may bring [her] past experiences, beliefs and sense of justice to bear on the decisions [s]he is required to make.** ... one of the great strengths of our system is the carefully guarded right to exercise independently those powers.”

Next, the findings misrepresent and try to characterize a particular demonstrative aid used by Judge Shepard at the final hearing as “highlight[ing]” language “deleted” from “**JQC Exhibit 10**”. The demonstrative aid referred to was a double transparent overlay, showing that the same, four **true** statements about candidate Shepard’s reputation for character and integrity which were **included** in the “Proven Integrity” postcard as evidence of her character and integrity, were, in fact, previously disclosed, multiple times, in full context, as part of a larger message with different purposes. Their use on the “Proven Integrity” postcard however, was for the very specific purpose of focusing on the differences between the candidates’ respective reputations for character and integrity, rather than a comparison of their “Li[ves] Of Service”.

The findings then turn to the testimony of the four witnesses called by Judge Shepard in her defense. Interestingly, the findings refer to the testimony of Judge Shepard’s witnesses as

“perception[s]” and “impressions” (**JQC Hearing Panel Findings and Recommendations** p.11 ln.11). However, the findings refuse to characterize the JQC’s own, non-expert, witness’ testimony in a similarly dismissive fashion.

Lawson Lamar, former State Attorney for the Ninth Judicial Circuit and candidate Shepard’s former boss, testified that he had “never” known candidate Shepard to “knowingly mislead anyone”. (**T.T.** p. 123 lns.11-16) He also testified he did not know or believe Judge Shepard to be the kind of person that would “cut corners”, “try to be expedient in pursuit of professional goals” or “try to mislead the public in order to win an election”. (**T.T.** p.123 ln. 17-p.124 ln. 1) He went on to state that he “look[ed] at [Ms. Shepard] as a truthful person” and had “never had any involvement with [Ms. Shepard] or [her] reputation that did not involve truth.” (**T.T.** p. 124 lns.1-4) Mr. Lamar also testified that he had known Judge Shepard since 1989 (**T.T.** p.118 lns.1-2). He further testified that the four statements describing candidate Shepard’s reputation for character and integrity were true. (**T.T.** p. 125 lns.16-19, p. 126 ln.1) Mr. Lamar testified that in all of the years of knowing Ms. Shepard, the character and integrity he identified in her, in 1989, had not “diminished, receded or otherwise evaporated.” (**T.T.** p.126 lns.5-11) Neither, had Ms. Shepard’s reputation for the same. (**T.T.** p. 122 lns.16-23)

After almost two full years of relentless investigation, the JQC did not produce a single witness to come forward to testify either that any of the four statements included on candidate Shepard’s postcard was not true, or that her reputation for character and integrity had diminished over time.

The findings do, at least, recognize that one of the witnesses called by Judge Shepard did not support her and, in fact, voted for her opponent. (**JQC Hearing Panel Findings and Recommendations** p.12 ln.4) That witness, even put a sign up on his property for candidate Shepard’s opponent. (**T.T.** p. 134 lns.10-14) Nonetheless, the witness testified that he was not

misled by the four truthful statements regarding candidate Shepard's reputation for character and integrity. (T.T. p. 133 lns.9-11, p.134 lns.1- p.135 ln. 11) The witness testified that even if the "Proven Integrity" postcard was the only postcard he saw; he would not feel that the postcard, standing on its own, was misleading. (T.T. p.135 lns.1-7) He further testified that he did not construe the challenged language to be a statement that candidate Shepard had gotten the official candidate endorsement of the Orlando Sentinel in the 2014 judicial race. (T.T. p.135 lns.8-11).

When asked how the witness came to the conclusion that the statements did not refer to an official candidate "endorsement", the witness stated unequivocally that the language did not say that candidate Shepard had been "endorsed" and so, he did not conclude that the statements referred to an "endorsement". The witness pointed out that there was nothing else in reference to those four true statements that suggested to him an "endorsement" of any kind. (T.T. p.135 lns.20-21, p. 136 lns.1-15) There was no use of the words "endorsement", "endorsed by" or "here are my endorsements" or "[any]thing that says [candidate Shepard] was endorsed" (T.T. p. 136 lns.3-11). The findings make no reference at all to the JQC's cross examination of this witness, because the entire exercise was deliberately and knowingly improper, and clearly violated of the rules of evidence. Yet, with the continuing permission of the hearing panel Chair, and over repeated and contemporaneous objections, the wholly improper examination was permitted to take place. The hearing panel Chair even initially failed to acknowledge Judge Shepard's right to redirect the witness. (T.T. p. 138 ln.3- 144 ln. 2)

The findings then make only passing reference the important testimony of Judge Shepard's third witness, Karl Kaiser, referring to him only as a "longtime friend" and referring to his sworn testimony dismissively as "impression". In fact, the witness testified, under penalty of perjury, that there was nothing Judge Shepard "could do or say that would cause [him] to come in... and tell something that was not true to the panel members who have to make [a] tough

decision” (T.T. p.147 lns.18-24). When asked why he and Ms. Shepard had formed a friendship, the witness testified that it was based on “integrity” and “honesty”. (T.T. p.147 ln.16 and ln.25-p. 148 ln. 2). Mr. Kaiser testified that he received both the “Life Of Service” postcard and the “Proven Integrity” postcard and that he received the “Life Of Service” postcard first. (T.T. p. 149 lns. 8-23).

Like the witness before him, Mr. Kaiser was asked if the four **truthful** statements about Judge Shepard’s reputation for **character** and **integrity** created an “impression” that candidate Shepard had received the official Orlando Sentinel candidate endorsement in the 2014 judicial race. (T.T. p. 152 ln. 17-19) His answer was an emphatic “no”. When asked why he didn’t come to the same conclusion that the JQC’s one witness had, he explained, “it doesn’t say that”. (T.T. p. 152 ln. 22). When questioned as to whether there was anything that would indicate to him that the language used could suggest that it was an official candidate “endorsement” rather than a statement about character and integrity, his testimony was “No. You’d have to read something else into it.” (T.T. p.153 lns.1-2) Mr. Kaiser went on to testify, not to “impressions” but to specific **facts** concerning the content of the “Proven Integrity” postcard. (T.T. p.153 lns.3-20).

In addition, to the three witnesses called by Judge Shepard at the final hearing, another character affidavit, from Jane Watrel, was offered and accepted into the record. **(Respondent’s Exhibit 4)** Ms. Watrel got to know Ms. Shepard when she was assigned to cover her as a reporter for Chanel 9 during Ms. Shepard’s prior public service in the Florida Legislature. .” **(Respondent’s Exhibit 4)** Ms. Watrel’s duty was to “scrutinize [Ms. Shepard’s] actions and report **objectively** on her activities to the greater Orlando TV market”. (Emphasis Supplied) Ms. Watrel, knew Ms. Shepard when her established reputation for character and integrity was first publically recognized. **(Respondent’s Exhibit 4)** She has known her for “the 24 years since that time.” **(Respondent’s Exhibit 4)**.

Ms. Watrel testified that she “found Kim Shepard's reputation in the community for integrity, independence, hard work, and ethical behavior as a public servant to be both earned and well deserved.” (**Respondent’s Exhibit 4**) Ms. Watrel went on to testify that “None of Kim Shepard's basic and fundamental character traits of integrity, independence, hard work and ethical behavior that [she], personally, ha[d]e observed over the years, nor her reputation for those attributes in the community, have diminished in the years [she] ha[s] known [Kim Shepard] and been keenly attuned to this community. [Kim Shepard] turned down the free gifts, drinks and dinners that often follow our elected leaders into office and still does to this day. Kim Shepard is fiercely independent as a matter of basic character and as a public servant.” (**Respondent’s Exhibit 4**). Ms. Watrel now works as the public information officer for a law enforcement agency.” (**Respondent’s Exhibit 4**).

The findings all but ignore the unimpeached testimony Judge Shepard offered in her own behalf, yet there is no finding that hearing panel disbelieved her testimony, or found it not to be credible. Rather, the remainder of the findings focus on an attempt to suggest that the tone of the pleadings filed by her counsel, her failure to concede to the alleged misconduct or to “apologize” for the alleged misconduct she still contests, indicate Judge Shepard’s “guilt” on the single charge at issue in the Amended Notice Of Formal Charge. However, as this Court affirmed in **In Re Davey**, 645 So.2d 345, 406 (Fla.1994), Rule 16 FJQC explicitly provides “A judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by attorney(s), and to examine and cross-examine witnesses.”(Fla.Jud.Qual.Comm’n R. 16).

As this Court went on to make clear, “[s]imply because a judge refuses to admit wrongdoing or express remorse before the Commission, however, does **not** mean that the judge exhibited lack of candor. Every judge who believes himself or herself truly innocent of misconduct has a right-indeed, an obligation-to express that innocence to the Commission, for

the Commission above all [should be] interested in seeking the truth.” **In Re Davey**, 645 So.2d 345, 405 (Fla.1994) (Emphasis Supplied).

JQC HEARING PANEL’S CONCLUSIONS OF LAW

Despite allowing Judge Shepard to suffer for almost a third of her initial judicial term under a cloud of multiple, unsupported allegations, the JQC’s hearing panel ultimately dismissed all charges related to alleged violations of Canons 1, 2(A), a portion of 7(A)(3)(b), 7(A)(3)(c) and 7(A)(3)(d). (**JQC Hearing Panel Findings and Recommendations** p.15 pp.3, p.20 lns.11-12) The JQC hearing panel admits that these “provisions of Canon[sic] are inapplicable to the facts. There was **no allegation** OR proof that...any person other than the respondent engaged in conduct [allegedly] prohibited by the judicial canons.” (**JQC Hearing Panel Findings and Recommendations** p.20 lns.13-15) (Emphasis Supplied) Egregiously, some of those unfounded allegations implicated members of Judge Shepard’s family. The hearing panel then concluded that Judge Shepard had violated the “other fact” provision of Canon 7(A)(3)(e)(ii) and as a result, violated the “integrity” clause of Canon 7 (A)(3)(b) by the alleged “knowing misrepresentations”. (**JQC Hearing Panel Findings and Recommendations** p.20 ln. 18- p.21 ln.1) They also conclude that, therefore, Judge Shepard also violated Rule 4-8.2, Rules Regulating the Florida Bar which requires lawyer candidates for judicial office to comply with the applicable Canons of judicial conduct. (**JQC Hearing Panel Findings and Recommendations** p.21 lns.1-2).

In support of their conclusions, the hearing panel cites **In Re Renke**, 933 So.2d. 482 (Fla. 2006) as the “closest case factually” to the instant case involving Judge Shepard. (**JQC Hearing Panel Findings and Recommendations** p.21 ln. 9) and claim that “[t]he [instant] case is stronger.”. (**JQC Hearing Panel Findings and Recommendations** p.19 ln. 12) However,

beyond the mere assertions, the hearing panel fails to demonstrate how the instant case is, in any way, factually “close” to the **Renke** case, much less that the instant case is “stronger”.

In the **Renke** case, a judicial candidate was charged with “knowingly misrepresenting” multiple, objectively verifiable, facts by making affirmative statements that directly contradicted those verifiable facts.

For example, in **Renke**, a first time judicial candidate claimed he was already an incumbent judge, referring to himself as “A Judge With Our Values”. **In Re Renke**, 933 So.2d. 482,487 (Fla. 2006). Renke also staged a photograph of himself beneath a banner stating “Southwest Florida Water Management District” while holding a nameplate in front of himself that said “John K. Renke, Chair”. In fact, there was no such position even existing on the Southwest Florida Water Management District, and the parties so stipulated. **In Re Renke**, 933 So.2d. 482, 487 (Fla. 2006). Renke also affirmatively claimed the endorsement of the Clearwater Firefighters by publishing a picture of himself surrounded by various firefighters and a caption which read “Supported by our area’s bravest : John with Kevin Bowler and the Clearwater Firefighters” when he did not have the endorsement of any group, much less any group representing the Clearwater Firefighters. . **In Re Renke**, 933 So.2d. 482, 485,487,488. (Fla. 2006)

In the first place, the hearing panel asserts that “[t]he Florida Supreme Court affirmed...” the findings of the JQC, “...concluding there was evidence supporting ‘clear violations of the judicial canon’s prohibition on knowing misrepresentations of a candidate’s experience and qualification for judicial office’”. This assertion misrepresents the Court’s review and conceals and the fact that Judge Renke, waived a hearing on the issues, entered a **prior stipulation** “to the conduct alleged and did not contest either the findings of guilt or the recommendation of discipline.” **In Re Renke**, 933 So.2d. 482, 485 (Fla. 2006).

The assertion also omits additional pertinent facts including that, in **Renke**, the JQC hearing panel found Renke **not** guilty of “knowingly misrepresenting” an endorsement by “Pinellas County public officials” despite a “clear pattern” of “numerous and flagrant” “intentional misrepresentations”, and despite the fact Renke specifically listed, by name, the five “Pinellas County public officials” who, it turned out, were **not** “Pinellas County public officials” but instead members of the Pinellas County Republican Party. **In Re Renke**, 933 So.2d. 482, 485 and 486 (Fla. 2006). It also omits the fact that despite their finding of a “clear pattern” of “numerous and flagrant” “intentional misrepresentations”, the **Renke** hearing panel’s original recommendation in that case was only a public reprimand, a 20,000 fine and a 30-day suspension. Further, the hearing panel’s comparison of **Renke** to the instant case, completely ignores the other “numerous”, “flagrant” and “blatant” violations proven against Judge Renke. Judge Renke was initially charged with nine separate counts, found guilty of seven of them and after a remand by this Court, an additional count was added, which Judge Renke was subsequently found guilty of as well.

In **Renke**, because of the stipulation, the Court was not confronted by, and did not have to address the substantial constitutional and due process issues raised in the instant case. Indeed, the entire opinion in **Renke** is devoid of any discussion of applicable law or constitutional considerations regarding the canons charged. **In Re Renke**, 933 So.2d. 482 (Fla. 2006). Much of the opinion is devoted to an examination of facts supporting an additional charge filed by the JQC after the Court rejected the hearing panel’s initial recommendation for discipline. **In Re Renke**, 933 So.2d. 482, 485,493 and 489-493 (Fla. 2006). The only discussion of precedent by the Court relates to its consideration of the appropriate discipline to be imposed against Renke. **In Re Renke**, 933 So.2d. 482, 493-495 (Fla. 2006).

In the instant case, it was never alleged, nor has it been demonstrated that candidate Shepard affirmatively claimed the official candidate endorsement of anyone. Nor have there ever been any allegations that candidate Shepard engaged in a “flagrant and intentional” misrepresentation of any kind, much less, a “pattern” of such misrepresentations. (**Record:** Notice Of Formal Charge September 24th, 2015, Amended Notice Of Formal Charge January 8th, 2016)

In fact, the JQC, itself, expressed doubt about the supposed “misrepresentation” alleged in the Amended Notice Of Formal Charge. In their response to Judge Shepard’s Motion For More Definite Statement, counsel for the JQC states “[t]he passage immediately following paragraph 4 lays out the misconduct alleged.” (**Record:** Response Of The Judicial Qualifications Commission To Judge Shepard’s Motion For More Definite Statement November 24th, 2015 p.2 Ins.1-2) JQC counsel then goes on to clarify, “[i]n essence, the allegation refers to Judge Shepard’s **mistaken** or intentional use of a misleading advertisement in the context of her judicial campaign.” (**Record:** Response Of The Judicial Qualifications Commission To Judge Shepard’s Motion For More Definite Statement November 24th, 2015 p.2 Ins.7-8)(Emphasis Supplied).

Without any discussion, or even acknowledgement, of the many substantial differences between both the factual circumstances underlying the charges filed against Judge Renke, the scope and breadth of the “numerous” “flagrant” violations which amounted to a “series of blatant” misconduct, or the markedly different procedural postures of the two cases, the hearing panel then summarily asserts “[t]he present case is stronger.” (**JQC Hearing Panel Findings and Recommendations** p.19 ln. 12). Despite the ample evidence to the contrary, the hearing panel distinguishes and minimizes **Renke** in comparing it to the instant case, suggesting that

Renke “...merely involve[d] a picture with a misleading caption”. (JQC Hearing Panel Findings and Recommendations p.19 ln. 12-13)

The hearing panel then concludes that the four **true** statements, accurately attributed, regarding Ms. Shepard’s reputation for **character** and **integrity**, positioned directly adjacent to a panel emblazoned with the words “Proven Integrity”, and which did **not** reference any term that could be construed as an “official candidate endorsement” were “misleading” because they were not date stamped and did not make reference to her legislative service. (JQC Hearing Panel Findings and Recommendations p.19 ln. 12-13) The hearing panel concluded that Ms. Shepard “made it appear” that she had the official Orlando Sentinel candidate “endorsement” in the 2014 judicial contest. (JQC Hearing Panel Findings and Recommendations p.19 ln. 12-13).

It is important to recognize that throughout these proceedings, the JQC, its counsel and hearing panel members have all used the words “mislead” and “misrepresent” as if those terms are identical and interchangeable. They have also used the words “deliberate” and “knowing” as if they too, are identical and interchangeable. The distinctions are important, however. Canon 7(A)(3)(e)(ii) requires a judicial candidate not to “knowingly misrepresent”. This language suggests that the canon, if not the esteemed hearing panel, recognizes that someone can be “misled” by even an honest and accurate representation. Accordingly, the canon does not assign a violation based on the assertion that someone has been or could be “misled”. Rather, the canon only ascribes fault to a judicial candidate who “knowingly misrepresents”. Likewise, the canon, recognizes the well-established legal principle, that an alleged “deliberate” act can, and often does, have unintended, unknown and unknowable effects. Accordingly, the canon, in marked contrast to the JQC hearing panel, does not equate the two. It seeks accountability only for “known” effects rather than “deliberate” acts.

To determine whether a judicial candidate has “knowingly misrepresented” something, the Court must first know what the “something” is, that has been allegedly “misrepresented”. In this case, according to the JQC, that “something” is the “official candidate endorsement” for the 2014 judicial race. (**Record:** Notice Of Formal Charge September 24th, 2015, Amended Notice Of Formal Charge January 8th, 2016, **JQC Hearing Panel Findings and Recommendations** p.19 ln. 12-13) Then, the Court must determine what, if anything, has been “represented” about that “official candidate endorsement” before it can determine if anything has been “mis” represented. Only then, can the Court consider whether or not any alleged “misrepresentation” was “knowingly” made.

The record fails to establish that Ms. Shepard represented anything, at all, about the 2014 “official candidate endorsement”. (**T.T.** p. 135 lns.8-11, p.152 lns.17- p.153 ln.2) There is no testimony from any witness that the “Proven Integrity” postcard, and the particular section of it that is the only portion made a part of the Amended Notice Of Formal Charge, contained any language, whatsoever, suggesting an “official candidate endorsement” in the 2014 judicial contest. (**T.T.** p. 135 lns.8-11, p.152 lns.17- p.153 ln.2) Instead, all of the testimony indicates that there were no words such as “endorsed”, “endorsed by”, “here are my endorsements” (**T.T.** p.136 lns.3-11), “endorsed by the Orlando Sentinel”, “the Sentinel’s choice for judge”, “the preference of the editorial is board is Kim Shepard for judge”, “endorsed” or “endorsement” anywhere near the four **true**, accurately attributed, statements regarding Ms. Shepard’s **character** and **integrity**. (**T.T.** p.153 ln.3-20). The accurate attribution to the author of those four **true** statements about Ms. Shepard’s character and integrity, is the only reference, at all, to the Orlando Sentinel. (**JQC Exhibit 10**)

Had the statements about Ms. Shepard’s **character** and **integrity** actually been penned by any other author, the illegitimacy of the charge filed against Judge Shepard and the JQC’s

conclusions would be immediately apparent and acknowledged. (T.T. p.106 ln.17- p.107 ln.21)

The hearing panel acknowledges that candidate Shepard personally distributed the full original Orlando Sentinel article containing the four true statements regarding her character and reputation.” (JQC Hearing Panel Findings and Recommendations p.20 ln.4) The panel also concedes that candidate Shepard additionally mailed a prior postcard that disclosed the very information she is accused of “knowingly” “concealing from the voters.” (JQC Hearing Panel Findings and Recommendations p.20 ln. 4)

Nonetheless, the panel concludes the challenged language is “*misleading*” and indicates a “willingness to *mislead*”. (JQC Hearing Panel Findings and Recommendations p.20 lns.1-2, and ln.5) Because they find the reference to four true, accurately attributed observations regarding the abiding qualities of character and integrity, without the addition of a date identifying when those qualities were first publically recognized, and a specific reference to legislative service, “*misleading*”, the hearing panel leaps to the conclusion that candidate Shepard “*knowingly misrepresented*” an “other fact” about herself in violation of Canon 7(A)(3)(e)(ii). (JQC Hearing Panel Findings and Recommendations p.20 lns.16-17). This conclusion is not only a failure of basic logic, it is unsupported by the record and demonstrates a complete lack of apprehension of the canon itself. In turn, this fundamental error leads to the equally flawed and derived conclusions that candidate Shepard violated Canon 7(A)(3)(b) and Rule 4-8.2 of the Rules Regulating the Florida Bar.

IV.

DISCIPLINE

The hearing panel’s recommended discipline in no way comports with the precedents established by this Court, is completely disproportionate to the alleged offense and evinces an imperial demand for an accused judge to concede wrongdoing and “apologize” for conduct the judge “...believes himself or herself truly innocent of...” in order to avoid a recommendation to this Court for harsher discipline. **In Re Davey**, 645 So.2d 345, 405 (Fla.1994) The attitude reflected by such an inappropriate and comfortably expressed expectation (**JQC Hearing Panel Findings and Recommendations** p.22 lns.7-19) is wholly inconsistent with the ultimate responsibility defined for the JQC by this Court. That responsibility, expressed **In Re Davey** and amplified in **In Re Taunton** 357 So.2d 172 (Fla. 1978) should not be suspended depending on the inclinations of a particular panel, its Chair, or any of its members.

In **Davey**, this Court reminded the JQC that its mission was not to ascribe motivations or engage in unqualified behavioral or psycho analysis, but rather, the Commission above all [should be] interested in seeking the truth.” **In Re Davey**, 645 So.2d 345, 405 (Fla.1994) (Emphasis Supplied).

In **Taunton**, the Court made clear :

“...We have traditionally tolerated differences of opinion and variations in philosophy among judicial officers....

“...In the interest of protecting and preserving a strong and independent judiciary, we must be careful never to judge a respondent and determine whether to... [discipline] on the grounds that [s]he possesses an unpopular philosophy, has offensive idiosyncrasies, has rendered unpopular decisions or is too compassionate. Unless [her] attitudes, prejudices or beliefs are

translated into action or inaction that constitutes a violation of law or the Code of Judicial Conduct, rendering [her] presently unfit to hold the office, **[s]he should be free to make [her] decisions and administer [her] office without fearing an investigation by the Commission that could lead to [discipline]....**” (Emphasis Supplied)

“...THERE WILL NOT BE AN INDEPENDENT, EFFECTIVE JUDICIARY IF WE EXPECT ALL JUDGES TO FIT A COMMON MOLD OR ENCROACH... BY INSTITUTING DISCIPLINARY PROCEEDINGS AGAINST THOSE WHO DEVIATE IN SOME MINOR WAY FROM THE MODEL CONSTRUCTED BY THE MEMBERS OF THE JUDICIAL QUALIFICATIONS COMMISSION.” (Emphasis And Edit Supplied)

As the Court, in Taunton, continued to emphasize, quoting from a “forceful” dissenting opinion in State ex rel. Turner v. Earle, 295 So.2d 609, at 621 (Fla.1974), Justice Ervin cautioned:

“...The Commission should never be unmerciful or Draconian. Nor should it take a Pecksniffian or crusading stance. Pecadillos (sic) of a judge should be ignored by the Commission unless they cumulatively reflect upon the present quality of [her] judicial service or render [her] an object of disrespect and derision in [her] role to the point of ineffectiveness. . .” (Emphasis Supplied)

To summarize the Court’s concern in Taunton, they quoted from “...a historic proceeding in which the Florida Senate acquitted Circuit Judge Richard Kelly of impeachment charges...” stating : “...counsel for Kelly articulated the concern we must all have for the independence of the judiciary:

“Our primary responsibility is to Richard Kelly, but I think, in a larger sense, that we have a responsibility to the entire judiciary of the State of Florida. The proposition that is before you in these proceedings involves every judge, sitting in every court in the State of Florida, and that proposition is simply this:

“Must a judge render decisions on the basis of the influence of the lawyer involved? Must a judge curry favor with the Bar that practices before [her], or risk impeachment, risk being discharged from [her] office, risk public disgrace and humiliation, or can [s]he make [her] decisions independently, as an independent judiciary was intended to make them?”

“Now, gentlemen, I think, also, in a larger sense, every citizen of the State of Florida is a participant in these proceedings because, when the independence of the judiciary is diminished, it diminishes all of us. **The very foundation of all our liberties and all our rights depends upon an independent judiciary, which is not subject to prejudice by lawyers, litigants, or from any other source.”** In Re Taunton 357 So.2d 172, 179 (Fla. 1978) (Emphasis Supplied)

The JQC has frequently recommended and this Court has often approved far less discipline for far more obviously egregious, alleged misconduct. (See: In Re Cope, 848 So.2d. 301, public intoxication and inappropriate sexual advances, In re Bell, 23 So.3rd. 81(Fla.2009), judge ordered arrest domestic violence victim , In Re Downey, 937 So.2d. 1025, viewing pornography on state computer and sexually harassing employee).

This random “leniency” arbitrarily appears not only in cases exclusively involving judicial campaign conduct but even less explicably in cases involving serious, and repeated misconduct while on the bench. (See : In Re Haymans, 767 so.2d. 1173 (Fla. 2000); In Re Newton 758 So.2d. 107 (Fla. 2000); In Re Golden 645 So.2d. 970 (Fla.1994); In Re Trettis, 577 So.2d.1312 (Fla.1991); In Re Albritton 940 So.2d. 1083(Fla.2006)). Some, even including violations of the criminal law while a sitting judge. (See: In Re Richardson, 760 So.2d. 932 (Fla.2000) judge tried to get favored treatment after arrest for soliciting a prostitute, In re Nelson, 95 So.3d. 188(Fla.2012) DUI).

Contrary to the disingenuously pained assertion that the hearing panel felt “constrained by prior precedent” to conclude that a simple reprimand on these facts would be “entirely inappropriate”, there are multiple examples in this Court’s jurisprudence and in the JQC’s own treatment of other alleged misconduct that establish the fiction of the claim. (See : In re Kay,

508 So. 2d 329, 330 (Fla.1987) (approving public reprimand for violation of Canon 7 as well as section 105.071, Florida Statutes); In re Pratt, 508 So. 2d 8, 9-10 (Fla. 1987) (same); In re Alley, 699 So. 2d 1369, 1370 (Fla. 1997) (approving public reprimand for judicial election campaign violations); In re Glickstein, 620 So. 2d 1000, 1002-03 (Fla. 1993) (approving public reprimand for violation of Canon 7); In re Turner, 573 So. 2d 1, 2 (Fla. 1990) (same); In re Schapiro, 845 So. 2d.170, 174 (Fla. 2003)(public reprimand imposed for violations which were “extreme in their seriousness, in their number and in the length of time over which they occurred”); In re Angel, 867 So. 2d 379 (Fla. 2004)(seven violations regarding judicial campaign misconduct resulted in public reprimand); In re Allawas, 906 So. 2d 1052, 1054 (Fla. 2005) (public reprimand for lengthy delays in acting on twelve separate matters which were "both significant and unreasonable and certainly impacted the parties"); In re Woodard, 919 So. 2d 389, 391-392 (Fla.2006)(multiple judicial campaign violations followed by a failure to conduct proceedings in a timely manner as well as "repeated rudeness and impatience in dealing with attorneys, litigants and witnesses" warranted a public reprimand); In re Albritton, 940 So. 2d 1083,1089 (Fla. 2006)(violations of a "substantial number of the canons of the Code of Judicial Conduct for a variety of reasons" which the Court found "covered a broad range of improper acts" resulted in a public reprimand, thirty day suspension and a \$5,000.00 fine); In re Cohen, 134 So.3d. 448 (Fla. 2014)(public reprimand imposed for repeated comments from the bench and a making a public statement suggesting bias against the State Attorney's office and law enforcement and involvement in a partisan political campaign).

To be sure, many allegations, such as the one pursued here and examined above, when subjected to a proper, even cursory, analysis do not survive the initial screening of the professional JQC legal staff. (See For Example and Compare : In Re Miller, SC07-1985 Number 06-432, Notice Of Voluntary Dismissal, April 13th, 2009).

V.

CONCLUSION

Based on all of the foregoing, the Court should reject the JQC hearing panel's findings and recommendations in total, including specifically, their unsupported conclusions that the unproven conduct alleged was "offensive and disturbing" and that the exercise of Judge Shepard's constitutionally guaranteed right to vigorously defend the unwarranted allegations against her, implies an "inability to recognize or understand her 'inappropriate' actions and reactions to these proceedings". Accordingly, the Court should strike down the unconstitutional provisions of the Canons of Judicial Conduct, dismiss the remaining allegations against Judge Shepard and impose no discipline.

VI.

REQUEST FOR ORAL ARGUMENT

Pursuant to rule 2.310(b)(3) Fla. R. Jud. Admin., Judge Shepard requests respectfully requests oral argument on the forgoing.

Respectfully Submitted,

/s/Timothy R. Hartung
Timothy R. Hartung
Counsel To Judge Shepard
Florida Bar No.: 0857440

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via email to the following this **31st** day of **July, 2016**. ORIGINAL AND 7 HARD COPIES TO FOLLOW VIA U.S.MAIL.

MAYANNE DOWNS, ESQUIRE
FJQC HEARING PANEL CHAIR
GRAY ROBINSON, P.A.
301 E. Pine Street
Suite 1400
Orlando, FL 32803
Mayanne.downs@gray-robinson.com

Alexander J. Williams, Special Counsel
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
P.O. Box 14106
Tallahassee, FL 32317
awilliams@floridajqc.com

Michael Schneider, General Counsel
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
P.O. Box 14106
Tallahassee, FL 32317
mschneider@floridajqc.com

SCOTT N. RICHARDSON, ESQUIRE
Special Counsel
Florida Judicial Qualifications Commission
1401 Forum Way, Suite 720
West Palm Beach, Florida 33401
snr@scottrichardsonlaw.com

LAURI WALDMAN ROSS, ESQUIRE
Counsel to the Hearing Panel
Florida Judicial Qualifications Commission
Ross & Girten
9130 S. Dadeland Blvd., Suite 1612
Miami, FL 33156
RossGirten@Laurilaw.com

_____/TRHartung\
Tim R. Hartung
Florida Bar No.: 0857440
44475 Chamberlain Terrace, Unit 106
Ashburn, VA 20147
(321) 277-7424
mail to: trhartung@verizon.net