IN THE SUPREME COURT OF FLORIDA

SC17-362

INQUIRY CONCERNING A JUDGE,
THE HONORABLE DANA MARIE SANTINO
JQC NO. 16-534

_____/

JUDGE SANTINO'S RESPONSE TO THIS HONORABLE COURT'S ORDER TO SHOW CAUSE

COMES NOW the Respondent, the Honorable Dana Marie Santino, by and through undersigned counsel, and respectfully files this, her Response to this Honorable Court's September 28, 2017 Order to Show Cause, and in support says as follows:

INTRODUCTION

This Court, pursuant to Article V, section 12(c)(1) of the Florida Constitution, has the discretion to accept, reject or modify the Findings and Recommendations of the Judicial Qualifications Commission's Hearing Panel. Judge Santino shows cause that this Court should reject the JQC's recommendation because the evidence in this case does not establish a "present unfitness to hold office," and thus does not meet the standard for removal under Article V of the State Constitution. Judge Santino deeply regrets the campaign violations that underlie this proceeding and will take no steps in this pleading to justify or minimize them. Respondent, however,

demonstrates good cause why the Hearing Panel's Legal Conclusions and Recommendations should not be approved by this Court, as the plain language of Article V and this Court's prior analysis of that provision and precedent in *In re Decker*, 212 So.3d 291 (Fla.2017) – as well as *In re McMillan*, 797 So.2d 560 (Fla.2001); *In re Renke,* 933 So.2d 482 (Fla.2006); and *In re Kinsey*, 342 So.2d 77 (Fla.2003) – demonstrate, as a matter of law, that removal is not the appropriate sanction in this case. The campaign violations – considering this Court's prior campaign violation precedent as well as Judge Santino's background, character and performance as a judge – do not establish evidence of "present unfitness to hold office" that is required under Article V for a removal Order.

UNCONTROVERTED FACTUAL BACKGROUND

In the course of the August 2, 2017 hearing, uncontroverted evidence was adduced regarding Judge Santino's background prior to running for judge, her general character, and her performance on the bench since she was elected. This evidence includes that Judge Santino possesses no prior Florida Bar disciplinary history.[1]

The unrebutted testimony at the hearing established that Judge Santino has performed extraordinarily as a judge since her election. The Chief Judge of the Fifteenth Judicial Circuit at the time, the Honorable Jeffrey Colbath, testified at the

[1] A factor this Court has historically considered and weighed heavily in the present context. *See Decker*, 212 So.3d at 308.

hearing and concluded that Judge Santino's work has been "exemplary" as a County Court Judge. (T.220) He noted that she inherited a division with a high case count, and that she has worked so hard in her time in the division that "she's driven her number down" so she now possesses the lowest case count in the County's civil division. (T.216)

Judge Colbath also testified – in addition to Judge Santino's exemplary work in her own division – that she has volunteered during her tenure to sit as the civil drug court judge for weekend proceedings. (T.212-213) The civil drug court is a voluntary program to assist individuals who have pending *Marchmann* Act proceedings. This position is strictly voluntary, court is conducted on the weekend, carries "no extra compensation," and "no extra real pat on the back." (T.213)

Judge Colbath further testified that Judge Santino frequently volunteers to assist her other colleagues on the bench and was "stepping up and trying to be the best judge she could be...." (T.211)

The Mediation Services Coordinator for the Fifteenth Judicial Circuit testified by affidavit. His testimony underscored that Judge Santino – at least in part – lowered her division's case count by implementing an open door policy with mediators, a novel approach in the Fifteenth Judicial Circuit that facilitated settlement in many cases. (T.218; Resp. Ex.22) In pertinent part, his testimony included:

> Since January of this year, I estimate 500 to 600 cases have come before the Honorable Dana Santino in a courtroom mediation posture. In those cases, the judge meets with the parties, their attorneys if they are represented and the mediator on a pretrial conference date and aid the parties and mediators during a four (4) hour pretrial mediation. I have received considerable feedback from a diverse group of mediators who have appeared before Judge Santino.
>
> To a person, these individuals have praised Judge Santino's demeanor on the bench, her treatment of the litigants and her work ethic on these cases. They have especially underscored that her evident compassion for and the dignity in which she has treated all the litigants before her has "set the tone" that has translated to productive mediations.
>
> **Her approach has been extremely refreshing. She has implemented and carried out an open door policy, encouraging mediators to give her input as to how to better facilitate the mediations. In short, she is doing an outstanding job.** (Emphasis added)

Judge Theodore Booras also testified at the hearing. Judge Booras has served as a county court judge for eleven years after a lengthy career as an assistant state attorney in the Fifteenth Judicial Circuit. He also served in the United States Marine Corps. (T.225)

Judge Booras has known Judge Santino for twenty-four (24) years. (T.226) He worked with her when she was a county probation officer and again when she worked as a certified legal intern at the Palm Beach County State Attorney's Office.

(T.226-229) He also interacted closely with her when she worked for a community-based drug treatment program with the Sheriff's Office. (T.229)

Judge Booras detailed that he always thought very highly of Judge Santino because of her dedication. (T.236) He recommended her for a law school scholarship and tried to hire her as a prosecutor. (T.234-236)

He described that prior to becoming a judge, Judge Santino worked tirelessly as an advocate for "SAAP," the Substance Abuse Awareness Program, a fledgling program that provided drug and alcohol treatment to criminal defendants in Palm Beach County. (T.228-234) When the program was just getting started, she relentlessly lobbied the Palm Beach County State Attorney's Office to expand the program, eventually convincing that office to offer diversion programs for those who sought and received drug and/or alcohol treatment. Because of her efforts, Judge Booras testified, individuals in the criminal justice system not only received treatment, but had their criminal cases dismissed. (T.228-234) Judge Booras indicated that thousands of people benefitted from this work. (T.234)

Judge Booras also testified that he has acted as Judge Santino's unofficial mentor since she has taken the bench. (T.236-237) He testified to extensive contact with Judge Santino during that time. He has watched her conduct court. (T.237) He has sought out and spoken with attorneys who have appeared before her for input, and spoken with other judges about her performance. (T.238-245)

Judge Booras concluded that – to a person – those he spoke with gave Judge Santino high marks. (T.239) Other testimony supported this conclusion. Attorney Elias Hilal testified by affidavit as to his experience appearing in front of Judge Santino, concluding that she is extremely courteous and respectful, reads all the materials prior to hearing, "exercise[s] great judicial temperament," and distinguished herself as a fair and neutral party. (T.239-240; Resp. Ex. 3)

Judge Booras indicated the testimony from Mr. Hilal and the Mediation Services Coordinator was "consistent with the feedback" he received about Judge Santino: she is doing a very good job on the bench. (T.241-245)

Judge Booras also described Judge Santino's voluntary efforts to assist her colleagues, accepting trials from other divisions and covering the civil drug court division. (T.242-243) Judge Booras also underscored Judge Santino's work ethic: "I know she's here late because you can't do that work without being here – I know there's some nights she is here until 8:00 getting her work done." (T.243)

Judge Booras testified, unrebutted, that based upon his extensive observations of Judge Santino, "she's an excellent judge." (T.245)

The uncontroverted trial testimony established Judge Santino's background and character as exemplary. The evidence showed she has engaged in significant good acts that have positively impacted her community. As mentioned, *supra,* she

possesses no prior Florida Bar disciplinary history. She worked as an advocate for a community-based drug treatment program prior to becoming an attorney, and she was "instrumental" in convincing the State Attorney's Office to establish and expand diversion programs as part of her efforts. (Resp.Ex.22b)

Evidence adduced at the hearing of Judge Santino's character was abundant and unrebutted. At the hearing, Mary Demassimo testified that Judge Santino raised Ms. Demassimo, then 16, after learning that Ms. Demassimo was a victim of familial sexual and physical abuse. (T.273) Ms. Demassimo, then a junior in high school, confided this information to Judge Santino because she was aware of the Judge's background as a rape-homicide counselor. (T.272) Judge Santino was a "big role model" for Ms. Demassimo, who was contemplating suicide at the time she disclosed her abuse to Judge Santino. (T.273-275)

Judge Santino immediately told Ms. Demassimo that Ms. Demassimo would come to live with her and her husband. (T.275) Judge Santino hired counsel for a dependency action, immediately filed a petition to serve as Ms. Demassimo's guardian, and just a few weeks later, Ms. Demassimo began living at Judge Santino's home. Ms. Demassimo was raised by Judge Santino for the next two years, until she matriculated to college. (T.276)

Ms. Demassimo testified that Judge Santino "saved my life." (T.276) She testified that Judge Santino effectively became her Mom and was the impetus for her

improved academic performance at school and effectively turned her life around. (T.276) Ms. Demassimo now lives in the same city where Judge Santino took her in, with four children of her own. (T.277-278) She has since taken another teenager into her home under similar circumstances. (T.278)

Patricia Okafor testified that she met Judge Santino when Judge Santino worked as a rape-homicide counselor, prior to becoming an attorney. Ms. Okafor's brother was murdered in Palm Beach County. Ms. Okafor testified that Judge Santino was there for her during one of the darkest points of her life and provided great comfort to her during that time and in the many years since. Judge Santino's support and comfort to Ms. Okafor was so profound that Ms. Okafor included a dedication to Judge Santino in a book Ms. Okafor published, which reads as follows:

> To Dana Fragakis: An angel sent from heaven. The love, strength, and support given at the most difficult time in my life, through my brother's death. You gave me the strength. (T.269; Resp.Ex.20)

Many other character affidavits were admitted, buttressing Judge Santino's character and good work in the community. (Resp.Ex.22) To its credit, the JQC recognized in its Findings of Fact, Conclusions of Law and Recommendations that Judge Santino is "a judge of strong work ethic" and that "there was substantial evidence presented here in mitigation." (See JQC Findings of Fact, Conclusions of Law and Recommendations, page 32) At least one member of the Hearing Panel

opposed the removal recommendation on this basis. (See JQC Findings of Fact; Conclusions of Law and Recommendations, page 31)

ARTICLE V

This Honorable Court has consistently acknowledged that Article V provides authorization for this Court "to remove a judge from office only for conduct 'demonstrating a present unfitness to hold office.'" *In re Renke*, 933 So.2d 482, 497 (Fla.2006) (quoting Art.V, sec.12(c)(1)).

Article V, section 12(c)(1) of the Florida Constitution provides:

> (c) SUPREME COURT.-The supreme court shall receive recommendations from the judicial qualifications commission's hearing panel.
>
> (1) The supreme court may accept, reject, or modify in whole or in part the findings, conclusions, and recommendations of the commission and it may order that the justice or judge be subjected to appropriate discipline, or be removed from office with termination of compensation for willful or persistent failure to perform judicial duties or for other conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office, or be involuntarily retired for any permanent disability that seriously interferes with the performance of judicial duties. Malafides, scienter or moral turpitude on the part of a justice or judge shall not be required for removal from office of a justice or judge whose conduct demonstrates a present unfitness to hold office. After the filing of a formal proceeding and upon request of the investigative panel, the supreme court may suspend the justice or judge from office, with or without compensation, pending final determination of the inquiry.

The object of disciplinary proceedings is not for the purpose of inflicting punishment, but to gauge a judge's present fitness to serve as a judicial officer. *In re Kelly*, 238 So.2d 565, 569 (Fla.1970); *In re McMillan*, 797 So.2d 560, 571 (Fla.2001).

This Court has further emphasized that the ultimate sanction of removal should not be imposed upon a judge unless the Court concludes that "the judge's conduct is fundamentally inconsistent with the responsibilities of judicial office." *In re Graziano*, 696 So.2d 744, 753 (Fla.1997).

Undersigned counsel respectfully suggests that there is articulable, genuine cause for this Honorable Court to reject the JQC Hearing Panel's Conclusions of Law and Recommendation because (1) Article V permits removal only upon a showing of present unfitness to hold office and, despite Judge Santino's campaign violations, the unrebutted evidence adduced of her exemplary performance as a jurist and her stellar background and character do not support a finding of present unfitness; and (2) this Honorable Court's prior precedent underscores that this is not a removal case, especially in light of her acceptance of responsibility.

IN RE DECKER

In re Decker, 212 So.3d 291 (Fla.2017), exemplifies that the facts of the instant case do not implicate removal because the "present unfitness" to serve standard is not met. In *Decker*, Judge Decker was found to have violated Code of Judicial Canon

Rules 7A(3)(a)(ii), 7A(3)(b), 7C(3) and 4-8.2 and 4-8.4(d) of the Rules of Professional Conduct. Specifically, that judge falsely campaigned that he had never been accused of a conflict of interest when a formal Florida Bar Complaint had been filed against him for a conflict of interest just four (4) months before. *In re Decker*, 212 So.3d at 297-298. Judge Decker had responded to that complaint just prior to the public statement, and this Court approved the finding that he violated Canon 7 by not acting with integrity, acting dishonestly and by knowingly misrepresenting his own record in denying the existence of that complaint.

This Court found Judge Decker violated Judicial Canon 7A(1)(c) by politically pandering at a judicial forum by confirming that he is a registered Republican and that his previous affiliation with the Democratic Party was in error. *In re Decker*, 212 So.3d at 301.

This Court further found then-attorney[2] Decker violated the Rules of Professional Conduct when he appeared before Judge Bryan while Judge Bryan was an active client of Decker's and did not disclose to opposing counsel that he and

[2] It is important to note this Court found Judge Decker was not presently unfit even though his conduct was not limited to his role as a judicial candidate and included additional misconduct as a practicing attorney, while Judge Santino's case is limited to issues as a candidate and did not involve the practice of law or conduct as a sitting judge.

Judge Bryan were engaged in an attorney/client relationship. (Emphasis added.) *Id.* at 302-307.

This Court also found then-attorney Decker additionally violated the Rules of Professional Conduct by representing Judge Bryan and two others jointly in a suit without properly notifying all three clients of the advantages and risks thereof. For example, then-attorney Decker failed to explain that joint guarantors are all entitled to demand reimbursement from the other(s) if one pays more than the other. *Id.*

Further, then-attorney Decker advised the two other clients to execute quitclaim deeds to Judge Bryan, putting them in a negotiating disadvantage, clearly favoring one client over others. This Court explicitly found several other instances of misconduct by then-attorney Decker in that litigation that implicated issues of lack of candor to the tribunal, using information relating to the representation of one client to the disadvantage of a former client, and concluded this conduct violated Rules of Professional Conduct 4-1.7(a), 4-1.8(b), and 4-1.9(b).

It is of further importance – especially in the context of this Court's test for present unfitness as analyzing potential for "future misconduct" – that Judge Decker possessed a prior disciplinary history with the Florida Bar. *Decker*, 212 So.3d at 308. Nonetheless, this Court concluded his conduct and background did "not merit removal from office " because he "ably served the citizens of the Third Circuit since assuming the bench" so that he did not meet the test for present unfitness. *Id.*

It is difficult to analyze the Canon 7 violations in Judge Decker's case in light of the "cumulative nature of the numerous violations proven" in his capacity as both an attorney and judicial candidate and conclude that those violations do not demonstrate present unfitness to hold office but that Judge Santino's conduct does.

This Court placed heavy weight on Judge Decker's positive service on the bench and, while imposing a sanction less than removal, noted his good service and that the Court did not wish to deprive his Circuit of that service. *Decker*, 212 So.3d at 312. Undersigned counsel respectfully submits Judge Santino's "exemplary" work on the bench should be similarly construed in analysis of the present fitness to serve issue.

Judge Santino's conduct – though wrong and regrettable – in no way involved issues of misconduct as a practicing attorney, false statements to a Court, or harm to a client. Based on this very recent Florida Supreme Court precedent, the authority of *Decker* suggests the present charges do not merit removal from office because they do not demonstrate a lack of present fitness to serve.

THIS COURT'S CAMPAIGN VIOLATION PRECEDENT CASES

In its Order, the JQC acknowledges – to its credit – that "Judge Santino correctly observes that prior election cases ordering removal based on violations of Canon 7 involved some additional type of misconduct." (JQC Findings of Fact, Conclusions of Law and Recommendations, page 31) It is in this acknowledgment

where undersigned counsel respectfully shows cause that the Panel's Conclusions of Law and Recommendations should not be adopted: in short, this Court has never held that campaign violations – absent some other evidence or additional misconduct establishing present unfitness – permits removal under Article V. Thus, the JQC's Conclusions of Law overlook this Court's prior precedent.

As this Court has recently recognized, judicial discipline cases limited to campaign violations have not led to a removal order:

> We are aware that in the past, a single instance of campaign violation has warranted only a public reprimand, or a reprimand and a fine. *See, e.g., In re Dempsey*, 29 So.3d 1030, 1031, 1034 (Fla. 2010) (public reprimand warranted where Dempsey misrepresented her position and qualifications during her campaign); *In re Colodny*, 51 So.3d 430, 432-33 (Fla. 2010) (campaign finance violation based on advice of counsel and interpretation of statutes warranted a reprimand and a fine). **For multiple campaign finance violations, this Court has imposed more severe discipline. *See, e.g., In re Rodriguez*, 829 So.2d 857, 861 (Fla. 2002) (imposing a four-month suspension, $40,000 fine, costs, and a public reprimand for multiple campaign violations).** *In re Decker,* 212 So.3d at 307. (Emphasis added.)

In other Canon 7 campaign cases where removal was ordered, the judge in question committed significant separate, additional misconduct. *See In re McMillan*, 797 So.2d 560 (Fla.2001); *In re Renke*, 933 So.2d 482 (Fla.2006). This distinction is crucial to the question of "present unfitness" to hold office.

I. IN RE McMILLAN

Judge McMillan was removed from office and some of his misconduct involved campaign violations, including:

Distribution of campaign literature entitled "A Fellow Police Office[r] Speaks Out," detailing that his opponent – incumbent Judge Brown – "has never been a friend to law enforcement in the Courtroom" and invited law enforcement officers to "imagine a judge who [would] go to bat for [them]."

- Distribution of campaign literature explicitly suggesting he would show bias or partiality toward law enforcement by not suppressing evidence, not overturning convictions, not reducing bail bonds, and not giving lenient sentences.
- Falsely asserting that his opponent pressured the county sheriff not to support him, and that his opponent pressured the sheriff for preferential treatment for his children when they were arrested.
- Sending a letter to the State Attorney, copied to the media, declaring Judge McMillan would "always have the heart of a prosecutor."
- Asserting falsely in a campaign brochure that Manatee County and crime victims lost millions in unpaid fines and court costs – suggesting these actions were attributable to his opponent.

- Published yet another brochure titled "16-Year Judge Brown Treats Crime Like a Part-Time Problem," and made additional statements to the local newspaper that fostered the impression that his opponent was not maintaining a full-time work schedule.
- Misled the local newspaper during an editorial board meeting as to his opponent's experience by falsely or in a misleading way misrepresenting his opponent's sentencing practices, further giving misleading examples to suggest his opponent was "soft on crime."

A. Judge McMillan's Additional Conduct As a Sitting Judge "Place[d] this Case in a Different Category"

What is crucial about this Court's opinion in *In re McMillan* is its clarification that removal was appropriate because of the additional, non-campaign related charges against Judge McMillan arising after his election and while sitting as a judge, since they were demonstrative of the "future misconduct" prong of the present unfitness test.

In addition to the voluminous campaign Canon violations detailed, *supra*, after taking the Bench, Judge McMillan violated the Judicial Canons by conduct as a sitting Judge. Specifically, the judge was a witness to an intoxicated driver case, called the police, and provided police a statement against the driver, who was then arrested. The next day, "knowing of his personal involvement and direct conflict in

the case," the judge convinced the assigned first appearance judge to permit him to preside over the driver's first appearance hearing. *McMillan*, 797 So.2d at 564-5.

Judge McMillan presided over the first appearance hearing despite a clear conflict of interest, and even though he was an actual witness in the case, he then ordered an allegedly overly excessive bond of $100,000. The defendant sat in jail until another judge reduced the bond later. *Id.* at 565.

In removing Judge McMillan, this Court emphasized that "his conduct *after* he became a judge also places this case in a different category." *Id.* at 572 (emphasis added). This Court explicitly underscored the judge's misconduct in the DUI case as a sitting jurist as critical to the order of removal:

> The charges arising out of the *Ocura* case clearly constitute the most serious charges both because of their nature and the fact they are based on conduct by a sitting judge and constituted a concerted effort. *Id.* at 572.

This Court found the "cumulative weight of the improprieties support[ed] removal." *Id*. at 573.

This Court explicitly recognized that *In re McMillan* implicated removal because of the additional violations as a sitting jurist, and the JQC's use of *McMillan* to justify the instant recommendation is thus, respectfully, misplaced. Judge McMillan's conduct did not involve solely campaign violations. Judge Santino has worked diligently and conducted herself honorably as a sitting judge, where Judge

McMillan's conduct involving the DUI defendant clearly implicated the removal provision of Article V as "a blatant breach of the fundamental principles of judicial ethics while sitting as a judge...." *Id.* at 573. Judge McMillan's cumulative conduct, including misconduct as a sitting judge, indeed "place[d] his case in a different category." *Id.* at 572.

B. Judge McMillan's Claims of "Conspiracies" and Failure to Acknowledge Responsibility Inflicted "Enormous Harm"

Further, Judge McMillan's defense to the charges involved an attempt to justify his actions and suggested "a conspiracy in Manatee County to prevent his election" and that "his election was necessary to break up such conspiracies of power." *Id.* at 572. This Court emphasized that "similar personal rationalizations and justifications for their improper conduct" led to the need to remove judges in *In re Shea*, 759 So.2d 631, 638 (Fla.2000) and *In re Graham*, 620 So.2d 1273 (Fla.1993). Understandably, this Court's analysis of the danger of future misconduct is impacted by an individual's inability to recognize wrongdoing and failure to acknowledge mistakes.

Judge McMillan's approach included "charges ... leveled without basis of fact," which inflicted "enormous" harm on public institutions by the loss of confidence among the public. *McMillan*, 797 So.2d at 572. In removing Judge McMillan, this Court was clearly swayed by this failure to acknowledge responsibility.

Judge Santino acknowledges her misconduct, has expressed remorse, and has apologized for her actions: "In your response to the Commission's Notice of Investigation, and again in your sworn testimony before the Investigative Panel, you appeared remorseful and apologetic." (Pet.Ex.1,p.6-7) She apologized to her opponent and to the local JCPC. (Resp.Ex.1&2) Judge Santino fully acknowledged her mistakes throughout her trial testimony. (T.119-205) S*ee In re Davey*, 645 So.2d 398, 405 (Fla.1994)("where a judge admits wrongdoing and expresses remorse before the Commission, this candor reflects positively on his or her present fitness to hold office and can mitigate to some extent a finding of misconduct."); *In re Holloway,* 832 So.2d 716, 724 (Fla.2002)(the admission of guilt and apology for conduct "should be taken into consideration" in determining fitness to hold office).

The substantial nature of Judge Santino's acceptance of responsibility is not merely reflected in her response to the Notice of Investigation, her testimony at the 6(b) Hearing, or in her trial testimony. At the trial, the Hearing Panel heard testimony from current Palm Beach County Circuit Judge Lou Delgado. Judge Delgado, who ran during the same election cycle as Judge Santino, has specifically spoken with Judge Santino and observed her genuine remorse:

> ...she's really beat up about it. The person that I met many, many months ago and the person I spoke to in March, this has really taken a toll on her ... it has affected her a great deal. (T.255)

Judge Delgado went on to testify that Judge Santino has expressed great regret and remorse regarding the violations. (T.255-256)

This Court has very recently reiterated the impact of "acceptance of responsibility" in the context of judicial discipline in *In re Yacucci*, ___ So.3d ___, (Fla.2017):

> In *In re Contini*, 205 So.3d 1281, 1284-85 (Fla.2016), this Court affirmed a public reprimand, but not suspension, where the judge engaged in *ex parte* communications with counsel and berated counsel in open court. However, the judge in *In re Contini* admitted to the wrongdoing, accepted complete responsibility for his actions, and apologized with sincere remorse. *Id*. Here, unlike the judge in *In re Contini*, Judge Yacucci has not exhibited regret or remorse for his conduct. *See In re Davey*, 645 So.2d at 405 ("Where a judge admits wrongdoing and expresses remorse before the Commission, this candor reflects positively on his or her present fitness to hold office and can mitigate to some extend a finding of misconduct."). Judge Yacucci did not apologize nor cooperate with the JQC, but instead attempted to justify his actions during the JQC hearings as well as in his briefs to this Court.

On the issue of remorse and acknowledgment, undersigned counsel would respectfully suggest the JQC's Findings of Fact, Conclusions of Law and Recommendations erroneously compares *In re Shepard*, 217 So.3d 71 (Fla.2017) to the instant case and did not give appropriate weight to Judge Santino's acceptance of responsibility and the comparative lack thereof in *Shepard.*

The JQC recommendation suggests removal is a proportionate sanction in Judge Santino's case in light of the Commission's recent recommendation to this Court of a public reprimand, coupled with a 90-day suspension without pay based upon a single serious campaign violation of Canon 7, with no mitigation, in the *Shepard* case. (JQC Findings of Fact, Conclusion of Law and Recommendations, page 31)

In *Shepard*, however, the record and evidence strongly suggest the judge acknowledged no wrongdoing throughout the proceedings, from the Notice of Investigation stage, 6(b) hearing, and trial to present. Without regurgitating that case's procedural history, the *Shepard* JQC Hearing Panel ultimately determined it was "seriously concerned about the Judge's inability to recognize or understand her inappropriate actions and reactions to those proceedings." (JQC Findings of Fact, Conclusion of Law and Recommendations, page 22, *In re Shepard*, SC15-1746) Undoubtedly, the Panel's disciplinary recommendation and this Honorable Court's Order of discipline was enhanced because of that failure to accept responsibility, and thus does not provide a seamless comparison to or baseline for this case.

The distinction between the additional and cumulative misconduct as both a candidate and judge in *McMillan* and this case, and the distinction in Judge Santino and others' approaches to acceptance of responsibility are not spurious. Again,

Article V and Supreme Court precedent only permits removal upon finding present unfitness to serve. Judge McMillan's actions in the DUI case not only involved additional misconduct as a sitting judge, but underscored that his campaign misconduct was not isolated and established the "likelihood of future misconduct" necessary to demonstrate a lack of fitness. His approach in defending his misconduct with unsupported allegations of a conspiracy only served to emphasize that likelihood, as it appeared he could not recognize his misconduct or would not accept responsibility for his actions. When juxtaposed to the instant case, the circumstances in *In re McMillan* are different than Judge Santino's case and underscore that these facts do not merit a finding of present unfitness.

II. IN RE RENKE

The other campaign violation case precedent of this Court resulting in removal is *In re Renke*, 933 So.2d 482 (Fla.2006). Undersigned counsel also contends the removal order of Judge Renke is readily distinguishable from the instant case and again underscores that this Court's precedent has not involved removal solely for campaign violations. Judge Renke's case involves campaign literature misconduct ***in addition to*** additional serious misconduct. In that case, Judge Renke:

- Disseminated campaign literature purposely creating the impression that he was the incumbent when he was not.

Disseminated campaign literature falsely conveying the impression he was the Chair of the Southwest Florida Water Management District when he was not and that he was endorsed by the local Firefighters when he was not.

- Made blatant misrepresentations about his qualifications as a trial lawyer when he, in fact, "had never examined a witness outside of [a] small claims court case."
- Blatantly misrepresented his opponent's qualifications. *In re Renke*, 933 So.2d at 489.

Additional misconduct attributed to Judge Renke readily distinguishes this case from the present one and provided the necessary evidence of present unfitness to hold office under Article V to permit removal. In addition to the campaign literature and misrepresentation charges, the JQC found – and this Court agreed – that Judge Renke illegally funneled $95,800 of campaign contributions into his campaign from not yet earned fees from his father's law firm in clear contravention of the State's campaign finance laws. Again, this Court emphasized that this additional, illegal conduct – on top of campaign violations – was a game changer in terms of discipline: "the addition of such egregious campaign finance violations merits a more substantial sanction." *Id.* at 493.

The Court removed Judge Renke because of the combination of the campaign violations, along with the campaign finance violations, concluding Judge Renke met the present unfitness to hold office test:

> The JQC's finding of guilt on the severe campaign finance improprieties evidenced here, **when coupled with** Judge Renke's efforts to mislead the voting public as to his experience and qualifications to serve as a judge, lead us to conclude that his conduct during his judicial campaign was "fundamentally inconsistent with the responsibilities of judicial office." (Emphasis added)

Id. at 495, quoting *In re Graziano*, 696 So.2d 744, 753 (Fla.1997. *Renke* and *McMillan*, when considered *in pari materia*, suggest this Court has ordered removal only when Canon 7 campaign violations occur ***in addition to*** other additional serious misconduct.

III. IN RE KINSEY

Indeed, precedent of this Court more consistent with Judge Santino's conduct and without evidence of misconduct outside campaign violations lies with *In re Kinsey*, 842 So.2d 77 (Fla.2003). Judge Kinsey was not removed by this Court. Judge Kinsey ran for judge against an incumbent. Judge Kinsey was a prosecutor at that time. During the race, Judge Kinsey was found to have committed the following campaign misconduct:

- She distributed campaign literature titled "Pat Kinsey: The Unanimous Choice of Law Enforcement for County Judge," in which she stated,

"police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong ... behind bars."

- She was found to have "reiterated her commitment to the prosecution side of criminal cases" by distributing campaign literature titled: "If You Are A Criminal, You Probably Won't Want to Read This," in which she stated: "police officers expect judges to take their testimony seriously and to keep law enforcement by putting criminals where they belong ... behind bars!"
- She distributed another piece of literature "Let's Elect 'Pat' Kinsey for County Judge," in which she reiterated that "a judge should protect victims' rights" and that judges must support "hard-working law enforcement officers by putting criminals behind bars, not back on our streets."
- She expressed hostility towards defendants in criminal cases during an interview with a local radio station.
- She deliberately attempted "to cloak [her] candidacy in an umbrella of law enforcement and to portray herself as a pro-prosecution / pro-law enforcement judge by various campaign literature disseminations.

- She knowingly misrepresented, in one of her campaign's brochures titled "A Shocking Story of Judicial Abuse," that her incumbent opponent had not revoked bond in a case when, in fact, he had, implying that he failed to protect "an elderly law-abiding couple" and the incumbent's conduct represented a "shocking lack of compassion for the victims of violent crime."
- She knowingly misrepresented the seriousness of the charges in a criminal case in incumbent's division, creating the impression that incumbent judge levied an unreasonably lenient bond. *In re: Kinsey*, 842 So.2d at 82-83.

This Honorable Court agreed that Judge Kinsey engaged in conduct unbecoming a candidate, creating the "misleading impression that a judge's role in criminal proceedings is to combat crime and support police officers as opposed to being an impartial tribunal where justice is dispensed without favor or bias." *Id.* at 91. Undersigned counsel suggests the underlying Canon 7 violations in this case are very similar in nature to those in *Kinsey*.

This Court noted, however, "there was no evidence that Judge Kinsey is presently unfit to hold office other than her misconduct involved in winning the election." Though concerned about her conduct and while warranting a severe

penalty, this Court thus rejected removal as a sanction against Judge Kinsey and ultimately imposed a public reprimand, a $50,000 fine, and payment of the costs of the proceeding.

Undersigned counsel respectfully suggests *In re Kinsey*[3] in many factual and intellectual respects is seamless in analysis to Judge Santino's case. Judge Santino acknowledges she made significant mistakes implicating Canon 7 campaign violations, but undersigned counsel avers that the overwhelming, unrebutted evidence of her exemplary service on the bench, acceptance of responsibility and other mitigation evidence demonstrates that she is presently fit to serve the Fifteenth Judicial Circuit and the people of Palm Beach County as a county court judge. Further, in light of this Court's precedent in Canon 7 campaign violations, such violations standing alone – without other misconduct – do not implicate removal.

"FUTURE MISCONDUCT" COMPONENT

In analyzing the issue of present unfitness to hold office under Article V, this Court's test examines the effect of the conduct on the public's trust and confidence in the judiciary as reflected in its impact on the judge's standing in the community,

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[3] The JQC cited certain *dicta* from *In re Alley*, 699 So.2d 1369 (Fla.1997) to justify the potential discipline of removal in this case. (JQC's Findings of Fact, Conclusions of Law and Recommendation, page 26) Respectfully, *In re Kinsey* was decided after *In re Alley* and *In re McMillan*. Undersigned counsel thus suggests the Court did not adopt that *dicta* in light of the subsequent *Kinsey* opinion.

and the degree to which past misconduct points to future misconduct fundamentally inconsistent with the responsibilities of judicial office. *In re Sloop*, 946 So.2d 1046, 1055 (Fla.2006); *In re Decker*, 212 So.3d 291 (Fla.2017). Conduct unbecoming is not itself sufficient to merit removal. *In re Kinsey*, 842 So.2d 77 (Fla.2003). Undersigned counsel respectfully suggests cause is shown to reject the recommended discipline because, like the circumstances in *In re Kinsey*, there is no degree to which the past misconduct points to future misconduct.

FUTURE MISCONDUCT PRECEDENT

Cases involving removal due to a likelihood of future misconduct have required more than underlying conduct not becoming a judge – but demonstrative proof that the record shows a likelihood of future misconduct. *In re Murphy*, 181 So.3d 1169, 1177 (Fla.2015) (emphasis added).

In *Murphy*, for example, the judge challenged his courtroom public defender to a fistfight during a docket. The judge then followed the public defender outside, struck him several times, and then returned to the courtroom, where he conducted court without the presence of said public defender, leaving the clients of that attorney without their attorney and handling the cases without the lawyer present. *Murphy*, 181 So.3d at 1171-4.

Though the Judicial Qualifications Commission recommended a suspension, this Court removed Judge Murphy, based on the test set out, *supra*, citing "the degree to which past misconduct points to future misconduct fundamentally inconsistent with the responsibilities of judicial office." The record evidence demonstrated that Judge Murphy suffered from Post-Traumatic Stress Disorder (PTSD) as a result of his military service in Afghanistan, and testimony acknowledged that condition could recur during significant periods of stress. *Id.* at 1174-9.

The Court thus found Judge Murphy's removal was appropriate because "the unmistakable possibility that he could have a similar outburst in the future" demonstrated present unfitness because of a likelihood of future misconduct. *See also In re Sloop*, 946 So.2d 1046, 1059 (Fla.2006)(Judge Sloop removed because Court "unconvinced" he could manage his temper).

While in no way offered to minimize Judge Santino's mistake, this Court's comfort level may be elevated that no future likelihood of misconduct exists in light of some very unique circumstances surrounding her election.

The seat Judge Santino ran for and ultimately was elected to was at first perceived to be an appointment seat. (T.70-71) After the time to qualify statewide for judicial office had elapsed, this Honorable Court considered a lawsuit filed as to

whether the seat should be filled by election. *Lerman v. Scott*, 2016 WL 3127708 (Fla.2016).

This Court ultimately ordered the Palm Beach County Supervisor of Elections to reinstate the election for the judicial office. Because the Court's Order occurred after the qualifying period had expired, this Court extended the period to qualify outside the state deadline to the week of June 6 to June 10, 2016. *Id.*

Judge Santino qualified thereafter, but after all the statewide Judicial Candidate Forums had already been held, and she missed the benefit of that guidance. (T.144)

Again, undersigned counsel does not cite this anomaly to minimize the mistakes for which Judge Santino takes ownership. However, the evidence adduced at the JQC Hearing underscored how vital the judicial candidates' forum is to educating candidates to avoid just these sort of Canon 7 issues. Judge Delgado, who ran in the same cycle as Judge Santino, described that when he qualified, he received a letter from this Court requiring he attend the judicial candidates forum, which were held statewide in May of 2016. (T.252) Because Judge Santino qualified after this Court's Order in *Lerman*, all those forums had already been held, and she thus did not receive the benefit of that guidance.

Judge Delgado testified the forum was "probably the single most important educational experience as you're leading up to your candidacy without a question."

(T.253) He testified that he genuinely believed the forum benefitted him and thus helped him avoid campaign violations. (T.253) Undersigned counsel emphasizes this issue because, in the context of "a likelihood of future misconduct," it is important to know that Judge Santino did not attend that forum and just brazenly disregard its teachings. Instead, a very unique set of circumstances occurred regarding the seat in question – unlikely to repeat itself – that caused her to miss the benefit of that teaching tool.

CONCLUSION

Judge Santino shows good cause that, as a matter of law, her admitted mistakes do not meet the criteria for removal under Article V of the Florida Constitution. In light of this Court's precedent in *Kinsey* and *Decker*, where violations are limited to campaign Canon 7 violations, the jurist has otherwise "ably served" while on the bench, and has acknowledged and accepted responsibility for misconduct, the standard of "present unfitness" is not met in this case, and a removal sanction is not warranted.

Further, the evidence does not underscore any likelihood of future misconduct, and therefore does not support a finding of present unfitness to hold office. The evidence clearly and convincingly demonstrates that Judge Santino is "a judge of strong work ethic," her work as a judge in the Fifteenth Circuit has been

"exemplary," and she has history of good deeds in her community. Her campaign violations were wrong, and she fully acknowledges her mistakes. This Honorable Court should, like *In re Decker*, levy a serious sanction consistent with this misconduct. As a matter of law, however, in light of her "excellent" work as a judge, lack of any prior Florida Bar discipline, character and mitigation, and full acceptance of responsibility, this record does not demonstrate present unfitness to hold office, and, under Article V, does not implicate removal.

Respectfully submitted,

BOGENSCHUTZ, DUTKO & KROLL, P.A.
Attorneys for Judge Santino
600 South Andrews Avenue, Suite 500
Fort Lauderdale, Florida 33301-2845
954-764-2500 // Fax: 954-764-5040
jeremykroll@bdkpa.com

BY: /s/ *Jeremy J. Kroll*
JEREMY J. KROLL
Florida Bar No. 96466

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Honorable Michelle T. Morley, (Chair)
HEARING PANEL CHAIR
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
Sumter County Courthouse
215 E. McCollum Avenue
Bushnell, FL 33513
mmorley@circuit5.org

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

Lauri Waldman Ross, Esquire
COUNSEL TO THE HEARING PANEL OF THE
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
ROSS & GIRTEN
9130 S. Dadeland Blvd., Suite 1612
305-670-8010 – Fax: 305-670-2305
Service E-Mail: RossGirten@Laurilaw.com

BY: /s/ *Jeremy J. Kroll*
JEREMY J. KROLL
Florida Bar No. 96466