

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

INQUIRY CONCERNING A JUDGE NO. 06-249
RE: JUDGE MICHAEL E. ALLEN

AMENDED NOTICE OF FORMAL CHARGES

TO: Honorable Michael E. Allen
First District Court of Appeal
301 S. Martin Luther King Blvd.
Tallahassee, FL 32399

YOU ARE HEREBY NOTIFIED that the Investigative Panel of the Florida Judicial Qualifications Commission, by the requisite vote, has determined, pursuant to Rule 6(f) of the Rules of the Florida Judicial Qualifications Commission, as revised, and Article V, § 12(b) of the Constitution of the State of Florida, that probable cause exists for formal proceedings to be, and the same are hereby instituted against you to inquire into charges based upon allegations that on June 28, 2006, you issued a concurring opinion in the case of *Wyon Dale Childers v. State of Florida*, 936 So. 2d 619 (Fla. 1st DCA 2006), which by the text and innuendos directed to your colleague, Judge Charles Kahn, violated the preamble to the Code of Judicial Conduct and Canons 1, 2A, 3B(2), 3B(4), 3B(5), 3D(1), Rule 4-8.2(a) of the Rules of Professional Conduct of The Florida Bar, and the Oath of Admission of The Florida Bar, to wit:

1. A copy of your concurring opinion is attached and incorporated herein.

2. In your concurring opinion, you made the following points:

A. Your vote in favor of *en banc consideration* was based upon your concern that "participation by a particular judge of this court in the panel decision would have led to public perception of partiality by this court. "

B. You quoted at length from various newspaper articles, the accuracy of which you admitted in the opinion were unknown to you, and which were not a part of the record on appeal.

C. You used these newspaper article quotations to conclude that the "public" would believe that there was a close personal relationship among the appellant, Mr. Childers, Fred Levin, a Pensacola attorney, and the late Governor Lawton Chiles. Following your lengthy newspaper quotations, none of which mention your judicial colleague, Judge Kahn, you wrote:

It is possible that some members of the public might believe that Mr. Levin's good fortune in making millions of dollars on the tobacco litigation - - actually 'a third of a billion dollars' according to a May 2, 2002, column in the Northwest Florida Daily News - - had nothing to do with his personal relationship with Mr. Childers, or with his personal relationship with Governor Chiles, or with the fact that he was allowed to recruit the lawyers who would represent the state in the tobacco litigation. But I doubt that many members of the public would have such beliefs after reading news accounts such as those quoted above. At the very least, after reading those accounts, most members of the public would believe that Mr. Childers and Mr. Levin are extremely close personal and political allies, that they both had a close personal and political relationship with Governor Chiles, and their close relationship with one another and with Governor Chiles ultimately resulted in Mr. Levin's firm receiving hundreds of

millions of dollars from litigation made possible by a law adopted as a result of a legislative 'scam' orchestrated by the three of them, that Mr. Levin was Mr. Childers' long-time personal attorney, and that Mr. Levin was personally representing Mr. Childers on various criminal charges growing out of his actions as Escambia County commissioner when - - and for some period of time after - - the indictment was handed down in the present case.

In expressing your "doubt" about what the "public" would believe and not believe, you conveyed your own, personal belief in the truth of the matters set forth in the foregoing quotation.

D. Having thus conveyed your personal views about the relationship among Mr. Childers, Mr. Levin and Governor Chiles, you then drew your colleague, Judge Kahn, into the mix:

During his tenure as governor, Lawton Chiles appointed nine judges to this court. The very first of these appointments went to Fred Levin's 39-year old law partner, Charles Kahn. It is certainly possible that neither Judge Kahn's senior law partner, Mr. Levin, nor Mr. Levin's well-placed friend, Senator Childers, exercised their reputed considerable influence with their friend, Governor Chiles, in seeking Judge Kahn's appointment to this court. It is even possible that Judge Kahn's relationship with the governor's friend, Mr. Levin, had nothing to do with the governor's decision to appoint Judge Kahn. But a member of the public familiar with the reported relationships between these persons, and also familiar with the realities of the political process, would not be considered unduly cynical to doubt these possibilities.

Again, you signaled your own personal belief in the truth of the matters set forth in the foregoing quotation.

E. You then pointed out that Judge Kahn was a member of the three-judge panel assigned to hear the Childer's appeal; that your review of the video of the oral argument caused you to conclude that Judge Kahn found merit in Mr.

Childers' argument that he was denied his full cross-examination rights at trial; that a reversal of the Childers verdict would result in a new trial for Mr. Childers, but that subsequent developments (also outside the record) revealed that the principal witness against Mr. Childers had died a mysterious death, which meant that Mr. Childers might not be "required to further answer for the crimes for which he had been convicted."

F. Having thus set the stage with non-record "evidence," you reasoned:

In June 2005, a divided panel reached its proposed decision in this case. The majority opinion, authored by Judge Kahn proposed to reverse Mr. Childers' convictions based upon the argument that Mr. Childers had been denied an adequate opportunity to cross-examine Mr. Junior. A dissenting judge disagreed, concluding that the cross-examination issue should be decided in accordance with the reasoning later reflected in the en banc majority opinion. Accordingly, if this panel decision had stood, Mr. Childers' convictions would have been reversed on a ground making retrial unlikely - - thus likely extricating Mr. Childers from what the June 23, 2002, St. Petersburg Times article called 'the most serious predicament of his political career.' And the deciding vote on this decision would have been cast by Fred Levin's former law partner.

G. Having utilized non-record newspaper articles, the truth and accuracy of which you admitted were unknown to you, together with non-record information about Judge Kahn, to link Judge Kahn to Mr. Childers, Mr. Levin and Governor Chiles, you drew your final conclusions:

Less suspicious members of the public familiar with the information contained in the articles quoted above and also familiar with Judge Kahn's former association with Mr. Levin and his firm would have found it inappropriate for Judge Kahn to have participated in the case. And more suspicious members of the public would have assumed that Judge Kahn had simply returned past favors provided

to him by Mr. Levin and Mr. Childers, thus allowing them, once again, to 'snooker the bastards.'

3. At the time you wrote your concurring opinion, you knew that no party to the Childers appeal had requested that Judge Kahn recuse himself from the Childers appeal. You knew that binding Florida law directs that decisions on disqualification or recusal of an appellate judge are committed to the "conscience" of that judge. *Ervin v. Collins*, 85 So. 2d 833 (Fla. 1956). And you also knew that matters outside the record should not be considered in resolving appeals.

4. Canon 1 provides that "[a]n independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved." Your concurring opinion did not comport with the high standards of conduct that Canon 1 requires, and your disparagement of Judge Kahn's integrity was contrary to your duty to observe high standards so that the integrity and independence of the judiciary may be preserved.

5. Canon 2A provides that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Your concurring opinion undermined public confidence in the integrity and impartiality of the judiciary, and was contrary to the existing law regarding the disqualification or recusal of appellate court judges, and the consideration of matters outside the record.

6. Canon 3B(2) provides that "a judge shall be faithful to the law and maintain professional competence in it." Your attack on your colleague, Judge Kahn, was not in keeping with the established law of Florida which provides that decisions on disqualification or recusal of an appellate judge are committed to the "conscience" of that judge, and that an appellate judge should not consider matters outside the record.

7. Canon 3B(4) provides that "[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, . . ." Your attack on Judge Kahn, was neither patient, nor dignified, nor courteous.

8. Canon 3B(5) provides that "[a] judge shall perform judicial duties without bias or prejudice." Your concurring opinion, together with your conduct leading up to the publication of the concurring opinion, reveals that you are prejudiced against Judge Kahn.

9. The attack against Judge Kahn contained in your concurring opinion was unnecessary. Canon 3D(1) provides that "[a] judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action." Appropriate action includes direct communication with the judge committing the violation, or reporting the violation to the appropriate authority, which in this case is the Judicial Qualifications Commission. By your own admission you did not personally communicate with Judge Kahn, nor did you consider reporting the matter to the Judicial Qualifications Commission. If the matter was as serious as

your concurring opinion indicates you believed it to be, you should have reported the matter to the Judicial Qualifications Commission rather than publishing your attack on Judge Kahn, which undermined public confidence in the integrity and impartiality of the judiciary.

10. The attack against Judge Kahn in your concurring opinion was also unnecessary because the resolution of the matter by an en banc proceeding had already assured that Judge Kahn would not cast the deciding vote that would reverse the conviction. That you disagreed with Judge Kahn and several other members of the court over the legal issue of whether en banc treatment was appropriate did not merit a wholesale attack against Judge Kahn's integrity arising out of an issue that had been mooted by the en banc proceeding.

11. The Preamble to the Code of Judicial Conduct provides that "the Code . . . is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards." Your concurring opinion and your conduct leading to its publication did not comport with the general ethical standards that should guide your judicial and personal conduct.

12. The oath of admission which all lawyers take as a condition to being sworn in as a member of The Florida Bar provides, among other things, that "I will maintain the respect due to courts of justice and judicial officers" and that "I will abstain from all offensive personality" Your concurring opinion and the conduct leading to its publication violated those provisions of the oath of admission.

13. Rule 4-8.2(a), provides that "a lawyer shall not make a statement . . . with reckless disregard as to its truth or falsity concerning the . . . integrity of a judge" Your concurring opinion violated this rule.

14. Your concurring opinion was unnecessary, unjustified and motivated by ill-will. The Preamble to the Code of Judicial Conduct provides that intrinsic to all of its sections "are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system." Your concurring opinion had the exact opposite effect, because it neither enhances nor maintains confidence in our legal system.

You are further hereby notified that the Investigative Panel of the Florida Judicial Qualifications Commission by the requisite vote of those members present at a meeting held on February 28, 2008, pursuant to Rule 6(f) of the Rules of the Florida Judicial Qualifications Commission as revised and by Article V, § 12(b) of the Florida Constitution, has determined that probable cause for formal proceedings against you exists on the following additional charges:

15. The Commission as a constitutional body charged with the duty to investigate the State Judiciary has a right to expect absolute candor from a judge appearing before its Investigative Panel. Nevertheless, in your appearance before the Investigative Panel on October 6, 2006, you knowingly and willingly made false statements relating to material issues, as follows:

A. Beginning at page 92, line 18 of the transcript of that proceeding, you were asked and answered:

CHAIR: Is there a history of animosity between you and Judge Kahn on the Court?

ALLEN: You know, Judge Kahn and I don't agree on everything. But if this has to do with the animus leading to this opinion, there was none.

* * *

And there is no - - there was no animus whatsoever associated with this.

B. Beginning at page 100, line 8, in further explanation of your reasons for writing the concurring opinion, you testified under oath:

ALLEN: I wrote this for the very purposes that I said I wrote it and with those motivations.

C. Beginning at page 103, line 16, in further testimony regarding your motivation, you stated:

ALLEN: And if I - - and if I do it again, it won't be with bad motivation, and there was no bad motivation here.

D. Beginning at page 104, line 14, you were asked and you answered under oath:

JUDGE YOUNG: You took - - you took the argument from clearly an intellectual argument to a clearly personal argument. I thought, "Is he okay?"

ALLEN: Well, I think I'm okay, and I don't think it was personal. I think I - - at the time, I - -

JUDGE YOUNG: Don't even go there. Of course it was personal. You brought in articles. You put extrajudicial stuff in your opinion. Yes, it was personal. If you don't think it was personal, you're deluding yourself.

Yes, it was very personal, and I suspect it was personal because of the fights that are going on in the First DCA concerning who is going to be the chief judge, and I suspect it was personal because your guy lost. That's what happened here, isn't it?

ALLEN: Well, the - -

JUDGE YOUNG: You're under oath, sir.

ALLEN: I know that I'm under oath, and I - - and I really am not too happy about this question, but I'll answer it, and I'll try to be pleasant. I didn't vote for Judge Kahn for chief judge. A number of judges - - a number of judges didn't vote for Judge Kahn for chief judge, and there is no animosity about that. There is none whatsoever.

E. Beginning on page 32, line 14, in further explanation of your motivation for publishing your concurring opinion, you testified under oath:

ALLEN: Now, I wasn't interested in revealing this. This was a painful thing for me. I want all of you to understand that. I didn't want to do this. This is no vendetta by me. It's nothing at all.

F. Beginning at page 58, line 23, of the transcript of that proceeding, you were asked and answered under oath:

MR. GARCIA: Yes, sir. So you were retaliating against your fellow judges, and that's your rationale for writing the opinion - -

ALLEN: No.

MR. GARCIA: - - is it not, sir?

ALLEN: No, it's not. No, it's not. ...

16. These acts violated Canons 1, 2A, 3, 4A and 5 of the Code of Judicial Conduct, and Rule 8.4 of the Rules of Professional Conduct of the Florida Bar and the oath you took before testifying.

17. These acts, if they occurred as alleged, would impair the confidence of the citizens of this state in the integrity of the judicial system and in you as a judge; would constitute a violation of the canons of the Code of Judicial Conduct, the Preamble to the Code of Judicial Conduct, the oath of admission, and the Florida Rules of Professional Conduct; would constitute conduct unbecoming a member of the judiciary; would demonstrate your unfitness to hold

the office of judge; and would warrant discipline, including, but not limited to, your removal from office and/or any other appropriate discipline recommended by the Florida Judicial Qualifications Commission.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 28, 2008, a true and correct copy of the foregoing Amended Notice of Formal Charges has been furnished by facsimile and U.S. mail to: Bruce S. Rogow, P.A., Broward Financial Centre, Suite 1930, Fort Lauderdale, FL 33394, Guy Burnett, Jr., Esq., 3020 N. Shannon Lakes Drive, Tallahassee, FL 34309, and Richard C. McFarlain, Esq., Carr Allison, 305 South Gadsden Street, Tallahassee, FL 32301.

Attorney

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