IN THE SUPREME COURT OF FLORIDA

In re Inquiry Concerning a Judge
Daniel W. Perry,

Respondent.

JQC Case No. 92-53

Supreme Court No. 80,457

UPON RECOMMENDATION FOR DISCIPLINE
FROM THE JUDICIAL QUALIFICATIONS COMMISSION

ANSWER BRIEF OF COMMISSION

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PRELIMINARY STATEMENT

References to the various pleadings and motions in the Supreme Court's case file shall be by document name and page number within the document, with the exception of the Response to Order to Show Cause, which shall be designated **"Response."** References to the transcript of the hearing before the Judicial Qualifications Commission shall be designated **"Tr."** followed by a page number. References to trial exhibits shall be designated **"Exh."** followed by the exhibit number. References to the Commission's Findings of Fact, Conclusions of Law, and Recommendation of Discipline shall be designated **"Report"** followed by a page number.

STATEMENT OF THE CASE AND THE FACTS

Because Respondent presented no Statement of the Case and the Facts in his "Response to Order to Show Cause," Special Counsel to the Judicial Qualifications Commission (the "Commission" or the "JQC") will do so here.

The Commission initially charged Respondent Daniel W. Perry, County Judge in Orange County ("Respondent" or "Judge Perry") on September 10, 1992 in four counts. **Notice of Formal Charges.** Further investigation resulted in six additional counts being lodged against Respondent on December 29, 1992. **Supplemental Notice of Formal Charges.** Eventually, these two sets of charges were consolidated into a single document on March 3, 1993, to which Respondent filed his timely answer, and the parties proceeded to trial. **Notice of Consolidated Formal Charges.**

The re-numbered and consolidated charges are as follows:

- Count I arose from an incident that occurred in open court in which Respondent was charged with having "unnecessarily admonished and berated an Army recruiter, the defendant Michael Facella, for appearing in court in his dress Army uniform." **Notice of Consolidated Formal Charges at 1-2.**[1]/
- Count II concerned six traffic cases over which Respondent had presided and during which he had summarily

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[1]/ See testimony of Sgt. Michael Facella (**Tr. 162-87**) and Respondent (**Tr. 194, 284-92, 1233-35, 1308-09**); and **Exh. 1** and **18.**

jailed five of the six defendants for driving away from the courthouse, the sixth having eluded law enforcement officers. In this count, the Commission charged Respondent with having exhibited a "disregard for the sober and proper exercise of your contempt powers, without any deference for due process of law" in violation of Canons 1, 2, 3A(1), and 3A(3) of the Code of Judicial Conduct. **Notice of Consolidated Formal Charges at 2-6.**[2]/

- Count III charged Respondent with having conducted himself "in such a manner as to lessen public confidence in the integrity, competence, and impartiality of the judiciary." This count detailed various incidents, including instances in which Respondent said, to him, pleading not guilty was an admission of being a "Ted Bundy look-alike"[3]/ and accused other local judges of

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[2]/ See testimony of Respondent (**Tr. 96-140, 1235-43, 1291-95, 1311-12, 1329-30**); testimony of Assistant Public Defender Cindy Schmidt (**Tr. 549-553** ; **Exh. 2 through 7** (audio tapes of contempt proceedings before Respondent); **Exh. 19 through 24** (transcripts of contempt proceedings before Respondent); and **Exh. 47 through 52** (court files of alleged contemnors).

[3]/ See **Exh. 9** (audio tape) and **Exh. 26** at 8 (transcript)("As soon as you come up here, you tell me, 'Not guilty,' and I'll understand you're a Ted Bundy look-alike, and you can go down and get your trial whenever you want to do it") and **Exh. 10** (audio tape) and **Exh. 27** at 27-28 (transcript)("If you're a Ted Bundy look-alike, wave your hand right now, and we'll just set your not guilty pleas for you so that you guys can get on about your way"). But see **Tr. 208** (Respondent's testimony)(Q: "Do you recall ever saying on any occasion that, to you, pleading not guilty was admitting to being like a Ted Bundy look-alike?" A: "I never made that statement. Never have I made that statement").

"playing games" with assigned cases.[4]/ **Notice of Consolidated Formal Charges at 6-8.**

- Count IV charged Respondent on various occasions with exhibiting "discourteous and insulting conduct toward litigants, attorneys, and courthouse personnel," including an instance in which, from the bench in open court, Respondent had "suggested the possibility of issuing a Rule to Show Cause to Judge Steven Wallace, his judicial assistant, and 'somebody' in the State Attorney's Office."[5]/ **Notice of Consolidated Formal Charges at 8-10.**

- Count V charged the Respondent with directing the prosecutor "to call the criminal defendant to the witness stand -- during the state's case in chief -- as a

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[4]/ See **Exh. 8** (audio tape) and **Exh. 25** at 5 (transcript)(". . .some judges have told me the best way to handle this. . .is to come in early and look over the files and make a preliminary decision what it is I'm going to do in your case"); **Exh. 9** (audio tape) and **Exh. 26** at 5 (transcript)(". . .and I'm not going to play those kind of games with you"); and **Exh. 10** (audio tape) and **Exh. 27** at 4 (transcript)(". . .that is sick"). See also **Tr. 211-12.**

[5]/ **Exh. 13** (audio tape) and **Exh. 30** at 19-20 (transcript)("We may need to do a rule to show cause against Judge Steven Wallace as well as his JA, Ms. Judy Ball, to find out why they should not be held in contempt for depriving this man of the time period within which to file a motion to modify. . . .Well, I'm also going to have to do a rule to show cause, then, on somebody in the State Attorney's office. . ."). But see **Tr. 230-31** (Respondent's testimony)(Q: "Did you ever suggest it might [be] necessary to issue a rule to show cause against Judge Steven Wallace and his judicial assistant, Judy Ball?" A: "No, ma'am. I would never threaten another county judge with contempt"). See also **Tr. 255-73, 348-53** for an incident in which Respondent conducted a hearing to accuse the State and the defense of forum-shopping.

'hostile witness.'"[6]/ **Notice of Consolidated Formal Charges at 10-11.**

- Count VI charged Respondent with routinely conducting infraction hearings by requiring the offender to testify first so that the police officer can "rebut" the offender.[7]/ **Notice of Consolidated Formal Charges at 11-12.**
- Count VII charged Respondent with routinely conducting voir dire despite Rule 3.300, Fla. R. Crim. P.[8]/ **Notice of Consolidated Formal Charges at 12-13.**
- Count VIII charged that prosecutors and defense attorneys are "hesitant to make vigorous legal argument to you for fear of your reaction, such as possibly being held in

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[6]/ **Exh. 15** (audio tape) and **Exh. 32** (transcript); **Tr. 300-46** (defense attorney Peyton Lea's testimony); and **Tr. 354-55** (Assistant State Attorney Yvonne Yegge's testimony).

[7]/ Respondent accomplished this result by stating on the record that he was taking judicial notice of the Uniform Traffic Citation. See, e.g., **Exh. 18** at 5 (transcript of State v. Facella)("All right. I'm going to take judicial notice of the uniform traffic citation alleging. . ."); **Exh. 34** at 2 (transcript of State v. Saady)("Officer Oberman, I'm going to take judicial notice of the Uniform Traffic Citation"). But see **Tr. 197** (Respondent's testimony)("I never took judicial notice of the citation. I took judicial notice that a citation had been issued").

[8]/ **Tr. 223-30** (Respondent's testimony); **Tr. 355-57** (Yegge's testimony); **Tr. 419-21** (testimony of Assistant State Attorney Russell Bergin); **Tr. 604-06** (testimony of Assistant Public Defender Evellen Houha); and **Tr. 651-54** (testimony of Assistant State Attorney Kim Shepard).

contempt."[9]/ **Notice of Consolidated Formal Charges at 13.**

- Count IX charged Respondent with being less than candid in responding to the Commission initially about the contempt cases detailed in Count I.[10]/ **Notice of Consolidated Formal Charges at 14-15.**
- Count X charged Respondent with failing to "correct that order [entered in one of the contempt cases] or your representation to the Commission until after you received the Amended Supplemental Notice of Investigation."[11]/ **Notice of Consolidated Formal Charges at 15-16.**

Respondent filed his Answer to the Notice of Consolidated Formal Charges on March 26, 1993, and the case was tried before the Commission in Orlando from July 13 through July 16, 1993. **Report at 1.** During the Commission's case in chief, the Commission heard several audiotapes of court proceedings before Judge Perry[12]/; took testimony from ten witnesses including Judge Perry himself, the Army recruiter who was the subject of Count I, the Public Defender and two of his assistants and several Assistant State Attorneys;

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[9]/ Seriatim in testimony of Assistant State Attorney Fred Lauten (**Tr. 724-77**), Public Defender Joseph DuRocher (**Tr. 30-90**), Assistant State Attorney Evellen Houha (**Tr. 602-38**), Assistant State Attorney Kim Shepard (**Tr. 638-723**), Assistant Public Defender Cindy Schmidt (**Tr. 536-601**). See also Respondent's testimony, e.g., at **Tr. 255-63.**

[10]/ **Exh. 39 through 44** and **Exh. 47 through 52.**

[11]/ Id.

[12]/ Audio tape recordings are the official court record of in-court proceedings in Orange County Court.

and received into evidence 56 exhibits, including audiotapes, transcripts of those tapes, and copies of pertinent court files.

At the conclusion of the Commission's case in chief, the Commission dismissed Counts V, VI and VII of the charges. **Tr. 792.**

Thereafter, the Respondent presented his defense case in chief, during which he called some 24 witnesses and introduced six exhibits into evidence. **Tr. 794-1330.**

After due deliberation, the Commission issued its Findings of Fact, Conclusions of Law, and Recommendation for Discipline on July 27, 1993. The Commission found clear and convincing evidence of guilt as to Counts I and II and "failed to find by not less than nine affirmative votes that Judge Perry is guilty on Counts III, IV, VIII, IX, and X. Judge Perry is therefore found not guilty on these five counts." **Report at 4-5.**

On July 30, 1993, this Court entered its Order to Show Cause, and these proceedings ensued.

SUMMARY OF THE ARGUMENT

The Commission found clear and convincing evidence in the record, including Respondent's admissions, that Respondent was guilty, in Count I, of unnecessarily berating an Army recruiter for wearing his dress uniform to court and, in Count II, for arbitrarily, improperly, summarily and abusively jailing persons for contempt of court when they allegedly attempted to drive away from the courthouse. The Commission's charges adequately put Respondent on notice of the conduct the Commission intended to scrutinize, and the record supports the Commission's findings of fact, conclusions of law, and recommendation for discipline.

ARGUMENT

I.
The Commission's Report Contains A Proper Summary of Clear and Convincing Record Evidence of Guilt as to Count I.

This Court historically has given "great weight" to the Commission's findings of fact in considering whether to impose judicial discipline, In re Leon, 440 So.2d 1267, 1269 (Fla. 1983); In re Crowell, 379 So.2d 107, 109 (Fla. 1979); In re LaMotte, 341 So.2d 513, 516 (Fla. 1977), although on at least one recent occasion this Court has noted its obligation to study and assess the record for itself. In re Graham, 620 So.2d 1273, 1276 (Fla. 1993).

As to Count I, Paragraph 17 of the Commission's Report is a fair and accurate summary of the testimony and evidence presented to the Commission. Respondent's argument in his Response to Order to Show Cause on this issue rests on one central but erroneous assumption: Judge Perry, who had jumped to the conclusion that Sergeant Facella was attempting to influence him improperly by wearing his Army dress blue uniform to court (**Tr. 285-86**), was entitled to admonish the Army recruiter, because Facella failed to inform Respondent of the reason he was wearing the uniform. Respondent boldly asserts that the "Commission seems to have forgotten the fact that the record established, without contradiction, that Facella, despite repeated questioning by Judge Perry, never, ever told Judge Perry that it was necessary for him to wear his dress blue uniform to Court because he had a function

to attend after Court." **Response at 3-4.**

The record establishes precisely the contrary. The Commission's Exhibit 18, which is a transcript of the Facella hearing before Judge Perry, shows on the first page that Respondent's first question was "Mr. Facella, why are you in uniform?" **Exh. 18 at 2.** Facella, apparently somewhat taken aback and bewildered,[13]/ told Respondent "I work till 10:00 o'clock at night. And sir, as soon as I get done here, I have additional work to do." **Id.** (emphasis added). Respondent cut him off but did not let the matter drop, however, and continued to pursue the recruiter further about his uniform, at one point asking "Who has told you that you should wear your dress uniform when you come talk to a judge?" **Id. at 3-4.**

In his Response and in his testimony before the Commission (**Tr. 286-87**), Judge Perry has stated that, had he but known Facella had a function to attend after his court appearance, the Respondent would have been satisfied and let the matter rest. This argument ignores the actual events at Facella's hearing. The evidence shows clearly and convincingly that when Facella appeared before the court, Respondent's first question to him was "Why are you in uniform?" The question was not about the particular uniform, a distinction Respondent now advances as justification for his outburst, nor did Facella interpret the questioning that way.

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[13]/ Exhibit 1, the audiotape of that proceeding, was played for the Commission and reveals Facella's confusion reflected in his tone of voice when he was immediately questioned about his uniform. **Tr. 165-66.**

According to the recruiter's testimony to the Commission,

> Judge Perry asked me why I was wearing a uniform; not the full dress-blue uniform, as you state. It's a dress-blue uniform. He didn't ask me why I wasn't wearing a different uniform. . . .What he was -- or what I feel he was addressing was the uniform, period; that **he wanted me to come to court in civilian clothes**.

Tr. 175 (emphasis supplied).

Facella had responded to the question put to him, not to the question Respondent now claims he had meant. Facella did tell Respondent he had work to do after court that day, and Respondent ignored that information, in his zeal to badger and humiliate the recruiter. Facella, who wore the same uniform to the hearing before the Commission, testified that "Judge Perry made me feel uncomfortable" about the uniform (**Tr. 172**) and that Respondent "made me feel like I did something wrong, so I apologized for wearing my uniform. I later found out I did not do something wrong." **Tr. 168.**

In his argument to this Court, Judge Perry appears to profess ignorance of the specific language or tone of voice that supports the Commission's findings that he was "rude, abusive, and insulting" during the Facella hearing and, therefore, the Commission's Report is defective. **Response at 5-6.** This argument invites this Court to ignore the record as a whole and concentrate solely on the Report. There is no requirement that the Commission detail the minutiae of each piece of evidence it found clear and convincing, however, and this record speaks for itself, loud and clear. The mere fact that Respondent asked the questions he asked

of Facella justifiably supports a finding of abuse, and there is no way to describe a rude tone of voice other than "rude."

The Commission's Report is a fair and accurate summary of what the Commissioners observed during the hearing, including Facella's and Respondent's demeanor and tone of voice during the underlying hearing. There is no reason to disturb the Commission's findings and conclusions, and Respondent's invitation to view the videotape of Facella's testimony is a transparent and inappropriate attempt to re-try Count I to this Court.

II.

The Commission's Findings as to Count I Are Based on the Tape Recording and Transcript of the Underlying Hearing, Which Demonstrate Respondent's Rude and Abusive Questioning of the Army Recruiter's Attire.

Subsection 3 of Canon 3A, Fla. Code Jud. Conduct, requires a judge to "be patient, dignified, and courteous to litigants. . ." By no stretch of anyone's imagination can Respondent's conduct in attacking Facella be characterized as patient, dignified or courteous. The Commission certainly is justified in finding the questioning was, instead, rude, abusive, and insulting, and its findings and conclusions are fully supported by the record.

An examination of Respondent's interaction with Facella vividly demonstrates the injudicious character of Respondent's conduct:

> - Mr. Facella, why are you in uniform? . . .Are you on duty right now? . . .Right now, at 4:20 in the afternoon, here in traffic court? . . . Wait a minute. Are you actually recruiting people in my courtroom?

Exh. 18 at 2.

- Well, I'm a little confused as to why you -- I mean, the uniform is impressive and everything, but I really don't understand why you're wearing your uniform today. . . To come to court in? . . . What part of the Army Code, if you will, directs that you're to wear your dress uniform when you come to talk to a judge, in court, when you're a defendant? . . .It's not a formal Army hearing. It's a formal civilian hearing.

Id. at 3.

- Okay. Who has told you that you should wear your dress uniform when you come talk to a judge? . . .So, it was your own interpretation of your Army Code, then, that you should wear your full dress uniform when you come talk to a judge when you're a defendant in a case, correct? . . .If you were a witness, that's another story. But when you're a defendant in court, you should not be wearing your dress uniform. And if I am mistaken on that, if there is a policy in the Army Code, I want to know about it, and I want you to get me a copy of it.[14]/

Id. at 3-4.

- You're not the first one who has worn the uniform in court. But I don't buy it. I mean, to the extent that it appears to be an attempt to influence me with little flags waving in the background, it's not going to work. . .I'm an Army brat. Okay? There are some judges who would be absolutely offended by this.

Id. at 4-5.

In the face of this undoubtedly unexpected attack, it is small wonder that Facella apologized if he had offended Respondent. Id. at 4. Significantly, only after Facella apologized did Respondent explain the attack, in somewhat inelegant language: "And the reason why I'm drilling you on it, to be honest with you, is to keep you from stubbing your toe like this in the future with somebody who is going to chew your face off next time you do it." Id. at 5. Respondent did not appear to consider the possibility that Facella wore the uniform as a sign of respect for the court,

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[14]/ Facella testified to the Commission he was adhering to Army regulations in wearing the uniform to court. Tr. 164.

nor did he pay the slightest attention to Facella's statement that he was going back to work after leaving court. The Commission listened to all of Exhibit 1, which is the in-court audio tape recording of the complete Facella infraction hearing. That recording, obviously, is the best evidence of the Respondent's tone of voice, but even if the Commission had read only the cold transcript of the hearing, which is Exhibit 18, a finding of misconduct would have been justified.

Respondent argues to this Court, however, that his concern about how he would look to the courtroom full of observers justifies his castigation of the hapless Facella. **Response at 9-10.** He needed to "confront the apparent attempt by Facella to gain an unfair advantage by wearing such an impressive uniform," in order to preserve the appearance of impartiality and fairness. **Id. at 10.** Respondent does not explain how attacking a litigant for the formality of his attire would promote the appearance of judicial impartiality.

Aside from the illogical nature of this argument, moreover, Respondent has missed an important point about the Code of Judicial Conduct. Since 1976, scienter or mala fides is no longer a requirement to impose discipline on an errant judge. Art. V, § 12(f), Fla. Const. See In re a Judge, 357 So.2d 172, 181 (Fla. 1978)(judge disciplined "notwithstanding his good intentions and compassionate motives"; holding Art. V, § 12(f) prospective in application only). Even assuming Respondent's good intentions, as this Court observed earlier this year about another judge given to

extreme behavior, "His motives are acceptable, but his methods are not." In re Graham, 620 So.2d 1273, 1275 (Fla. 1993). In short, violation of the Code is not analogous to a specific intent crime. This is so because the public's perception of justice arises from the external indices of fairness and impartiality, not from what a judge intended or meant to say or do. That public perception, of course, is crucial to the preservation of an independent judiciary, fueled as the judicial branch of government is by a self-governing people's willingness to submit their disputes to the courts only if the system is perceived to be just.

In this context, Respondent chose a poor way to show that he could not be influenced by a uniform. Given the outcome of Facella's infraction charge, in fact, it appears the uniform did influence Respondent: it influenced him unfavorably.[15]/ That outcome may not have been lost on the observers, who probably left Respondent's courtroom that day wondering what he had against the military.

Facella, contrary to Respondent's assertions, was not "evasive, smart-alecky, and insubordinate" with the judge, **Response at 13,** as the evidence demonstrates and as the Commission found. Furthermore, this Court should note Respondent's admissions to the Commission that he regretted the way he had treated Facella, **Tr. 1308,** and that he should apologize to Facella for what he did. **Tr. 1309.** In the face of those admissions, Respondent's present disingenuous argument is an affront to this Court.

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[15]/ Facella testified that after the hearing before Respondent, the Army changed its initial determination that he was not culpable in his traffic accident. **Tr. 181-82.**

III.

The Commission's Findings and Conclusions That Respondent Was Guilty on Count II As Charged Did Not Violate Rule 17 or Respondent's Due Process Rights.

Respondent asserts that the Commission's Report finding him guilty on Count II is based on "matters not alleged in Count II." **Response at 15-19.** Respondent asks that Paragraph 18 of the Report be "stricken," contending that the Commission was precluded from making certain findings appearing there because Respondent was not "charged" with the conduct the Commission found. Paragraph 18 of the Report focuses on Respondent's actions and conduct when on six occasions during January 28 and 30, 1992, he cited traffic infraction defendants for contempt for driving away from the courthouse, their drivers' licenses having been suspended. Four of them he summarily sentenced to jail. A fifth, Emma Russell, pleaded not guilty, and was jailed for 26 days when Respondent set her bond at $20,000. A sixth person was not captured by law enforcement officers, and Respondent issued a warrant for his arrest.

Specifically, Respondent asserts that Rule 17 and his "due process rights" precluded the Commission from finding that on these occasions he was (a) upset and angered, (b) that he required any defendant to post a "very high" bond, (c) that he was sarcastic in addressing them, and (d) that his tone of voice was inappropriate. **Response at 16-17; Report at 6.** Respondent's argument focuses on this language, which appears at the end of the Report's paragraph

18, to the exclusion of the language appearing at the beginning of the paragraph:

> There was clear and convincing evidence presented to the Commission in the form of an audiotape and court files of each of the six contempt proceedings referred to in the Consolidated Formal Charges that Judge Perry did exercise his contempt powers in an arbitrary, improper manner without regard for due process of law.
>
> Judge Perry cited the defendant[16]/ for indirect contempt without complying with the rule and requirements relating to indirect contempt. All of the contempt defendants were sentenced to jail including one that was incarcerated for twenty-six days, [and] were illegally and wrongfully confined.

Report at 6. Respondent does not appear to challenge on Rule 17 or "due process" grounds these particular factual findings, which supported the Commission's verdict of guilt on Count II.

Respondent's contention that he did not have sufficient "notice" of the Code violations with which he was charged is without merit for several reasons. First, Rule 7, Fla. Jud. Qual. Comm'n R., relating to the Notice of Formal Charges, provides (emphasis supplied):

> The notice shall be issued in the name of the Commission and specify in ordinary and concise language the charges against the judge and allege <u>essential facts</u> upon which such charges are based, and shall advise the judge of his

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[16]/ It is obvious from reading Report's preceding sentence that the Commission is referring in the singular to <u>each</u> of the six contempt proceedings identified in the Consolidated Formal Charges. Instead of using "the defendant" the Commission could have used "each defendant" in this sentence as well, but the Commission's failure to use "each" instead of "the" does not make its finding an error, as Respondent appears to contend on pages 21 and 22 of his Response.

right to file a written answer ....

There are no cases decided under this rule, and there is no definition of "essential facts." However, a reasonable interpretation of this rule is that it does not require the evidence against the judge to be detailed in the notice, just the essential facts, along with the Canons of Judicial Conduct allegedly violated. The Consolidated Formal Charges in this case specifically identify the court proceedings under scrutiny and what Judge Perry did in each case.

Count II specifically charged Respondent with having

> conducted yourself on several occasions in a manner indicating a disregard for the sober and proper exercise of your contempt powers . . . . This allegation includes, but is not limited to, [six occasions, identified by date and the name of the defendant, in subparagraphs (2)(a) through (f) of the Notice].

(emphasis supplied).

Subparagraphs b, e and f of Count II specifically state the amounts of the bonds Judge Perry set for contemnors Wingard (total of $15,000), Russell (total of $20,000), and Hernandez ($5,000 for contempt charge). Thus, Respondent was clearly on notice that he would be called to answer for this aspect of his conduct, in addition to his having failed to enter judgments reciting the facts upon which the contempt adjudications were based, having failed to issue a show cause order in any of the six cases, and having failed to follow any of the other due process safeguards as required by

law. **See Notice of Consolidated Formal Charges at 2-5.**[17]/ Furthermore, "a manner indicating a disregard for the sober and proper exercise of [Respondent's] contempt powers" certainly includes a judge's conducting himself with anger and sarcasm and having addressed alleged contemnors in an admittedly inappropriate tone of voice.

Moreover, in addition to charging Respondent with a violation of Canon 1, Count II specifically charged him with violations of Canons 2A and 3A(1) and (3). Canon 3A(3) specifically directs:

> A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom he deals in his official capacity....

Canon 3A(3), Fla. Code Jud. Conduct (emphasis supplied).

Thus, Respondent clearly was placed on notice of the conduct the Commission intended to examine based on the language of the Notice of Consolidated Formal Charges.[18]/ In his testimony before the Commission, he admitted that on the occasions described in detail in Count II of the Commission's Notice of Consolidated

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[17]/ Respondent admitted in his Answer as to five of the six cases that he failed to enter a judgment reciting the facts upon which the contempt charges were based and failed to enter a show cause order in any of them. **Answer to Consolidated Formal Charges at 2.**

[18]/ Moreover, under Rule 12, Fla. Jud. Qual. Comm'n R., the accused judge has a right to demand names and addresses of all witnesses whose testimony the Commission expects to offer and copies of all transcripts of testimony and written statements of the witnesses. Respondent exercised his rights under Rule 12 and was also provided with a witness list specifically stating that contemnors Russell and Wingard (as well as a host of other witnesses) would testify to "actions and demeanor of Respondent when [he/she] appeared before him and how he made [him/her] feel."

Formal Charges, he had been upset and angered, was sarcastic, and used an inappropriate tone of voice. **Report at 6.**[19]/ This Court cannot presume that Respondent admitted these facts -- which admissions are supported by the tapes of the court proceedings at issue[20]/ -- without realizing the admitted conduct violated the Canons. "Scienter" is not a requirement for finding a violation of the Canons, see Art. V, § 12(f), Fla. Const., and Respondent presents nothing to this Court to warrant questioning why, represented by able counsel, he decided to make these admissions.

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[19]**See Tr. 102:** Respondent: " ... I regret the expression of disappointment and disgust I had in my voice, the tone of disgust I had in my voice. ... Yes, I was disappointed. I was upset, a little angered by the fact that this person had stood me in the face and lied to me about his decision to drive. Certainly I regret the choice of language at this point. What else can I say?"; **Tr. 104-05:** Q: "Judge Perry, were you being sarcastic when you said to [contemnor] McCant, 'I'm dying to hear your explanation?'" A: "Certainly. ... I was certainly upset. These people had been warned repeatedly not to violate the law ..... Had I been sarcastic? Yes. Did I tell you earlier -- and I still believe that my tone of voice was inappropriate, and I regret that I did that. I'm not about to sit here and tell you that I didn't make any mistakes that day ...."; **Tr. 109-110:** Q: "Do you think you were being sarcastic to [contemnor Rickel] when you said, 'Maybe next time you'll listen'?" A: "The tone of my voice certainly implies I was sarcastic, but -- and obviously there was no need for the statement, and I regret making the statement itself. ... You know, I did express some natural human disappointment, anger, disgust, whatever you want to call it, which I regret making, but -- I don't know what you're trying to ask me to say to you except that I do regret making the statement"; **Tr. 280:** Commissioner Gillman: "Now you stand by your answer earlier today that you only regret your tone of voice and your choice of words; you do not regret the procedure that your followed in regard to those tapes which are Exhibits 2 through 7?" . . . . A: "Yes, sir. I stand by that." See In re Graham, 620 So.2d at 1275 ("Unfortunately, Graham fails to recognize that the alleged misconduct of others does not justify his repeated departure from the guidelines established in the Code of Judicial Conduct").

[20]/ See **Exh. 2-7.**

The questions prompting the admissions were not even the subject of objections from Respondent or his counsel.

In re a Judge, 357 So.2d 172 (Fla. 1978), the sole case cited by Respondent in support of his Rule 17 and due process arguments, is inapposite. In a footnote, the case notes the May 12, 1977 repeal of the 1977 version of Rule 17, Fla. Jud. Qual. Comm'n R., which apparently permitted amendment of the Notice of Formal Charges "to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing." The case, however, involved a pre-hearing addition of three counts (which was adjudged proper under Rule 17 permitting pre-hearing amendment and answer) and a mid-hearing deletion of a certain phrase from one of the counts (which was adjudged non-prejudicial because the Judge was found not guilty on that count). Significantly, nothing was added to or deleted from the Consolidated Formal Charges during the hearing in Judge Perry's case. No additions or deletions were necessary.

Respondent wishes to foist upon this Court a strange and untenable notion of "due process" in Commission proceedings. The argument does nothing more than attempt to elevate form -- that is, what Respondent believes would have been the "proper" form -- over the clear substance of the charges against him in Count II, which he substantially admitted.

> Proceedings looking toward the suspension or revocation of a medical or legal professional license are free of any due process defect, so far as procedure is concerned, so long as the basic requisites of notice and hearing are complied with; the form of the notice and

hearing is immaterial.

In re Kelly, 238 So.2d 565, 571 (Fla. 1970)(quoting Annotation, 98 Law Ed. 857); see also In re Graham, 620 So.2d 1273, 1276 (Fla. 1993). The argument Respondent makes here is not unlike that rejected in In re Leon, 440 So.2d 1267 (Fla. 1983). There, Judge Leon argued before this Court that Count VI of the Commission's Amended Notice (charging that he had made false statements concerning the activities under investigation to Commission member Thomas C. McDonald) was not properly before the Commission because the amendment had been filed by JQC counsel, not by the Commission. This Court stated:

> The Commission had already found probable cause on the original five counts. Requiring an additional formal meeting of the Commission to hold a probable cause hearing on the new count would have been pointless. There was knowledge of the additional count; it was directly related to the other charges upon which probable cause had been found; and there was no request for an additional probable cause hearing. Under these facts, there was no prejudice and we conclude it was not reversible error for the Commission's counsel to file the additional count for misconduct.

In re Leon, 440 So.2d at 1269-70.[21]/

In this Respondent's case, Count II of the Consolidated Formal Charges against him specifically charged that he lacked proper sobriety in the exercise of his contempt powers and that he failed to be patient, dignified and courteous. As this Court observed

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[21]/ Notably, elsewhere in the charges, Respondent Perry was charged with failing to be patient, dignified, and courteous on other occasions. See, e.g., **Notice of Consolidated Formal Charges at 8-10.**

with regard to Judge Leon, "there was knowledge" that this particular aspect of Perry's conduct specifically in connection with the contempt proceedings would be scrutinized. He then admitted the conduct in his pleadings and in his testimony. Unlike the contemnors who were summarily jailed by Respondent, Respondent was represented at the Commission's hearing by counsel. There were no violations of the rules of procedure and no mid- or post-hearing amendment of the charges. This Court should find Respondent's argument here without merit.

IV.

The Record, Including Respondent's Admissions, Demonstrates Respondent's Guilt As to Count II As Charged.

The record is clear that Respondent is guilty of Count II, in which Judge Perry was charged with having conducted himself "on several occasions in a manner indicating a disregard for the sober and proper exercise of your contempt powers, without any deference for due process of law." **Notice of Consolidated Formal Charges at 2.** The Commission found that "Judge Perry did exercise his contempt powers in an arbitrary, improper manner without regard for due process of law." **Report at 5-6.**

The Commission based its conclusion on "an audiotape and court files of each of the six contempt proceedings referred to in the Consolidated Formal Charges. . ." **Report at 5.** This evidence showed that each of the six defendants appeared before Respondent for arraignment on various charges. In each case, at the conclusion of each arraignment Respondent cautioned the defendant

not to drive, as his or her driver's license was suspended. Unknown to the defendants but known to Judge Perry, **Tr. 453-54**, law enforcement officers were waiting outside the courthouse, and, with the exception of defendant Herbert Hernandez[22]/, each was allegedly apprehended behind the wheel of his or her vehicle and each, without representation, immediately was taken back into the courtroom before Judge Perry. **Exh. 2-7; 19-24; 47-52.**

Respondent informed defendants Robert Smith, Daniel Lee Wingard, Tony McCant, Jack Allen Rickel, and Emma Russell that each had been newly charged with driving while license suspended (DWLS) and with contempt for disregarding his earlier instruction not to drive. **Exh. 19 at 3-4 (Smith); Exh. 20 at 4-5 (Wingard); Exh. 21 at 3-4 (McCant); Exh. 22 at 7-8 (Rickel); and Exh. 23 at 4-5 (Russell).** Ms. Russell pleaded not guilty, Respondent set bond at $20,000 for both charges[23]/, and she was remanded into custody, where she remained for 26 days. **Exh. 23 at 5-7; Tr. 135.** Mr. Wingard originally pleaded not guilty "till I talk to a lawyer," but when Respondent set his bond at $15,000, he changed his plea. **Exh. 20 at 5-7.** In each of the other cases, the defendants pled not guilty or no contest. Mr. Smith, after pleading guilty, asked "What was the contempt for?" **Exh. 19 at 5.**

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[22]/ Mr. Hernandez was not apprehended, and Respondent issued a bench warrant for his arrest.

[23]/ Respondent believed Ms. Russell should be incarcerated on a high bond "to make sure, obviously, that she not be permitted to go right down to the jail and bond out while still under the influence of alcohol," **Tr. 132-33**, but he denied the bail was excessive or punitive. **Tr. 134.** There was no record evidence of Ms. Russell's lack of sobriety.

In sarcastic and demeaning words and tone, Respondent demanded to know why each defendant had defied him in allegedly attempting to drive. He told Mr. McCant, "I'm dying to hear your explanation of why it is you were driving when I told you not to drive."[24]/ **Exh. 21 at 5.** He then immediately sentenced the unrepresented defendants on both charges, with the sentences to run concurrently: 45 days for Mr. Smith (**Exh. 19 at 9**); 20 days for Mr. Wingard (**Exh. 20 at 11**); 15 days for Mr. McCant (**Exh. 21 at 8**); and 20 days for Mr. Rickel (**Exh. 22 at 13**). Ms. Russell, as stated above, was remanded into custody on a high bond[25]/, and Respondent issued a bench warrant on the contempt charge for the arrest of Mr. Hernandez, who had not been apprehended. **Exh. 49; Tr. 112.**

Respondent admitted to the Commission that he had not actually witnessed any of the alleged contemnors driving away from the courthouse and that he was familiar with the steps involved in citing an alleged contemnor for indirect contempt of court. **Tr. 113-16.** He denied, however, that he failed to follow the mandate of Rule 3.840, Fla. R. Crim. P. (**Tr. 119**), even though he admitted he had not issued a show cause order to any of the defendants (**Tr. 121**) and had not witnessed the alleged driving. He claimed before the Commission that he had <u>not</u> cited any of the defendants for

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[24]/ When asked if he was being sarcastic to Mr. McCant, he admitted to the Commission, "Certainly. . . I was certainly upset." **Tr. 105.**

[25]/ Ms. Russell had just told Respondent that she earned approximately $100 per week when he set her bail at $20,000. **Exh. 23 at 6.** Respondent admitted to the Commission that "the standard bond schedule amount is $500" on a DWLS charge. **Tr. 104.**

indirect contempt, but, instead, for direct contempt for lying to him in court about their intentions not to drive.[26]/ **Tr. 121-22.** He then testified, "They drove away from the courthouse, and they lied to me. Two separate actions. One's direct, one's indirect." **Tr. 126.** Despite this evasive testimony, he admitted that there was nothing in any of the court files to indicate any of the defendants were adjudicated guilty of contempt for lying to him. In a final effort to justify his actions in the face of the court files, Respondent testified, "No, there's nothing in here, because the action of driving away from the courthouse was also the lie." **Tr. 126-27.** This testimony suggests that Respondent still does not understand the difference between direct and indirect contempt[27]/ and certainly suggests he was not remorseful for his summary, high-handed actions.

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[26]/ This testimony was a surprise. On June 18, 1992, at his probable cause hearing, he testified to the Commission, "And at that time I arraigned them on contempt charges for not doing what I told them to do, which was simply 'Don't drive without a valid driver's license,'..., and I expressed some exasperation to these people who drove away after I told them three times not to." **Exh. 39 at 49, 53.**

[27]/ Respondent testified, "Most recently in Giddens [sic] versus State, the Florida Supreme Court said that in an indirect proceeding you don't need to file a rule to show cause provided that there's a sufficient notice on the record as to what the circumstances of the indirect contempt are;. . ." **Tr. 1240.** In fact, that is not the holding of Gidden v. State, 613 So.2d 457, 460 (Fla. 1993), in which this Court reiterated that "the indirect criminal contempt process requires that all procedural aspects of the criminal justice process be accorded a defendant, including an appropriate charging document,. . ." (emphasis supplied). The Court did relax the requirements for issuance of a written order of contempt containing a complete recital of the facts, id., and Respondent later corrected his testimony, when led to do so. **Tr. 1241.**

Likewise, his argument to this Court as to Count II suggests that he still believes the defendants were guilty of -- and were properly cited for -- direct contempt of court. **Response at 21-22.** This argument is astonishing, in light of his orders dismissing the contempt charge eventually entered in each of the defendants' court files. Respondent stated in those orders, "The Defendant then allegedly went out to his car and proceeded to drive. . .This court erroneously characterized the contempt as direct rather than indirect." See **Exh. 47 through 52** (court files)(emphasis supplied). He takes issue with the Commission's finding that he "cited the defendant for indirect contempt without complying with the rule and requirements relating to indirect contempt," **Report at 6**, and asserts such a finding is irrelevant, as he imposed penalties for direct, not indirect, contempt. **Response at 22.** This remarkable argument would allow a judge to insulate himself from discipline by the expedient, after-the-fact characterization of his own wrongdoing. The Court should note that Respondent's very failure to follow the indirect contempt rule in not issuing a show cause order gives him the latitude to make this ever-shifting argument to the Commission and to this Court.

A careful review of the record in this case reveals that, at most, each of the defendants in question had engaged in indirect contempt, but that Respondent acted in anger and failed to follow any of the due process safeguards for indirect contempt and instead summarily cited as though each had engaged in direct contempt, while castigating each in an injudicious manner. A review of the

court files and the audio tapes of the underlying proceedings -- materials relied on by the Commission -- leads to the inescapable conclusion that Respondent abused his contempt powers and was not forthcoming about it during the hearing before the Commission. Given his evident continuing confusion, perhaps discipline imposed by this Court will help him learn the various distinctions inherent in contempt proceedings and will provide Respondent an incentive to refrain from exercising his contempt power in an intemperate manner in the future. In re Graham, 620 So.2d 1273 (Fla. 1993); In re Muszynski, 471 So.2d 1284 (Fla. 1985); In re Turner, 421 So.2d 1077 (Fla. 1982); In re Crowell, 379 So.2d 107 (Fla. 1979); In re a Judge, 357 So.2d 172 (Fla. 1978).

V.
The Commission and This Court Have the Authority to Find Respondent Guilty of and to Discipline Him For the Conduct Alleged in Count II.

Respondent contends that in holding in contempt and summarily jailing persons who had earlier appeared before him on traffic citations, had their licenses suspended, then allegedly drove away from the courthouse, he committed "mere errors of law" which are not subject to "review" through disciplinary proceedings. In support of his argument, he cites cases from New Jersey, West Virginia, Iowa and Massachusetts, but none from Florida.[28]/ Respondent also argues that the discipline recommended "threaten[s]

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[28]/ In addition, he cites certain non-record material, which Special Counsel for the Commission has moved to strike.

the independence of the judiciary," **Response at 26**, and creates a means for dissatisfied attorneys or litigants to recuse judges at whim by filing complaints with the Commission based on judges' past rulings. **Response at 31.**

However, while a judge may have "the right to be wrong," he does not have the "right" to engage in a pattern of conduct reflecting abuse of the power of his office. As this Court has observed, while there is room in the judicial system for differing philosophies and opinions among judges,

> There are, of course, limits that every judicial officer must observe. Judges are required to follow the law and apply it fairly and objectively to all who appear before them. No judge is permitted to substitute his concept of what the law ought to be for what the law actually is. ... Every judge is answerable for excesses or abuse of his awesome power. There is no place in our system for justice by whim or capricious notion. Regardless of the philosophy to which a justice or judge subscribes, he is not permitted to conduct himself in a manner which is unbecoming to a member of the judiciary and which demonstrates an unfitness to hold office.

In re a Judge, 357 So.2d 172, 179 (Fla. 1978). Conduct unbecoming a member of the judiciary is what is at issue in the present case, not whether Respondent committed errors of law. This Court has reprimanded, and even has removed from office, judges who wielded their contempt power like a sword against this State's citizens without regard for the substantive law, rules of procedure, basic due process, or the demeanor required of a judge. See In re Eastmoore, 504 So.2d 756 (Fla. 1987)(judge reprimanded for compelling non-litigant's appearance in chambers for failing to

respond to judge's hallway greeting and for addressing litigant in raised voice in "an overbearing and dictatorial manner")[29]/; In re Muszynski, 471 So.2d 1284 (Fla. 1985)(judge reprimanded for "arrogantly casigat[ing]" officer for loudness of police radio in restaurant and for directing him to appear to "explain [his] contemptuous conduct"); In re Turner, 421 So.2d 1077 (Fla. 1982)(judge reprimanded, inter alia, for failing to observe "elementary standards of judicial conduct"; judge summarily jailed two witnesses whose testimony conflicted so that perjury investigation could be conducted, and held two lawyers in contempt for evidentiary or procedural errors he believed they committed); In re Crowell, 379 So.2d 107 (Fla. 1979)(judge removed from office "substantially due to his tendencies to lose his temper when confronted by the human failings and shortcomings of others . . . show[ing] a pattern of conduct over a long period of time, involving persistent abuse of the contempt power, which demonstrates a lack of proper judicial temperament and a tendency to abuse the authority of the office").

The actions and conduct Respondent characterizes as "judicial

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[29]/ Applicable here is this Court's observation in Eastmoore:

> [T]yranny is nothing more than ill-used power. ... [J]udges must recognize the gross unfairness of becoming a combatant with a party. ... The disparity in power between a judge and a litigant requires that a judge treat a litigant with courtesy, patience, and understanding. Conduct reminiscent of the playground bully of our childhood is improper and unnecessary.

504 So.2d at 758.

error" mirrors the conduct resulting in judges' reprimands and removal from office in Crowell, Eastmoore, Muszynski, and Turner. Respondent must realize, as he apparently does not, that the power to hold a citizen in contempt of court is indeed an "awesome power," not to be lightly invoked in response to perceived affronts without the slightest regard for procedural precautions. This Court should accept the Commission's recommendation for discipline in Count II.

CONCLUSION

The record provides clear and convincing evidence of guilt as to Count I and Count II. This Court should accept the Commission's findings and conclusions and discipline Respondent Daniel W. Perry for his intemperate and injudicious conduct.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail to GUS BENITEZ, ESQUIRE, 1223 East Concord Street, Orlando, Florida 32803, this 6 day of October, 1993.

Attorney