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SID J. WHITE

NOV 2 1993

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE,
DANIEL W. PERRY,

Case No. 80,457

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

Respondent.

**RESPONDENT'S REPLY TO THE JUDICIAL
QUALIFICATIONS COMMISSION'S "ANSWER BRIEF"**

The Respondent, THE HONORABLE DANIEL W. PERRY, by and through his undersigned attorney, files this his reply to the Judicial Qualifications Commission's so-called "Answer Brief", and states in support thereof as follows:

I. REPLY TO THE COMMISSION'S FIRST ARGUMENT:

**THE JUDICIAL QUALIFICATIONS COMMISSION HAS
MISREPRESENTED THE ESTABLISHED RECORD,
INTENDING TO MISLEAD THIS COURT.**

There is a significant difference between vigorous advocacy and the intentional manipulation of the record to create a new appellate reality. Appellate advocacy, above all, requires that all presentation and submissions to the reviewing court "be truthful and fair in all respects." Hutchins v. Hutchins, 501 So.2d 722, 723 (Fla. 5th DCA 1987).¹ The Commission, it appears, wants so desperately to justify its prosecution of Judge Perry that it is willing to participate and engage in arguments before this Court that are known to the Commission to be

¹ Hutchins v. Hutchins, 501 So.2d 722 (Fla 5th DCA 1987), which resulted in disciplinary action being taken against the Special Counsel for the Commission in The Florida Bar v. Anderson, 538 So.2d 852 (Fla 1989), for having misrepresented the record on appeal.

misleading to this Court and not based on the record.

At Page 10 of its "Answer Brief", the Commission argues that the record does not support Judge Perry's assertion that he was never told by Facella that the reason Facella was wearing his dress blue uniform to the infraction hearing was because Facella had a function to attend that day. The Commission goes further and states that "[t]he record establishes precisely the contrary." (First full paragraph on Page 10 of the "Answer Brief") The Commission's aforementioned statement is not supported by the record and is an intentional misrepresentation of the record by the Commission. This false representation by the Commission is clearly designed to confuse and mislead this Court.

The record established, without contradiction or equivocation, that Facella, despite repeated questioning by Judge Perry, never once told Judge Perry that it was necessary for him to wear his dress blue uniform to Court because he had a special function to attend after Court. The transcript of the infraction verifies the fact that Facella did not inform Judge Perry that he was required to wear the dress blue uniform because he had a function to attend that day. (App. E. 2-5; App. F. 169)²

² References to the transcript of the Commission hearing shall be indicated by "T." followed by the page number.

Reference to the Petitioner's Initial Appendix shall be indicated by "App." followed by the exhibit number and page number.

Reference to the Petitioner's Supplemental Appendix shall be indicated by "S. App." followed by the exhibit number and page number. [continued on next page]

Of even greater significance, Facella himself, grudgingly, but nevertheless unequivocally, testified during the Commission's hearing that he never told Judge Perry about the function. (App. F. 169)

"BY MR. BENITEZ:

"Q: Mr. Facella, when you came before Judge Perry, you never told him that you had a function to go to that was requiring you to put on that uniform. Correct?

"A: No, sir. He didn't ask."
(App. F. 169)

For the Commission to now argue, directly or by inference, implication, innuendo or otherwise, that Facella told Judge Perry that Facella was required to wear his dress blue uniform to the infraction hearing, and that Judge Perry simply ignored that information, is simply untrue.

Interestingly, the Commission has focused on the following dialogue from the infraction hearing in order to argue that Judge Perry was told by Facella that Facella was required to wear his dress blue uniform to the infraction hearing:

"THE COURT: Are you on duty right now?

"THE DEFENDANT: Yes, sir.

References to a Commission exhibit shall be indicated by "Exh." followed by the exhibit number.

References to a Respondent exhibit shall be indicated by "Def. Exh." followed by the exhibit number.

"THE COURT: Right now, at 4:20 in the afternoon, here in traffic court?

"THE DEFENDANT: Sir, I work till 10:00 o'clock.

"THE COURT: You what?

"THE DEFENDANT: I work until 10:00 o'clock at night. And sir, as soon as I get done here, I have additional work to do." (App. E. 2)

Nowhere in the foregoing dialogue does Facella provide even the slightest clue that he was required to wear his dress blue uniform to the infraction hearing.

Instead, Facella appears to tell Judge Perry that the reason he was wearing his dress blue uniform is because that was part of his job as an Army recruiter and that as long as he was on duty, he was required to wear that particular uniform. Facella makes it a point to tell Judge Perry twice that his work day ends at 10:00 P.M.

This dialogue serves to highlight the real cause for the extended dialogue between Judge Perry and Facella about Facella's dress blue uniform, to wit: Facella's tendency to avoid answering Judge Perry's questions directly and honestly.

First, Facella attempts to mislead Judge Perry into believing that he was required to wear his dress blue uniform as an Army recruiter at all times. That is dishonest. The notion that Facella was required to wear his dress blue uniform at all times because of his work as an Army recruiter is so preposterous

that not even the Commission has the necessary audacity to advance such a position before this Court.

Second, Facella clearly lied to Judge Perry when he stated that he was working until 10:00 o'clock at night on the date of the infraction hearing. In classic Facella style, Facella attempted to explain the lie away before the Commission as follows:

BY MR. BENITEZ:

"Q: But you never told him that you were wearing it for some other function. Correct?

"A: I told him I had additional duties to do.

"Q: Okay. And you also told him that you were going to have additional duties until 10 o'clock that night. Correct?

"A: No. I said, sir, that I work until 10 o'clock at times.

Q: Okay. Well you didn't say 'at times,' did you?

A: No, I don't believe I did, sir."
(App. F. 169)

Facella tried to explain away the lie by saying that he really meant to tell Judge Perry was that he works until 10 o'clock at night "at times", but that he was not working until 10:00 o'clock that evening.

Facella showed the same level of dishonesty during the part of the infraction hearing involving the merits of the traffic citation. Facella was charged with having committed the

civil infraction of careless driving by having rear-ended a vehicle in front of him on November 18, 1991. (App. E. 5) Facella initially told Judge Perry that he was unable to avoid the accident because his brakes locked up on the wet surface. (App. E. 7) Facella explained that the Army had conducted an investigation after the accident which determined that the tires needed to be replaced. (App. E. 7) The impression being given by Facella was that he was unaware of the vehicle's inability to brake prior to the accident. (App. E. 7) Later during the hearing, and after the investigating officer testified as to certain admissions made by Facella at the scene, Facella reluctantly admitted that he had experienced prior difficulties in braking on wet surfaces with this vehicle. (App. E. 11)

The issue raised by Count I boils down to whether or not Judge Perry was shown to have crossed the very subjective line between appropriate judicial behavior and inappropriate judicial behavior. Judges do not work in a vacuum. They react to what is before them. Judges should be judged by the totality of the circumstances. In this case, Judge Perry was faced with a smart-alecky, conniving, dishonest Army recruiter, who not only thought he could out-smart Judge Perry, but who believed he was better than the other persons present in Judge Perry's courtroom.³ Judge Perry did the best he could with Facella's

³ Judge Perry asked Facella if he was actually recruiting people in his courtroom, and Facella responded by saying: "Sir, I think that if I were to try, probably they wouldn't be qualified". (App. E. 2-3) Instead of just answering Judge Perry with a simple,

transparent attempt to improperly influence the proceedings, while remaining courteous, impartial and fair in his dealings with Facella. The degree of fairness exhibited by Judge Perry reached such heights, that Judge Perry imposed virtually no sentence on Facella because of Judge Perry's articulated fear that an adjudication of Facella on the careless driving charge would adversely affect Facella's career. (Exh. 39, 41, 41; Def. Exh. 5; T. 163, App. E. 13-15)

There is a material difference between conduct undertaken for the purpose of insulting, demeaning, injuring or ridiculing a person, or for some other ulterior and non-judicial motive, and conduct that is undertaken in a courteous manner, in open court, without the intent to injure, and strictly motivated by a legitimate judicial function. Judge Perry's dialogue with Facella falls under this latter type of conduct, which conduct does not justify a finding of guilt nor the imposition of any discipline by this Court. But for Facella's refusal to directly and honestly answer Judge Perry's questions, the dialogue between Facella and Judge Perry regarding the dress blue uniform would have been short lived.

It is once again vigorously urged that this Court take the time to review the videotape of Facella's testimony before the Commission and audiotape of the infraction hearing. The

"No," Facella was relaxed and obnoxious enough to reply with a disparaging remark towards other persons awaiting their infraction hearings.

issue of whether or not Judge Perry is guilty of any misconduct, or warrants discipline because of his dialogue with Facella, is so purely subjective that each member of this Court must listen to the audiotape of the infraction hearing in order to formulate an opinion on this issue.

It is disturbing that the Commission at page 12 of its "Answer Brief" has openly discouraged this Court from listening to the videotape or audiotape on Facella. This Court has repeatedly recognized that it is "... obligated to study the record and independently assess the factual findings and recommendation of the Judicial Qualification Commission". In re Graham, 620 So.2d 1273, 1276 (Fla. 1993). This Court should only defer to the Commission's findings in instances where there has been substantial conflict in the testimony received by the commission as in In re Crowell, 379 So.2d 107 (Fla. 1979), or where there has been the need for a particularly difficult and complicated analysis of some issue, such as the judge's intent, as in In re La Motte, 341 So.2d 513 (Fla. 1977).

There is no substantial conflicts in the evidence presented at the Commission hearing, nor was there a question of intent presented to the Commission. The transcripts and tapes are in evidence, and a videotape of Facella's testimony has been provided to the Court by Judge Perry. In short, this Court has the ability and the obligation to review the evidence.

While listening to the tapes, the Court must keep in mind that while it may not personally agree with the way Judge

Perry handled the matter, the issue is not whether they would have handled the situation in the manner that Judge Perry handled Facella. Every judge will react differently, to one extent or another, given the same set of facts. Judges will articulate their thoughts, ask questions and respond to statements made to them, in their own way and style. Rather, the issue is whether or not Judge Perry stepped over that so subjective line between appropriate versus inappropriate behavior and warrants discipline.

The Court may feel that Judge Perry should have done what Commissioner Liles suggested during the informal Commission hearing held on June 18, 1992:

"MR. LILES: It seems to me that there's nothing wrong with someone wanting to dress up or look nice, as long as he's not influencing the Court or trying to influence the Court in an illegal or unethical manner, to do something. And the Court should -- and I would assume, as you did, saw through whatever you thought was going on and should impose the appropriate penalty, rather than get into a dialogue like this." (Exh. 39 at Page 16)

Judge Perry truly believed at the time of the infraction hearing that he was serving both the spirit and the letter of the judicial canons by being open with Facella and openly confronting his apparent efforts to improperly influence him. Judge Perry believed that to ambush Facella at the end of the hearing and blast him with a high fine and adjudication, in the hope sending out a message to the rest of the persons in his

courtroom that he had not been influenced by the uniform, would, in fact, have violated the judicial canons.

Any different words that Judge Perry may have used, any different questions he may have asked Facella, would have resulted in the same, to wit: criticism for having asked Facella about why he was wearing his dress blue uniform to court. Sadly, it appears that what Judge Perry is truly guilty of is honestly verbalizing his concerns in order to maintain the appearance of impartiality in his courtroom.

In conclusion, it is respectfully submitted to this Court that if this Court views the videotape of Facella's testimony before the Commission (the videotape includes the playing of the audiotape of the infraction hearing) or listens to the audiotape of the infraction hearing, this Court will conclude that Judge Perry's dialogue with Facella during the infraction hearing does not warrant a finding of misconduct or the imposition of any discipline.

II. REPLY TO THE COMMISSION'S SECOND ARGUMENT:

**JUDGE PERRY HAS NEVER CONCEDED THAT
HE IS GUILTY OF COUNT I.**

The Commission ends its second argument by making the following statement:

"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." (Page 15 of the Commission's "Answer Brief")

The Commission is trying to give this Court the impression that Judge Perry confessed his guilt as to Count I before the Commission. Judge Perry did no such thing.

What Judge Perry told the Commission was that having now learned that Facella had worn his dress blue uniform to the infraction hearing because he was required to attend a function that required that particular uniform to be worn, Judge Perry would apologize to Facella. (App. J. 1309) The exact words used by Judge Perry follow:

BY ANDERSON:

"Q: If Sergeant Facella were here today, would you apologize to him for what you did?

A: Yes, I would, because now I understand -- he didn't tell me at the time, but now I understand that he had to attend a function. If he had told me that he had to attend that function that day, I wouldn't have gone any further with my inquiries and the whole situation would have ended. Yes, now, knowing that he had a function to attend, there's no question that I would apologize to him." (App. J. 1309)

Judge Perry has never conceded that he has violated any of the judicial canons by virtue of his dialogue with Facella

regarding his apparent attempt at influencing Judge Perry with his dress blue uniform. Such a "disingenuous argument" by the Commission, in light of the record, is truly a serious "affront to this Court". (Page 15 of the Commission's "Answer Brief")

Further, the Commission has taken out of context the questions asked by Judge Perry of Facella regarding his dress blue uniform. (Pages 12 and 13 of the Commission's "Answer Brief") The Commission has restated Judge Perry's questions and comments, omitting Facella's replies and comments to Judge Perry, and has referred to this one side of the dialogue as "Respondent's interaction with Facella".

"Interaction" is defined by the New World Dictionary of the American Language, Second College Edition, as a noun meaning "action on each other; reciprocal action or effect".

Highlighting Judge Perry's questions and comments to Facella, without Facella's response, is an unfair and misleading misrepresentation of Judge Perry's "interaction" with Facella. The Court should disregard this portion of the Commission's brief or, in the alternative, review the actual transcript or audiotape of the infraction hearing.

III. REPLY TO THE COMMISSION'S THIRD ARGUMENT:

**THE LAST TWO SENTENCES OF PARAGRAPH
18 OF THE COMMISSION'S FINDINGS
SHOULD BE STRICKEN OR, IN THE
ALTERNATIVE, SHOULD BE FOUND TO BE
UNSUPPORTED BY THE RECORD.**

The Commission begins this portion of its "Answer Brief" by stating, incorrectly, that Judge Perry is asking that paragraph 18 of the Commission's Report be stricken by this Court. Actually, Judge Perry is only requesting that the last two (2) sentences of paragraph 18 be stricken.

The Commission is also misfocused on the issues being raised by Judge Perry under Rules 7 and 17, Rules of the Judicial Qualifications Commission.

The Commission has reproduced Rule 7(b), Rule of the Judicial Qualifications Commission, and emphasized the language requiring that the charging document set out the "essential facts" alleged. (Page 17 and 18 of the Commission's "Answer Brief") This emphasis is misplaced.

Rule 7(b), Rule of the Judicial Qualifications Commission, states, in its totality, as follows:

"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 essential facts upon which such charges are based, and shall advise the judge of his right to file a written answer to the charges against him within 20 days after service of the notice upon him."

To properly read Rule 7(b), Rule of the Judicial Qualifications Commission, emphasis must be placed on the following language:

"The notice shall be issued in the name of the Commission and specify in ordinary and concise

language the charges against the judge ..."

Only after the Commission has specified the charges, should the following language be considered:

"... and allege essential facts upon which such charges are based..."

The Commission has argued in its "Answer Brief" that, provided the "essential facts" are alleged, the charge need not be specified. Such an argument is contrary to Rule 7(b), Rule of the Judicial Qualifications Commission. To embrace such an argument, would be to pervert the concept of "notice" required under even the most restrictive version of Due Process of the Law.

Our judicial system has long recognized the importance of setting out, with specificity, the "charges" in conjunction with the "essential facts" constituting the "charge". It would be truly revolutionary for this Court to find that the charge could be kept secret, and that as long as the prosecuting authorities specify "essential facts" in its charging document, that the trier of fact would be allowed to bring back a "guilty" verdict against the accused for any crime or charge which may be supported by the facts alleged.

The argument being advanced by the Commission would turn our concept of justice and due process upside down.

The danger of not requiring the Commission to specify the "charges" in its charging document can be appreciated by the Commission's "harmless error" type of argument on Page 20 of its

"Answer Brief":

"In his testimony before the Commission, [Judge Perry] admitted that on the occasions described in detail in Count II of the Commission's Notice of Consolidated Formal Charges, he had been upset and angered, was sarcastic, and used an inappropriate tone of voice. **Report at 6. 19**[footnote omitted] This Court cannot presume that [Judge Perry] admitted these facts -- which admissions are supported by the tapes of the court proceedings at issue 2[footnote omitted] -- without realizing the admitted conduct violated the Canons". (Emphasis on last sentence only, added)

The danger is that Judge Perry, having no reason to believe that the charge involved his tone of voice or his comments to the contemnors and believing that the charge for which he stood accused was that he failed to procedurally comply with the rules governing criminal contempt, would make admissions which, taken out of context and without explanation, may provide a basis for discipline. Putting the burden on Judge Perry to guess whether "the admitted conduct violated the Canons", is simply ludicrous and a violation of Judge Perry's due process rights. As this Court has previously stated in In Re Judge, 357 So.2d 172 (Fla. 1978), "an accused judicial officer is to be accorded both substantive and procedural due process." Id. at 181.

It must be stressed, at this point, that Judge Perry vehemently denies that the so-called "admitted facts" constitute

a violation of the Canons of Judicial Conduct.

It should be emphasized that the Commission's addition of the last two sentences in Paragraph 18 was intentionally included by the Commission as a direct result of Judge Perry's closing arguments at the hearing, which were that the Commission was without jurisdiction to review errors of law, as the Commission was attempting to do under Count II. The Commission is simply trying, after the fact, to justify its prosecution of Judge Perry under Count II.

A further point must be stressed. If this Court does not strike the aforementioned portions of paragraph 18, the record still fails to establish by clear and convincing proof that Judge Perry violated Canons 1, 2 and 3A(1)(3) by the so-called "admitted conduct".

First, none of the contemnors testified before the Commission. Second, none of the contemnors have filed a complaint against Judge Perry. Third, none of the contemnors have filed an appeal from the contempt proceedings. (App. J. 1329-1330) Finally, none of the contemnors received any additional sanctions for having been held in contempt by Judge Perry. (App. J. 1329-1330)

In short, unlike Facella, none of the contemnors testified that Judge Perry was rude to them, that they felt Judge Perry did anything wrong, that they were dissatisfied with the proceedings before Judge Perry, or that they were upset about having been found in contempt by Judge Perry. The Court should

remember that it was Irl Marcus and Herbert Hall, two Orange County defense attorneys who never represented any of the contemnors, who did not testify before the Commission, and who only wanted to get their clients' DUI cases away from Judge Perry, who filed the complaint with the Commission regarding Judge Perry's failure to follow the procedural rules regarding indirect and direct criminal contempt. (App. J. 1221-1330)

The record is clear that Judge Perry testified that he was upset and angered because the six (6) contemnors had lied to him and failed to comply with his order that they not drive a motor vehicle without a valid driver's license. (T. 102-103, 121) Judge Perry had a right to be upset and angered by the contemnors' lies and by their attempt to drive themselves away from the courthouse without a valid license. There is not a Canon of Judicial Conduct which prohibits Judge Perry from getting upset or angered by such conduct. Judges are human, and they should not be expected to develop the false appearance that they have no human emotions.

In dismissing a complaint against a judge, the Supreme Court of Pennsylvania voiced the "need for judges to be ever vigilant in guarding against the erroneous use of the contempt power." In Re Johnson, 395 A.2d 1319, 1326 (Pa. 1978) The court continued:

"The authority of a judge to hold one in contempt, depriving as it does a person of liberty, is an authority that should be used rarely, and with extreme caution.

Nevertheless, judges overly sensitive, or judges acting in pressure-laden situations, should not be required to fear automatic discipline because a contempt ruling might later be reversed on appeal. Judges have [sic] and will make mistakes. They are human beings and not robots woven from steel mesh." Id.

The record is also clear that Judge Perry imposed a substantial bond on defendant Emma Russell. In this case, there were a number of reasons which reasonably justified the imposition of the \$20,000.00 total bond on defendant Emma Russell.

First, defendant Emma Russell was warned not to drive without a valid license by Judge Perry and she had promised Judge Perry that she would not be driving. (Exh. 6, 23, 41, 42; Def. Exh. 5; S.App. 3) Second, defendant Emma Russell, upon leaving the courthouse, drove her car. (Exh. 6, 23, 41, 42; Def. Exh. 5; S.App. 5) Third, defendant Emma Russell was under pre-trial release for a previous DUI offense. (Exh. 47; S. App. E.) Fourth, defendant Emma Russell was driving on a DUI suspension, as opposed to a suspension for failure to pay a fine or failure to maintain insurance on her vehicle. (T. 111-12, 124, 282-84; Exh. 41, 42; Def. Exh. 5). Fifth, she had an odor of alcoholic beverages on her breath when she was arrested leaving the courthouse. (T. 11-112, 124, 282-284; Exh. 41, 42; Def. Exh. 5) These are all factors which may be considered under Section 903.046, Florida Statutes (1993), and Rule 3.131, Florida Rule of

Criminal Procedure, in setting the bond amount.

The principle purpose of bail is

"to ensure the appearance of the criminal defendant at subsequent proceedings and to protect the community against unreasonable danger from the criminal defendant." (Emphasis added) §903.046(1), Fla. Stat. (1993).

and to

"...assure the integrity of the judicial process..." (Emphasis added) Fla. R. Crim. P. 3.131

Under Section 903.046(2), Florida Statutes (1993), Judge Perry is required to consider certain factors. Some of the applicable factors in defendant Russell's case were:

a. Under Section 903.046(2)(a), Florida Statutes (1993), the nature and circumstances of the offense charged. In this instance, defendant Russell had driven from the courthouse without a valid license after she had appeared before Judge Perry on another unrelated criminal traffic offense (DUI) and after Judge Perry had ordered her not to drive from the courthouse.

b. Under Section 903.046 (2)(b), Florida Statutes (1993), the weight of the evidence against the defendant. The evidence against defendant Russell appeared to be strong.

c. Under Section 903.046 (2)(g), Florida Statutes (1993), whether the defendant is already on release pending resolution of another criminal proceeding. Defendant Russell had been in court earlier in the day on an unrelated DUI

charge, and she was under pre-trial release status, a condition of which was that she violate no laws.

d. Under Section 903.046 (2)(j), Florida Statutes (1993), any other facts that Judge Perry considers relevant. The arresting officer smelled the odor of alcoholic beverages on defendant Russell's breath.

The same foregoing factors are also listed in Rule 3.131, Florida Rules of Criminal Procedure, as factors which may be considered by a judge in determining whether to release a defendant on bail and what the bail amount should be.

There was nothing improper in the setting of a \$20,000.00 total bond on defendant Russell; \$10,000.00 bond on her contempt and \$10,000.00 on her new charge of driving with a suspended license.

Judge Perry reaffirmed the appointment of a public defender to ensure prompt attention to defendant Emma Russell's current situation (Exh. 41, 42, 47; Def. Exh. 5), knowing that defendant Russell's bond amount was to be reviewed at Video Initial Appearances the next morning. (T. 111-12, 124, 132-138, 582-89; App. J. 841-49, 913-21, 1184-1191).

The next morning, the video judge, County Judge Jose Rodriguez, had complete discretion to reduce the bond or release defendant Russell on her own recognizance on the new charges. (App. J. 1191; Def. Exh. 1, 4) Judge Rodriguez reviewed the facts of the case, spoke to defendant Russell, and ordered that the bond remain at \$10,000 on each charge. (App. J. 1191; Def.

Exh. 1, 4).

The Commission seems to be trying to blame Judge Perry for defendant Emma Russell's 26 day stay in the Orange County Jail. This is both unfair and unsupported by the record.

Within several days of defendant Russell's entry into jail, her boyfriend called the Public Defender's office. (T. 549-550) Attorney Cindy Schmidt, Assistant Public Defender, received the call and was asked to get defendant Russell a bond hearing right away. (T. 549-50). Ms. Schmidt refused to assist defendant Russell because she was unable to confirm that the Public Defender's office had been appointed to assist defendant Russell. (T. 549-50). As a result, no action was taken by the appointed Public Defender's office until February 14, 1992, when the paperwork made its way to the traffic division of the Public Defender's office. (T. 549-50)

On February 14, 1992, Ms. Schmidt filed a boilerplate Motion for Release on Own Recognizance. (App. J. 820-23) Nothing in the Motion for Release on Own Recognizance told Judge Perry or his judicial assistant of any unusual circumstances of this case. (App. J. 820-823) At a bond hearing on February 21, 1992, Judge Perry was surprised to learn that defendant Russell was still in custody. (App. J. 820-23) Judge Perry dismissed the contempt charge and ordered defendant Russell released on her own recognizance on the Driving While License Suspended charge. (App. J. 820-23)

Judge Perry recused himself from further proceedings in

defendant Russell's case. (Exh. 47) Defendant Russell's case was reassigned to the Honorable Evelyn Golden, County Judge, for trial on defendant Russell's DUI charge. (App. J. 1158-1164) Ultimately, Judge Golden was prepared to sentence defendant Russell to 30 days in the Orange County Jail with credit for the 26 days she had served previously. (App. J. 1158-1164) An unforeseen family emergency developed and the Honorable Alan Todd, County Judge, stepped in for Judge Golden. (App. J. 1158-1164) Judge Todd agreed that a 30 day sentence was appropriate but suspended the remaining four days in jail. (App. J. 1158-64; Exh. 47)

There is nothing wrong with Judge Perry's imposition of a high bond on defendant Russell. There is no Canon of Judicial Conduct which requires Judge Perry to impose a low bond on Defendant Emma Russell. The Commission's finding that Judge Perry violated the Judicial Canons by the imposition of a high bond on defendant Emma Russell is nothing but a flagrant and impermissible intrusion by the Commission into the discretion of the judiciary. Only the appellate courts have the jurisdiction to review a sitting judge's alleged abuse of discretion in the setting of a bond amount.

IV. REPLY TO THE COMMISSION'S FOURTH ARGUMENT:

**THERE IS NO PRECEDENT FROM
WHICH TO JUSTIFY THE IMPOSITION OF
DISCIPLINE ON JUDGE PERRY.**

The Commission cites to 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), and In re a Judge, 357 So.2d 172 (Fla. 1978), apparently equating Judge Perry's conduct with the conduct in those cases. Judge Perry's conduct is far removed from the conduct which resulted in discipline in the aforementioned cases.

In In re Graham, 620 So.2d 1273 (Fla. 1993), the Supreme Court found that Judge Graham's cumulative conduct was unbecoming a member of the judiciary and demonstrated a present unfitness to hold office. Id. at 1274.

The Commission found that Judge Graham sentenced a DUI defendant to a six month suspension of his driving license. Id. When the defendant questioned the fairness of the sentence, Judge Graham sentenced him to a nine month suspension of his license. Id. Judge Graham asked the defendant if he wanted him to reconsider the sentence. Id. When the defendant responded "Yes, sir", Judge Graham increased the suspension to a year. Id.

Judge Graham sentenced a defendant to six months in jail for spray painting vulgar graffiti on public property. Id. When the mother of the defendant questioned the fairness of the sentence, Judge Graham responded that,

"You know what his problem is, his problem is you. It is not me. It is you. I can tell by the way you are defending him." Id. at 1274

Judge Graham then engaged courtroom personnel and spectators in a highly inappropriate colloquy that would be

embarrassing to any reasonable person, particularly the defendant's mother. Id. Judge Graham needlessly utilized vulgar and offensive language and, in doing so, demonstrated a significant lack of judicial temperament. Id.

Judge Graham took the opportunity, while sentencing a defendant, to accuse the sheriff's office of improperly releasing the defendant on his own recognizance as an act of favoritism. Id. at 1275 Judge Graham stated that a ten-day sentence would have been appropriate but sentenced him to ninety days in retaliation for the "improper release." Id.

In In re Muszynski, 471 So.2d 1284 (Fla. 1985), Judge Muszynski stipulated that he had arrogantly castigated a police officer at a public restaurant for not turning down his police radio. Id. at 1285. He later directed the officer, by letter, to appear in chambers to explain his "contemptuous" conduct. Id. This Court accepted the Commission's recommendation for a reprimand. Id. Judge Muszynski's conduct was not reasonably or rationally related to any judicial proceeding or duty. Judge Muszynski's tirade was as a result of a personal affront in the absence of any rational provocation. Id.

In In re Turner, 421 So.2d 1077 (Fla. 1982), Judge Turner made several unannounced late night visits to an attractive woman's home to see if any male "friends" were staying the night. Id. at 1078-79 At one point, Judge Turner pounded on the door and shined a flashlight into her bedroom window. Id. The judge discussed the woman's behavior and its expected

significance upon her child custody case the next morning during an ex-parte conference with the woman's attorney. Id.

Judge Turner incarcerated an attorney after he failed to pay a fine for a contempt citation later determined by the Commission to have been completely unwarranted. Id. at 1079 The arrest resulted in considerable embarrassment to the attorney, his family and friends. Id.

In still another matter, Judge Turner decided that one of two conflicting witnesses was lying. Id. He incarcerated both witnesses so that the State Attorney could investigate and file perjury charges against the witness who was lying. Id.

Judge Turner made numerous derogatory comments about attorneys' performances in court. Id. at 1079-80 In one instance, an older member of the Bar asked for a conference with the judge, and in such conference advised him that he was abusing his powers from the bench. Id. He summarily held a lawyer in contempt and stated, "... we will settle this matter at the end of this case," in the presence of other lawyers, clients and spectators. Id.

In another instance, without provocation, Judge Turner directed the trial attorney to remain seated and directed her not to state any grounds for objection, thereby depriving the attorney and her client from preserving her record on appeal. Id. at 1080.

In several proceedings, Judge Turner criticized attorneys in a derogatory manner for not following what he

believed to be the proper method of impeachment with depositions. Id. In one case he accused an attorney of being a master of minutiae, and "... tripping the light fantastic and chasing butterflies." Id. He stated at one point that he was going to teach attorneys how to impeach a witness even if he had to put every attorney in Bay County in jail. Id. He also demeaned a trial attorney by making statements such as, "...[a] first-year law student should know better," in the presence of her client, spectators, and other attorneys. Id.

Judge Turner agreed that there was competent substantial evidence to support the Commission's findings (except for the finding that he incarcerated two conflicting witnesses) but argued a lack of intent. Id. at 1081 The Court adopted the recommendation of the Commission and ordered a reprimand. Id.

In In re Crowell, 379 So.2d 107 (Fla. 1979), Judge Crowell referred to a child's grandmother as a prostitute and later held a youth counselor in contempt for placing the child in the custody of the grandparents despite that fact the order of placement had been unclear or misunderstood. Id. at 108.

Judge Crowell also prevented an attorney from explaining why he was late to court and, instead, held him in contempt. Id. Judge Crowell increased those penalties when the attorney insisted on trying to explain. Id. The attorney was jailed for several hours. Id.

Judge Crowell stated publicly that a juvenile counselor had lied to him. Id. Judge Crowell subsequently ordered periodic

written reports in retaliation for the agency's refusal to fire the youth counselor. Id.

Judge Crowell issued an order on a custody petition, requiring a change in the custody of certain children, without allowing the custodial parent or his attorney to respond or argue the merits of the custody question. Id. The judge also sentenced the respondent in the case to 60 days in jail for being late to a hearing that the respondent had received notice of only minutes earlier. Id.

Another juvenile was incarcerated pending a continued hearing for his attorney's refusal to stipulate evidence into the proceeding. Id. When the boy's father went to Judge Crowell's chambers to ask why his son had been detained, the judge had the father arrested when he did not immediately leave the courthouse. Id. The Commission said the incident shows a

"propensity to summarily adjudicate and incarcerate a citizen ... without according to the accused a right to be heard or any opportunity to defend himself." Id. at 108.

The Commission found that Judge Crowell improperly held an attorney in contempt for failing to answer the judge's questions when the transcript showed that the lawyer tried to answer the judge's questions. Id. at 109.

Judge Crowell harshly reprimanded a sheriff's officer for lack of cooperation with the judge's secretary in an administrative matter, without allowing the officer to respond.

Id. at 109.

Judge Crowell had a delivery truck driver arrested for not immediately moving his delivery truck from in front of the judge's reserved parking spot. Id. at 109.

The Commission found that Judge Crowell had threatened and intimidated a commission witness. Id.

In In re a Judge, 357 So.2d 172 (Fla. 1978), Judge Taunton prepared a motion for change of venue and mailed it to various defendants with directions on filing and an opinion as to the validity of the motions, that he knowingly, intentionally placed himself in a position whereby his impartiality toward a case before him could be questioned and in which his recusal was required; that he believed his actions were proper; and that he intended to continue to act according to his own standards. Id. at 174-75.

Judge Taunton was also charged with attempting to promote his personalized concept of justice and along with others employed by him, by conducting investigations, during office hours, for his own purpose and unrelated to his judicial duties, into the conduct of certain local officials; that in the course of those investigations, he made long distance telephone calls at county expense; that he made a speech publicly accusing several residents of Gulf County of illegal conduct. Id.

Judge Taunton volunteered to and did, in fact, appear as a character witness for a DUI defendant without the necessity of a subpoena, before a hearing examiner for the Department of

Highway Safety and Motor Vehicles. Id. at 175

Judge Taunton partially paid the debts of a defendant, in lieu of issuing the plaintiff's requested writ of replevin, and refused to order the defendant to pay the costs of the action. Id.

Finally, Judge Taunton spoke, ex-parte, to a debtor defendant about his inability to pay, and refused to execute the final judgment because of the defendant's financial difficulties. Id.

The Court found that the Commission's findings that Judge Taunton opted to follow his own conscience when it conflicted with the Code of Judicial Conduct and that he will perform his future duties on that basis are likewise supported by the record. Id. at 177

It is hard to understand how the Commission can possibly justify equating Judge Perry's conduct with any of the conduct by the judges disciplined in the foregoing cases.

V. REPLY TO THE COMMISSION'S FIFTH ARGUMENT:

**JUDGE PERRY'S ALLEGED MISCONDUCT IS
NOTHING MORE THAN ERRORS AT LAW,
AND DOES NOT ESTABLISH A PATTERN OF
MISBEHAVIOR WARRANTING DISCIPLINE.**

It appears that the Commission is arguing that Judge Perry's failure to follow the procedural rules for holding someone in contempt were more than mere "errors of law". The Commission seems to be arguing that Judge Perry's conduct was a

pattern of misbehavior that should result in discipline.

The best way to respond to this last set of arguments by the Commission is to begin by setting out in detail the contempt proceedings. This will be done below. However, the Court should keep in mind while reviewing the history of the contempt proceedings the following three (3) important facts:

1. Many witnesses testified as to Judge Perry's ubiquitous respect for the law. The testimony before the Commission concerning Judge Perry's respect for the law is accurately illustrated by attorney Joerg Jaeger's testimony.⁴

⁴ The following is Mr. Jaeger's pertinent testimony before the Commission:

"MR. BENITEZ: Did you have a chance to come before Judge Perry in the first week or so that he took the bench?"

"MR. JAEGER: Yes. The first week that he took the traffic bench, January of 1992, I had his first jury trial with him on the traffic bench.

"MR. BENITEZ: Okay. Can you relay to the Commission your experience with Judge Perry during that first week?"

"MR. JAEGER: He and I have butted heads. I did not like the man when we first started out. I had a case where I had worked out a plea negotiation with the State on a client, and he didn't follow the negotiations; instead he gave her ten days in jail. And we had agreed with the State to a non-jail sentence, to a 28-day residential treatment program sentence. And I moved to withdraw the plea; he denied that. And then I got on my portable phone outside the courtroom, and we had a notice of appeal within an hour over at the courthouse. We filed that.

And then I had a second client -- I had about 20 clients with him that week that -- we were in the middle of jury selection on this client; June Watts, I believe her name was.

"MR. BENITEZ: Was this the same day or --

"MR. JAEGER: It was either the same day or the next

(App. J. 1207-1208) Mr. Jaeger testified that he appeared twice before Judge Perry on the very first week that Judge Perry began handling cases as a county court judge in 1991. Mr. Jaeger testified that the first time he appeared, Judge Perry refused to allow his client to withdraw his plea of guilty after Judge Perry announced that he would not be sentencing the client to the negotiated sentence agreed upon between the client and the State.

(App. J. 1206) Mr. Jaeger testified that he returned to Judge Perry's courtroom the very next day, and the very same thing happened. (App. J. 1206-08) This time, however, Mr. Jaeger had

morning. I think it was the same day, as a matter of fact. And my client, halfway through jury selection, decided she wanted to -- I take that back. It was in fact the next day. It was in fact the next day. Halfway through jury selection she decided she wanted to enter a plea, a negotiated plea, with the State. And she entered the plea, and the judge again gave her jail time, gave her ten days jail, which was not part of the plea. This time I moved to vacate the plea, and this time he allowed me to vacate the plea, which kind of surprised me.

"MR. BENITEZ: Why was that?"

"MR. JAEGER: Because he had denied it the day before. And I asked him why, and he said, 'because this time you showed me the law,' when -- after the fiasco the day before, I had researched the law that evening for the purposes of a bond motion and the notice of appeal and showed him the recent case, which, in all fairness to the court, had just come out about six weeks before, the Knight case, that said even if the court goes through the colloquy that says they're not bound by the negotiated plea, that the court cannot modify the plea in a substantial way. They have to either accept it or reject it. That was a new case that had just come out. And I showed that case to him, and then he allowed me to withdraw the plea." (App. J. 1206-1208)

researched the issue and was prepared to show Judge Perry the pertinent case law. (App. J. 1206-08) This second time, Judge Perry reviewed the pertinent case law, agreed that the law dictated that a defendant should be afforded the opportunity to withdraw a plea under the circumstances, and allowed Mr. Jaeger's client to withdraw the plea. (App. J. 1206-08) Mr. Jaeger testified that:

"Q: Has that been consistently your experience in front of Judge Perry; that when presented with the law, he does follow the law?

"A: Yes.

"Q: Has that ever not happened in your experience?

"A: In my personal experience, with him, no, that has never happened. Every time I've shown him a law, he's followed the law. ..." (App. J. 1208)

2. As soon as Judge Perry was made aware of the procedural errors in the contempt cases, Judge Perry, on his own initiative, set aside all the contempt judgment and sentences. (Def. Exh. 5; App. J.)

3. Judge Perry has never again held anyone in contempt for driving away from a courthouse. (App. J. 1236)

Keeping the foregoing in mind, the following is a history of the six contempt proceedings.

On January 28, 1992, Judge Perry was the presiding judge at the Orange County branch courthouse in Ocoee, Florida. (Exh. 39, 41, 42, 43, 46; Def. Exh. 5) The Orange County Sheriff's Office is located in the back of the same building.

(App. J. 1259-1262) Numerous law enforcement officers stroll through the courthouse and occasionally will come in and watch the proceedings. (T. 415-416; App. J. 1259-1262) Approximately 150 persons were scheduled for arraignments on the day in question. (Def. Exh. 5)

Immediately prior to the opening of court, Judge Perry was introduced to several deputy sheriffs by his court deputy in the hallway behind the courtroom adjoining the Sheriff's office. (T. 105-07; Exh. 41, 42; Def. Exh. 5) They told Judge Perry that they were unsure if they had the manpower to conduct a driver's license surveillance of persons leaving the courtroom. (T. 105-07; Exh. 41, 42; Def. Exh. 5) Judge Perry expressly told them that he was not involved and that if they conducted such a surveillance that the only reason to bring those persons caught back before him was to arraign, set bond, and appoint counsel. (T. 105-07; Exh. 41, 42; Def. Exh. 5) Judge Perry walked away from the conversation with no definitive idea that the surveillance was to be conducted. (T. 105-07; Exh. 39, 40, 41, 42; Def. Exh. 5)

This had been a recurring problem at all Orange County courthouses. (Exh. 41, 42; Def. Exh. 3, 5) People routinely drive from the courthouse after their license had been suspended. (Def. Exh. 3). Such surveillance operations had been conducted previously by law enforcement at various courthouses. (T. 105-07; Exh. 41, 42; Def. Exh. 3, 5) Judge Perry did not feel that it was his role to frustrate law enforcement's efforts in dealing

with this problem by telling the defendants of the possibility that members of law enforcement were outside waiting for them.

(T. 105-70; App. J. 1311-1312; Exh. 41, 42; Def. Exh. 5)

Moreover, Judge Perry could not warn persons that the deputies might be outside for fear that it might possibly place a deputy's safety in jeopardy. (T. 105-07, Exh. 41, 42; Def. Exh.

5) Rather, during an extensive thirty minute introductory speech regarding the defendant's constitutional rights and the importance of consulting with an attorney (Exh. 8, 25), Judge Perry also mentioned:

"If I hear your traffic case either on a DUI case ... on a Driving While License Suspended ... or maybe I have looked at your driving history and felt that it was appropriate to suspend your license for a period of time, if you've got a valid driver's license today I'm going to order you to hand it over to me today. But, even if you don't have a valid driver's license, today, if I tell you that your license has been suspended that means that it has been suspended immediately, today. That means you don't drive from this courthouse, folks. I mean, I swear, last time I was here I left about 5:30 or so and one of the guys that I had suspended a driver's license on drove by and waved at me. (laughter by audience) Okay, now trust me when I say this ... that didn't make me a very happy camper. Okay, don't do it. If there's pay phones out there. You've got relatives, you've got loved ones, you've got employers. If I suspend your license today you do not drive from this courthouse today. You go out there use a pay phone. Do what ever you have to do let your car sit overnight but don't let me hear later on a week or two down the road, "Hey, you know that guy you suspended his license on? ... yeah, I stopped him in a 7-11 the other day driving on another suspended license." Don't do it to me and don't do it to yourself." (Exh. 8)

Judge Perry then began the important job of arraigning the many defendants that had come to court that day. (Exh. 39,

41, 42; Def. Exh. 5) Judge Perry patiently discussed their constitutional rights with each person and listened carefully to their explanations before determining what sentence to impose or action to take. (Exh. 39; Def. Exh. 5) In each case, there was a brief discussion between the Judge and the defendant as to whether the defendant had carefully read the written plea form that Judge Perry had urged them to do earlier. (Exh. 39; Def. Exh. 5) In each case, Judge Perry would wait for a verbal response from the defendant that he or she understood all of his or her constitutional rights and that he or she was relinquishing those rights in return for settling his or her case that day. (Exh. 39; Def. Exh. 5)

Judge Perry carefully reviewed each person's driving history and listened carefully to whatever the defendant wished to offer in mitigation of the sentence. (Exh. 39; Def. Exh. 5) A number of persons were remanded into custody for their criminal charges. (App. J. 1259-1262) Numerous persons were given fines or community service and allowed to leave. (Exh. 39; Def. Exh. 5)

Still more persons entered pleas of Not Guilty and were allowed to leave. (Exh. 39; Def. Exh. 5) In each case, where the license-less defendant had been allowed to leave the courthouse, Judge Perry reminded those persons not to drive without a valid license. (Exh. 39, 41 42; Def. Exh. 5) Judge Perry's discussion with persons in the courtroom was loudspeaker-amplified and could be heard by the other defendants in the courtroom. (Exh. 2, 3, 4, 5, 6, 7, 8, 10)

At approximately 10:30 A.M., defendant Tony McCant appeared before Judge Perry on a criminal charge of Driving While License Suspended or Revoked. (Exh. 4, 21, 41, 42; Def. Exh. 5) Defendant McCant had the following previous criminal/civil traffic record:

1986 No/Improper Child Restraint
1986 Failure to Observe Stop Sign
1987 Driving While License Suspended
1987 Suspension for Failure to Pay Fine
1988 Suspension for Failure to Pay Fine
1990 Driving While License Suspended
1991 Suspension for Failure to Pay Fine
(Exh. 51; S. App. J)

Judge Perry informed defendant McCant of the nature of the criminal charge, the maximum sentence that could be imposed, and that he had a right to speak with an attorney before he did anything further. (Exh. 4, 21, 41, 42; Def. Exh. 5; S. App. F.) Judge Perry asked him if he understood these rights. (Exh. 4, 21, 41, 42; Def. Exh. 5; S. App. F) Defendant McCant replied that he did and that he wanted to plead guilty. (Exh. 4, 21, 41, 42; Def. Exh. 5; S. App. F.) Judge Perry asked him whether he understood all the rights that were contained on the plea form that Judge Perry had referred to earlier in his speech and that defendant McCant had signed in Judge Perry's presence. Defendant McCant replied that he did. (Exh. 4, 21, 41, 42; Def. Exh. 5) The written plea form executed by defendant McCant follows:

COUNTY COURT, ORANGE COUNTY, FLORIDA

STATE OF FLORIDA Case Number TW92-889

vs

Citation Number _____

(IN TRAFFIC CASES)

**PLEA OF GUILTY
OR
NO CONTEST TO CRIMINAL CHARGE IN COUNTY COURT**

I have appeared on the below listed date in County Court, Orange County, Florida, have been advised by the Judge of the criminal charge(s) against me, and have entered a plea of GUILTY or NO CONTEST to the charge(s) before the Judge.

I have sworn under oath before the Judge that I understand the following:

1. The nature of the charge(s);
2. The difference between the pleas of Guilty, No Contest, and Not Guilty, and the effect of each plea;
3. The right to trial before a Judge or a Judge and jury;
4. The right to an attorney and the right to have an attorney appointed if I cannot afford one, and to know if the Judge is considering a jail sentence on this charge;
5. The right to be presumed innocent until proved guilty beyond a reasonable doubt;
6. The right to question the witnesses at trial;
7. The right to call witnesses of my own at trial and have those witnesses subpoenaed by the Court;
8. The right to remain silent and not to have that fact considered by the Judge or jury at trial;
9. The right to testify at trial and have my testimony considered by the same standards as the other witnesses;
10. The right to have a court reporter make a complete record of the proceedings;
11. The right to appeal any harmful error to a higher court; and
12. That I understand the maximum and minimum sentences listed on the reverse side of this document.

By pleading Guilty or No Contest, I have sworn under oath before the Judge that I wish to give up the above-listed rights and have the Judge impose the sentence the Judge deems appropriate.

I hereby waive my right to consult with an attorney or to have one appointed.

I am not under the influence of any alcohol or drugs at this time, and I fully understand the Judge's instructions, and what my rights are.

I understand I have the right to speak to the Judge concerning the sentence before sentencing, and to appeal, in writing within thirty (30) days, only the judgment and sentence imposed.

I understand I have the right to have an attorney appointed for the appeal if I cannot afford one; however, I am giving up my right to talk to an attorney before entering this plea.

I understand that as a result of my conviction here today, I may be subject to greater penalties if I am ever convicted again or if I am found to be a Habitual Offender.

| | |
|-----------------|-------------------------------|
| ATTORNEY _____ | DEFENDANT <u>Tony McCant</u> |
| ADDRESS _____ | ADDRESS <u>5263 Boufay Ct</u> |
| TELEPHONE _____ | TELEPHONE <u>295-5575</u> |

SIGNATURE

Sworn to by the above-named Defendant before me on the _____ day of _____, 19____.

I find this plea to be by a Defendant who appears alert and intelligent, who understands the nature of the charge and the consequences of entering a plea of Guilty or No Contest, and who has hereby made an informed and voluntary waiver of the rights described above.

24-11 (8/89) COUNTY JUDGE [Signature]

Figure 1 Plea Form - Tony McCant

(S. App. F.)

During this conversation with defendant McCant, Judge Perry asked him how he had come to court without a valid license. Defendant McCant replied, "Uh ... my Aunt down the street dropped me off." (Exh. 4, 21, 41, 42; Def. Exh. 5) Judge Perry adjudicated him guilty of the criminal charge and gave him six months to pay a small fine. (Exh. 4, 21, 41, 42, 51; Def. Exh. 5) Judge Perry reminded and ordered defendant McCant not to drive

without a valid license. Defendant McCant told Judge Perry that, "I got somebody to pick me up." (Exh. 4, 21, 41, 42; Def. Exh. 5)

At approximately 10:45 A.M., defendant Daniel Wingard appeared before Judge Perry on a criminal charge of Driving While License Suspended or Revoked. (Exh. 3, 20, 41, 42; Def. Exh. 5) Defendant Wingard had the following previous criminal/civil traffic record:

- 1985 Operating Without Proper Tag
- 1985 Operating Without Valid License
- 1986 Unlawful Speed (75/55)
- 1986 Careless Driving
- 1987 Unlawful Speed (91/55)
- 1987 Passing - Posted sign/hill
- 1987 Unlawful Speed (55/30)
- 1988 Suspension for Failure to Pay Fine
- 1988 Driving Under the Influence (DUI)
- 1988 Fleeing and Attempting to Elude
- 1988 Reckless Driving
- 1988 Failure to Maintain Lane
- 1989 Suspension - one year for DUI conviction
- 1989 Suspension - Failure to Maintain Insurance
- 1989 Suspension - Failure to Maintain Insurance
- 1989 Suspension - Failure to Maintain Insurance
- 1989 Suspension - three months for points
- 1989 Suspension - twelve months for points
- 1990 Unlawful Speed (53/35)
- 1990 Seat Belt Violation
- 1990 Driving While License Suspended
- 1990 Suspension - Failure to Maintain Insurance
- 1988 Seat Belt Violation
- 1990 Operating With Unsafe Equipment
- 1990 Unlawful Speed (47/30)
- 1991 Suspension for Failure to Pay Fine
- 1991 Suspension for Failure to Pay Fine
- 1991 Suspension for Failure to Pay Fine
- 1991 Suspension for Failure to Pay Fine
- 1991 Operating Without Proper Tag
- 1991 Seat Belt Violation
- 1991 Operating With Unsafe Equipment
- 1991 Operating Without Proper Tag
- 1991 Suspension - Failure to Maintain Insurance

(Exhibit 50; S. App. K.)

Judge Perry informed defendant Wingard of the nature of

the criminal charge, the maximum sentence that could be imposed, and that he had a right to speak with an attorney before he did anything further. (Exh. 3, 20, 41, 42; Def. Exh. 5) Judge Perry asked him if he understood these rights. (Exh. 3, 20, 41, 42; Def. Exh. 5) Defendant Wingard replied that he did and that he wanted to plead no contest. (Exh. 3, 20, 41, 42; Def. Exh. 5; S. App. G) Judge Perry asked him whether he understood all the rights that were contained on the plea form that Judge Perry had referred to earlier in his speech and that defendant Wingard had signed in Judge Perry's presence. (Exh. 3, 20, 41, 42; Def. Exh. 5; S. App. G.) Defendant Wingard replied that he did. (Exh. 3, 20, 41, 42; Def. Exh. 5; S. App. G.) The written plea form executed by defendant Wingard follows:

COUNTY COURT, ORANGE COUNTY, FLORIDA

STATE OF FLORIDA Case Number TW 92-631

vs

PLEA OF GUILTY
OR
NO CONTEST TO CRIMINAL CHARGE IN COUNTY COURT

I have appeared on the below listed date in County Court, Orange County, Florida, have been advised by the Judge of the criminal charge(s) against me, and have entered a plea of GUILTY or NO CONTEST to the charge(s) before the Judge.

I have sworn under oath before the Judge that I understand the following:

1. The nature of the charge(s);
2. The difference between the pleas of Guilty, No Contest, and Not Guilty, and the effect of each plea;
3. The right to trial before a Judge or a Judge and jury;
4. The right to an attorney and the right to have an attorney appointed if I cannot afford one, and to know if the Judge is considering a jail sentence on this charge;
5. The right to be presumed innocent until proved guilty beyond a reasonable doubt;
6. The right to question the witnesses at trial;
7. The right to call witnesses of my own at trial and have those witnesses subpoenaed by the Court;
8. The right to remain silent and not to have that fact considered by the Judge or jury at trial;
9. The right to testify at trial and have my testimony considered by the same standards as the other witnesses;
10. The right to have a court reporter make a complete record of the proceedings;
11. The right to appeal any harmful error to a higher court; and
12. That I understand the maximum and minimum sentences listed on the reverse side of this document.

By pleading Guilty or No Contest, I have sworn under oath before the Judge that I wish to give up the above-listed rights and have the Judge impose the sentence the Judge deems appropriate.

I hereby waive my right to consult with an attorney or to have one appointed.

I am not under the influence of any alcohol or drugs at this time, and I fully understand the Judge's instructions, and what my rights are.

I understand I have the right to speak to the Judge concerning the sentence before sentencing, and to appeal, in writing within thirty (30) days, only the judgment and sentence imposed.

I understand I have the right to have an attorney appointed for the appeal if I cannot afford one; however, I am giving up my right to talk to an attorney before entering this plea.

I understand that as a result of my conviction here today, I may be subject to greater penalties if I am ever convicted again or if I am found to be a Habitual Offender.

| | |
|-----------------|---|
| ATTORNEY _____ | DEPENDANT <u>Daniel Wingard</u> |
| ADDRESS _____ | ADDRESS <u>2532 Plover Hill</u> |
| TELEPHONE _____ | TELEPHONE <u>204 Oklawaha Fla 32864</u> |

Sworn to by the above-named Defendant before me on the _____ day of _____, 19____.

I find this plea to be by a Defendant who appears alert and intelligent, who understands the nature of the charge and the consequences of entering a plea of Guilty or No Contest, and who has hereby made an informed and voluntary waiver of the rights described above.

COUNTY JUDGE [Signature]

24-11 (8/89)

Figure 2 Plea Form - Daniel Wingard

(S. App. G.)

During this conversation with defendant Wingard, Judge Perry asked him how he had come to court without a valid license. (Exh. 3, 20, 41, 42; Def. Exh. 5) Defendant Wingard replied, "My fiancée drove my motorcycle." (Exh. 3, 20, 41, 42; Def. Exh. 5).

Defendant Wingard explained to Judge Perry that his extensive record was composed of offenses that had happened a year or two before. (Exh. 3, 20, 41, 42; Def. Exh. 5) Judge Perry then suspended his already suspended license again for

ninety days. (Exh. 3, 20, 41, 42; Def. Exh. 5) Judge Perry adjudicated defendant Wingard guilty and gave him six months to pay a fine. (Exh. 3, 20, 41, 42, 50; Def. Exh. 5) He was also ordered not to drive that day. (Exh. 3, 20, 41, 42; Def. Exh. 5) Judge Perry asked defendant Wingard if he understood and defendant Wingard replied that he did. (Exh. 3, 20, 41, 42; Def. Exh. 5).

At approximately 11:15 A.M., defendant Herbert Hernandez appeared before Judge Perry on a criminal charge of Driving While License Suspended or Revoked and an infraction of Driving with Unsafe Equipment. (Exh. 7, 24, 41, 42; Def. Exh. 5) Defendant Hernandez had the following previous criminal/civil traffic record:

- 1989 Failure to Display Driver's License
- 1990 Unlawful Speed (80/65)
- 1990 Expired Driver's License
- 1991 Seat Belt Violation
- 1991 Operating Without Proper Tag
- 1991 Operating Without Proper Registration
- 1991 Suspension for Failure to Pay Fine
- 1992 Driving While License Suspended
- 1992 Operating with Unsafe Equipment

(Exhibit 49; S. App. L.)

Judge Perry informed defendant Hernandez of the nature of the criminal charge and the civil infraction, the maximum sentence that could be imposed, and that he had a right to speak with an attorney before he did anything further. (Exh. 7, 24, 41, 42; Def. Exh. 5; S. App. H.) Judge Perry asked him if he understood these rights. Defendant Hernandez replied that he did and that he wanted to plead no contest. (Exh. 7, 24, 41, 42; Def.

Exh. 5) Judge Perry asked him whether he understood all the rights that were contained on the plea form that Judge Perry had referred to earlier in his speech and that defendant Hernandez had signed in Judge Perry's presence. (Exh. 7, 24, 41, 42; Def. Exh. 5; S. App. H.) Defendant Hernandez said that he did. (Exh. 7, 24, 41, 42; Def. Exh. 5; S. App. H.)

COUNTY COURT, ORANGE COUNTY, FLORIDA

STATE OF FLORIDA Case Number 12W989
Citation Number _____
(IN TRAFFIC CASES)

vs

**PLEA OF GUILTY
OR
NO CONTEST TO CRIMINAL CHARGE IN COUNTY COURT**

I have appeared on the below listed date in County Court, Orange County, Florida, have been advised by the Judge of the criminal charge(s) against me, and have entered a plea of GUILTY or NO CONTEST to the charge(s) before the Judge.

I have sworn under oath before the Judge that I understand the following:

1. The nature of the charge(s);
2. The difference between the pleas of Guilty, No Contest, and Not Guilty, and the effect of each plea;
3. The right to trial before a Judge or a Judge and jury;
4. The right to an attorney and the right to have an attorney appointed if I cannot afford one, and to know that the Judge is considering a jail sentence on this charge;
5. The right to be presumed innocent until proved guilty beyond a reasonable doubt;
6. The right to question the witnesses at trial;
7. The right to call witnesses of my own at trial and have those witnesses subpoenaed by the Court;
8. The right to remain silent and not to have that fact considered by the Judge or jury at trial;
9. The right to testify at trial and have my testimony considered by the same standards as the other witnesses;
10. The right to have a court reporter make a complete record of the proceedings;
11. The right to appeal any harmful error to a higher court; and
12. That I understand the maximum and minimum sentences listed on the reverse side of this document.

By pleading Guilty or No Contest, I have sworn under oath before the Judge that I wish to give up the above-listed rights and have the Judge impose the sentence the Judge deems appropriate.

I hereby waive my right to consult with an attorney or to have one appointed.

I am not under the influence of any alcohol or drugs at this time, and I fully understand the Judge's instructions, and what my rights are.

I understand I have the right to speak to the Judge concerning the sentence before sentencing, and to appeal, in writing within thirty (30) days, only the judgment and sentence imposed.

I understand I have the right to have an attorney appointed for the appeal if I cannot afford one; however, I am giving up my right to talk to an attorney before entering this plea.

I understand that as a result of my conviction here today, I may be subject to greater penalties if I am ever convicted again or if I am found to be a Habitual Offender.

| | |
|-----------------|------------------------------------|
| ATTORNEY _____ | DEFENDANT <u>Herbert Hernandez</u> |
| ADDRESS _____ | ADDRESS <u>5434 Timberlake Ct</u> |
| TELEPHONE _____ | TELEPHONE <u>295-3156</u> |

Sworn to by the above-named Defendant before me on the _____ day of _____, 19____.

I find this plea to be by a Defendant who appears alert and intelligent, who understands the nature of the charge and the consequences of entering a plea of Guilty or No Contest, and who has hereby made an informed and voluntary waiver of the rights described above.

24-11 (8/89) COUNTY JUDGE [Signature]

Figure 3 Plea Form - Herbert Hernandez

(S. App. H.)

Defendant Hernandez explained that he had not known his license was suspended and that his fines had been paid. (Exh.

7, 24, 41, 42; Def. Exh. 5) Judge Perry adjudicated him guilty of both charges and gave him nine months to pay a fine on each case. He was also ordered not to drive without a valid license in the future. (Exh. 7, 24, 41, 42; Def. Exh. 5)

At approximately 12:00 P.M., defendant Robert Smith appeared before Judge Perry on a criminal charge of Driving While License Suspended or Revoked. (Exh. 2, 19, 41, 42; Def. Exh. 5) Defendant Smith had the following extensive previous criminal/civil traffic record:

- 1983 Failure to Yield Right of Way
- 1983 Unlawful Speeding (52/35)
- 1983 Careless Driving
- 1984 Operating with Defective Equipment
- 1984 Suspension - for Failure to Pay Fine
- 1984 Suspension - for Failure to Pay Fine
- 1984 Suspension - for Failure to Pay Fine
- 1985 Suspension - for 30 days for Points
- 1986 Driving While License Suspended
- 1987 Driving While License Suspended
- 1987 Suspension - for Failure to Pay Fine
- 1987 Suspension - for Failure to Pay Fine
- 1987 Suspension - for Failure to Pay Fine
- 1987 Suspension - for Failure to Appear
- 1987 Reckless Driving
- 1988 Suspension - for Failure to Appear
- 1990 Accident
- 1990 Suspension - for Failure to Appear
- 1990 Suspension - for Failure to Appear
- 1990 Suspension - for Failure to Pay Fine
- 1991 Suspension - for Failure to Pay Fine
- 1991 Suspension - for Failure to Pay Fine
- 1991 Suspension - for Failure to Pay Fine
- 1991 Suspension - for Failure to Pay Fine
- 1991 Suspension - for Failure to Pay Fine
- 1991 Suspension - for Failure to Pay Fine
- 1991 Suspension - Failure to Maintain Insurance
- 1991 Suspension - for Failure to Appear
- 1991 Driving While License Suspended
- 1991 Driving While License Suspended
- 1991 Suspension - Five Years as a Habitual Traffic Violator
- 1991 Driving While License Suspended

1992 Driving While License Suspended
(Exhibit 52; S. App. M.)

Judge Perry informed defendant Smith of the nature of the criminal charge, the maximum sentence that could be imposed, and that he had a right to speak with an attorney before he did anything further. (Exh. 2, 19, 41, 42; Def. Exh. 5) Judge Perry asked him if he understood these rights. (Exh. 2, 19, 41, 42; Def. Exh. 5) Defendant Smith wanted to plead Not Guilty. (Exh. 2, 19, 41, 42; Def. Exh. 5) He then told Judge Perry that he would be hiring an attorney that day. (Exh. 2, 19, 41, 42; Def. Exh. 5) Judge Perry agreed that was a smart move. (Exh. 2, 19, 41, 42; Def. Exh. 5) The Judge reminded him that he was not to drive without a valid driver's license and expressly made that a condition of his bond. (Exh. 2, 19, 41, 42; Def. Exh. 5) The Judge asked defendant Smith how he had gotten to court that day and defendant Smith told him that his mother-in-law had brought him. (Exh. 2, 19, 41, 42; Def. Exh. 5) Judge Perry ordered him not to drive. (Exh. 2, 19, 41, 42; Def. Exh. 5) Defendant Smith replied, "I'm not." (Exh. 2, 19, 41, 42; Def. Exh. 5)

On January 28, 1992, at approximately 3:30 P.M., several persons were brought by deputies back to the sheriff's office and then to the courtroom for driving away from the courthouse without a valid license. (Exh. 41, 42; Def. Exh. 5)

Defendant Smith was one of the persons who had been before Judge Perry earlier on a criminal charge of Driving While License Suspended or Revoked and was seen driving away from the

courthouse without a valid license.

"JUDGE PERRY: Mr. Smith, you're back here with us. You were here earlier this morning on a driving while license suspended charge, TW92-1566, now you're here on a uniform traffic citation, 74711, which happens to also be a driving while license suspended or revoked."

"You're also here on a contempt citation, and I recall you told me earlier today that you had to ride home with your mother-in-law, so I let you go and told you not to drive, but now we got you back here on a driving while license suspended and the contempt: and the driving while license suspended charge carries with it a possibility of up to one year in the Orange County Jail, and the contempt charge carries the possibility of six months in the Orange County Jail. Do you understand that?"

"MR. SMITH: Yes, sir.

"JUDGE PERRY: What are we going to do with this thing? How do you want to handle this? Do you want to plead no contest or guilty or do you want to plead not guilty and talk to a lawyer? Your choice.

"MR. SMITH: To which one?"

"JUDGE PERRY: Both of them. Do you want to do one -- do you want to do them separately?"

"MR. SMITH: To both driving on suspended license?"

"JUDGE PERRY: No. You already got this one taken care of today, remember? Okay? You're here on a brand spanking new driving while license suspended. I told you not to drive --

"MR. SMITH: Uh, then I got to plead guilty, Your Honor, 'cause I'm guilty as --

"JUDGE PERRY: All right. Have him sit down or step over there, and that's on both the contempt and the driving while license suspended; correct?"

"A SPEAKER: Have a seat right here.

"JUDGE PERRY: Okay.

"MR. SMITH: What was the contempt for?"

"JUDGE PERRY: For driving when I told you not to.

"MR. SMITH: Okay."

(Exh. 2, 19, 41, 42; Def. Exh. 5; S. App. B. 2-3).

Defendant Wingard was apprehended and returned to the courthouse. (Exh. 3, 20, 41, 42; Def. Exh. 5; S. App. B. 2-7) He pled Not Guilty and wanted to talk to a lawyer. (Exh. 3, 20, 41, 42; Def. Exh. 5; S. App. B. 2-7) Judge Perry conducted a careful inquiry of defendant Wingard's financial matters and denied his request for court-appointed counsel. (Exh. 3, 20, 41, 42; Def. Exh. 5; S. App. B. 2-7) Bond was set at a total of \$15,000. (Exh. 3, 20, 41, 42; Def. Exh. 5; S. App. B. 2-7) Defendant Wingard remained in the courtroom while Judge Perry handled the other cases. (Exh. 3, 20, 41, 42; Def. Exh. 5; S. App. B. 2-7)

Defendant McCant was also apprehended and returned to the courthouse. (Exh. 4, 21, 41, 42; Def. Exh. 5; S. App. B. 2-8) He started to explain why but Judge Perry stopped him and urged him to consider his plea before he made any further comment.

"JUDGE PERRY: ... and you're here today now on a brand-spanking-new driving-while license suspended because you drove --

"MR. MCCANT: Sir, I just parked my car across the street.

"JUDGE PERRY: Wup, wup, wup. Listen. Listen. Listen. Don't say a thing just yet -- and you're also here on a contempt citation for violating a court order not to drive. Now, how do you wish to handle both of the charges? Guilt or no contest, or do you want to plead not guilty and talk to a lawyer?

"MR. MCCANT: Guilty." (Exh. 4, 21, 41, 42; Def. Exh. 5; S. App. B. 7-8)

Judge Perry then turned to defendant Smith:

"JUDGE PERRY: Mr. Smith, I'm dying to hear your explanation. Here you were in front of me today on a driving while license suspended charge. We had a conversation. In fact, we scheduled you for trial, and I told you before you left here, I said, 'Don't drive without a valid driver's license.'

"Do you understand that by pleading guilty as you have you've given up your right to a lawyer and all that sort of stuff?

"MR. SMITH: Yes, sir.

"JUDGE PERRY: All right. Well, educate me, sir. Why did you drive when I told you not to drive without a valid driver's license?

"MR. SMITH: 'Cause that was the only way I was gonna get home, and if I would have told you from the beginning, well, I ain't got no other choice except to drive, then I probably wouldn't have walked out of here anyhow."
(Exh. 2, 19, 41, 42; Def. Exh. 5; S. App. B 8-9).

Judge Perry adjudicated defendant Smith guilty of both the contempt and the Driving While License Suspended charge and sentenced him to two concurrent sentences of 45 days in jail.
(Exh. 2, 19, 41, 42, 52; Def. Exh. 5; S. App. B. 10).

Judge Perry then asked defendant McCant why he had been driving. (Exh. 4, 21, 41, 42; Def. Exh. 5; S. B. 11-15) After carefully listening to his explanation, Judge Perry asked the arresting officer some questions. (Exh. 4, 21, 41, 42; Def. Exh. 5; S. App. B. 11-15) There was a long pause while Judge Perry considered what action to take. (Exh. 4) Defendant McCant neither had any questions of the officer nor wished to say anything further. (Exh. 4) Judge Perry adjudicated defendant

McCant guilty and then sentenced him to two concurrent sentences of 15 days in jail on both charges. (Exh. 4, 21, 41, 42, 51; Def. Exh. 5; S. App. B. 15)

After watching Judge Perry sentence these other persons to short jail sentences, and after having earlier blurted out that he had driven his motorcycle, defendant Wingard asked Judge Perry if he could change his plea to guilty.

"MR. WINGARD: Your honor, could I change my plea and go ahead and get this over with?

"JUDGE PERRY: If you want to, Mr. Wingard.

"MR. WINGARD: Might as well. I did drive a motorcycle."

(Exh. 3, 20, 41, 42; Def. Exh. 5; S. App. B. 15-19).

Judge Perry ensured that he understood that if he pled Guilty that he would be exposing himself to a year and six months in jail.

"JUDGE PERRY: All right. We're back on Uniform Traffic Citation 74719 and also a contempt citation under the same case for Daniel Lee Wingard.

"Mr. Wingard, I previously entered a plea of not guilty, advised that you were going to try and hire a private lawyer.

"I now find that you're telling me that you would rather reconsider and try and enter a plea to this charge. Is that correct?

"MR. WINGARD: Yes, sir. I don't have the money to go to the lawyer or anything.

"JUDGE PERRY: You understand that on the first driving while license suspended, this one that you just got, you could get a year in the Orange County Jail and on the contempt citation you could get six months. Do you understand that?

"MR. WINGARD: Yes, sir.

"JUDGE PERRY: All right. Well, you understand you'd be giving up you right to a lawyer and all the other rights we talked about earlier?

"MR. WINGARD: Yes, sir."
(Exh. 3, 20, 41, 42; Def. Exh. 5; S. App. B. 15-16).

Judge Perry listened carefully to defendant Wingard's explanation and adjudicated him guilty of both the contempt and the Driving While License Suspended charges. (Exh. 3, 20, 41, 42, 50; Def. Exh. 5; S. App. B. 18) Judge Perry sentenced defendant Wingard to two concurrent 20 day jail sentences. (Exh. 3, 20, 41, 42, 50; Def. Exh. 5; S. App. B. 18) Judge Perry did give defendant Wingard credit for the previous day that he had to miss work and mistakenly spent in court on an earlier day. (Exh. 3, 20; S. App. B 18)

Defendant Hernandez was seen driving away from the courthouse without a valid license but jumped out of his car and fled on foot before he could be arrested. (Exh. 7, 24, 39, 41, 42, 49; Def. Exh. 5) Judge Perry set a bond on his new charge in the amount of \$5,000. (Exh. 7, 24, 39, 41, 42, 50; Def. Exh. 5)

On January 30, 1992, Judge Perry was the presiding judge at the branch courthouse in Apopka, Florida. (Exh. 39, 41, 42, 43, 46; Def. Exh. 5) The Apopka section of the Orange County Sheriff's Office is located in the back of the same building in a similar arrangement to the complex in Ocoee. (App. J. 1259-1262) Numerous officers stroll through the courthouse and occasionally

will come watch the proceedings. (T. 415-416) Approximately 100 arraignments were scheduled for that morning. (Def. Exh. 5)

Judge Perry had not had any contact with any sheriff's deputy and was unaware whether any license surveillance would be attempted. (Exh. 41, 42; Def. Exh. 5)

Judge Perry could not warn persons that the deputies might be outside for fear that it might place a deputy's safety in jeopardy. (T. 1259-1262; Exh. 41, 42, Def. Exh. 5) Rather, during a thirty minute introductory speech regarding the defendants' constitutional rights and the importance of consulting with an attorney (Exh. 10, 27), Judge Perry also mentioned:

"Now, if I tell you that your license is suspended, that means it's suspended immediately, today, right now, and I may order you to give me your driver's license ... physically give it to the court deputy so he can give it to me. Let me tell you how serious I am about this, okay? A couple of weeks ago I was in Ocoee and I told a guy that his license was suspended immediately and that he shouldn't drive from the courthouse. Later that afternoon, about five thirty in the afternoon I was leaving the courthouse and the son of gun drove by me waiving at me, okay. (laughter from the audience) Folks, don't do that to me. That doesn't make me feel good and I don't think you particularly want me upset ... not at you either today or a week or three weeks or six weeks down the road, please don't do that. There are pay phones out there. If I tell you your license is suspended for whatever reason, use a pay phone, I don't care if your car is sitting out there. Use a pay phone and call a relative or a friend or an employer, have them come get you and have that person drive your car home. Whatever it takes, but don't you be driving from the courthouse

today." (Exh. 10).

At approximately 10:15 A.M., defendant Jack Rickel appeared before Judge Perry on a criminal charge of Driver's License Expired More Than Four Months. (Exh. 5, 22, 41, 42: Def. Exh. 5) Defendant Rickel had the following previous criminal/civil traffic record:

1983 Operating Without a Valid Driver's License
1986 Racing on Public Trafficway
1986 Unlawful Speeding (41/25)
1986 Unlawful Speeding (56/35)
1986 Operating Without a Valid Driver's License
1986 Following Too Closely
1987 Failure to Wear Helmet or Goggles
1987 Driving While license Suspended or Revoked
1987 Operating Without a Valid Driver's License
1987 Suspension - for Failure to Pay Fine
1987 Suspension - for Failure to Pay Fine
1987 Suspension - for Failure to Pay Fine
1987 Suspension - for Failure to Pay Fine
1987 Suspension - for Failure to Pay Fine
1987 Suspension - for Failure to Pay Fine
1987 Suspension - for Failure to Pay Fine
1987 Suspension - for Failure to Pay Fine
1990 Driving While License Suspended or Revoked
1990 Failure to Keep in Proper Lane
1990 Suspension - for Failure to Pay Fine
1990 Operating with an Expired Driver's License
1992 Improper Passing
(Exhibit 48; S. App. N.)

Judge Perry informed defendant Rickel of the nature of the criminal charge, the maximum sentence that could be imposed, and that he had a right to speak with an attorney before he did anything further. (Exh. 5, 22, 41, 42, 48; Def. Exh. 5; S. App. D 3, J.) Judge Perry asked him if he understood these rights. (Exh. 5, 22, 41, 42, 48; Def. Exh. 5; S. App. D. 5, J.) Defendant Rickel replied that he did and that he wanted to plead no contest. (Exh. 5, 22, 41, 42, 48; Def. Exh. 5; S. App. D. 3-5,

J.) Judge Perry asked him whether he understood all the rights that were contained on the plea form that Judge Perry had referred to earlier in his speech and that defendant Rickel had signed in Judge Perry's presence. (Exh. 5, 22, 41, 42, 48; Def. Exh. 5; S. App. D. 5, J.) Defendant Rickel said that he did. (Exh. 5, 22, 41, 42, 48; Def. Exh. 5; S. App. D. 5, J.) Judge Perry asked defendant Rickel if he was sure that he did not want to talk to a lawyer. (Exh. 5, 22, 41, 42, 48; Def. Exh. 5; S. App. D. 3) Defendant Rickel said that he had financial trouble and didn't want to take any more time off work. (Exh. 5, 22, 41, 42, 48; Def. Exh. 5; S. App. D. 3) Judge Perry asked if he had a valid license. (Exh. 5, 22, 41, 42, 48; Def. Exh. 5; S. App. D. 3) Defendant Rickel said that he had not and that his girlfriend had dropped him off at court. He told Judge Perry that he lived right down the road. (Exh. 5, 22, 41, 42, 48; Def. Exh. 5; S. App. D. 3-4) Judge Perry told him not to drive and defendant Rickel assured Judge Perry that he would not. (Exh. 5, 22; S. App. D.) Judge Perry reviewed his extensive driving record and then made sure that defendant Rickel understood the rights on the written plea form. (Exh. 5, 22, 41, 42, 48; Def. Exh. 5; S. App. D. 5) Defendant Rickel was adjudicated guilty of the Expired License charge. (Exh. 5, 22, 41, 42, 48; Def. Exh. 5; S. App. D. 5) Judge Perry told defendant Rickel that he was fortunate to not be going to jail and to be careful in the future. (Exh. 5, 22, 41, 42; Def. Exh. 5; S. App. D. 6) He was also ordered not to drive without a valid license. (Exh. 5, 22, 41, 42, 48; Def.

Exh. 5; D. 6-7) Judge Perry asked defendant Rickel if he understood and defendant Rickel replied that he did. (Exh. 5, 22, 41, 42; Def. Exh. 5; S. App. D. 7) Judge Perry also gave him six months to pay his fine. (Exh. 5, 22, 41, 42; Def. Exh. 5)

At approximately 12:30 P.M., defendant Emma Russell appeared before Judge Perry on a criminal charge of Driving While Under the Influence of Alcoholic Beverages to the Extent that Her Normal Faculties were Impaired (with a .25 blood alcohol level). (Exh. 6, 23, 41, 42, 47; Def. Exh. 5) Defendant Russell had the following previous criminal/civil traffic record:

- 1984 Improper Child Restraint
- 1985 Unlawful Muffler/Noise
- 1986 Improper Turn
- 1987 Seat Belt Violation
- 1987 Unlawful Speed (40/20)
- 1989 Open Container - by Operator
- 1989 Leaving Child Unattended
- 1991 Operating with Unsafe Equipment
- 1992 Operating with Defective Equipment

(Exhibit 47; S. App. 0)

Defendant Emma Russell wanted to plead Not Guilty. (Exh. 6, 23, 41, 42; Def. Exh. 5; S. App. E. 2) Judge Perry appointed her an Assistant Public Defender. (Exh. 6, 23, 41, 42; Def. Exh. 5; S. App. E. 3) Judge Perry noted that she did not have a driver's license (it had been suspended for the DUI blood alcohol level) and asked how she had come to court. (Exh. 6, 23, 41, 42; Def. Exh. 5; S. App. E. 3) Defendant Russell responded that, "My brother brought me and dropped me off." Judge Perry reminded her to not drive without a valid license. (Exh. 6, 23, 41, 42; Def. Exh. 5; S. App. E. 3-4) Defendant Russell assured

Judge Perry that she would not. (Exh. 6, 23, 41, 42; Def. Exh. 5; S. App. E. 3-4) defendant Russell was released from court on her own recognizance with no additional bond. (Exh. 6, 23, 41, 42; Def. Exh. 5; S. App. E. 4)

At approximately 2:00 P.M., defendant Russell and defendant Rickel were brought back to the sheriff's office by a deputy sheriff. (Exh. 6, 23, 41, 42; Def. Exh. 5; S. App. E. 4-6) Apparently defendant Russell had not only been driving on her recently suspended license, but the deputy clearly identified the odor of alcoholic beverages on her breath. (T. 111-12, 124, 132, 282-84, Exh. 6, 23, 47; Def. Exh. 5; S. App. E. 4-6)

Judge Perry spoke briefly with defendant Russell. (Exh. 6, 23, 41, 42; Def. Exh. 5; S. App. #. 4-6) As she started to explain, Judge Perry cautioned her to first tell him how she wanted to plead to the charge. (Exh. 6, 23, 41, 42; Def. Exh. 5; S. App. E. 5) Judge Perry asked her if she would rather plea Not Guilty and talk with an attorney. (Exh. 6, 23, 41, 42; Def. Exh. 5, App. E. 5-6) Defendant Russell wanted to speak with an attorney. (Exh. 6, 23, 41, 42; Def. Exh. 5; S. App. E. 5-6)

Defendant Rickel had also been driving away from the courthouse without a valid license. (Exh. 5, 22, 39, 41, 42; Def. Exh. 5; S. App. D. 7) He was brought back by the deputy. (Exh. 5, 22, 39, 41, 42; Def. Exh. 5; App. D. 7) Judge Perry told him what he had been charged with and asked him how he wished to plead, "... Guilty or no contest, or do you want to plead not guilty and talk to a lawyer?" (Exh. 5, 22, 39, 41, 42; Def. Exh.

5; App. D. 8-9) Defendant Rickel started to explain and Judge Perry reminded him to tell him how he wished to plead first. (Exh. 5, 22, 39, 41, 42; Def. Exh. 5; S. App. D. 8-9) Judge Perry then asked,

"JUDGE PERRY: All right. Do you understand by pleading no contest that you give up all your rights that we previously went over with you this morning, those rights being your right to a trial, your right to be presumed innocent, your right to have assistance of a lawyer, as well as your right to appeal any judgment, sentence of the Court; and that if you plead no contest, you're giving up all those rights in return for settling the case today? Do you understand that?"

"MR. RICKEL: Yes, sir."

"JUDGE PERRY: All right. If you understand everything that's on that plea form and agree with it, go ahead and put your John Hancock -- or in this case, your Jack Rickel -- on that -- on the form for me." (Exh. 5, 22, 41, 42; Def. Exh. 5; S. App. D. 9).

The written plea form executed by defendant Rickel follows:

COUNTY COURT, ORANGE COUNTY, FLORIDA

STATE OF FLORIDA Case Number JA92-1147

vs Jack Rickel Citation Number _____
ON TRAFFIC CASES

**PLEA OF GUILTY
OR
NO CONTEST TO CRIMINAL CHARGE IN COUNTY COURT**

I have appeared on the below listed date in County Court, Orange County, Florida, have been advised by the Judge of the criminal charge(s) against me, and have entered a plea of **GUILTY** or **NO CONTEST** to the charge(s) before the Judge.

I have sworn under oath before the Judge that I understand the following:

1. The nature of the charge(s);
2. The difference between the pleas of Guilty, No Contest, and Not Guilty, and the effect of each plea;
3. The right to trial before a Judge or a Jury and jury;
4. The right to an attorney and the right to have an attorney appointed if I cannot afford one, and to know if the Judge is considering a jail sentence on this charge;
5. The right to be presumed innocent until proved guilty beyond a reasonable doubt;
6. The right to question the witnesses at trial;
7. The right to call witnesses of my own at trial and have those witnesses subpoenaed by the Court;
8. The right to remain silent and not to have that fact considered by the Judge or jury at trial;
9. The right to testify at trial and have my testimony considered by the same standards as the other witnesses;
10. The right to have a court reporter make a complete record of the proceedings;
11. The right to appeal any harmful error to a higher court; and
12. That I understand the maximum and minimum sentences listed on the reverse side of this document.

By pleading Guilty or No Contest, I have sworn under oath before the Judge that I wish to give up the above-listed rights and have the Judge impose the sentence the Judge deems appropriate.

I hereby waive my right to consult with an attorney or to have one appointed.

I am not under the influence of any alcohol or drugs at this time, and I fully understand the Judge's instructions, and what my rights are.

I understand I have the right to speak to the Judge concerning the sentence before sentencing, and to appeal, in writing within thirty (30) days, only the judgment and sentence imposed.

I understand I have the right to have an attorney appointed for the appeal if I cannot afford one; however, I am giving up my right to talk to an attorney before entering this plea.

I understand that as a result of my conviction here today, I may be subject to greater penalties if I am ever convicted again or if I am found to be an Habitual Offender.

ATTORNEY _____ DEPENDANT Jack Rickel

ADDRESS _____ ADDRESS 562 north place SIGNATURE

TELEPHONE _____ TELEPHONE APR 11 32712

Sworn to by the above-named Defendant before me on the 29 day of January, 19 92

I find this plea to be by a Defendant who appears alert and intelligent, who understands the nature of the charge and the consequences of entering a plea of Guilty or No Contest, and who has hereby made an informed and voluntary waiver of the rights described above.

24-11 (8/89) COUNTY JUDGE [Signature]

Figure 4 Plea Form - Jack Rickel

(S. App. I.)

Judge Perry adjudicated defendant Rickel guilty on both the contempt and the driving while license suspended. (Exh. 5, 22, 39, 41, 42, 48; Def. Exh. 5; S. App. D. 9-10) When asked by Judge Perry why he was driving, defendant Rickel responded that he was moving his truck to the other side of the road. (Exh. 5, 22, 39, 41, 42; Def. Exh. 5; S. App. D. 11) Judge Perry asked the arresting deputy to provide some testimony. (Exh. 5, 22, 39, 41, 42; Def. Exh. 5; S. App. D. 12-13) The deputy testified that

defendant Rickel was seen driving on the exit ramp from the courthouse parking lot. (Exh. 5, 22, 39, 41, 42; Def. Exh. 5; S. App. D. 12-13) Judge Perry asked defendant Rickel why he had left a perfectly good parking spot. (Exh. 5, 22, 39, 41, 42; Def. Exh. 5; S. App. D. 13) Defendant Rickel said that, "Because I didn't feel like it. I figured somebody would door-ding my truck or -- you know. It's not a pretty truck, but --." (Exh. 5, 22, 41, 42; Def. Exh. 5; S. App. D. 13)

Judge Perry sentenced defendant Rickel to two concurrent terms of twenty days jail. (Exh. 5, 22, 39, 41, 42, 48; Def. Exh. 5; S. App. D. 13) Finally, Judge Perry ordered defendant Rickel not to drive without a valid driver's license in the future. (Exh. 5, 22, 39, 41, 42, 48; Def. Exh. 5; App. D. 14)

Sometime later, two criminal defense attorneys, Irl Marcus and Herbert Hall, filed a series of motions to disqualify Judge Perry from their clients' DUI cases. (App. J. 1221-1233; Def. Exh. 5) Neither Mr. Marcus nor Mr. Hall represented any of the Ocoee-Apopka contemnors. (App. J. 1221-1233; Exh. 41, 42; Def. Exh. 5)

The lawyers filed their first motion on February 10, 1992. (App. J. 1221-1233; Def. Exh. 5) This motion contained numerous factual inaccuracies and, after a careful review, was determined to be legally insufficient. (Exh. 39, 41, 42; Def. Exh. 5)

Shortly after the filing of the motion to disqualify,

but before the filing of these complaints, Judge Perry had discussed some of these issues with his fellow judges and had learned how they handled similar situations in the past. (App. J. 1293-95) As a result of discussions with other judges, Judge Perry advised law enforcement that if they choose to engage in such surveillance operations again that they not bring these kind of defendants before him for any purpose other than the setting of bond and the appointment of counsel. (App. J. 1288-90, 1311-1312)

Marcus and Hall then amended their disqualification motions to add an allegation that a Judicial Qualifications Commission complaint had been made by the attorneys and refiled their motion on February 28, 1992. (App. J. 1221-1233; Exh. Def. 5) Their amended motions were likewise determined to be legally insufficient and Judge Perry entered an appropriate order. (App. J. 1221-1233; Exh. Def. 5) Later, after a newspaper article quoted these attorneys criticizing Judge Perry, Judge Perry recused himself from further involvement in these lawyers' cases. (Def. Exh. 5)

The foregoing history of the contempt proceedings clearly negate the existence of a pattern of misbehavior by Judge Perry. Instead, it reinforces the fact that Judge Perry's transgressions have been, if anything, mere "errors of law", for which the appellate process is well equipped to correct, should any contemnors have found it necessary to correct.

WHEREFORE, the Honorable Daniel W. Perry requests that this Court reject the "Findings of Fact, Conclusions of Law, and Recommendation for Discipline" filed by the Judicial Qualifications Commission on July 30, 1993 as to the finding of "Guilty" on Counts I and II of the "Consolidated Formal Charges", and dismiss the instant proceedings with prejudice.

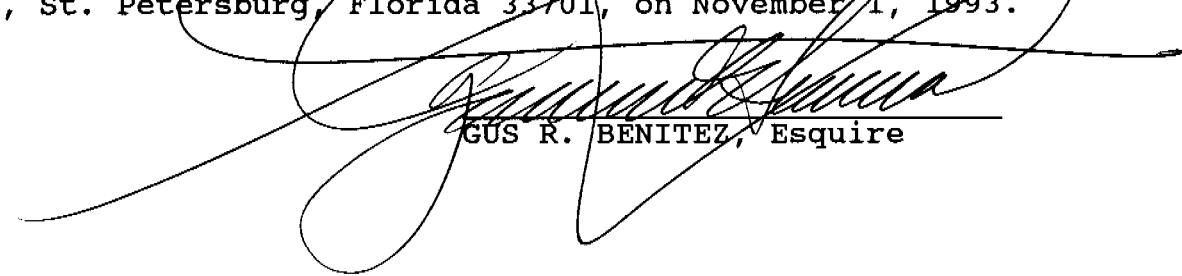

BENITEZ & BUTCHER, P.A.

By

Gus R. Benitez
1223 East Concord Street
Orlando, Florida 32803
(407) 894-5000
Florida Bar # 278130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered by U.S. Mail, to: Ford L. Thompson, General Counsel, Florida Judicial Qualifications Commission, Room 102, The Historic Capitol, Tallahassee, Florida 32301; and, Patricia F. Anderson, Special Counsel, Rahdert & Anderson, 535 Central Avenue, St. Petersburg, Florida 33701, on November 1, 1993.


GUS R. BENITEZ, Esquire