IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE,)
Re: P. Kevin DAVEY)
_____)

No. 82,328

A matter before the Court on
Findings of Fact, Conclusions of Law and Recommendation
of the Judicial Qualificatons Commission

BRIEF *AMICUS CURIAE* OF ROBERT P. SMITH

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Preliminary Statement

By leave of Court this brief *amicus curiae* is submitted by an active practitioner in the Second Judicial Circuit where Judge P. Kevin Davey has served as Circuit Judge for nine years. He was elected in the Fall of 1984 and re-elected in 1990.

The brief is filed in support of Judge Davey and, one hopes, in this Court's interest in properly interpreting the standards and tending the process for judicial discipline under Article V, Section 12 of the Constitution. As stated in the motion under which it is filed, the brief is the tangible expression in conventional form by a host of Second Circuit practitioners whose collective sense of Judge Davey's performance over nine years cannot be reconciled with the Commission recommendation that prior bad conduct renders him now unfit.

More than one hundred of those practitioners have authorized the undersigned so to represent to the Court their endorsement of what former Justice O'Connell, Mr. Ausley, Judge Hall, Judge Padovano, Mr. Randolph, Mr. Harkness, and Public Defender Daniels attested to the Commission: that Judge Davey is a fine judge, of good repute, and he should not be removed or censured.

Amicus will submit that this startling disagreement is accounted for by the Commission's neglect of constitutional or prudential limitations on its inquiries, and its underestimation of the systemic dangers to its judgment in attempting to deal from limited remedies with what it considers to be remote but reprehensible conduct. The Commission stretched to find guilt commensurate with the only remedy available to it.

STATEMENT OF THE CASE AND OF THE FACTS

For a more comprehensive Statement, *amicus* defers to the Response filed by counsel for Judge Davey, and adopts that Statement. The Argument of this brief proceeds on these salient facts:

1. The Commission charged Judge Davey with no judicial misconduct and no pre-judicial misconduct affecting clients or the courts.

The September 2, 1993 Notice which initiated this process makes two factual charges against Judge Davey [1] arising from "the process of terminating your relationship with the Firm" known as Douglass, Cooper, Coppins & Powell, P.A.

The Notice p. 3 asserts that the conduct so alleged "is in violation of" Canons 1 and 2, FLORIDA CODE OF JUDICIAL CONDUCT, entitled **A Judge Should Uphold the Integrity and Independence of the Judiciary** and **A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.**

The factual charges conspicuously do not say in what year when the conduct complained of occurred. Conspicuously the charges do not say Judge Davey was a judge when that occurred.

In fact, every aspect of the transactions described in the charges occurred before Judge Davey took office. No conduct by Judge Davey since then is referenced in the charges. No

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[1] The Notice itself is of course in the Record before the Court. Its specification of charges is reproduced as an appendix to this brief.

conduct during those nine years except his testimony before the Commission in December 1993 is referenced in the Findings.

Every aspect of the transactions complained of occurred in 1984. Neither the charges nor the Findings suggest that any ramification of Mr. Davey's conduct as a lawyer - if an unseemly money dispute between law partners is a "lawyer's" conduct, as such - carried over to affect his work as a judge.

Finally there was no charge, no finding and no evidence that at any time during the past nine years, ensuing the transactions complained of or the civil litigation to adjust those private debts and differences, some hubbub or scandalous reputation arose in the Circuit affecting its courts or Judge Davey's service. The only record evidence is to the contrary. Justice O'Connell, Mr. Ausley, Judge Hall, Judge Padovano, Mr. Randolph, Mr. Harkness, and Public Defender Daniels all attested Judge Davey's sound reputation and his sound work.

2. The Commission offered no charge against Judge Davey of perjury, false testimony or other abuse of the judicial process, but its findings and recommendation are driven by a retroactive charge and finding that Judge Davey lied to the Commission by denying the substantive charges.

In its simplest terms the many-sided financial imbroglio involving former lawyer Davey and his former partners, out of which this inquiry arose nine years later, was this:

- Davey considered the firm entitled to no part of the small Bryant fee because the firm abandoned the case when it appeared worthless, so Davey handled the case on his own, first

concealing the fee because he thought the firm would unjustly demand a share, then owning up to and finally sharing the fee. The Breyer fee, on the other hand, Davey considered "absolutely" to be shared with the firm, but to defend what he thought would be his just share against the firm which threatened a lock-out, Davey controlled the case personally, took the draft in his name alone, told former partner Cooper he had received it, got a bank receipt in his name alone, and deposited the draft to the firm account for collection; whereas

- Davey's former partners thought themselves entitled to share the Bryant fee, and that Davey should have collected the settlement draft through the firm's account, [2] but he concealed it until confronted. They thought themselves entitled to share the Breyer fee as well, and that Davey concealed his handling of the case to conclusion not to secure his just share but to convert the whole fee, which GEICO thwarted by issuing the settlement draft not to Davey but to the firm.

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[2] While the Commission appears to have endorsed this view of the Agreement, there is nothing in the Agreement which would have required Davey to collect through the firm's account a later settlement in a case such as Bryant's which the firm had abandoned to Davey or to Joe Fixel, because it was considered worthless. At any rate, there is nothing in the Agreement which would have rendered Davey's opinion of its provisions dishonest on its face, as distinguished from a debatable position to be decided in civil litigation.

The June 1984 Agreement terminating Davey's association in the firm as of July 1 provided (JQC 1):

> **b) All PKD contingent fee cases will be evaluated for % of completion, and those worked by PKD which produce a fee will result in compensation to PKD on a pro-rata basis.**
>
> **c) All cases which PKD does not handle after July 1, 1984 will be identified and reassigned within the firm or transferred to other qualified attorneys outside the firm.**

Whereas the September 20, 1984 Agreement reciting Davey "is no longer a member of the firm" provided (JQC 2):

> **(5) The parties agree that with respect to any fees earned on work done by Davey after July 1, 1984 and until January 8, 1985, that these will belong to Davey and will not be applied to "sum due". . . .**
>
> **(7) In non-hourly rate cases in which work is performed by Davey both before and after July 1, 1984, the parties will agree as to the percentage of work done by Davey prior to July 1, 1984 and a percentage of work done afterwards with a distribution of fee made accordingly. . . .**
>
> **(10) Davey will take responsibility for completing or reassigning to other attorneys within the firm or other qualified attorneys outside the firm all cases he was handling as of June 6, 1984 and afterwards. As of January 8, 1985, he will have completed all such cases or have them reassigned to other attorneys.**

Neither Agreement required Davey to collect any settlement through firm accounts on cases farmed out by the firm or worked by Davey alone after separating from the firm on July 1.

The conflicting stories told by Davey on the one hand and his former partners on the other were nine years old when they were recited to the Commission.

Those stories had long been solidified by time and, beginning in 1985, by litigation during Judge Davey's judicial service. Tr. 76, 358. The Commission found in the public record of that litigation no reason to charge that Judge Davey gave false testimony or otherwise demeaned the judicial process or his office in violation of Canons 1 and 2.

The Commission had every opportunity to interview Judge Davey to determine whether there was probable cause to make these charges in September 1993. Judge Davey's memory of the events was the same in August 1993 as in December 1993, when he told his story to the Commission under oath. The Commission chose not to charge Judge Davey with lying to any Commission member during the investigation or, for that matter, at the hearing in December.

Therefore Judge Davey came before the Commission in December to tell his story, not to defend himself against a charge of lying either in his civil trial testimony [3] or to representatives or members of the Commission.

The Commission found "Judge Davey has compounded his original misconduct by appearing before the Commission and attempting to explain his conduct through testimony that the Commission finds to be false in material respects." Findings

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[3] If lying under oath was to be the decisive charge of contemporaneous misconduct indicating a present unfitness to serve, the Commission might have composed such a charge from Judge Davey's September 1992 testimony in the civil litigation, Tr. 358, that the first "case list" discussion involving the Bryant case occurred "ASAP" in July 1984, as Judge Davey later testified before the Commission, Tr. 302, rather than in November as the firm witnesses said, Tr. 26 et seq.

p. 21. This climactic finding largely accounts for the Commission's conclusion "by clear and convincing evidence that Judge Davey's violations of these Canons demonstrate a present unfitness to hold office." Findings pp. 21, 22.

3. Decisive evidence was missing or stale or both.

The unavailability of documentary evidence to verify the July meeting "ASAP" after June 6, 1984, when the separation agreement required that meeting (JQC 1 ¶ 8), contributed to the Commission's Finding that Judge Davey was "not worthy of belief" (Findings ¶ 20) in testifying that he and Cooper met in July and classified the Bryant case to be "farmed out" to another lawyer. Tr. 302, 310. Judge Davey attested to that July meeting, saying "There is nothing that I have to tell me what the actual date is. I know about when it was." Tr. 302. Nine years after the event the Commission disparaged Davey's testimony saying "he could not testify as to the exact date and had no notes or memoranda to support his testimony as to the date." Findings ¶ 10.

The Commission's skepticism for lack of documentary verification nine years later led also to its finding that ***if the Bryant case was indeed discussed in July, and classified then to be firm-abandoned as a poor case***, "any abandonment was based upon a misrepresentation [by Davey] of the merits and value of the case." Findings ¶ 22. The Commission thus attributed a wicked state of mind to Davey ***in July based on knowledge he could not***

have had in July, that a new adjuster would make a surprising offer some weeks later. [4]

The firm's "lock-out letter," by which the firm notified Davey one night in September 1984 that the locks were being changed and he was "out," was lost, unaccounted for, and not introduced at the JQC hearing nine years later. While the lock-out threat was not carried out and the firm's testimony gave it little importance, Tr. 110-111, Judge Davey testified it was that "shock" - remembering another such letter to another member of the firm, Tr. 304 - which spurred him to defensively remove his client files from the office immediately. Tr. 293, 305.

Most important, the $ 127,500 GEICO draft in the Breyer case, which the Commission inexplicably found "was payable to the Firm" thus "thwart[ing]" Davey's intended conversion of it, ¶ 23, was never produced or accounted for in the evidence, and no records of GEICO were sought out to prove the critical fact in issue. That the check was payable to Kevin Davey and Ms. Breyer was attested by Judge Davey, Tr. 327, and was corroborated both by the December 13 GEICO letter to Davey individually, mentioning Breyer as Davey's client, JQC 10, Tr. 59-60, and by the bank receipt from "P. Kevin Davey." JQC 11, Tr. 61.

A written record of the GEICO draft, from GEICO itself, might have verified or falsified Judge Davey's testimony, but the

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[4] "Q Did you ever misrepresent the strength of the case to them in order to keep the case for yourself? ¶ A Absolutely not. There was nobody any more shocked than me when he came back with a $24,000 offer to settle." Tr. 313.

Commission did not recover any such record from GEICO and offered no proof accounting for its absence. Instead, never having formally charged that the GEICO draft was payable to Douglass, Davey, Cooper and Coppins, [5] the Commission entered a "clear and convincing" finding that the draft was payable to Douglass, Davey, Cooper and Coppins, ***therefore*** that the draft "could not be deposited into any bank account except that of the law firm," Tr. 126, ***therefore*** that Davey was "thwarted" in his imagined intent to convert the draft, Findings ¶ 23, which ***therefore*** accounted for his notifying Cooper of it as Davey said he did as of course, Tr. 324, see also Tr. 56. [6] ***Therefore***, the Commission concluded in this remarkable chain of unvarnished supposition, Judge Davey "lied under oath to the Commission at the trial of this cause in an attempt to justify his conduct," Findings ¶ 24, when he said he handled the Breyer case only to secure *his* share of a fee which he intended "absolutely" to share with the firm. Tr. 330-31.

The Commission did not seek out GEICO records of the draft itself, but based this chain of reasoning on a "clear and

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[5] The first charge specified only that "You also received and attempted to negotiate an insurance company draft in the amount of $ 127,500 which had been paid in full settlement of the uninsured motorist claim of Carol Breyer."

[6] Cooper: "He approached me at that preschool Christmas pageant thing [on Friday, December 21, 1984], which was around the noon hour, and advised me that he had just settled a case for 120-some-odd thousand dollars, and he would be getting a fee of about $40,000, and that he would like to get the draft cleared if at all possible before the end of the year, so a disbursement could be made in the year 1984 for tax reasons. And that he had done the great bulk of the work after July, 1984."

convincing" finding that the draft was payable to Douglass, Davey, Cooper & Coppins - a finding based on John Cooper's testimony, first, that "I can't tell you . . . that I have an independent recollection [from 1984] that I saw it," but "if I followed my ordinary routine and practice" of "peeking" at ***large checks "that came into the firm,"*** "I most likely did see it at some time," Tr. 98 (emph. added); and then "I have seen a copy of it, and my recollection is that it was made payable to the client and to the law firm," Tr. 99. No copy of the 1984 draft was ever produced for the Commission's 1993 hearing.

The Response by counsel for Judge Davey has shown the insubstantiality of Mr. Douglass' memory concerning being called by a bank officer to report Davey's deposit of the Breyer draft. The question was withdrawn, the answer was dubious, the whole affair was entirely consistent with Davey's and Cooper's story of Davey receiving a check, telling Cooper about it, and putting it in the firm's bank account for collection. The Finding ¶ 23 that a supposed telephone call "thwarted" Davey's intended conversion of the Breyer draft is a tissue of unwarranted assumptions.

Summary of the Argument.

I. A judge may be reprimanded or removed under Article V, Section 12 only for sanctionable conduct as a judge. The 1974 amendment to Section 12 did not disturb this core holding in Turner; indeed the 1974 and 1976 amendments reinforced that view of the text. But if the Court overrules Turner, it must do so supplying the normative and prudential limitations on Commission

inquisitions that Justice Ervin's dissent in Turner deemed essential to a free and independent judiciary. Those limitations were not observed in the inquisition against Judge Davey, which therefore must be dismissed.

II. The Commission deprived Judge Davey of Due Process by substituting its disbelief of his testimony denying the charges for clear and convincing evidence of their truth, and by trying Judge Davey on a charge of lying not formally noticed and made the subject of a disinterested hearing. The report and recommendation should therefore be disapproved.

ARGUMENT

I. Article V, Section 12 authorizes reprimanding or removing a judge only for misbehavior as a judge or proximate to judicial function. It does not support stale sanctions for conduct while a lawyer years ago, not affecting clients or the justice system, not violating law or Rules of Professional Conduct, and not affecting the judicial function.

A. The text of the Constitution, read according to ordinary canons of interpretation, is concerned to reprimand judges or remove them only for their misconduct as judges.

Before Section 12 was amended by referendum on the Legislature's initiative in 1974, subsection (d) was its heart, stating the grounds on which the Court on the Commission's recommendation might order that "the justice or judge be disciplined by appropriate reprimand, or be removed for office with termination of compensation." The stated grounds were:

> . . . for willful or persistent failure to perform his duties or for other conduct unbecoming a member of the judiciary . . . .

"Other conduct unbecoming a member of the judiciary," in the formula of subsection (d), was to be read in pari materia with the preceding phrase, "willful or persistent failure to perform his duties," and indeed with the next phrase, "or be involuntarily retired for any permanent disability that seriously interferes with the performance of his duties." Art. V. Sec. 12(d), FLA. CONST., *Florida Statutes 1973*.

The first and third phrases in the series spoke of present misconduct or disability in judicial office. The second phrase fairly had the same implication. If this Court were later to suppose, and suppose rightly, that the Commission in the public interest "understandably expects a higher standard of conduct from the judges of this state than of anyone else connected with the judicial system," [7] then "conduct unbecoming a member of the judiciary" referred to conduct by the judge which contemporaneously offended the "higher standard of conduct" that was applicable to the judge when he gave that offense.

The 1974 amendment by referendum did not disturb the text of subsection (d), which became subsection 12(f), 3 FLORIDA STATUTES 1975, but it expanded subsection (a) to change prospectively the rule of State ex rel. Turner v. Earle, 295 So.2d 609 (Fla. 1974). That decision held that Commission could properly inquire into and recommend sanctions only for a judge's conduct in his current term of judicial office, not as in Judge

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[7] In re Inquiry Concerning a Judge [Hal P. DEKLE], 308 So.2d 5, 11 (Fla. 1975).

Turner's case for conduct in the prior term of another judicial office - judge of a criminal court of record - which was not subject to Commission scrutiny from 1966, the year the Commission was created, [8] through 1973. [9] Despite much discussion tending to insulate incumbent judges from scrutiny of judicial conduct before the current term of office, the Court reconciled its Turner result with its Kelly decision [10] to the extent of holding the Commission might inquire into Judge Turner's conduct as a criminal court of record judge, but only "within a reasonable time backwards . . . not exceeding two years" before he became a circuit judge, and only to seek in that judicial conduct "evidence germane to charges allegedly occurring in the current term of office" as circuit judge. 295 So.2d at 619.

Following the 1974 amendment, then, subsection (f) continued to speak in terms that fairly implied, and were held in Turner to imply, a concern only for ***judicial misconduct as such***, i.e., not authorizing any reprimand or removal of a judicial officer for conduct before taking judicial office which might

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[8] Art. V, Sec. 17A, FLA. CONST., 3 *Florida Statutes 1967*, was initiated by S.J.R. 485 in 1965 and adopted in 1966.

[9] "It is hardly to be expected that the exact situation here would ever arise again because, under revised Article V which became effective January 1, 1973, all courts .. . are within the jurisdiction of the Judicial Qualifications Commission." Turner, 295 So.2d at 619-20.

[10] In Re Kelly, 238 So.2d 565 (Fla. 1970), which Turner distinguished, 295 So.2d at 618, as involving a judge whose alleged misconduct, though in a prior term as circuit court judge, was unlike Judge Turner in a judicial office that was then subject to Commission scrutiny.

later be regarded as retroactively sanctionable as "unbecoming a member of the judiciary." New subsection (a) of Section 12 was drafted consistently with that reading of the old language to speak of ***judicial misconduct as such***, i.e., to sanction misconduct as a judge, during term of office or otherwise, which demonstrates a present unfitness to hold office. Art V, Sec. 12(a), 3 *Florida Statutes 1975*:

> (a) There shall be a judicial qualifications commission vested with jurisdiction to investigate and recommend to the Supreme Court of Florida the removal from office of any justice or judge whose conduct, during term of office or otherwise occurring on or after November 1, 1966, (without regard to the effective date of his section) demonstrates a present unfitness to hold office, and to investigate and recommend the reprimand of a justice or judge whose conduct, during term of office or otherwise occurring on or after November 1, 1966 (without regard to the effective date of this section), warrants such a reprimand. . . .

The 1976 amendment made subsection 12(f) more perfectly consonant with new subsection 12(a) by inserting "demonstrating a present unfitness to hold office" in the appropriate place. 3 FLORIDA STATUTES 1977; and *see* ***Historical Notes*** 26 *Florida Statutes Annotated* (1993 Cum. Ann. Pocket Part) at 101. But the 1976 amendment made no change indicating a purpose to excoriate a judge for conduct before he was a judge which was later thought to be "unbecoming a member of the judiciary demonstrating a present unfitness to hold office." On the contrary, the other significant amendment to subsection 12(f) in 1976 reinforced its prior interpretation by providing that "malafides, scienter or moral turpitude on the part of a justice or judge" need not

attend his or her sanctionable "conduct [which] demonstrates a present unfitness to hold office." [11]

In other words, issues over the contemporaneous mental state "of a justice or judge" when he commits sanctionable conduct were resolved by this amendment: "malafides, scienter or moral turpitude on the part of a justice or judge" need not attend otherwise sanctionable conduct. But the obvious assumption of this amendment is that sanctionable conduct is the contemporaneous conduct "of a justice or judge," and that alone; this amendment did not trifle over whether "malafides, scienter or moral turpitude on the part of a justice or judge" infected the judge's consciousness, years after the fact, of conduct he engaged in before he was a judge.

Even the legislature's insertion of "on or after November 1, 1966," as the period to which Commission inquiry might be directed, was an endorsement of Turner's basic theme that only a judge's conduct while a judge is the proper subject of inquiry. For the 1966 date was not inserted in 1974 as a makeshift statute of limitations to cordon off inquiry into early nonjudicial conduct by those who later were to become judges; the 1966 date exactly corresponded to the year in which the Judicial Qualifications Commission was created with the lesser jurisdic-

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[11] The 1976 amendment also added to subs. (f) the present provision that "[m]alafides, scienter or moral turpitude on the part of a justice or judge shall not be required for removal from office of a justice or judge whose conduct demonstrates a present unfitness to hold office." This amendment changed, prospectively, the holding of In re Inquiry Concerning a Judge [Hal P. DEKLE], 308 So.2d 5 (Fla. 1975).

tion noted in Turner. 3 *Florida Statutes* 1967, Art. V. Sec. 17A, FLA. CONST. The 1974 amendment, then, was an endorsement, but with the jurisdictional clock set back to the first year of the Commission's existence, of Turner's doctrine that a judge may be disciplined only for conduct within the inquiry jurisdiction of the Commission, i.e., for sanctionable conduct during the time of being a judge.

In the years following Turner neither the legislature nor any public initiative has sought to amend Article V, Section 12 to reach back into conduct of a man or woman who later became a judge. The Turner Court itself called attention to a "hiatus in the law in certain matters where election law violations become a subject of disciplinary investigation." 295 So.2d at 619. Were a judge-candidate to commit "flagrant election law violations" in getting elected, the Court said, he would escape discipline both as a lawyer and as a judge, absent conviction for the crime. The Court called "this deficiency" to the legislature's attention. Ibid. The legislature has done nothing to recognize that "deficiency," if it exists, and nothing to address it.

Justice Ervin's dissent in Turner, joined by Justice Boyd, argued that Section 12 had no explicit "time limits upon investigations of judicial conduct," 295 So.2d at 621, and so authorized inquiry into earlier conduct of the subject judge - not only the Judge Turners whose conduct in a prior judicial office was the matter in issue, but also, apparently, the judge whose earlier nonjudicial life was found blameworthy. Thus:

"[T]he time of origin or occurrence of the misconduct does not necessarily exclude investigation," 295 So.2d at 622, and:

> If the alleged misconduct of a judge reasonably has a germane nexus to or bearing upon his judicial character or likelihood of possible adverse effect upon the quality of his service, it may be considered by the Commission.

This latitude of inquiry derived, in Justice Ervin's view, from the possibility of "a carry-over deleterious effect" into the judge's judicial service. At 622;

> Within the nature of things there may be a carry-over deleterious effect upon a judge's character from former acts of misconduct, as the following examples will illustrate:

Justice Ervin's examples suggested both normative and prudential limits on the otherwise unrestrained inquisitorial power of the Commission. "[T]here are, of course, practicable limitations both overt and subtle on [the Commission's] investigative authority which the native intelligence of reasonable men in keeping with principles of good conscience require the Commission to apply." 295 So.2d at 621.

Justice Ervin's normative limits were to be found in texts: he had in mind the "judicial codes of ethics" for judges in a prior judicial office, like Judge Turner; [12] "modern rules relating to conflicts of interest," 295 So.2d at 621; and the law of crimes, election laws, and such. At 622. Thus if a lawyer became "thrall to organized criminal or subservice elements" or

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[12] At 623, finding the text of Section 12 "broad enough in ambit to reach to the full spectrum of a judge's character and especially conduct of a judge in his judicial capacity, whether in a lower judgeship or in an earlier judicial term."

by money to "any special interest group"; or if he took and failed to disclose "illegal campaign contributions," or kept "secret knowledge of a crime he has committed - one of serious proportions": these outrages, absent mitigating circumstances, might well imply a present unfitness for judicial office.

The more "subtle" or prudential restraints upon the Commission's inquisitory power, as proposed by Justice Ervin, were more problematic, amounting to the exercise of sound judgment with respect to the passage of redemptive time, "no evidence of reversion or regression to bad character" (at 622), and so on. "Only the judge of proven unmistakably bad character or venal or corrupt tendency should have reason to fear." At 623. The Commission should beware its own imperfect judgments, lest judges "be made so timorous . . . that they have almost to be priests fearful to exercise the privileges and independence of free men guaranteed citizens by the Constitution." At 623.

The majority view in Turner remains the law. The 1974 and 1976 amendments to Article V, Section 12, left the critical text alone, if indeed those amendments did not, as we have suggested, strengthen its conservative interpretation. The amendments did nothing to put Justice Ervin's expansive views into effect, nor to close the "hiatus" that Justice Roberts described in the majority opinion. Except for dissolving any insularity in each term of a judge's career, which in fact the Turner majority had done, the 1974 and 1976 amendments left the

text as the majority read it, as concerned with ***judicial*** misconduct by the judge, at a time when he was a judge.

The initiative-and-referendum process has done nothing these 20 years to overrule Turner's conservative reading of the Section 12 text, which limits its reach to ***judicial*** misconduct as such; and has done nothing to substitute, with or without the normative and prudential limitations Justice Ervin envisioned, his vastly broader conception of the Commission's power.

Then in 1984 this Court uttered an *ipse dixit*. In re Inquiry Concerning a Judge, Mark A. Speiser, 445 So.2d 343 (Fla. 1984) passed the Court's hand over the Commission's negotiated recommendation of public reprimand as stipulated by nonadverse parties on a record bereft of facts - bereft, that is, except for the stipulated fact that Judge Speiser, in the period after his nomination as circuit judge and before taking office, secretly met with the prosecutor, in a criminal case being defended by his own law firm, and counseled the prosecutor on the "weak points" of the State's case.

Speiser's case was the ideal vehicle for raising up Justice Ervin's view of Article V, Section 12, if that were to be ordained by this Court. In terms of corrupting the judicial process, as described by Justice Ehrlich's dissent; in terms of the "modern rules relating to conflicts of interest," to which Justice Ervin had referred in Turner as a canonical source of normative restraint upon the Commission; in the very promptness of the Commission's inquiry, scarce nine months after the judge's

closeting with the prosecutor; in all these aspects, Speiser was ideal for expounding Ervin's theme and the canonical and prudential limitations that, in Ervin's view, were essential components of any such power in the Commission.

But the Court said only "We accept the Commission's recommendation and the publication of this opinion in *Southern Reporter* shall serve as Judge Speiser's public reprimand ***for his conduct as an attorney which occurred prior to his becoming a circuit judge.***" 445 So.2d at 344, emph. added.

Amicus respectfully submits that this was no decent overruling of Turner, nor any adequate exposition of the normative and prudential restrictions that this Court must insist upon as a condition to recognizing such an expansive view of the Commission's inquisitorial power.

> *B. Judge Davey's nine years of judicial service since the pre-judicial conduct complained of minimally required the Commission to justify its stale inquisition by formal charges and findings that Davey violated specific norms in statutes or rules defining crimes, protecting clients, or guarding the justice system; and required specific allegations and findings of a corrupting carryover in fact to Davey's judicial career.*

Justice Ervin in Turner mentioned the normative canons that might be employed, and he at least exhorted the Commission and Court for prudential restraint in inquisitions years after the conduct; but the Justice did not mention the ***systemic*** dangers - dangers to the Commission's own sound judgment, as well as to "the privileges and independence of free men" - in inquisitions

unchecked by the passage of time and change of circumstance, whereby Mr. Davey has been Judge Davey these nine years.

Chief among the systemic dangers to the Commission's own prudence, the sound judgment on which Justice Ervin relied for self-restraint, is that Article V, Section 12 ***gives the Commission no remedial power except to recommend reprimand or removal; and a corrective reprimand is useless nine years later when the allegedly miscreant lawyer has been for those nine years, by all reports, a fine judge.***

Members of this Court have remarked ruefully upon the paucity of these remedies, ***reprimand*** or ***removal.*** In Speiser [13] Justice Ehrlich joined by Justice Shaw remarked upon that hard choice. In Berkowitz Justice McDonald did so. [14]

Hard as that choice may be when only the gravity of a judge's misconduct is at issue, and nine-year staleness is no factor - hard as that choice may be, it is as nothing to the diabolical pressure the Commission exerted against its own sound judgment when it took up this case. For from that moment, ***reprimanding Judge Davey for conduct aged nine years from a former life, not affecting his judicial service, was never a real option for this Commission.*** That is to say, it was inevitable

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[13] "The charges made against the judge are far too grave for a simple reprimand to suffice, but by the same token I am loathe to vote to remove him from office on the basis of the stipulated facts." 445 So.2d at 345.

[14] "In my judgment, Berkowitz should be punished by something greater than a public reprimand, but less than removal, if that option were available." Inquiry Concerning a Judge, re Irwin A. BERKOWITZ, 522 So.2d 843, 845 (Fla. 1988) (dissenting op.).

that a finding of guilt would entail a recommendation of removal. A reprimand would make not only the nine-year old offense but the Commission itself appear trivial.

Therefore the Commission was at pains to find an offense commensurate with removal, the only recommendation it could conceivably make.

There is no other explanation for this Commission of worthy judges, lawyers and other citizens, ordinarily men and women of repose, reaching out to declare, indefensibly whatever the standard of proof, that in December 1984 Kevin Davey in handling the Breyer draft must have attempted to steal the firm's money because, after all, (1) the draft was payable not to Davey but to the firm, which (2) accounts for the bank calling Dexter Douglass "regarding receipt of the draft." Findings ¶ 24 p. 18.

In fact, the draft was payable to Davey, he reported to Cooper having received it, and he took it to the bank for deposit to and collection within the firm's account, not to get the cash and run as the Commission so recklessly assumes.

The pressures that stale inquisitions bring to bear on the Commission itself, then, require measures to protect the Commission process from that systemic danger.

From this Court's decisions in the cases against Judges Sturgis, Berkowitz and Meyerson [15] the Court should derive the

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[15] In re Inquiry Concerning a Judge, re: Wallace E. STURGIS, Jr., 529 So.2d 281 (Fla. 1988); In re Inquiry Concerning a Judge - re Murray MEYERSON, 581 So.2d 581 (Fla. 1991); Inquiry Concerning a Judge, re Irwin A. BERKOWITZ, 522 So.2d 843 (Fla. 1988).

pleading standard that in order to reach back into a judge's prior life the Commission must (1) specify the normative texts, be they statutes or ethical rules for lawyers, violated by the judge's prior non-judicial conduct; and (2) must charge and make factual findings of a carryover tainting into the judicial function, to which Justice Ervin referred.

Judge Berkowitz was charged with pre-judicial "election law improprieties," misusing his clients' trust accounts, filing inaccurate tax returns, and "practicing law while a judge." Judge Sturgis was charged and found guilty of similar misconduct, spanning his non-judicial and judicial service. Judge Meyerson's case was similar. In each case the charges specified the canonical text, be it statute or Rule of Professional Responsibility, that the pre-judicial conduct violated. In each case the carry-over effect was specified in the charges and in the findings.

In Judge Davey's case, the Notice of Formal Proceedings in omitting reference to the date or year of the conduct complained of actually obscured the staleness of this nine-year delayed inquisition into Judge Davey's former life. That should be regarded as fatal to the inquiry.

Or if not, the Notice should be judged by the standards that would have been applicable had its staleness appeared. What law or rule did Mr. Davey offend? How did that misconduct carry over, in fact, into Davey's nine-year judicial career?

The proceedings should be entirely dismissed for want of a proper pleading of the charges, and for want of corresponding evidence and findings by the Commission, in the same detail.

II. The Commission violated elemental standards of Due Process by substituting its own disbelief of Judge Davey's denial of the charges for clear and convincing affirmative proof of those charges, and by convicting Davey on a lying charge not formally made.

As we have said, the Commission's findings with respect to the December 21, 1984 handling of the Breyer draft, attributing evil motive where there was none, are without any competent support in the record, let alone by clear and convincing evidence.

The real offense of which Judge Davey was convicted, and the only offense which the Commission could possibly find was committed during his judicial tenure, or had a tainting effect on his judicial service, was that of lying to the Commission.

It is most significant that the case decision cited by the Commission, Conclusions p. 21, as endorsing its recommended sanction upon a judge for untruthfulness to the Commission is In re Inquiry Concerning a Judge, Richard E. Leon, 440 So.2d 1267, 1260 (Fla. 1983). That was a case in which the charge of lying under oath was formally noticed and tried as a substantive offense which, of course, it is.

Why was no such charge proferred against Judge Davey based on his civil trial testimony, or his interviews, as in Leon, with an investigating Commissioner? Judge Davey might then

at least have known that perjury on his part, or ***perceived perjury***, was the real matter in issue.

The absence of clear and convincing evidence as to Judge Davey's guilt on these two stale charges, and as to the second particularly, requires dismissal of the proceedings. And if the Court were doubtful about this, then dismissal is required for the future prophylactic effect upon Commission inquisitions. For the Commission cannot be allowed to mount up lying charges against judges as a means of filling a want of clear and convincing evidence. As the First DCA held in somewhat similar circumstances, Bowling v. Department of Insurance, 394 So.2d 165, 175 (Fla. 1st DCA 1981) (emph. added):

> Were there substantial evidence showing the asserted fact which Bowling's testimony contradicted, the rejection of Bowling's testimony as "not believable" would leave the substantial evidence uncontradicted. But, as we have held, that substantial evidence is missing. A witness who is found to be untruthful gives the trier of facts an additional reason to believe substantial evidence to the contrary, ***but in our heritage the accused's unbelievable denial of an essential element of the accusation does not prove the accusation.***

This principle, like the principle calling for prior notice of the charges on which one may be sanctioned if convicted, is one of Due Process of Law.

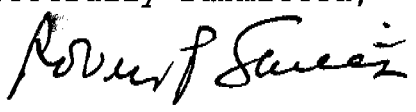
Recently in the federal criminal justice context the Supreme Court resolved the Due Process issues raised by the Court of Appeals for the Fourth Circuit in the matter of "enhancing" - adding years to - a convicted defendant's term of sentence as fixed by the Federal Sentencing Guidelines for the offense, on

themselves asked, and a potential resentment of any answers they might deem unsatisfactory. Then these same Commissioners are called on to judge the truth of the formal charges. When their disbelief of the judge's testimony on stale substantive charges leads the Commission not only to overlook a want of clear and convincing evidence as to a formal charge, but also to "enhance" their sanction against the judge ***by another charge and an elevated sanction for lying, to-wit a public denunciation and removal from office***, then, *amicus* respectfully suggests, the Commission is all too apt to become, in Justice Ervin's words, a threat to "the privileges and independence of free men."

Conclusion.

The Commission's report and recommendation should be disapproved or dismissed.

Respectfully submitted,



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Certificate of Service

I CERTIFY that a copy hereof was furnished this February 14, 1994, to Richard C. McFarlain, Esq., Counsel to Respondent, McFarlain, Wiley, Cassedy & Jones, P.A., 215 South Monroe Street, Suite 600, Tallahassee, Florida 32301, and to Ford L. Thompson, Esq., General Counsel, Florida Judicial Qualifications Commission, Room 102, The Historic Capitol, Tallahassee, Florida 32399-6000, and to Charles P. Pillans, III, Esq., The Bedell Building, 123 East Adams Street, Jacksonville, Florida 32202.

Karen H. Peterson
Attorney

APPENDIX

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A

JUDGE, NO. 93-62

_____/

NOTICE OF FORMAL PROCEEDINGS

TO: The Honorable P. Kevin Davey, Circuit Judge,
Second Judicial Circuit, Leon County Courthouse,
301 South Monroe Street, Tallahassee, Florida 32301

THIS IS TO NOTIFY YOU, in the name of The Florida Judicial Qualifications Commission, that the Commission, by a vote of at least seven members thereof at its meeting held in Orlando, Florida on July 12, 1993, has determined, pursuant to Rule 2(b)(2) and Rule 7 of the Florida Judicial Qualifications Commission Rules, that probable cause exists and formal proceedings should be instituted against you.

Formal proceedings are hereby instituted to inquire into the charges described as follows:

1. At the time you were in the process of terminating your relationship with Douglass, Cooper, Coppins & Powell, P.A., f/k/a Douglass, Davey, Cooper & Coppins, P.A. ("the Firm"), you misrepresented to the Firm that the case of Emma Bryant, a personal injury case involving a motor vehicle

accident in which you were representing the plaintiff Emma Bryant, was not a good case and that the client had agreed that she would not pursue the case and you were going to close the file when, in fact, you actively pursued the case, settled the case for $24,000, caused the settlement draft to be sent to your home and, without the knowledge of the Firm, negotiated the draft in your personal account and failed to inform the Firm of the settlement of the case and the negotiation of the draft.

2. At the time you were in the process of terminating your relationship with the Firm, you were representing Carol Breyer in a personal injury case arising out of a motor vehicle accident, but the case did not appear on the list of the Firm's cases being handled by you and you failed to mention the case or in any manner bring the existence of the case to the attention of the Firm in meetings at which the list of the Firm's cases being handled by you were being reviewed, and, after admitting having lied about the handling of the Emma Bryant case, you untruthfully answered, "No, sir. There are not" when asked if there were any other contingency fee cases handled by you of which the Firm should be apprised. You also removed from the Carol Breyer file information pertinent to the settlement of the uninsured motorist claim and forged your secretary's initials on the closed file checklist to make it appear as

if the file had been closed. You also received and attempted to negotiate an insurance company draft in the amount of $127,500 which had been paid in full settlement of the uninsured motorist claim of Carol Breyer.

The conduct described above, if true, is in violation of the following provisions of the Florida Code of Judicial Conduct:

> Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary.
>
> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.
>
> Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.
>
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Your conduct as described above, if true, could impair the confidence of the citizens of this State in the integrity of the judicial system and could constitute a violation of the aforementioned Canons of the Code of Judicial Conduct.

WHEREFORE, your conduct as set forth in the above allegations could constitute conduct unbecoming a member of the judiciary, could demonstrate your present unfitness to hold the office of judge and could warrant discipline.

Dated this 2nd day of September, 1993.

Charles P. Pillans, III
BEDELL, DITTMAR, DeVAULT & PILLANS P.A.
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202
(904) 353-0211

Attorney for Florida Judicial
Qualifications Commission

Ford L. Thompson, General Counsel
Florida Judicial Qualifications
Commission
Room 102 The Historic Capitol
Tallahassee, FL 32399-6000
(904) 488-1581

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to Richard C. McFarlain, Esq., Counsel to the Respondent, 600 First Florida Bank Bldg., 215 S. Monroe Street, Tallahassee, FL 32301, by hand-delivery this 2nd day of September, 1993.

Ford L. Thompson