FILED

SUPREME COURT OF KENTUCKY
FILE NUMBER: 2011-SC-[illegible]

RUSSELL D. ALRED, CIRCUIT
JUDGE OF THE 26TH JUDICIAL CIRCUIT APPELLANT

VS.

COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION APPELLEE

APPELLANT'S BRIEF

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this [illegible] day of November, 2011, served by U.S. mail, postage prepaid, to Hon. Scott Majors, Executive Secretary, Judicial Conduct Commission, P.O. Box 4266, Frankfort, KY 40604-4266; George Rabe, Esq., Counsel for Judicial Conduct Commission, 167 West Main Street, Suite 1004, Lexington, KY 40507; Jeff Mando, Esq., Counsel for Judicial Conduct Commission, P.O. Box 861, Covington, KY 41012-0861; and Louis Kelly, Esq., Counsel for Judicial Conduct Commission, P.O. Box 861, Covington, KY 41012-0861.

MARCUS S. CAREY

INTRODUCTION

This is the prosecution of an appeal and request for judicial review from the FINAL ORDER of the Judicial Conduct Commission entered September 16, 2011 which order removed Honorable Russell D. Alred from the office of Circuit Judge for the 26th Judicial Circuit. SCR 4.290.

STATEMENT CONCERING ORAL ARGUMENT

Counsel for the Appellant requests oral argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This matter began in 2010. During that year the Judicial Conduct Commission (hereinafter JCC) sent its regularly employed investigator, Gene Weaver, to Harlan County, Kentucky to begin the process of interviewing witnesses in connection with an investigation into the conduct of Judge Alred. Despite repeated requests and the provisions of SCR 4.170, the source of the complaints under investigation have not been provided to the Appellant.

The JCC received and reviewed numerous statements from various witnesses as well as received reports from the investigator. During the preliminary investigation phase at least four informal conferences with Judge Alred were held.

During at least one of those conferences the JCC expressed the opinion that Judge Alred was guilty of misconduct. It is important to note that they recommended that he accept a 90 day suspension and admit wrongdoing. When Judge Alred declined to admit the wrongdoing they had suggested, 20 formal charges were filed against him. The JCC in its final order dismissed 8 of those charges.

Judge Alred moved to disqualify the chairman and members of the JCC. He moved to dismiss many of the counts against him. He raised due process arguments in a federal court action seeking an injunction preventing the JCC from proceeding.

Judge Alred defended himself at the formal proceedings held on August 29, 30 and 31st of 2011. The JCC ordered him removed from the elected office. Notice of appeal was filed.

Due to the voluminous nature of this case, over 700 pages of hearing transcript, hundreds of pages of file documents, three days of videotaped hearing as well as videotaped testimony played at that hearing, and the number of significant due process issues presented by this case, Judge Alred requested, through counsel, an extension of time for filing his brief.

Because there is no tolling provision during the time such a motion is pending, this brief is being filed as protective measure. It continues to be the Appellant's position that a full and complete presentation of the issues and authority necessary in this matter cannot be accomplished under the time requirements set by rule and that an extension of time is warranted, or at the very least, the opportunity for supplemental briefing should be provided.

ARGUMENT I. THE APPELLANT WAS DENIED DUE PROCESS; SCR 4.020 AND 4.300 ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED.

The will of the people of Harlan County was expressed when they elected Russell D. Alred to the circuit bench. Notwithstanding that due process is required in all matters such as this, it is respectfully submitted that there must be an even greater sensitivity to this concern when the outcome overrides the expressed will of the people in a certified election. For this reason, each and every step of the process must be examined to make certain that these rights were steadfastly protected. As will be seen, they were not.

A. SCR 4.020(1)(b)(i) Is Unconstitutional On Its Face And As Applied On Grounds of Vagueness and Overbreatdth.

SCR 4.020 vests the JCC with the exclusive authority to remove an elected judicial official from office upon a finding that he/she is "guilty" of any one or more separate grounds including:

(b) …

(i) Misconduct in office

The JCC found that Judge Alred was guilty of violating SCR 4.020(1)(b) in that his actions constituted "misconduct" in each and every one of its findings and final order, when ruling upon Counts II, III, V, VI, VII, IX, XII, XIII and XVII as set forth in the formal charges issued by the JCC. These universal findings cannot stand for reason that standards against which Judge Alred's conduct was tested are impermissibly vague;

Neither the Rules Of the Supreme Court nor more specifically the Kentucky Code Of Judicial Conduct provide any definition for the term "misconduct" as used in the context of judicial conduct.

This is quite to the contrary of and a vast departure from the Rules of Professional Conduct where in SCR 3.130(8.4) lawyer misconduct is specifically defined. The Judicial Conduct rules contain no definition whatsoever.

Though the rules of statutory construction do not apply to the rules of court, nevertheless because the rules provide no definition of what constitutes "misconduct" and the court has not spoken on the matter, there exists no ascertainable standard against which any judge, subject to discipline by the JCC, can determine where the line is which must not be crossed.

As Justice Palmore noted at a time when the "Code of Professional Conduct" was still in use in Kentucky:

> If the canons of ethics adopted for the legal profession were tested under the 'void for vagueness' doctrine which has spelled the doom of various breach of peace and disorderly conduct laws throughout the country it is doubtful that they would survive this case. What is 'fair and honorable,' 'a respectful attitude,' 'candor and fairness,' or 'chicane' must depend very largely on the subjective point of view of the person or persons making a judgment after the fact. Obviously we do not all have the same sense of propriety. It is interesting to note, for example, the chairman of the trial committee's comment that 'you all live in a legal jungle down here.' It may well be that the standard of decorum usually prevailing in the sedate precincts of chancery should also be observed by the jungle-fighters in the pit of police and criminal courts, but it would be somewhat less than realistic to assume that the advocate who practices exclusively in one of these two worlds will have the same conception of what is expected of him as the lawyer who confines his practice to the other. We do not mean to suggest that there should be two different sets of rules. On the contrary, there can be only one. But when the rules are loosely couched in terms of high principle, as are the canons, there is room for differences of opinion, hence the distinct possibility that they do not provide sufficiently explicit 'no trespassing' signs for those who may approach the invisible line of proscription. For this reason, if for no other, simple justice dictates that in arriving at a final determination all doubts be resolved in favor of the respondent. *Kentucky State Bar Association v. Taylor,* Ky., 482 S.W. 2d 574 (1972).

Removal from office is the most extreme penalty in the JCC arsenal and impacts not only the judge himself but an entire community of citizens whose will is nullified by the JCC's actions.

Without clear guidance from the rules or the decisional law of this court, the JCC is left free to decide on an ad hoc basis what is and what is not "misconduct". Furthermore, in the order appealed from herein, the JCC's findings of "misconduct" were merely conclusory, they having expressed an opinion in summary fashion without first defining the term themselves. As such it adds an onerous burden to the Appellant in prosecuting this appeal to advocate against those findings since no definition was stated

Spargo v. New York State Comm'n On Judicial Conduct, 244 F. Supp. 2d 72 (ND NY 2003), rev'd on other grounds.

How would anyone know what conduct any particularly constituted commission would deem a failure to uphold the integrity and independence of the judiciary?

> This broad directive would tend to lead judges to severely restrict their conduct, lest they be accused of failing to "uphold the integrity and independence of the judiciary. *Id.*

As To Canon IIA:

Canon II A requires a judge to "respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

> A person of ordinary intelligence would undoubtedly know that this section forbids unlawful conduct. See *Grayned*, 408 U.S. at 108, 92 S. Ct. at 2298-99. However, a person of ordinary intelligence could not know what conduct does or does not constitute acting "in a manner that promotes public confidence in the integrity and impartiality of the judiciary." See id. From reading this phrase there simply is no way to determine permissible and impermissible conduct, short of the extreme. *Id.*

Again, each and every charge of misconduct against Judge Alred cites these two provisions (Canons I and 2A) which again demonstrates that the JCC's enforcement of these provisions must be arbitrary and subjective, for lack of any specific, objective standards to apply.

ARGMENT II: THE APPELLANT WAS DENIED HIS RIGHTS PURSUANT TO US CONSTITUTION AMENDMENT 6.

ISSUE 1: THE HEARING PROCESS DENIED THE APPELLANT HIS RIGHTS UNDER THE "CONFRONTATION CLAUSE".

The exclusive authority for the removal of elected judges in Kentucky is vested in the Judicial Conduct Commission. Rules of Procedure for the JCC are established by the Kentucky Supreme Court. Kentucky Constitution. Section 121.

Unlike the rules regarding lawyer discipline, the JCC is vested with overlapping authority. It may initiate charges, receive charges, investigate charges, resolve charges by informal resolution, bring formal charges, hear evidence and issue orders of removal. SCR 4.020, 4.025, 4.170, 4.220, 4.260.

Its orders are effective ten days after service on the judge, unless he appeals from that order within that time. Its orders are final in the absence of an appeal. They do not merely make recommendations.

In this matter the JCC conducted an investigation over many months. Its members received and reviewed a number of statements obtained by an investigator for the JCC. In addition, members had communications with the investigator regarding his investigation, had communications with the attorneys for the JCC (who later presented the case at hearing) and discussed the matter among themselves outside the presence of Judge Alred all prior to issuing formal charges.

This large body of evidence, all hearsay, was known to and considered by the JCC for a number of purposes. First, they reviewed the ex parte communications, unsworn statements and documentary evidence as part of their preparation for bringing formal charges unfiltered by the rules of evidence which are written to insure fairness and that proceedings are justly determined. KRE 102.

Second, they reviewed this large body of evidence, outside the presence of Judge Alred, in order to come to a conclusion with regard to guilt or innocence as reflected in the four, informal resolution meetings in September, October, November and December of 2010 with Judge Alred at which time they notified him that they had concluded that

grounds existed for the imposition of sanctions and attempted to persuade Judge Alred to admit guilt in exchange for a temporary suspension.

When Judge Alred denied his guilt, the JCC then proceeded to formally charge him with 20 counts and proposed to conduct a hearing before themselves to determine his guilt or innocence, upon which they had already expressed their opinions.

This procedure, as established by rule of the Kentucky Supreme Court vesting such broad power in the JCC creates an environment for abuse far beyond the mere exercise of dual roles for the JCC in both investigating and adjudicating guilt. This is in part due to the fact that the exclusive power over judicial discipline granted to the JCC by the Kentucky Constitution, it is not merely a "recommending"authority. Its orders are final unless appealed by the judge. The JCC possesses the exclusive power to remove elected officials from their official office.

Unlike the procedures for discipline of Kentucky's attorneys, where charges brought after consideration by an inquiry tribunal are assigned to an impartial trial commissioner to hear contested matters, then presented to the KBA Board of Governors and ultimately sent to the Kentucky Supreme Court, the JCC is charged by Supreme Court rule with all of those duties.

However, during its investigative work it receives substantial ex parte communications from counsel who is first advising the JCC but who then also acts to prosecute the charges. Through this process the JCC receives substantial "hearsay" statements from investigators and others and receives, reviews and formulates opinions upon unsworn testimony and the conclusions of others engaged in the investigative process.

These combinations of factors serve to deprive those who are then formally charged with the right to confrontation and cross examination of the evidence already received prior to the JCC's determination of guilt leading to formal charges. In addition, after those formal charges are filed, the evidence consumed by the JCC during the investigative phase cannot be "unlearned".

This is even more problematic when one takes into consideration that much of this evidence may contain inadmissible opinion testimony, hearsay upon hearsay or other improper items which would not and in this case, were not introduced at the hearing itself. The resulting harm either forces the judge under charge to ignore the impact this hearsay and ex parte evidence may have had on the tribunal, or to force him to seek the compulsory attendance of witnesses who gave unsworn statements for the sole purpose of cross examining this otherwise inadmissible evidence (received and reviewed before the formal hearing) and thereby risk waiving any objection to it and his right to appeal from the consideration of that evidence not withstanding its otherwise objectionable nature in the first place.

The JCC is held to the same standards as judges in a judicial proceeding. SCR 4.090. Where judges engage in ex parte communications with one side in the litigation, receive and review evidence outside of the hearing process consisting primarily of hearsay evidence, consult with and are advised by investigators for the prosecution and formulate and express opinions, prior to trial, regarding guilt of the accused, the reality of these influences so taint the appearance of impartiality of the proceedings that the requirements of a fair and unbiased tribunal explicitly required by constitutionally mandated due process is effectively removed, and recusal mandatory.

The evolution of the modern view of bias and self interest in this very context has been thoroughly summarized by the U.S. Supreme Court in *Capperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009). There the Supreme Court discussed the destruction of a fair and impartial hearing, not only when actual bias was shown, but when the objective standards for due process coupled with human experience required that recusal occur in order to remove the taint even where there was no actual interest or bias that could be shown.

> The second instance requiring recusal that was not discussed at common law emerged in the criminal contempt context, where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding. This Court characterized that first proceeding (perhaps pejoratively) as a "'one-man grand jury.' " *Murchison*, 349 U.S., at133, 75 S.Ct. 623.
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> In that first proceeding, and as provided by state law, a judge examined witnesses to determine whether criminal charges should be brought. The judge called the two petitioners before him. One petitioner answered questions, but the judge found him untruthful and charged him with perjury. The second declined to answer on the ground that he did not have counsel with him, as state law seemed to permit. The judge charged him with contempt. The judge proceeded to try and convict both petitioners. *Id.*, at 134-135, 75 S.Ct. 623.
>
> This Court set aside the convictions on grounds that the judge had a conflict of interest at the trial stage because of his earlier participation followed by his decision to charge them. The Due Process Clause required disqualification. The Court recited the general rule that "no man can be a judge in his own case," adding that "no man is permitted to try cases where he has an interest in the outcome." *Id.*, at 136, 75 S.Ct. 623.
>
> It noted that the disqualifying criteria "cannot be defined with precision. Circumstances and relationships must be considered." *Ibid.* These circumstances and the prior relationship required recusal: "Having been a part of [the one-man grand jury] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.*, at 137, 75 S.Ct. 623. That is because "[a]s a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session." *Id.*, at 138, 75 S.Ct. 623. *Capperton, supra*.

In evaluating the facts of the case before them, the Supreme Court was confronted with the fact that the judge in the matter had determined that recusal was not necessary because he found no "actual bias" in himself. However, as the court noted, bias which requires recusal is bias that denies due process and in that context it does not require a finding of "actual bias".

> Justice Benjamin was careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order. In four separate opinions issued during the course of the appeal, he explained why no actual bias had been established. He found no basis for recusal because Caperton failed to provide "objective evidence" or "objective information,"but merely "subjective belief" of bias. --W.Va., at ----, ---- - ----, ---- S.E.2d, at ----, ---- - ----, 2008 WL 918444; App. 336a, 337a-338a, 444a-445a. Nor could anyone "point to any actual conduct or activity on [his] part which could be termed 'improper.' " ---- W.Va., at ---- - ----, ---- S.E.2d, at ---- - ----, 2008 WL 918444; App.655a-656a. In other words, based on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias. The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. See *Tumey*, 273 U.S., at 532, 47 S.Ct. 437; *Mayberry*, 400 U.S., at 465-466, 91 S.Ct. 499; *Lavoie*, 475 U. S., at 825, 106 S.Ct. 1580. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S., at 47, 95 S.Ct.1456. *Id.*

As the Capperton court recognized, where the tribunal is serving in a dual capacity, not just in the initiation of charges, but in receiving evidence, considering the evidence sufficient to warrant charges, has previously determined that the accused is guilty and suggested a penalty for conduct which the tribunal has already determined to be illegal, bias and interest must be gauged by an objective standard, not by the inability of the judges to recognize it in themselves or of the accused to offer direct evidence of "actual bias or interest".

Applying the Capperton discussion to the case at bar, applying a realistic appraisal of psychological tendencies and human weakness, the process employed in this matter "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented". *Id.*

The procedure outlined in the Rules of the Kentucky Supreme Court, on their face and as applied, fail to satisfy the objective standards of due process required for such matters. As such, the order of the JCC must be overruled.

ISSUE 2: IT WAS ERROR FOR THE JCC TO NOT RECUSE AFTER TWO REQUESTS.

On separate occasions during the proceedings after formal charges were filed, Judge Alred requested recusal of the Chairman and the JCC as a whole. His reasons are fully explained in the motions and supporting documentation.

It was error for Commission Chairman Wolnitzek and the JCC not to recuse. They in fact had received substantial pre-hearing information by way of hearsay evidence and reports from investigators much of which came to them through ex parte communications. This alone is grounds for recusal for presumed, not actual, bias *Ice v. Commonwealth, Ky., 667 S.W. 2d 671 (1984).*

They expressed their belief that Judge Alred was in violation of the Rules of the Supreme Court and the Canons of Judicial Conduct when acting as both the "grand jury" and as the tribunal. See, *Caperton v. Massey Coal*, *supra*.

Judge Alred brought to the JCC's attention a number of facts which established a close relationship between Chairman Wolnitzek and the JCC's investigator, Gene Weaver, which need not be set out again here. But, suffice it to say, that relationship spans 30 years, includes the involvement of each in a number of personal relationships for the benefit of the other and, despite Chairman Wolnitzek's assertion that it was the JCC, not he, who hired Weaver to be the Commission's investigator, the closeness of their relationship and the fact that Weaver was the driving force behind the investigation and ended up being a witness at the hearing gives the appearance of a lack of impartiality.

Furthermore, though George Rabe represented the JCC as private counsel in at least two federal court matters referenced in the motions to disqualify, and though that representation of them was in their "official capacity", nevertheless the rules provide that the JCC's decision to use Mr. Rabe for the presentation of evidence at the hearing was purely discretionary. SCR 4.110.

Mr. Rabe was contracted as private counsel for that purpose. He was also contracted as private counsel in the two federal court matters. Again, while no direct evidence of self interest is being asserted on this appeal the integrity of the process and the appearance of impartiality is negatively affected by this relationship with the JCC members.

Several advisory opinions of the Judicial Ethics Committee have found an appearance of impropriety when addressing similar situations where a judge or trial

commissioner (or an employee of) has a close relationship with either an attorney who practices before the judge, or an employee of that attorney's office. See e.g., Judicial Ethics Opinion (JE) - 13 (stating that a judge may not hire a part-time secretary who also works for a former law partner because it may appear to others that the former law partner may be able "to exert a subtle influence on the judge" by sharing a secretary); JE - 47 (stating that a trial commissioner must disqualify from all matters in which his former law partner, who was also the County Attorney, appeared); JE - 101 (stating that a judge whose secretary is married to an attorney appearing before the judge must recuse himself because of the appearance of impropriety). Other advisory opinions have stated that a judge could sign arrest warrants prepared by his daughter in her capacity as county attorney if there was no other judge on hand to issue the warrant (JE - 34); and that a judge must disqualify himself only in those cases in which his son, as an assistant commonwealth attorney, actually participates (JE – 8).

However, this court has spoken to this issue on only a few instances.

> In *O'Hara v. Kentucky Bar Association*, Ky., 535 S.W.2d 83 (1975), we affirmed an ethics opinion adopted by the Kentucky Bar Association that stated a trial commissioner could not be a member of the same law firm as the commonwealth attorney. In *Sanderson v. Ethics Committee of the Kentucky Judiciary*, Ky., 804 S.W.2d 10 (1991), we upheld the Committee's opinion that found a violation of Canon 2 of the Code of Judicial Conduct when an assistant county attorney also held the position of domestic relations commissioner "because of the potential for public distrust...."Today's opinion takes a harsher stance against the propriety of judges and trial commissioners having close personal relationships with others who may be in a position to influence their decision-making. We reiterate that there need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns. *Commonwealth v. Brandenburg*, Ky., 114 S.W. 3d 830 (2003).

Judges throughout the Commonwealth and at every court level are entitled not only to a fair and impartial hearing in fact, but one in appearance as well.

> [T]he right to an impartial tribunal is distinctly judicial in concept and function and is derived from the fundamental right of every criminal defendant to receive a fair trial. See *Rose v. Clark*, 478 U.S. 570, 577, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986). In allegiance to this concept of always endeavoring to ensure completely fair and unbiased determinations of guilt or innocence, judicial officers are held to very stringent guidelines and rules of conduct in order to ensure the highest possible degree of impartiality **in both fact and appearance**. See, e.g., *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942, 946 (1955)); see also Debra Lyn Basset, Judicial Disqualification in the Federal Appellate Courts, 87 Iowa L. Rev. 1213 (2002). *Hilltop Basic Resouces Inc., v. County of Boone, Ky., 108 S.W. 3d 464 (2005)* (emphasis added)

For these reasons the Commission and Chairman Wolnitzek should have recused and their refusal was error. SCR 4.090.

ARGUMENT III: APPELLANT'S RIGHTS UNDER 4.170 WERE VIOLATED.

After a preliminary investigation is completed and before formal proceedings are initiated the JCC is required to afford the judge under investigation an opportunity to examine all factual information, including the name of the complainant if relevant. SCR 4.170

As the record clearly indicates, Judge Alred requested the name of the complainant which request was simply denied by order, without explanation of whether there was or was not a complainant, or the reasons why the names were not disclosed. This effectively deprived the Judge of factual information relevant to claims of bias, recent fabrication and lack of personal knowledge. See, Docket Entry 34 'Motion to Compel' and Docket Entry 48 "Order'.

Furthermore, as the record also clearly shows, the JCC's investigator obtained significant exculpatory evidence before formal proceedings were initiated and not only failed to transcribe that information, but failed to report it to the JCC and failed to disclose it to the Judge. (Transcript of hearing pg. 540; 508-510.)

A fair and impartial hearing requires compliance with the rules. That's why they are there in the first place.

ARGUMENT IV: THE FINDINGS OF THE COMMISSION ARE CLEARLY ERRONEOUS AND RESULT FROM THE MISAPPLICATION OF THE LAW.

The standard for burden of proof at the commission level requires that the allegations of the formal charges be proven by "clear and convincing evidence." *Wilson v. Judicial Retirement & Removal*, Com., Ky., 673 S.W.2d 426 (1984).

The standard for review by this court is whether the JCC was clearly erroneous in its findings of fact, misconstrued the law or treated the Judge "unreasonably". *Gormley v. Judicial Conduct Comm'n.*, Ky., 332 S.W.3d 717 (2010). As will be shown, one or more of these errors can be found in each of the findings and conclusions for each count.

AS TO COUNT II:

The JCC's findings with regard to Canon I, Canon 2A and the "misconduct" issue have been addressed above.

In addition the JCC found, under Count II that Judge Alred violated Canon 2D in that he allowed "family, social, political or other relationships to impair his objectivity." Yet the factual findings referenced under Count II do not relate to Judge Alred's conduct in the discharge of his official duties but rather state as follows:

On January 19, 2010 the Respondent appeared at a meeting of the Harlan County Fiscal Court....and asserted veto power over use of donated funds."

First, neither the evidence nor the findings establish any self dealing, personal gain or evidence of a lack of objectivity due to a family, social, political or other relationship.

Judge Alred had presided over a negotiated plea involving two indicted defendants charged with drug trafficking. Part of that negotiated plea included a push by the Commonwealth Attorney and the County Sheriff to allow the defendants to be sentenced to misdemeanors, upon condition that they give up their rights to $1 million in cash bond money. Both the Commonwealth Attorney's office and the Sheriff's office stood to receive a substantial portion of this money from this negotiated plea.

Judge Alred was also informed that the Sheriff wanted an even larger portion of the abandoned bond money and had in fact tried to get a fiscal court member to accept the money pursuant to the court's order under direction that it be used for the benefit of children in a drug county, but then to divert it to the Sheriff in violation of that order. Judge Alred was present at the fiscal court meeting to explain, when asked and on the record, the nature and scope of the order which mentioned that fiscal court by name.

The JCC found that Judge Alred lent the prestige of his office to advance the private interests of "the judge". Not one scintilla of evidence appears anywhere in the record in support of this salacious finding. It most definitely does not appear to have been proven by "clear and convincing evidence."

The JCC also found that the Judge lent the prestige of his office to advance the private interests of "others". Judge Alred entered an order specifically directing that

bond money abandoned under an agreement negotiated by the Commonwealth's Attorney went to a public entity rather than a private interest. Not one shred of evidence supports the finding otherwise.

The JCC found that Judge Alred's appearance at the fiscal court meeting violated Canon 4 C(1) in that he appeared at a public meeting and concluded that he was not permitted to do so. However, as the JCC recognizes, such appearances are proper where they involve matters concerning the "administration of justice". Judge Alred's statements made at that meeting were for the sole and exclusive purpose of answering questions regarding the meaning of his order in so far as it specified money would be transferred to the fiscal court and to the extent he was attempting to prevent the Sheriff and Commonwealth Attorney from trying to circumvent the public purpose to which the money was supposed to be applied, in order to get some of it for themselves, to explain to the court that he retained supervisory power over that money to see that those funds were not misapplied. Explaining his order was in pursuit of the administration of justice.

AS TO COUNT III:

The JCC found that Judge Alred amended an order of January 11, 2010 by order of March 10, 2010 by "removing language". Nothing could be further from the truth. No language was removed and the order of January 11 is still of record.

On March 10, 2010, Judge Alred modified the order after the JCC brought to his attention that he had chosen his words poorly in the prior order. By modification Judge Alred clarified the words of the earlier order but once again left himself open to misinterpretation. His order clarifying the previous order stated that the words contained therein were "inadvertently put into this order by counsel for the defendants and the

Commonwealth's Attorney." The next finding by the JCC is so bizarre and contradictory with their own finding that one might think there was a real bias against Judge Alred.

The JCC, after identifying the above language as grounds for their finding of "misrepresentation" next find that the language was in fact in the motions of "separate counsel for each defendant and referred to by the Commonwealth's Attorney in open court" at the time the order was tendered to the judge for signature!

The JCC by its own finding confirmed that the courts statements were not misrepresentations at all. The language was in fact suggested by counsel and argued in open court.

There is no allegation that Judge Alred received any personal benefit here at all. He reluctantly approved the dismissal of two felonies upon a plea to misdemeanors negotiated by the Commonwealth's Attorney after which the Commonwealth's Attorney would receive a sizeable portion of $1 million in cash. Exercising supervisory powers over the terms of the plea the Judge entered the agreed upon which as drafted by counsel directed that the money go to the county fiscal court, rather than the Sheriff's political slush fund. Such is within his discretion and perfectly consistent with his duties. *Hoskins v. Maricle*, Ky., 150 S.W.3d 1 (2004).

And his choice of words in the amending order does not offend. "Inadvertance" refers to the choice of words, not the fact that the Judge signed the order prepared and presented by counsel. To suggest otherwise "jumps the shark".

If the JCC's finding in this count is premised upon an assertion that Judge Alred was in error by retaining jurisdiction over the distribution of the abandoned bond money

in order to prevent the misapplication of it, then his error of judgment in that regard cannot be the grounds for removal. SCR 4.020 (2)

> SCR 4.020(2) prevents a judge from being sanctioned for committing a good faith legal error. Something more than committing a good faith legal error is obviously required before a judicial officer may be properly disciplined. But Courts have sometimes struggled to define precisely what that "something more" must be and have used various formulas to attempt to explain what differentiates a good faith legal error from sanctionable misconduct. Perhaps what constitutes misconduct would be apparent to the members of this Court and the Commission. But we agree with the Maine Supreme Judicial Court's observation that "[w]hile it may always be possible for this or any court to determine on an 'I know it when I see it' basis whether judicial conduct violates [the Kentucky Code of Judicial Conduct], that approach is plainly unsatisfactory." *Gormley v. Judicial Conduct Comm'n*, Ky., 332 S.W.3d 717 (2010)

AS TO COUNT V:

The sum and substance of Count V rests upon a finding that Judge Alred, after having released a felony fraud defendant on bond, learned that she was in regular contact with school children on a daily basis by serving as a substitute teacher.

As a father of two children attending that school Judge Alred inquired of the principal regarding the school's policy for hiring persons with pending felonies. At the next hearing involving this defendant, after learning that the school had no policy against allowing those under indictment for felonies to serve as substitute teachers, Judge Alred, in open court, with the defendant represented by counsel, imposed an additional bond condition that the defendant not serve as a substitute teacher and that she undergo random drug testing.

Without citation to any authority the JCC concluded that Judge Alred's actions were "without legal basis". What does that mean? Did they mean to suggest that the

Judge did not at that time have discretion regarding bond conditions? If so, they severely misconstrue the law.

RCr 4.12 – 4.14 granted Judge Alred wide discretion with regard to imposition of non-financial conditions. Judges throughout the Commonwealth vary widely on the types of non-financial conditions they impose. The JCC's conclusion that they can substitute their discretion for that of the sitting judge in his own county is not only wrong on the law, but offensive to the sitting judiciary across the Commonwealth.

Courts are extended great discretion in the exercise of their bonding powers. *Abraham v. Commonwealth*, 565 S.W.2d 152, 158 (Ky.App.1997).

The good of the public is a legitimate consideration in setting conditions of release. See, *Braden v. Lady*, 276 S.W.2d 664, (1955). And certainly if Judge Alred was entitled to consider pre-trial detention for a felony charge, a less restrictive condition which included release but limited contact with children in the local schools cannot be said to be "without legal basis" (It is doubtful that the defendant could have done much substitute teaching from the county jail).

Drug tests, refraining from use of alcohol and drugs, limitations on travel, home incarceration, monitoring devices and other restrictions are daily imposed by judges across Kentucky. It would likely be very disturbing to the bench to learn that their election could be overturned and they could be removed from office upon such a vague and undefined conclusion such as the commission came to in its findings under this count, that the exercise of discretion could be labeled "without legal basis".

AS TO COUNT VI:

The JCC has pieced together a string of unrelated events in an obvious attempt to reach a conclusion which is pure fantasy.

They find, for example, that Judge Alred became "visibly upset" when confronted with an affidavit offered by a lawyer for one of the litigants in a civil proceeding in support of a motion to recuse which, as the maker of the affidavit testified, represented that Judge Alred had sought to obtain a parcel of property owned by the county "for himself." (Transcript, pg. 581).

While proper decorum is certainly to be encouraged, how should a judge react when a lawyer offers an affidavit in open court falsely accusing the judge of personal impropriety? If becoming "visibly upset" under such circumstances is grounds for removal from office, any number of judges would be on that bubble on a daily basis. How did judge Alred react when falsely accused of impropriety? He recused.

The JCC then goes on to note that on the same day Judge Alred was presented with an affidavit over the signature of the Judge-Executive (though never sworn, Transcript, pg. 561) he issued an order for a special grand jury to investigate an "ongoing drug investigation" involving the same Judge-Executive. However, what the JCC failed to note in their finding was that Judge Alred testified that the order for that special grand jury was entered upon request of the Commonwealth's Attorney who acknowledged on the record that he agreed with the call of a special grand jury.

It is also without dispute that the Sheriff's office had provided video evidence to Judge Alred which they represented demonstrated illegal drug dealing by the Judge-Executive. It is also without dispute that there was an ongoing investigation into the

matter which was in fact underway at the time the special grand jury order was entered. The JCC assigns improper motive to this order for a special grand jury because a "second cousin" of Judge Alred was also running for Judge-Executive.

What the JCC fails to appreciate is that Judge Alred's conduct was consistent with his duties and that, notwithstanding how things might "look", he executed his responsibilities without being swayed by public clamor or fear of criticism. Canon 3B(2).

The JCC improperly found that there was undisputed testimony that Judge Alred's "father and brother ...were actively supporting the second cousin" in a race against the Judge-Executive.

First of all, there was NO testimony of any witness that the father and brother were so engaged. An unsworn investigator's statement was read to a witness and he was asked if that was what he had said at the time. He was not asked to confirm the truth of that statement in the formal proceedings, and in fact appeared at the hearing to recant his statements which he testified were made out of anger and not factually supported. (Transcript, pgs. 581, 551) Moreover, the activities of Judge Alred's brother and father cannot form the basis for Judge Alred's removal from office.

Furthermore the finding that Judge Alred "failed to disqualify in a proceeding in which [his] impartiality might reasonably be questioned because of a personal bias or prejudice concerning a party in violation of Canon 3 E(1)(A)" is without any factual support whatsoever.

The JCC was urged to find Judge Alred guilty on this count because he initially refused to recuse when so requested on grounds that one litigant in a civil matter had supported Judge Alred's opponent several years earlier and had been involved in other

litigation in the past where Judge Alred represented an opposing party while still in private practice. Neither of these grounds requires recusal under Canon 3 E(1)(b-d). And the fact that a civil litigant may have supported Judge Alred's opponent some years earlier cannot be grounds for recusal when statistically this support could put that litigant in the category of potentially 49.9% of the people of the district. Judges are not required to disqualify upon such grounds. *Dean v. Bondurant*, Ky., 1935 S.W.3d 744 (2006).

Neither is former representation grounds for mandatory recusal. And yet, despite the commissions finding of guilt, Judge Alred did in fact disqualify himself when the lawyer presented him with an affidavit which falsely accused the judge of improper conduct. At that moment his impartiality, understandably, might be questioned and he acted in accordance with the Canon.

The JCC found that Judge Alred was not "faithful to the law" in violation of Canon 3 A yet failed in any way to identify which law and what conduct was unfaithful to it. Such broad conclusions are so vague as to stray into the impermissible territory of arbitrariness and capriciousness.

The JCC also found that Judge Allred failed to dispose of judicial matters fairly in violation of Canon 3 B(8). Yet the facts cited in this count make no reference to any failure to dispose of any legal matters.

All of the facts referred to in this section of the findings were disputed. Proof on these matters utterly fails to rise to the level of "clear and convincing evidence" sufficient to support the wild conclusions reached by the JCC, without citation to a single authority for their rulings except for the Canons themselves.

> [W]hen the rules are loosely couched in terms of high principle, as are the canons, there is room for differences of opinion, hence the distinct possibility that they do not provide sufficiently explicit 'no trespassing' signs for those who may approach the invisible line of proscription. For this reason, if for no other, simple justice dictates that in arriving at a final determination all doubts be resolved in favor of the respondent. *See, Kentucky State Bar Association v. Taylor, supra.*

It is clear that the JCC in reaching these conclusions treated the Judge "unreasonably." *Gormley v. Judicial Conduct Commission, supra.*

AS TO COUNT VII:

The JCC found that on a specific occasion Judge Alred was in the Sheriff's office and there examined evidence of drug dealing by the Judge-Executive when there was then "no request pending...for the issuance of an arrest warrant or a search warrant." This finding is contrary to the evidence.

Sheriff Marvin Lipford testified that in fact there may have been a request for a search warrant of Judge-Executive Grieshop's office pending "I honestly don't remember". (Transcript, pg. 359) He later confirmed that on the day he showed Judge Alred evidence regarding a controlled buy from Judge-Executive Grieshop that Judge Alred was in his office to sign an arrest warrant or a search warrant (Transcript, pg. 407) and that he advised Judge Alred that there was an investigation into a "big fish" and specifically named Judge Joe Grieshop. (Transcript, pg. 356)

The findings of the JCC to the contrary are clearly erroneous, certainly don't satisfy the requirement of "clear and convincing evidence" standard and cite to no specific law for their conclusion that Judge Alred was not "faithful to the law" in violation of Canon 3A and B (2).

The JCC clearly misconstrues the law as it relates to their finding that Judge Alred "initiated ex parte communications with regard to an impending proceeding in violation of Canon 3 B(7)". First, there is no "clear and convincing evidence" that Judge Alred "initiated" a communication with Sheriff Lipford or anyone else for that matter. Rather, the evidence is that the Sheriff initiated the conversation while Judge Alred who was in his office for the purpose of signing an arrest or search warrant.

Furthermore, the alleged "ex parte communication" was not with attorneys or parties as prohibited by the Canon cited by the JCC. The communication was with a sheriff in a setting consistent with the law. See, Canon 3 (7)(e). Judges routinely receive ex parte evidence from police, sheriffs, detectives and other law enforcement agents with regard to ongoing investigations under a variety of circumstances where probable cause is an issue.

Sheriff Lipford notified Judge Alred that he should expect a bigger "fish", namely Judge-Executive Joe Grieshop to be the subject of just such a request and demonstrated for the Judge evidence in support of that statement.

The order removing Judge Alred from the bench under this misapplication of the law and in light of the facts must be overturned.

AS TO COUNT IX:

The JCC found that Judge Alred "urged" the Kentucky State Police to investigate and the Commonwealth Attorney to pursue criminal charges which ultimately became a Harlan Circuit Court case over which Judge Alred subsequently presided. This finding is clearly erroneous.

First there is no evidence in the record that Judge Alred "urged" the Kentucky State police to investigate criminal charges. What the record clearly reflects is that Judge Alred received a call from a woman who alerted him to the allegation that illegal gambling operations were being conducted in the county. The record clearly reflects that Judge Alred reported this allegation to the Kentucky State Police. (Transcript, pgs. 367, 452)

The findings by the JCC state that Judge Alred then "disposed of" that case as presiding judge and it is upon that act they find him guilty of violating the Canons.

The record clearly reflects that there were no proceedings before Judge Alred relating to criminal charges involving the individuals ultimately indicted for the crimes Judge Alred reported to the police. The ONLY proceeding which came before him was an agreed order of dismissal presented by the Commonwealth Attorney after he had obtained an indictment AND BEFORE ARRAIGNMENT. There was no objection, no motion to recuse and no contested matter involved in that pro forma act of accepting the agreed order of dismissal.

Recusal under these circumstances would have served no useful purpose. There was no reasonable grounds upon which to question Judge Alred's impartiality because there was no controversy between the parties. The agreed order of dismissal was presented before the defendant had even been arraigned and before he ever appeared in court.

The JCC once again seeks to tie together unrelated matters in a desperate attempt to find some wrongdoing on the part of Judge Alred. In this count they go so far as to mention that "the person charged in [these cases] was the same individual in which the

respondent was required to recuse in a civil matter upon receipt of an affidavit by the County Judge Executive". What they fail to point out however is that these criminal cases were dismissed before arraignment by agreed order, and before the defendant ever appeared in court TWO FULL YEARS before the recusal issue in the civil case came up after a false affidavit was presented by the lawyer for one of the litigants.

There is absolutely no logical connection which can be drawn between these two totally unrelated events. There was no reason or opportunity for recusal in this criminal case back in 2008 and the order of the commission removing Judge Alred from the bench on this charge must be overruled.

AS TO COUNT XII:

In 2008 Judge Alred made a complaint in his own name for a refund of fuel adjustment charges from Kentucky Utilities. The claim related to the time before he took office as circuit judge.

In settlement of that claim Judge Alred chose not to receive any money for himself, but rather requested that the utility company pay the money to the local school which lacked playground equipment.

Judge Alred received no recognition or credit for this magnanimous and selfless gesture.

The JCC specifically found that "Kentucky Utilities is likely to have cases which come before the Harlan Circuit Court." Yet there is not one single shred of evidence in the record to support such a finding.

Would this court rule that judges cannot be charitable? Could Judge Alred have settled the case and taken the money for himself? Is he permitted to give to his church?

Schools and churches are both considered eleemosynary institutions. For this good deed the JCC voted to remove Judge Alred from the bench.

He received no personal gain. His name was not associated in any way with the donation. The children of the community were the beneficiaries of his anonymous charity. Under these circumstances the finding that he "lent the prestige of his judicial office to advance [his own] private interests" is clearly erroneous. He received no benefit. He gave up a benefit. He lent no one anything.

The finding that he "lent the prestige of his judicial office to advance ...the private interests of others" is likewise clearly erroneous. Neither his name nor his office were associated with the playground.

AS TO COUNT XIII:

Judge Alred did admit to an error of judgment for the charges brought under Count XIII. He did admit that he personally participated in fund raising for a public project.

He viewed his conduct as supporting a public agency as permitted by Canon 2(B). Judge Alred also viewed his conduct as being engaged in extra-judicial activities with his children's school. Nothing in the record suggests that this activity cast reasonable doubt on his capacity to act impartially as a judge, demeaned the judicial office or interfered with the proper performance of judicial duties. Canon 4A.

In his activities he was acting pro se in a matter involving the Judge's own interests, the effort of a father to help out at his children's school.

Certainly, Judge Alred was entitled to serve as an officer or non-legal adviser to an educational or civic organization. Canon 4C(3). And in that capacity he was permitted

to assist such an organization in planning fund-raising. But he missed the finer point contained in Canon 4 C(b)(i) that provided that he was not permitted to solicit funds himself. He admitted to this mistake. But removal from office seems an incredibly harsh penalty.

For example, one of the members of the JCC is herself routinely associated with the fund raising activities of a charity in her brother's name. That charity is in fact registered at her residence. She appears regularly in fund raising communications where she is identified as a judge. Yet she voted that Judge Alred should be removed from the bench.

Two wrongs do not make a right, but disparity in treatment does raise the prospect of inequality and denial of equal protection. For his first offense Judge Alred was not engaged in any activity which benefited him personally. Rather his actions were charitable and for the benefit of the children of his home county. A much less harsh sanction is warranted under these conditions.

AS TO COUNT XVII:

The JCC made the following finding regarding Count XVII of the charges:

> [Judge Alred] entered a sua sponte order relieving an assistant public defender as counsel in all cases…without legal basis and without affording the assistant public defender the opportunity to be heard.

First and foremost the JCC has determined that the Judge had no "legal basis" for his actions. Yet the JCC cites no law which the Judge violated, no law providing that the Judge lacked discretion in the matter and no law setting forth any support whatsoever for their own conclusion as to what the "law" is on this matter.

As Judge Alred has made very clear, his removal of this public defender from pending cases was done in the exercise of his duty to protect the Sixth Amendment right of the accused to counsel. When it comes to the discretion of trial judges in removing appointed counsel, the Sixth Circuit has clearly addressed this important constitutionally protected right specifically in the context of judicial discretion regarding replacement of appointed counsel.

A defendant relying upon appointed counsel has no right to counsel of his choice. *Daniels v. Lafler*, 501 F 3d. 735 (6th Cir. 2007). Where there is no showing of prejudice, such as removal of counsel on the eve of trial, there are no grounds for the conclusion that Judge Alred had no "legal cause" for the removal of the public defender.

As a matter of record and fact, this court's attention is directed to Exhibits M and X introduced by Judge Alred at the hearing. These documents clearly show, as confirmed by Judge Alred's testimony, that the public defender assigned to the case in question had a long history of non-appearance, refusal to answer orders of appearance and in essence disregarded orders of the court.

In addition, the record reflects that this public defender routinely failed to consult with her appointed clients, failed to keep court appointments and had previously been reprimanded by the Department of Public Advocacy for this conduct.

Judge Alred did not deny any defendant counsel. He merely ruled that adequate counsel was not being provided by the DPA by the assignment of Cotha Hudson to handle cases on his docket.

He did not punish her for contempt, did not order her to be fined or imprisoned and did not impose any personal sanctions on her. No defendant raised any issue regarding the ruling and the DPA assigned other counsel to the docket.

The JCC, without any citation to any legal authority concluded on its own behalf that Judge Alred's efforts to protect the Sixth Amendment rights of defendants appearing before him, consistent with the authority to remove appointed counsel as approved by the Sixth Circuit, warranted removal from office.

Judicial power in this state is vested exclusively in the courts. Kentucky Constitution Section 109. Inasmuch as the JCC is not part of the Court of Justice, it possesses no power to interpret statutory ambiguities or to compel judges to conform their conduct to any such interpretations.

This audacious exhibition of power by the JCC to substitute its own views for those of a trial judge, to declare that he acted without "legal cause" when there exists no authority for that statement and then to order him removed from the bench for taking steps to protect the constitutional rights of the accused, is a disturbing overreach which cannot stand.

To the extent that Judge Alred's actions were an erroneous decision (though no citation of authority has been provided to inform him of such error), it is respectfully submitted that his actions were made in good faith and therefore not subject to the jurisdiction of the JCC.

Even though Judge Alred's actions did not punish anyone for contempt, it is without doubt that trial courts have broad authority when exercising their contempt powers. *Kentucky River Community Care, Inc. v. Stallard*, 294 S.W.3d 29, 31 (Ky. App.

2008). Review of the exercise of that power requires an appeal asserting an abuse of discretion. *Id.*

There has been no appeal, there has been no finding by a court of an "abuse of discretion" and it is improper for the JCC to substitute itself for a properly constituted court and then exercise its power in such an extreme manner as to order not a mere reversal of the judge's discretion, but removal from office.

ARGUMENT V: THE ORDER OF THE COMMISSION IS NOT SUPPORTED BY THE EVIDENCE, AND RELIED UPON COUNTS WHICH WERE DISMISSED, AND IS OTHERWISE INDICATIVE OF THE LACK OF IMPARTIALITY.

The JCC's order begins with a paragraph which so grossly misstates the facts as to raise a very serious question as to the impartiality of the commission itself. The JCC recites that Judge Alred was "the complaining witness to the police agency which resulted in a person being charged with a felony." Obviously, this alone is not "misconduct". Judges are not required to turn a blind eye to crime. Would this court rule that a judge who knew of a sexual assault on a minor, witnessed the rape of a woman, a murder or a robbery not report it? And what is a judge to do when reports of crimes are brought to his attention from others? Would this court, or the public, tolerate a judge learning of a crime and merely telling the other person to report it, without more? And what if the other person did not report it, but the judge knew of it and did nothing? This conduct has been held to be unacceptable for priests, school administrators and revered football coaches. Is there now to be an exemption from honor, duty and morality for judges?

But the JCC complains about more. They say that the Judge then sat as "the presiding judge" in that case. But there was no case. There was no arraignment. The

prosecutor presented an agreed order of dismissal immediately after obtaining an indictment. No one requested recusal. No one complained about the Judge signing an agreed order of dismissal.

The JCC then seeks to bootstrap its complaints against Judge Alred to a higher level by saying that he not only "sat" in that case but also "sat" in a civil case involving the same individual.

The JCC is grasping at straws. The recusal in the civil case occurred two years AFTER the criminal case had been dismissed. Judge Alred did in fact recuse in that civil case upon motion but that motion was not grounded upon and did not even mention the earlier criminal case He recused not because he had signed an agreed order at the request of the prosecutor to dismiss a criminal case two years earlier, not because one of the litigants in a civil case had supported the opponent of Judge Alred four years earlier, but because counsel for that litigant presented the court with an "affidavit" accusing the Judge of improper conduct and having an interest in obtaining a "personal gain", which "affidavit" was false. Of course, the JCC did not mention that the person who signed that "affidavit" testified a hearing that it was never sworn, that it was already prepared by the lawyer who offered it, that he merely glanced at it, and that the contents were false!

The JCC then goes on, in its order, to so severely misconstrue the law and facts that a serious question as to fundamental fairness begins to appear. The JCC next says that Judge Alred issued an order for a special grand jury to investigate allegations that were known to him to be "woefully inadequate to support indictment". This court's attention is directed at respondent's Exhibit A. This is what Judge Alred knew.

Furthermore, Commonwealth's Attorney Henry Johnson testified that he agreed to the Special Grand Jury saying, "Yes. That's not an admission, you know, it's a statement of fact. I've said it all along. I've never said anything else, and I haven't deviated." (Transcript 306:8-14). The purpose of the complaints against Judge Alred had nothing to do with "legal cause" or the need for the special grand jury, but rather everything to do with political games being played by Henry Johnson and the Sheriff. (See Exhibit C).

In addition, as Judge Alred testified, the special grand jury had been requested by the Commonwealth's Attorney. The JCC cites to no law or rule which requires a Circuit Judge to first review ***all*** of the evidence which a Commonwealth's Attorney might present to a grand jury to "support an indictment" before issuing an order for a special grand jury and in fact imposing such a requirement on a sitting judge is outside the scope of the power of the JCC.

All that is required is that there appear to be "cause" for empaneling a special grand jury. KRS 29A.220. In construing this section the court has observed that a general and non-specific statement that "cause" exists is insufficient.

> [T]here must be at least an allegation of conduct which would constitute reasonable cause to believe that a grand jury investigation will disclose criminal activity within the court's jurisdiction to punish. *Board of Education v. Nicholson*, Ky., 551 S.W.2d 1 (1976).

Yet what the Judge knew was that the Sheriff was involved in an "ongoing" investigation into drug dealing by the County Judge-Executive, had been provided with videotape evidence which the Sheriff alleged proved this activity was taking place and was consulted by the Commonwealth's Attorney with regard for the need to empanel a special grand jury with jurors being called in from an adjoining county due to the fact that

the jury in Harlan would of necessity include people with strong connections to the Judge- Executive himself. "Woefully inadequate"? Hardly.

But, knowing that such evidence existed to provide "cause" for the order empaneling a special grand jury the JCC seeks to further taint the Judge's order by suggesting that his "timing" was motivated by an affidavit which clearly "angered him" and the fact that a "second cousin" was running against the Judge-Executive.

If the JCC's order is premised upon the "second cousin" issue, then it is misplaced, the JCC having already ruled that such relationship would not be considered as presumptive of any conflict of interest. (Transcript, pg. 595)

Then the JCC goes on to suggest that Judge Alred could have issued the order for the special grand jury "under seal...or drafted in such a way that the County Judge Executive was not named". But it is not up to the commission to dictate to duly elected judges the details of how they exercise their duties. Judge Alred's order for a special grand jury set out with specificity the "cause" requirement contain in KRS. 29A.020. As such, the JCC's order of removal predicated upon "style" issues is misplaced and seems to be based upon a severe overestimation of the limitations of its authority.

The JCC then goes on in its order to note that when the Commonwealth's Attorney chose to present the matter to the regular grand jury, despite his request for a special grand jury, Judge Alred became "visibly upset". Yet despite noting that charges for this conduct were dismissed, the JCC seeks to resurrect this discussion for the purpose of punishment. This stretches the presumption of the JCC's impartiality and fairness nearly to the breaking point and is compelling evidence that the JCC treated Judge Alred "unreasonably."

The JCC's personal ire is further illustrated by their use of the phrase "of grave concern to the commission" in describing Judge Alred's denial of the "spin" the JCC's counsel submitted in argument. Even Judge-Executive Greishop testified that these charges against Judge Alred be dismissed. (Transcript, 551:-552:2). Not only did the Chairman of the JCC ignore the request, but stated that Judge Greishop's request "has no bearing" on the charge. (Transcript 552:11-19).

For example, the JCC's order accuses Judge Alred of asserting "positions which were, at best, disingenuous and, at worst, blatant misrepresentations." In support of this accusation they cite to the videotape of a fiscal court meeting at which Judge Alred appeared and say this:

> "Respondent continued to deny that he appeared before the Harlan County Fiscal Court in any capacity other than a member of the public, and yet when questions arose concerning the use of ...donated fund, made it abundantly clear that he maintained veto power over those funds as Judge." [Order, page 14]

Why the JCC chose to view this through the accusatory eyes of counsel for the JCC rather than the clear explanation of Judge Alred is beyond understanding and certainly consistent with Judge Alred's position that he did not receive a fair hearing. Judge Alred was at the meeting of the Harlan Fiscal Court as a member of the public. While there he was asked a question about an order he entered.

What would the JCC have him do when this question was posed to him? Get up, leave the room in silence, retrieve his robe and return in his capacity as a judge? Or would they have him refuse to answer the question regarding the meaning of an order he had entered and permit it to become misapplied? His conduct was perfectly consistent with his duties under Canon 2C in so far as his answer was in explanation of an order of

his court and could therefore be properly treated as "testimony...on public matters concerning...the administration of justice". But the JCC chose to view it otherwise in their order

Judge Alred had the right to attend the meeting. He was asked what an order from his court meant. Are judges now to be removed from office if they clarify for circuit clerks, county clerks, jailers, county attorneys and all other elected officials what their orders mean, or is this proscription which puts their status as an elected official at risk limited to "on the record" answers given to elected members of a county fiscal court?

The JCC also then seeks to assign some sort of misconduct in their order to Judge Alred's modification of an earlier order to reflect that it was prepared by counsel (undisputed) and that it did not reflect adequately (inadvertently) the degree to which he retained jurisdiction to supervise the distribution of a bond forfeiture in a case where the sheriff and Commonwealth's Attorney had schemed together to reduce two major drug trafficking felonies down to misdemeanors in exchange for them getting the chance to split a million dollars in cash between them.

There is no allegation that Judge Alred stood to benefit one penny from his orders or his supervision of the use of the forfeited bond money. But he was aware of efforts, and produced evidence in support thereof, that the Sheriff was trying to get extra money for himself out of these funds which the Judge explicitly disapproved of at the time the matter was brought to his attention.

But that doesn't stop the JCC from attempting to smear Judge Alred, when they say he entered an order which "can only be seen as...an attempt to absolve himself from any responsibility for the entry." He had nothing to lose, nothing to gain and actually set

the record straight. The order was presented as the agreement of both prosecution and defense. The language inserted was in fact "inadvertent" in the sense that the Judge started to make editorial changes in the margins before it was entered and "inadvertently" let it be filed as presented.

Furthermore, the JCC seems to find fault with the fact that Judge Alred's modification only came after the JCC had written him a letter bringing the matter to his attention. But in the case of *Gormley v. Judicial Conduct Commission*, *supra*, this court used Judge Gormley's delay in correcting an order after notification in support of its findings issuance of a public reprimand.

> Nevertheless, Judge Gormley waited some six weeks, until July 13, 2009, to rescind the May 8, 2009 Order. *Gormley v. Judicial Conduct Commission*, Ky., 332 S.W.3d 717, 724 (2010).

For the JCC now to argue that Judge Alred's prompt attention to their letter contributes to their reason why he should be removed from the bench sends a very mixed signal to judges around the Commonwealth. It's as if they are "damned if they do, damned if they don't."

For the JCC to go on and on that Judge Alred was "clearly involved in cases in which he should have recused, but did not", what cases? A criminal case which was dismissed before arraignment? A case where the grounds for recusal were that one of the parties supported the judge's opponent? This is not grounds for recusal. *Dean v. Bondurant*, Ky., 193 S.W.3d 744 (2006).

What the JCC exhibits by its repetition in citing the same things over and over again in its order is to demonstrate its own anger and frustration with Judge Alred's defense of the charges against him, his suggestion that they recuse themselves and his

good faith assertion that the JCC process is tainted because the JCC receives and reviews ex parte evidence which does not appear in the record but which allows them to develop a bias against the accused.

As evidence of this bias Judge Alred suggests that this court review the timing of docket entries 5, 9 and 10. On March 18, 2011 Judge Alred requested that the JCC chair disqualify himself. The Chairman responded.

Judge Alred moved for disqualification on the grounds that he felt the Chair could not preside over a fair and impartial hearing. Judge Alred brought to the Chairman's attention a close and personal relationship between the investigator and the Chair. Judge Alred avered that the investigator had engaged in conduct which failed to disclose relevant evidence to the JCC, and that the investigator had engaged in deception.

Judge Alred exposed in his motion that fact that the Chair had, during informal conference, pointed his finger at Judge Alred and said in a loud voice, "You are not the avenging angel of Harlan County", berated him and in another hearing said that "Everybody in Harlan County is a liar." Of course, the Chair responded and denied the assertions.

On March 24, 2011, Judge Alred renewed his motion and this time included a request that the entire panel disqualify. What happened next is without dispute.

Within hours the JCC counsel filed a motion to remove Judge Alred from the bench on an emergency basis. The timing of that motion creates an appearance that it was retaliatory. At the very least it supports the fact that the JCC treated the Judge "unreasonably."

CONCLUSION

Judge Alred is before the JCC for the first time. Not one single allegation or finding involves any action on his part that inured to his personal gain.

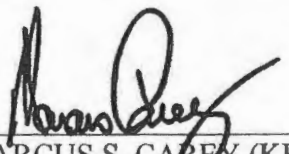
No alleged action on his part affected the substantial due process rights of any litigant.

No assignment of fault arises from any conduct except that which was for the betterment of his community, the protection of the rights of defendants in his courtroom or an effort on his part to exercise discretion for the protection of school children or to prevent a prosecutor and sheriff from personally benefiting, any more than the law allows, from the abandonment of $1 million in cash, abandoned by two alleged felons who were ultimately moved through the system, removed of their money and then sent home with misdemeanors.

Removal from office is the harshest punishment available. It should be reserved for the most egregious conduct. It should not be used as a club to punish those who maintain their innocence, refuse to bow down to the commission and accept an offered temporary suspension, who are then forced to be tried by the very same people who are their accusers in an atmosphere which carries with it the appearance of bias, and the denial of due process.

There are constitutional issues, factual issues and legal issues addressed in this appeal, and on each of them an extension of time to fully prepare this brief was requested. In the absence of that extension and the additional time required to more fully present the issues in this case, this brief is filed as a protective measure.

Respectfully submitted,



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