COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2011-SC-000558-RR

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

v.

COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION — **APPELLEE**

APPELLEE'S BRIEF

Respectfully submitted,

JEFFREY C. MANDO, ESQ. (#43548)
LOUIS D. KELLY, ESQ. (#92094)
ADAMS, STEPNER,
WOLTERMANN & DUSING, PLLC
40 West Pike Street
Covington, KY 41012
(859) 394-6200 (phone)

GEORGE F. RABE, ESQ. (#56300)
167 West Main Street, Suite 1004
Lexington, KY 40507

Counsel for Appellee, Commonwealth of Kentucky Judicial Conduct Commission

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been served by U.S. Mail on this the 5 day of Dec, 2011, upon the following: Marcus S. Carey, Esq., 3814 Dixie Highway, Erlanger, KY 41048; Hon. Russell D. Judge Alred, P.O. Box 288 Harlan, KY 40831; Scott D. Majors, Esq., P.O. Box 4266, Frankfort, KY 40604-4266; and the original to the Clerk, Supreme Court of Kentucky, State Capitol Building, Room 209, 700 Capitol Avenue, Frankfort, KY 40601. I further certify that the record on appeal has not been withdrawn.

JEFFREY C. MANDO, ESQ.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee believes oral argument is important, and will be helpful to the court in deciding the issues on appeal. Therefore, Appellee requests oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Judge Russell D. Alred is the Circuit Judge for the 26th Judicial Circuit consisting of Harlan County. He appeals the Final Order of the Kentucky Judicial Conduct Commission ("the Commission") removing him from office after finding by clear and convincing evidence that he had engaged in misconduct in violation of the Judicial Code of Conduct. Judge Alred challenges not only the decision of the Commission but the constitutionality of the Canons in the Code of Judicial Conduct and the Judicial Conduct Commission itself. Judge Alred's constitutional challenges fail because both the Canons and the structure of the Commission have been consistently upheld both in Kentucky and in other jurisdictions around the country. Judge Alred's appeal of the Commission's decision likewise fails because the Commission relied upon clear and convincing evidence that he blatantly and repeatedly used the power and prestige of his office to advance his personal interests with no regard to his ethical responsibilities or the rights of others. As such, the Commission acted reasonably and within its authority in removing him from office.

I. PROCEDURAL HISTORY

The Commission investigated allegations of misconduct by Judge Alred after receiving a complaint from an individual.[1] After investigating the initial complaint, the Commission authorized a more extensive investigation of Judge Alred's activities.[2]

The Commission informed Judge Alred of the investigation and he appeared either *pro se* or with counsel before the Commission on four separate occasions.[3] Pursuant to SCR 4.170(4), the Commission provided Judge Alred with the factual information in its custody for

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[1] See Findings of Fact, Conclusions of Law and Final Order, p. 1, docket entry 64.
[2] *Id.*
[3] *Id.* at 2. Informal conferences were held on September 3, 2010, October 14, 2010, November 12, 2010, and December 10, 2010.

examination.[4] The Commission also afforded Judge Alred an opportunity to present any other information bearing on the investigation.[5]

After complying with all procedural requirements under Supreme Court Rules, the Commission filed a Notice of Formal Proceedings and Charges against Judge Alred on February 18, 2011 charging him with twenty (20) counts of violations of the Code of Judicial Conduct.[6] Through a combination of motions to dismiss filed by Counsel for the Commission[7] and Judge Alred,[8] or through a finding of insufficient evidence at the hearing,[9] the Commission ultimately dismissed eleven (11) counts.

With due and timely notice to Judge Alred, the Commission conducted a hearing on the charges on August 29, 30, and 31, 2011 in London, Kentucky.[10] Judge Alred attended the hearing and acted as his own counsel.[11] During the hearing, Judge Alred cross-examined adverse witnesses, presented evidence in his defense, and called witnesses on his own behalf.[12]

On September 16, 2011, the Commission issued its Findings of Fact, Conclusions of Law and Final Order. The Commission found by clear and convincing evidence that Judge Alred committed nine (9) violations of the Code of Judicial Conduct[13] and, pursuant to its authority under Section 121 of the Kentucky Constitution and SCR 4.020, voted unanimously to remove Judge Alred from office.[14]

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[4] *Id.*
[5] *Id.*
[6] See Notice of Formal Proceedings and Charges, docket entry 1.
[7] Counts XI, XVIII, and XIX, see docket entry 40.
[8] Counts IV, XIV, XV, and XX, see docket entries 44, 51.
[9] Counts I, VIII, X, and XVI, see docket entry 64.
[10] See generally, Transcript of Hearing.
[11] *Id.*
[12] *Id.*
[13] Canons of the Code of Judicial Conduct is attached as Appendix 1.
[14] See generally, Transcript of Hearing.

II. JUDGE ALRED'S CONDUCT

In his Brief, Judge Alred follows the same pattern he utilized before the Commission; namely to blame his accuser in an attempt to deflect attention away from his own conduct. Judge Alred does not address the evidence presented at the hearing which supported the charges and the Commission's ruling. That evidence can be summarized as follows:

In 2010, Judge Alred approved a plea agreement for two defendants charged with drug trafficking that included a $500,000.00 donation to the Harlan Fiscal Court.[15] The plea agreement and Order signed by Judge Alred gave him approval over the use the funds.[16] Judge Alred attended a Harlan County Fiscal Court meeting following the sentencing and told the Fiscal Court he wanted the funds used for a water park.[17] When a Fiscal Court member suggested an alternate use, Judge Alred proclaimed that he held "absolute veto authority" over the funds and threatened to use it if the funds were not spent as he deemed appropriate.[18] When the Commission contacted him about his veto authority over the funds, Judge Alred issued an order amending the plea agreement falsely claiming that his approval over the funds was "inadvertently" put in and neither "solicited nor approved" by the Judge.[19]

Judge Alred also used his powers as a Circuit Judge to advance his personal political interests. On April 22, 2010, Judge Alred issued a Special Grand Jury Order identifying Harlan County Judge/Executive Joe Grieshop as a target of an investigation into drug trafficking.[20] Judge Alred issued this Order despite knowing that the allegations against Grieshop were unsubstantiated and that the grand jury would return a no true bill.[21] Judge Alred ensured that the

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[15] Transcript of hearing, pp. 209-210.
[16] *Id.* at 211.
[17] *Id.* at 80.
[18] *Id.* at 83-84.
[19] *Id.* at 87-88.
[20] *Id.* at 119.
[21] *Id.* at 221.

Grand Jury would not meet and clear Grieshop's name until after the May primary, in which Judge Alred's second cousin was running against Grieshop.[22] Judge Alred issued the Special Grand Jury Order on the same day he reviewed an affidavit by Grieshop identifying a serious conflict of interest that caused Judge Alred to recuse from a case.[23]

Judge Alred routinely used the power and prestige of his office to further his personal interests. For example, Judge Alred engaged in improper activity involving James A. Cawood elementary, where his wife worked and his children attended school. Judge Alred used his influence to raise money for a playground, going so far as to negotiate a *quid pro quo* with Kentucky Utilities in which they donated $12,500.00 in exchange for Judge Alred dismissing a complaint he filed with the Public Service Commission.[24] Judge Alred also contacted the school Principal expressing his disapproval of a woman who worked as a substitute teacher who was a defendant in his Court.[25] When the school continued to employ her, he imposed a bond condition prohibiting her from working as a substitute teacher anywhere in Harlan County.[26]

Judge Alred routinely ignored his ethical duties by repeatedly presiding over cases in which he had clear conflicts of interests, violating individuals' due process rights. He insisted upon viewing *ex parte* video evidence during the investigation into the Harlan Judge/Executive.[27] He also presided over two criminal cases in which he acted as the complaining witness.[28] Finally, Judge Alred exercised his authority without regard to others' due process rights. In one instance, he unilaterally removed a public defender from twenty four (24)

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[22] *Id.* at 120-121.
[23] *Id.* at 116-118, 124-125.
[24] *Id.* at 165, 171-172.
[25] *Id.* at 416.
[26] *Id.* at 173-176.
[27] *Id.* at 357, 427.
[28] *Id.* at 179-188.

cases without providing notice or hearing because he was displeased with her performance in Court.[29]

ARGUMENT

I. THE COMMISSION DID NOT VIOLATE JUDGE ALRED'S DUE PROCESS RIGHTS BECAUSE NEITHER SCR 4.020(1)(B)(I), NOR CANONS 1 AND 2A ARE UNCONSTITUTIONALLY VAGUE OR OVERBROAD

Judge Alred contends that SCR 4.020(1)(b)(i) and Canons 1 and 2A are unconstitutionally vague and overbroad, both on their face and as applied to him, such that his removal based on violations thereof violated his right to due process of law.[30] Those contentions lack merit.

The test for determining whether judicial conduct standards are void-for-vagueness is whether they convey to a judge a sufficiently definite warning of the proscribed conduct when measured by common understanding and practice.[31] It is generally understood that "a greater degree of flexibility and breadth is permitted with respect to judicial disciplinary rules and statutes than is allowed in criminal statutes," given that the purpose of judicial discipline is to maintain standards of judicial fitness rather than to punish criminal conduct.[32]

Against these standards, Judge Alred's void-for-vagueness challenges to Canons 1 and 2A, and to SCR 4.020(1)(b)(i), must fail.

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[29] *Id.* at 433-435.
[30] Appellant's Brief, p. 7-10.
[31] *In re Hill*, 8 S.W.3d 578, 582 (Mo. 2000); *Judicial Inquiry and Review Commn. v. Taylor*, 685 S.E.2d 51, 64 (Va. 2009); *Halleck v. Berliner*, 427 F.Supp. 1225, 1240 (D.D.C. 1977); *In re Lowery*, 999 S.W.2d 639 (Rev. Trib. of Tex. 1998); *Miss. Comm'n on Judicial Performance v. Spencer*, 725 So.2d 171 (Miss. 1998); *In re McGuire*, 685 N.W.2d 748 (N.D. 2004).
[32] *In re Young*, 522 N.E.2d 386 (Ind. 1988). *See also In re Storie*, 574 S.W.2d 369, 373 (Mo. 1978); *In re James.L. Barr*, 13 S.W.3d 525 (Rev. Trib. of Tex. 1999); *In re Seraphim*, 294 N.W.2d 485 (Wisc. 1980); *In re Gillard*, 271 N.W.2d 785 (Minn. 1978) ("the constitutionality of necessarily broad standards of professional conduct has long been recognized.")

A. The fact that SCR 4.020(1)(b)(i) refers to "misconduct" does not render it void for vagueness.

SCR 4.020(1)(b)(i) permits the Judicial Conduct Commission to levy sanctions against a judge who engages in "misconduct." SCR 4.020(1)(b)(i) is not unconstitutionally vague because the Kentucky Code of Judicial Conduct defines the type of conduct that constitutes "misconduct" within the meaning of the Rule.

The Kentucky Supreme Court has already concluded that the words "for good cause" are sufficiently definite to put a judge on notice of the type of conduct for which he could be disciplined, where there also existed an established set of ethical rules explaining what conduct was expected of lawyers and judges.[33] In *Nicholson v. Judicial Retirement and Removal Commission*,[34] which arose before the adoption of SCR 4.020, a judge was censured pursuant to Section 121 of the Kentucky Constitution, which allows for the imposition of sanctions against judges "for good cause." Judge Nicholson challenged the sanction on several grounds, including an argument that "for good cause" was too vague a standard to apprise him of the type of conduct that would be subject to censure.[35] The Court, however, ruled against the judge on that argument, declaring that "for good cause" is a term of art in the legal community that must be construed in light of other established codes of judicial conduct:

> Nicholson cannot claim a lack of notice that his conduct would be subject to review by the Commission. The authority to remove members of the judiciary for good cause is not ambiguous to members of the legal profession. Such phrases as "for cause" and "for good cause" are terms of art which possess a special meaning manifest to the profession when used in this context. These terms denote a legal cause which affects the ability and fitness of a judge to perform the duties of office. ...
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> Such a standard is not so vague as to violate due process requirements. Although the specific acts of misconduct encompassed within the phrase are numerous,

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[33] *Nicholson v. Judicial Retirement and Removal Commn.*, 562 S.W.2d 306 (Ky. 1978).
[34] *Id.*
[35] *Id.*

> ample guidelines for the determination of proper conduct may be found in the ethical standards applicable to lawyers and judges adopted by national and state bar associations and in the moral standards expected of judicial officers by the public. ... Such a standard is no more vague than that of "good behavior" used with respect to federal judges contained in Section I of Article 3 of the United States Constitution.[36]

Similarly, in *Halleck v. Berliner,* a judge of the Superior Court of the District of Columbia challenged the constitutionality of D.C. Code § 11-1526(a)(2)(C), a statute allowing the discipline of judges who engage in "willful misconduct in office" or "any other conduct which is prejudicial to the administration of justice or which brings the judicial office into disrepute."[37] The Court ruled that the language of § 11-1526(a)(2)(C) was not unconstitutionally vague, given that the Canons of the Code of Judicial Conduct more fully defined what type of conduct constitutes misconduct:

> The provisions of § 11-1526(a)(2)(C) do not stand alone. The ABA Code of Judicial Conduct has been adopted by the Joint Committee on Judicial Administration in the District of Columbia. The Canons of that Code supply judges with ethical standards expected of them. Arguments in other jurisdictions that constitutional and statutory provisions for the discipline of judges were vague or overbroad have been rejected primarily on the grounds that the Code of Judicial Conduct furnished sufficient specification of the judicial conduct which warrants disciplinary action. ...[38]

In light of these authorities, SCR 4.020(1)(b)(i) is not vague or overbroad. "Misconduct" as used in the rule is a term of art, which has a special meaning in the legal profession when used in the context of judicial behavior. Nor does SCR 4.020(1)(b)(i) exist in a vacuum. Rather, like the rules in *Nicholson* and *Halleck*, SCR 4.020(1)(b)(i) must be construed along with established

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[36] *Id.* at 308-309. *See also State of Oklahoma v. Colclazier*, 106 P.3d 138 (Ct. on the Judiciary of Okla. 2002) (the term "oppression in office" is not unconstitutionally vague since "a judge's conduct is measured with reference to the Code of Judicial Conduct.")

[37] *Halleck, supra* at 1239-1240.

[38] *Id.* at 1240 (citations omitted). *See also Barr, supra* at 565 (the term "willful and persistent conduct" as used in Texas Constitutional provision related to discipline of judges was not unconstitutionally vague given that "the Code of Judicial Conduct furnished sufficient specification of the judicial conduct which warrants disciplinary action.").

codes for judicial conduct, including the Kentucky Code of Judicial Conduct, which provides "ample guidelines for the determination of proper conduct" by judges.

With reference to the Kentucky Code of Judicial Conduct and the Commentary thereto, any judge, including Judge Alred, can readily discern what constitutes "misconduct" within the meaning of SCR 4.020(1)(b)(i). For these reasons, SCR 4.020(1)(b)(i) is not unconstitutionally vague.

B. Canons 1 and 2A are not unconstitutionally vague.

Canons 1 and 2A are rooted in the American Bar Association's Model Code of Judicial Conduct. As such, they are identical to canons in the judicial codes of conduct of other states that have also adopted the ABA's Model Code. Several of these states have already addressed the precise issue presented by Judge Alred, i.e. whether Canons 1 and 2A are unconstitutionally vague.

For example, Canons 1 and 2A of Virginia's Canons of Judicial Conduct are identical to Kentucky's Canons 1 and 2A.[39] In *Judicial Inquiry and Review Commn. v. Taylor*,[40] a Virginia judge was sanctioned for having violated Canons 1 and 2A, and argued that her sanctions were invalid because the Canons failed to describe meaningful standards of conduct. In that case, the Virginia Supreme Court determined that the Canons:

> ... are sufficiently definite and certain to withstand Judge Taylor's due process challenge. The procedural due process requirements of the Constitution of Virginia compel the Commission, and this Court, to recognize the balance that must be struck between protecting the integrity of the judiciary and the rights of individual judges. ...
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> The Canons for the Commonwealth of Virginia contain a Preamble, which provides in relevant part that "the Canons of Judicial Conduct are intended to establish standards for ethical conduct of judges. They consist of broad statements called Canons, specific rules set forth in Sections under each Canon and

[39] *Va. Sup. Ct. R. pt. 6, sec. III, Canon 1 and 2.*
[40] 685 S.E.2d 51, 64 (Va. 2009).

> Commentary. The text of the Canons and the Sections is authoritative. Each Commentary, by explanation and example, is advisory and provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules." Va. Sup. Ct. R., Part 6, § III, Preamble.
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> The Commentary to Canon 1 includes the following language: "Although judges should be independent, they must comply with the law ... Violation of this Canon diminishes public confidence in the judiciary and thereby does injury to the system of government under the law." Canon 2A requires a judge to comply with the law in a manner that promotes public confidence in the integrity and impartiality of the judiciary. ...
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> ... The relevant Canons clearly prohibit a judge's failure to follow the law in such a manner as to fail to promote public confidence in the integrity and impartiality of the judiciary. There can be no "vagueness" in the application of the relevant Canons to the conduct in question.[41]

Like Virginia's Canons of Judicial Conduct, Kentucky's Code of Judicial Conduct contains a Preamble, a set of broad statements called Canons, specific rules set forth in Sections under each Canon, and Commentary. The text of Kentucky's Canons and Sections is authoritative, and the Commentary is advisory, providing guidance on the purpose and meaning of the Canons and Sections. As in Virginia's Canons of Judicial Conduct, the Commentary to Kentucky's Canon 1 includes the following language: "... Although judges should be independent, they must comply with the law, including the provisions of this Code. ... Violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law." In addition, as in Virginia's Canons of Judicial Conduct, the Commentary to Kentucky's Canon 2A requires a judge to comply with the law in a manner that promotes public confidence in the integrity and impartiality of the judicial system. As the Court in *Taylor* held, such language is sufficient to apprise judges that they are required to abide by the law in order to promote public confidence in the integrity and impartiality of the judicial system.

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[41] *Taylor*, supra at 720-721.

Likewise, Canons 1, 1.1, 1.2, 2, and 2.2 of Indiana's Code of Judicial Conduct are substantially similar to Kentucky's Canons 1 and 2A.[42] In *In re Young*,[43] an Indiana judge was charged with violating Canons 1 and 2, and sought to dismiss the charges on the basis that the Canons were unconstitutionally vague. The Indiana Supreme Court wisely denied the judge's motion to dismiss, ruling:

> The fact that these provisions may not have the preciseness required of laws defining criminal conduct is of no consequence. Respondent has not been charged with engaging in criminal conduct, but with judicial misconduct. His reading of the Code of Judicial Ethics is not as a layman, unfamiliar with the law, but as a judge of twenty years' experience and an attorney of almost twenty more. We think the notice provided by the code is adequate.[44]

Canons 1 and 2A of Mississippi's Code of Judicial Conduct are also identical to Kentucky's Canons 1 and 2A.[45] In *Miss. Comm'n on Judicial Performance v. Spencer*,[46] a Mississippi judge was suspended for having violated these Canons, and challenged his suspension on the basis that Canons 1 and 2A were unconstitutionally vague. The Mississippi Supreme Court soundly rejected the judge's argument, finding that "the Canons are 'sufficient to put men of common intelligence on notice of what type of conduct is prohibited.'"[47]

Additionally, Canons 1 and 2A of North Dakota's Code of Judicial Conduct are identical to Kentucky's Canons 1 and 2A.[48] In *In re McGuire*,[49] a North Dakota judge was suspended for having violated these Canons, and challenged his suspension based on the argument that Canons

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[42] *Ind. Code of Judicial Conduct 1, 1.1, 1.2, 2 and 2.2*
[43] 522 N.E.2d 386 (Ind. 1988).
[44] *Id.* at 388, (citing *Seraphim*, supra at 491).
[45] *Miss. CJC, Canons 1 and 2.*
[46] 725 So.2d 171 (Miss. 1998).
[47] *Id.* at 176.
[48] *N.D. Code Jud. Conduct Canons 1and 2.*
[49] 685 N.W.2d 748 (N.D. 2004).

1 and 2A were unconstitutionally vague. The North Dakota Supreme Court ruled against the judge, citing numerous other authorities on the issue.[50]

Based on these and other persuasive authorities, Kentucky's Canons 1 and 2A are not unconstitutionally vague. The Canons, read together with the Sections and Commentary, placed Judge Alred, an experienced attorney and judge, on notice that he was obliged to follow the law and that he could be disciplined for engaging in behavior that eroded the public confidence in the integrity and impartiality of the judicial system. Accordingly, Judge Alred cannot now be heard to complain that Canons 1 and 2A were unconstitutionally vague.

C. Assuming, *arguendo*, that SCR 4.020(1)(b)(i) and Canons 1 and 2A are unconstitutional, that does not taint the Commission's decision to remove Judge Alred, because removal was also premised on other provisions in the Judicial Code of Conduct that he does not challenge.

Assuming *arguendo* that SCR 4.020(1)(b)(i), Canon 1 and/or Canon 2A is deemed unconstitutionally vague, such a ruling does not taint any of the Commission's findings with respect to Counts II, III, V, VI, VII, IX, XII, XIII, or XVII. Each of those Counts was also premised on a determination that Judge Alred violated other Canons of the Judicial Code of Conduct, and Judge Alred does not challenge the constitutionality of those Canons.

For example, in addition to violations of Canons 1 and 2A, the Commission found that Judge Alred violated the following Canons:

- Count II – Canons 2D and 4C(1);
- Count III – Canons 3A and 3B(2);
- Count V – Canons 3A, 3B(2) and 3B(8);
- Count VI – Canons 3A, 3B(2), 3B(8) and 3E(1)(a);
- Count VII – Canons 3A, 3B(2) and (7);
- Count IX – Canons 3A, 3B(2), (8) and 3E(1)(a);

[50] *Id.* at 762.

- Count XII – Canon 2D, 4C(3)(b)(i) and (iv);
- Count XIII – Canons 2D and 4C(3)(b)(i) and (iv);
- Count XVII – Canon 3A and 3B(2).[51]

Judge Alred does not challenge the constitutionality of these other Canons. Consequently, even if SCR 4.020(1)(b)(i), Canon 1 or Canon 2A are ruled unconstitutional, the Commission's findings and its Order must remain intact.

II. JUDGE ALRED WAS NOT DENIED HIS RIGHTS UNDER THE SIXTH AMENDMENT

A. The Sixth Amendment does not apply because the charges against Judge Alred were not criminal.

Judge Alred contends that he was denied his rights under the Sixth Amendment because he claims he was denied the right to confront the witnesses upon whose testimony the Judicial Conduct Commission relied in removing him from office and because the Commission failed to recuse itself.[52] That contention fails because Judge Alred was not entitled to any rights under the Sixth Amendment in connection with the charges.

The Sixth Amendment only applies in the context of criminal proceedings.[53] Judicial disciplinary proceedings are not criminal proceedings. In *Nicholson*, the Kentucky Supreme Court held that the "ex post facto" prohibition did not apply in the judicial disciplinary proceeding at issue in that case.[54] The Court further held:

> It is clear that the 'ex post facto' prohibition applies only to criminal matters. ... The aim of [judicial disciplinary] proceedings ... is to improve the quality of justice administered within the Commonwealth by examining specific complaints of judicial misconduct, determining their relation to a judge's fitness for office

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[51] Docket Entry 64.
[52] Appellant's Brief, p. 10-19.
[53] U.S. CONST. AM. VI ("*In all criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.")
[54] *Nicholson, supra* at 308.

> and correcting any deficiencies found by taking the least severe action necessary to remedy the situation. The target is not punishment of the judge. Consequently, the action of the Commission does not constitute a violation of the 'ex post facto' prohibitions of the federal and state constitutions.[55]

In addition to the Kentucky Supreme Court, other courts have also ruled that attorney and judicial disciplinary proceedings are not criminal proceedings.[56]

Because they are not criminal proceedings, attorney and judicial disciplinary proceedings do not implicate any constitutional safeguards attendant to criminal proceedings, such as those applicable under the Sixth Amendment. Thus, Judge Alred did not have any Sixth Amendment rights in connection with the disciplinary proceeding against him.

Notwithstanding the fact that Sixth Amendment does not apply, Judge Alred's argument fails because he was not denied the right to confront his accusers. During the hearing, Judge Alred was able to cross examine all of the Commission's witnesses, challenge the credibility of its evidence, and present his own witnesses and evidence in support of his defense. Accordingly, his argument regarding the Sixth Amendment must fail.

B. The Commission's combined investigative and adjudicatory functions did not violate Judge Alred's constitutional rights.

Judge Alred argues that the disciplinary proceedings against him violated his constitutional rights because the Judicial Conduct Commission "is vested with overlapping authority. It may initiate charges, receive charges, investigate charges, resolve charges by

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[55] *Id.*

[56] E.g., *In re Sibley*, 564 F.3d 1335 (D.C. Cir. 2009) ("Speedy Trial Clause of the Sixth Amendment of the Constitution simply does not apply to non-criminal cases such as this attorney discipline case."); *Rosenthal v. Justices of Supreme Court*, 910 F.2d 561 (9th Cir. 1990) ("A lawyer disciplinary proceeding is not a criminal proceeding. As a result, normal protections afforded a criminal defendant do not apply."); *People v. Smith*, 937 P.2d 724 (Col. 1997) (Sixth Amendment right to trial by jury does not apply because "a lawyer discipline proceeding is not a criminal proceeding."); *Statewide Grievance Comm. v. Friedland*, 609 A.2d 645 (Conn. 1992) (Sixth Amendment right to effective assistance of counsel does apply because attorney disciplinary proceedings are not criminal proceedings); *In re Kelly*, 238 So.2d 565 (Fla. 1970) (prohibition against double jeopardy does not apply to judicial disciplinary proceeding because such a proceeding is not criminal in nature); *In re Stigler*, 607 N.W.2d 699 (Iowa 2000) (Sixth Amendment right to public hearing did not apply to judicial disciplinary proceeding, which is not criminal in nature)

informal resolution, bring formal charges, hear evidence, and issue orders of removal."[57] In essence, he complains that he was deprived of an impartial and unbiased tribunal.[58]

Similar claims made by a doctor about the procedures utilized by the state Examining Board in suspending his license were rejected by the United States Supreme Court in *Withrow v. Larkin*.[59] In that case, the Examining Board was empowered to initiate disciplinary proceedings by bringing charges against doctors; to investigate the charges; to prosecute the charges; to rule on the charges; and to impose punishment on the doctor.[60] The Supreme Court ruled that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation."[61]

To establish that something "more" that would give rise to a constitutional violation, one complaining about the combination of investigative and adjudicative functions "must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals 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."[62] For example, the Supreme Court observed that "experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable" where "the adjudicator has a pecuniary interest in the outcome … [or] … has been the target of personal abuse or criticism from the party before him."[63] Ultimately, the

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[57] Appellant's Brief, p. 11.
[58] *Id.* at 10-16.
[59] 421 U.S. 35 (1975).
[60] *Id.*
[61] *Id.* at 58.
[62] *Id.* at 47.
[63] *Id.*

Supreme Court determined that there was no evidence sufficient to overcome the presumption of honesty and integrity on the part of the adjudicators on the Examining Board.[64]

Following the United States Supreme Court's ruling in *Withrow*, the Kentucky Supreme Court in *Nicholson* rejected the claim that disciplinary proceedings against a judge were tainted by the combination of investigatory and adjudicative functions in the Judicial Retirement and Removal Commission (i.e., the predecessor to the Judicial Conduct Commission).[65] There, Judge Nicholson averred that "involvement in the investigation of this incident so influenced the members of the Commission that they could in no way remain impartial at the adjudicative stage of the proceedings." However, the Court held that the judge "has not overcome the presumption of honesty and integrity of the members of the Commission, most of whom are members of the bench or bar and cognizant of the proper standards applicable at each stage of the proceedings. The case law, both federal and state, generally rejects the idea that the combination of judging and investigating is a denial of due process."[66]

In addressing the same issue, the Mississippi Supreme Court upheld its Commission's decision holding that the judge had "present[ed] no specific foundation for suspecting that the Commission was in any way biased toward the Executive Director of the Commission or his investigation into [the judge]."[67] In the instant matter, the Commission's unanimous dismissal of Counts I, VIII, X and XVI because they were "not proven by clear and convincing evidence"

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[64] *Id.*
[65] *Nicholson, supra* at 309.
[66] *Id.*
[67] *Mississippi Commn. on Judicial Performance v. Russell*, 691 So.2d 929 (Miss. 1997). See also *In re Del Rio*, 256 N.W.2d 727 (Mich. 1977) (stating that the authority is legion in support of the proposition that combining the investigative and adjudicative roles in a single agency does not necessarily violate due process in judicial fitness proceedings); *In re Hanson*, 532 P.2d 303 (Alaska 1975) (the combination of judicial and investigative functions in the Commission on Judicial Qualifications did not violate judge's due process rights); *In re Zoarski*, 632 A.2d 1114 (Conn. 1993) (same); *Arkansas Judicial Discipline and Disability Commn. v. Proctor*, 2010 Ark. LEXIS 81 (same).

confirms that the members of the Commission were acutely aware of the different standards for initiating formal proceedings and for subsequent adjudication on the merits.

Judge Alred's reliance on *Caperton v. A.T. Massey Coal Co., Inc.*,[68] is similarly misplaced. In *Caperton*, the United States Supreme Court established a rule governing when judges are required to recuse from deciding cases involving persons who contributed to their election campaigns.[69] For *Caperton* to have any application here, there must be proof that (a) Judge Alred contributed to the election campaign of one or more of the judges who sit on the Judicial Conduct Commission and (b) the contribution was of such a size and was made in such temporal proximity to the pendency of his case that it was likely to affect the judge's decision.[70] There is, of course, no such proof in this case. Moreover, *Caperton* has absolutely nothing to do with the combination of investigative and adjudicatory functions and therefore does not support Judge Alred's position on that issue.

Because there is nothing inherently wrong in combining investigative and adjudicatory functions within the Commission, and because Judge Alred has not offered any evidence to overcome the presumption that the Commission acted honestly and with integrity, his constitutional challenge must fail.

C. Commission members were not required to recuse.

Judge Alred asserts that the individual members of the Commission violated his rights by refusing to recuse themselves from hearing his case.

SCR 4.090 requires a member of the Commission to recuse if he/she has an interest, relationship or bias that would require a judge to recuse herself in a judicial proceeding. Judge Alred contends that Chairman Wolnitzek should have recused himself because of his relationship

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[68] 129 S.Ct. 2252 (2009).
[69] *Id.*
[70] *Id.* at 2263-2264.

with Gene Weaver, the Commission's investigator. Of course, what little Judge Alred offers about the nature of that relationship – i.e. that the Chairman and Weaver have known each other for 30 years and have been involved in nondescript "personal relationships for the benefit of the other" during that time – does not establish the type of relationship that would require a judge to recuse himself in this case.[71] Here, the Chairman was not called upon to pass judgment on *Weaver*'s conduct, but on Judge Alred's. Indeed, there is no allegation that the Chairman had any sort of relationship with Judge Alred that would have required his recusal.

Judge Alred further complains that members of the Commission were biased because they "received pre-hearing information by way of hearsay evidence and reports from investigators much of which came to them through *ex parte* communications."[72] In support of his complaint, Judge Alred cites to information the Commission received during the preliminary investigation under SCR 4.170 and before the formal charges were filed.

Citing *Ice v. Com.*,[73] Judge Alred argues that information received during the preliminary investigation required the Commission to recuse. In *Ice*, a teenager was accused of murdering a young girl. Before deciding whether or not to transfer the teenager from juvenile court to circuit court, the District Court Judge met *ex parte* and at length with prosecutors and the investigating law enforcement officer to discuss the case. Under those circumstances, the concurring justice in the Court of Appeals opined that the District Court judge should have recused himself from the decision whether to transfer the juvenile. *Ice*, of course, was a criminal case and in criminal cases, judges are not allowed to investigate the criminal charges against those who come before them.[74]

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[71] Appellant's Brief, p. 17.
[72] Appellant's Brief, p. 16.
[73] 667 S.W.2d 671 (Ky. 1984)
[74] *Id.*

By contrast, the proceeding against Judge Alred was administrative in nature and does not invoke the same heightened procedural safeguards that apply in a criminal case.[75] It is well-settled that investigative and adjudicative functions may be combined in the same person or agency in an administrative proceeding such as a judicial disciplinary proceeding.[76] And, factual information obtained during a preliminary investigation under SCR 4.170 is distinguishable and quite different from *ex parte* evidence obtained in a criminal case.

Judge Alred also cites *Caperton* for the proposition that members of the Judicial Conduct Commission were required to recuse themselves because they supposedly (no proof or citation to the record is offered to support this assertion) expressed a belief, during an informal conference with him, that he had violated the standards governing judicial conduct.[77] In particular, Judge Alred refers to the portion of *Caperton* that discusses *In re Murchison*,[78] quoted on page 14 of Appellant's Brief.

In *Murchison*, a judge conducted a one-man grand jury, a procedure which is expressly permitted by Michigan law, as part of an investigation into bribery and gambling in a local police agency.[79] The judge called two witnesses to testify before the grand jury.[80] He believed that one witness committed perjury, and the second witness refused to answer any questions without his attorney present.[81] The judge then tried both witnesses on criminal contempt charges, convicted them and sentenced them.[82] The United States Supreme Court held that it was a violation of due

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[75] E.g., *Nicholson, supra.*
[76] *Withrow, supra*; *Nicholson, supra.*
[77] Appellant's Brief, pp. 5, 17.
[78] 349 U.S. 133 (1955). *Caperton, supra* at 2261-2262.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*

process for the same judge who had presided over the grand jury proceedings to then try, convict and sentence the witnesses on the contempt charges.[83]

Judge Alred's reliance on *Murchison*, as discussed in *Caperton*, is misplaced and again fails to appreciate the distinction between criminal and administrative proceedings. The purpose of criminal proceedings is, by definition, to punish a criminal wrongdoer. Since punishment is the objective, it stands to reason that the tribunal that will potentially impose the punishment should not be involved in investigating the wrongdoer's guilt. By contrast, the purpose of a judicial disciplinary proceeding is "to improve the quality of justice administered within the Commonwealth by examining specific complaints of judicial misconduct, determining their relation to a judge's fitness for office and correcting any deficiencies found ..."[84] The hearing conducted by the Commission was not for misconduct Judge Alred engaged in before the Commission, but rather for his conduct as Circuit Judge. The Commission's determination as to whether or not to initiate formal proceedings under SCR 4.170 is not comparable to the contempt adjudications in *Murchison* for conduct before the same judge who made them, and furnishes no basis for relief for Judge Alred here.[85]

Because it is not a punitive proceeding, the fact that members of the Judicial Conduct Commission may have expressed a belief that Judge Alred may have violated judicial conduct standards before the adjudicative phase of the proceeding began is of no moment and insufficient to reverse the Commission's ruling.

III. THE COMMISSION COMPLIED WITH SCR 4.170.

SCR 4.170(1)(4) states that after the preliminary investigation is completed and before formal proceedings are initiated under Rule 4.180, the Commission shall afford the judge under

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[83] *Id.*
[84] *Nicholson, supra.*
[85] See *Withrow* and *Nicholson, supra.*

investigation an opportunity to examine all factual information, including the name of the complainant if relevant. Judge Alred alleges that the Commission failed to provide the name of a complainant he sought via a Motion to Compel.

Judge Alred cites to a Motion to Compel filed with the Commission on June 27, 2011.[86] He claims that the motion was denied without explanation as to whether or not there was a complainant. However, he fails to note that in its Response to his Motion to Compel, Counsel for the Commission indicated that the Commission had received two complaints regarding Judge Alred and that those complaints were provided to him on November 3, 2010.[87] Consequently, because the Commission provided Judge Alred with the name of the complainants as required under SCR 4.170(1)(4), the Commission properly denied his motion.

Judge Alred further argues that the Commission failed to provide him with exculpatory evidence prior to the hearing. Specifically, he claims that the Commission's investigator, Gene Weaver, failed to transcribe exculpatory evidence and failed to report the information to either the Commission or to him. This claim misrepresents Weaver's testimony.

At the hearing, Judge Alred questioned Weaver about a conversation he had with Harlan County Judge/Executive Joe Grieshop.[88] During this meeting, Weaver testified that Grieshop began making statements about Commonwealth Attorney Henry Johnson and Sheriff Marvin Lipfird's personal preferences and religious beliefs.[89] Notwithstanding the personal attacks on Johnson and Lipfird, Weaver testified that Grieshop's statements had no bearing on the merits of the investigation he was conducting so he did not memorialize the meeting in a written report.[90]

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[86] Docket Entry 34.
[87] Docket Entry 36.
[88] Transcript of hearing, p. 506.
[89] *Id.* at 507.
[90] *Id.*

The purpose of SCR 4.170(1)(4) is to allow a judge under investigation to be apprised of the information being considered by the Commission and to allow the judge the opportunity to provide additional information if he deems necessary. The rule does *not* require that the Commission document, record, and disclose every conversation or discussion that occurs during an investigation, no matter how unrelated it may be. In short, the Commission complied with its obligations under the Rules and Judge Alred's claims to the contrary are unfounded.

IV. THE COMMISSION'S FINDINGS WERE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

Section 121 of the Kentucky Constitution authorizes the Commission to remove a judge or justice for good cause, with judicial review directly to the Supreme Court.[91] The evidence to sustain the charges before the Commission must be "clear and convincing."[92] On appeal, the Court must accept the findings and conclusions of the Commission "unless they are clearly erroneous" or "unreasonable."[93]

Judge Alred argues that the Commission's findings and conclusions are clearly erroneous. However, the Commission was presented with substantial evidence to support each charge that it determined Judge Alred violated. Such evidence included court records, videos of hearings, and testimony from witnesses. Moreover, as shown below, the most compelling evidence came from Judge Alred himself who admitted a majority of the factual allegations contained in the charges. As such, the Commission's decision was not clearly erroneous or unreasonable.

A. Count II – Advocating use of funds at Harlan Fiscal Court Meeting.

At the hearing, Counsel for the Commission introduced Court records and videos of hearings in Harlan Circuit Court showing that on January 11, 2010, Judge Alred approved a plea

[91] *Gormley v. Judicial Conduct Comm'n*, 332 S.W.3d 717, 725 (Ky. 2010).
[92] SCR 4.160; *Wilson v. Judicial Retirement & Removal Comm'n*, 673 S.W.2d 426, 427 (Ky. 1984).
[93] *Id.* at 427-428.

agreement in Harlan Circuit Court Case Nos. 08-CR-00481-001 and 08-CR-00481-002 resolving drug trafficking charges against two doctors.[94] The evidence showed the two defendants posted a $1.2 million bail.[95] Before the Commission, Commonwealth Attorney Henry Johnson testified that prior to the January 11, 2010 hearing he negotiated a plea agreement which entailed, *inter alia*, the Defendant doctors to donating $500,000.00 of the posted bond to the Harlan County Fiscal Court for the purposes of drug prevention in Harlan County.[96] Johnson testified that Judge Alred expressed his desire that the plea agreement include specific provisions for the bond money, first requesting it be used for the Bluegrass Challenge Academy and later for a water park.[97] Due to Judge Alred's indecision, Johnson included language in the plea agreement that gave Judge Alred approval authority over the use of the funds.[98]

Johnson discussed the terms of the agreement, including the judge's approval over the funds, with Judge Alred before the January 11, 2010 hearing.[99] Moreover, the terms of the agreement were set forth in a Motion to Reduce Asset Forfeiture filed by the Defendants prior to the hearing.[100] Finally, the Commonwealth Attorney disclosed and discussed the language in open court at the January 11, 2010 hearing.[101] Judge Alred approved the agreement and the case was resolved that day.[102]

Against this backdrop, Judge Alred appeared at a regularly scheduled meeting of the Harlan County Fiscal Court on January 19, 2010.[103] At that meeting he addressed the Fiscal

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[94] See hearing exhibits 1-3.
[95] *Id.*
[96] Transcript of hearing, p. 209-210.
[97] *Id.*
[98] *Id.* at 211.
[99] *Id.* at 213.
[100] See hearing exhibit 1.
[101] Hearing Transcript, p. 213.
[102] See hearing exhibit 2.
[103] Hearing Transcript, p. 80.

Court and advocated that they use the donated funds from the physicians for a water park.[104] During the meeting, a Fiscal Court member suggested that a portion of the funds be used for the Sheriff's Chaplain Corps, a local outreach organization run by Sheriff Marvin Lipfird.[105] Judge Alred objected to the Chaplain Corp receiving any portion of the money.[106] He told the Fiscal Court he retained "absolute veto power" over the use of the funds via the plea agreement and that he would veto any attempt to use the funds for the Chaplain Corps.[107] Sheriff Lipfird testified before the Commission that he was present at the Fiscal Court meeting and that Judge Alred made it clear that he had control over the money.[108]

Judge Alred claimed at the Commission's hearing that he appeared at the Fiscal Court meeting as a private citizen and advocated for the water park in his personal capacity.[109] However, by threatening to invoke his "absolute veto power" over the funds, Judge Alred was clearly speaking as a Circuit Judge and was using the power and authority of his office to influence an otherwise independent financial decision of the Harlan County Fiscal Court.

In its Final Order, the Commission found that Judge Alred engaged in misconduct violating Canons 1, 2A, 2D, and 4C(1) of the Judicial Code of Conduct.[110] His appearance at the Fiscal Court meeting advocating the use of funds and expressing his right to veto any attempt to give the money to the Sheriff's Chaplain Corps violated Canon 4C(1). And, by using his position as Judge to control the Fiscal Court's use of the bond proceeds, Judge Alred used the prestige of his office to advance his interests in violation of Canon 2D. Finally, Alred's actions

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[104] *Id.*
[105] *Id.* at 82.
[106] *Id.* at 83
[107] *Id.* at 83-84.
[108] *Id.* at 347.
[109] *Id.* at 617-618.
[110] Docket Entry 64, p. 4-5.

unquestionably impaired the integrity and public confidence in the judiciary in contravention of Canons 1 and 2A.

B. Count III – Amendment of January 11, 2010 Order.

On March 3, 2010, Commission Executive Secretary James Lawson sent a letter to Judge Alred inquiring about his appearance at the January 19th Harlan Fiscal Court meeting.[111] In that letter, Lawson asked Judge Alred to explain what authority he had to retain the direction and control, including veto power, over the donated funds as part of the plea agreement.[112]

One week after receiving this letter, Judge Alred issued an Order on March 10, 2010 amending the January 11, 2010 Order by removing the language that the funds were subject to approval of the Harlan Circuit Judge.[113] Judge Alred's Order further stated that the "language was inadvertently put into this Order by counsel for Defendants and the Commonwealth's Attorney's Office" and "was neither solicited nor approved by this judge."[114]

The proof showed to the contrary. The language giving Judge Alred approval over the funds was not placed inadvertently in the Order but rather was a key term to the plea agreement. Judge Alred testified that the language giving him approval over the funds was included in the Defendants' Motion to Reduce Bond Forfeiture which he reviewed.[115] Moreover, Commonwealth Attorney Henry Johnson testified that he informed Judge Alred that he would have approval over the funds during plea negotiations.[116] Finally, Judge Alred admitted that Johnson set forth the terms of the plea agreement, including Judge Alred's approval over the expenditure of the funds, in open court during the January 11, 2010 hearing.[117]

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[111] Hearing Exhibit 4.
[112] *Id.*
[113] Transcript of hearing, p. 87, see also hearing exhibit 6.
[114] Transcript, p. 88, see also hearing exhibit 6.
[115] Transcript, p. 73.
[116] *Id.* at 213.
[117] *Id.* at 75

In sum, the evidence showed that Judge Alred both solicited and approved the language in the January 11, 2010 Order. Indeed, Johnson testified that during the plea negotiations, Judge Alred was intimately involved in determining where and how the proceeds would be spent.[118] Importantly, Judge Alred ultimately admitted that he approved the terms of the agreement, including his control over the use of the money.[119]

Because of Judge Alred's actions and misrepresentations in his March 10, 2010 Order, the Commission correctly found that Judge Alred engaged in misconduct violating Canons 1, 2A, 3A, and 3B(2).[120] Judge Alred's misrepresentation in the March 10, 2010 Order were clearly designed to absolve himself of criticism in violation of Canons 3A and 3B(2). Furthermore, the dishonest nature of the Order violated Canons 1 and 2A.

C. Count V – Bond condition prohibiting substitute teaching.

Judge Alred presided over Harlan Circuit Case No. 09-CR-00504 in which the Defendant, Robin Teshon, was accused of insurance fraud.[121] Judge Alred testified before the Commission that after being indicted, he saw Teshon working as a substitute teacher at James A. Cawood Elementary School, where his wife worked and children attended school.[122] Upon learning this, Judge Alred contacted school Principal James Clem and inquired as to why Teshon was still working at the school while under felony indictment.[123]

Clem testified at the hearing that he informed Judge Alred that he could not prevent Teshon from working as a substitute teacher because she met all of the district requirements and had not yet been convicted of any crime.[124] He testified that a month later, Judge Alred

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[118] *Id.*
[119] *Id.* at 87.
[120] *Id.* at p. 6.
[121] Transcript, p. 173-174.
[122] *Id.* at 175
[123] *Id.* at 174.
[124] *Id.* at 416

approached him again expressing concern about Teshon's employment.[125] Clem informed him that he had consulted with the district office and that he could not prevent her from working at the school based solely on the indictment.[126] Judge Alred admitted that upon learning that Clem would continue to allow her to teach, he imposed a bond condition at Teshon's next hearing prohibiting her from substitute teaching during the pendency of the case.[127]

The Commission ruled that Judge Alred's unilateral bond condition was imposed without legal basis and without a hearing in contravention of Canons 1, 2A, 3A, 3B(2) and (8).[128] By issuing a bond condition to prevent an individual from working at his children's school, Judge Alred allowed interests to sway his decisions in violation of Canon 3A and 3B(2). The fact that he issued the bond condition without legal basis violated Canon 3B(8). Furthermore, his interference with the Principal's authority at the school and general nature of his bond condition impaired the integrity and propriety of the judiciary in violation of Canons 1 and 2A.

D. Count VI – Special Grand Jury Order.

In the fall of 2009, Judge Alred learned that the Sheriff's Department was investigating allegations that Harlan County Judge/Executive Joe Grieshop was selling drugs out of his county office.[129] The allegations came from Melissa Hensley who was under federal indictment and had a known criminal history of drug abuse. The investigation continued into the spring of 2010.[130] At the same time, Grieshop was running in the May primary election for Judge/Executive against

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[125] *Id.*
[126] *Id.*
[127] *Id.* at 176.
[128] Docket Entry 64, p. 7
[129] Transcript, p. 94.
[130] *Id.* at 100-101.

several challengers including Judge Alred's second cousin, Denny Pace.[131] Grieshop acknowledged that Alred's family members were supporting Pace in the election.[132]

Because the investigation involved an elected official, Commonwealth Attorney Henry Johnson contacted the Attorney General's Office to assist in the investigation.[133] As the investigation went on, it became readily apparent to Johnson and Sheriff Lipfird that there was no direct evidence supporting the allegations against Grieshop and they questioned Melissa Hensley's credibility.[134] In the spring of 2010, Johnson met with Judge Alred and informed him that the Attorney General concluded that the allegations against Grieshop were unsubstantiated and that they were going to conclude the investigation.[135]

In discussing the matter with Judge Alred, they discussed presenting the matter to a special grand jury.[136] Johnson made it clear to Judge Alred that the special grand jury would return a no true bill.[137] Furthermore, at the time of this meeting, Johnson was not concerned with the impact on the May 2010 primary election because the investigation had not become public and no criminal charges would result from the grand jury.[138]

During his testimony before the Commission, Judge Alred admitted that on April 22, 2010, he conducted a hearing in *Potter v. Howard*, Harlan Circuit Case No. 07-CI-0040 in which the Defendant, James Howard, filed a motion for Judge Alred to recuse.[139] Howard sought Judge Alred's recusal on grounds that (1) Judge Alred had previously represented the Plaintiff in an

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[131] *Id.* at 110.
[132] *Id.* at 570. Grieshop acknowledged prior statement to Gene Weaver in which he said Alred's Father and Father-in-law were supporting Pace in the election. See also *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969) (inconsistent prior statements of a witness is admissible if declarant is present and subject to cross examination).
[133] *Id.* at 217.
[134] *Id.* at 217, 354-355.
[135] *Id.* at 221.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 222.
[139] *Id.* at 113-114.

unrelated matter and (2) Howard had openly opposed Judge Alred in his last election.[140] Judge Alred initially denied Howard's motion on those grounds.[141] Howard then renewed his request for Judge Alred to recuse and presented him with an affidavit signed by Grieshop.[142] The affidavit claimed that Judge Alred had contacted Grieshop and asked him to regain control of certain property owned by the County which was under lease by Howard so it could be leased to a tenant who could perform drug tests.[143] The affidavit further stated that when Grieshop told Judge Alred that he could not rescind the lease, Judge Alred became angry.[144]

Upon reading this affidavit in court, Judge Alred became upset because he believed the content of the affidavit was false.[145] A video of the April 22, 2010 hearing showed a visible change in Judge Alred's demeanor in which he admitted that his "face was a little flushed."[146] Judge Alred ordered an evidentiary hearing and directed Grieshop to appear before the Court and testify as to the contents of the affidavit.[147]

Later that same day, Judge Alred issued an Order for a Special Grand Jury to convene in the Grieshop investigation.[148] The Order identified the target of the investigation stating: "The Special Grand Jury is charged to investigate alleged illegal drug trafficking by the Harlan County Judge Executive from the Harlan County Judge Executive's Office as a result of an ongoing investigation by the Harlan County Sheriff's Department."[149] The special grand jury was to

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[140] *Id.* at 114.
[141] *Id.* at 115.
[142] *Id.* at 116-117.
[143] *Id.* at 117.
[144] *Id.* at 118.
[145] *Id.* at 128.
[146] *Id.* at 636, see also hearing exhibit 10.
[147] *Id.* at 127, see also hearing exhibit 10.
[148] *Id.* at 119.
[149] *Id.* at 119, see also hearing exhibit 11.

convene on May 25, 2010, a week *after* the 2010 primary election.[150] The next day, Judge Alred issued an Order recusing himself from the Howard case.[151]

Johnson became aware of the Special Grand Jury Order on April 26, 2010 when a member of the local press contacted him about it for a story she was working on.[152] Johnson testified that someone had leaked the contents of the grand jury Order to the press.[153] He was concerned about the language of the Order because it implied that the allegations against Grieshop had merit and that the investigation was ongoing when both he and Judge Alred knew that the allegations were unsubstantiated and the investigation had concluded.[154] Based on this information, Johnson became convinced that Judge Alred had issued the Order to punish Grieshop for signing the affidavit in the *Potter v. Howard* case and to help his cousin who was running against Grieshop in the primary election.[155]

The Commission found that when Judge Alred issued the Special Grand Jury Order he was aware that there was insufficient evidence to support an indictment.[156] The Commission also found that despite this knowledge, Judge Alred issued the Order with the above described language when he could have issued it under seal or drafted it in such a way as to not identify Grieshop.[157] The Commission further noted that the grand jury would not be convened until after the primary election in which Judge Alred's cousin was running against Grieshop.

Based on these facts, the Commission found Judge Alred engaged in misconduct violating Canons 1, 2A, 3A, 3B(2), 3B(8) and 3E(1)(a).[158] By using the Special Grand Jury

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[150] *Id.* at 120 – 121.
[151] *Id.* at 124 – 125, see also hearing exhibit 12.
[152] *Id.* at 224.
[153] *Id.*
[154] *Id.* at 225.
[155] *Id.* at 226, 235, and 238.
[156] Docket Entry 64, p. 13.
[157] *Id.*
[158] Docket Entry 64, p. 8.

Order for political purposes, Judge Alred allowed interests to take precedence over his duties as a judge in violation of Canons 3A and 3B(2) and further impugned the integrity and public confidence in the judiciary in violation Canons 1 and 2A.

E. Count VII – Review of *ex parte* evidence in Grieshop investigation.

Upon learning of the Grieshop investigation, Judge Alred engaged in an *ex parte* review of videotape evidence in the office of the Harlan County Sheriff before entering the Special Grand Jury Order and before any proceeding was pending in his Court.

Sheriff Marvin Lipfird and Chief Deputy Winston Yeary approached Judge Alred in 2009 to receive a continuance on a pending criminal case against Melissa Hensley because she was providing information to them in another matter.[159] Judge Alred was hesitant to grant the continuance.[160] To stress the importance of granting the continuance, Lipfird and Yeary informed Judge Alred that she was involved in a major investigation.[161] Judge Alred asked who the subject of the investigation was. Lipfird and Yeary were initially hesitant to identify the target but Judge Alred insisted on knowing.[162]

Lipfird and Yeary ultimately relented and told Judge Alred that the investigation centered on Grieshop and that they had a video recording of an attempted controlled buy.[163] Upon learning this information, Judge Alred asked to view the recording.[164] Yeary questioned Judge Alred if it was appropriate for him to review the evidence.[165] Judge Alred dismissed his concern

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[159] Transcript, pp. 356, 427.
[160] *Id.* at 357, 427.
[161] *Id.* at 357, 427.
[162] *Id.* at 357.
[163] *Id.* at 357, 427.
[164] *Id.* at 357.
[165] *Id.* at 428.

and said he would have to recuse if charges were ever brought.[166] Judge Alred then reviewed the video with Lipfird and Yeary.[167]

At the Commission's hearing, Judge Alred did not dispute that he reviewed the video.[168] Instead, he claimed he reviewed it for probable cause purposes. However, he admitted that at the time of his review, there was no arrest or search warrant request pending that required a probable cause determination.[169]

Based on this evidence, the Commission found that Judge Alred's *ex parte* review of the evidence constituted misconduct and violated Canons 1, 2A, 3A, 3B(2) and (7).[170] As with the other charges, Judge Alred's actions impaired the integrity and public confidence in the judiciary in violation of Canons 1 and 2A. He allowed his interests in Judge Grieshop's political future to take precedence of his judicial duties when he reviewed the video, thus violating Canons 3A and 3B(2). And, by considering *ex parte* evidence without a pending search or arrest warrant request, he violated Canon 3B(7).

F. Count IX – Investigation into gaming machines.

In 2008, Judge Alred received multiple complaints from various individuals about gaming machines being operated in local gas stations.[171] He contacted the Kentucky State Police urging them to investigate the matter.[172] He also contacted Sheriff Lipfird and specifically asked him to investigate illegal gaming machines at gas stations owned by James Howard.[173] As a result of his calls, Howard and his business partner were indicted on conspiracy to promote

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[166] *Id.*
[167] *Id.* at 357, 428.
[168] *Id.* at 97.
[169] *Id.* at 99.
[170] Docket Entry 64, p. 9.
[171] Transcript, p. 179.
[172] *Id.* at 182.
[173] *Id.* at 366-367.

gambling charges.[174] Despite acting as the complaining witness who prompted the investigation, Judge Judge Alred did not recuse himself and presided over the criminal case against Howard, ultimately signing an Agreed Order of Dismissal.[175]

The Commission found that Judge Alred actions constituted misconduct in violation of Canons 1, 2A, 3A, 3B(2), (7), (8) and 3(E)(1)(a).[176] Judge Alred showed his personal bias against James Howard by referring him, by name, to the Kentucky State Police and Sheriff's office. His handling of the case despite being the complaining witness shows that he allowed his personal bias to take precedence over his duties as a judge.

G. Count XII – Quid Pro Quo with Kentucky Utilities.

On or about April 16, 2008, Judge Alred filed a complaint with the Kentucky Public Service Commission against Kentucky Utilities ("KU") alleging that they had unlawfully billed and collected certain fuel adjustment charges.[177] At some point after he filed the complaint, he contacted KU's legal counsel to resolve the matter.[178] Judge Alred agreed to dismiss his complaint in exchange for KU making a $12,500.00 donation to the playground project at James A. Cawood Elementary where his children attended school and his wife worked.[179]

The Commission found that KU was aware that Judge Alred was a Circuit Judge at the time he solicited the donation and that KU was likely to have cases in Harlan Circuit Court. Accordingly, the Commission found that Judge Alred's actions constituted misconduct violating Canons 1, 2A, 2D and 4C(3)(b)(i) and (iv).[180] Judge Alred's fundraising was a direct violation of Canon 4C(3)(b)(i) and (iv). More importantly, using the prestige of his office to secure a

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[174] *Id.* at 188, see also hearing exhibit 19.
[175] *Id.*, see also hearing exhibit 19.
[176] Docket Entry 64, p. 10.
[177] Transcript, p. 161, see also hearing exhibit 16.
[178] *Id.* at 165.
[179] *Id.* at 165.
[180] Docket Entry 64, p. 11.

financial donation to his children's school in exchange for a dismissal of his complaint against KU is a textbook abuse of power and a blatant "shakedown" in violation of Canons 1, 2A and 2D.

H. Count XIII – Fundraising for Cawood Elementary.

In addition to soliciting the funds from KU, Judge Alred solicited contributions from numerous individuals for a playground at Cawood Elementary.[181] The Commission found that this conduct violated Canons 1, 2A, 2D and 4C(3)(b)(i) and (iv).[182]

I. Count XVII – Removal of Public Defender from all Harlan Circuit Cases.

Cotha Hudson was an attorney with the Kentucky Department of Public Advocacy in the Eastern Region.[183] In February of 2010, she missed two motion hour hearings in Harlan Circuit Court due to inclement weather and illness.[184] Each time she contacted the Court to inform them that she would not be present.[185] While she was in Frankfort the following week attending death penalty training, she received a faxed copy of an Order issued by Judge Judge Alred *sua sponte* removing her from the twenty four (24) cases she was handling in Harlan Circuit Court.[186] She claimed she was shocked to receive the Order because she had not received notice or a hearing prior to the issuance of the Order.[187] Hudson felt the Order was entered without proper authority and violated her due process rights.[188] Judge Alred admitted that he issued the Order without notice to Hudson but claimed that it was done because she would routinely miss court and not contact her clients.[189]

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[181] Transcript, p. 171-172.
[182] Docket Entry 64, pp. 11-12.
[183] Transcript, p. 432.
[184] *Id.* at 433.
[185] *Id.*
[186] *Id.* at 434, see also hearing exhibit 20.
[187] *Id.* at 434-435.
[188] *Id.* at 435.
[189] *Id.* at 193-194.

The Commission found that Judge Alred entered the Order without legal basis and did not afford Hudson an opportunity to be heard as to why she was not present in court and whether or not her representation was accurate. Accordingly, the Commission found that this was another instance of misconduct that impaired the integrity and public confidence of the judiciary thus violating Canons 1 and 2A.

CONCLUSION

In light of the foregoing, the Kentucky Judicial Conduct Commission, respectfully request that this Court affirm its Findings of Fact, Conclusions of Law and Final Order.

Respectfully submitted,

JEFFREY C. MANDO, ESQ. (#43548)
LOUIS D. KELLY, ESQ. (#92094)
ADAMS, STEPNER,
WOLTERMANN & DUSING, PLLC
40 West Pike Street
Covington, KY 41012
(859) 394-6200 (phone)

GEORGE F. RABE, ESQ. (#56300)
167 West Main Street
Lexington, KY 40507

Counsel for Appellee, Commonwealth of Kentucky Judicial Conduct Commission

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