BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE, SC16-2103
THE HONORABLE SCOTT DUPONT,
No. 16-377
_____/

REPLY OF FLORIDA JUDICIAL QUALIFICATIONS COMMISSION TO JUDGE DUPONT'S RESPONSE TO ORDER TO SHOW CAUSE

This Reply of the Florida Judicial Qualifications Commission (FJQC) to Judge DuPont's ("Judge DuPont") Response to Order to Show Cause ("Response") is filed pursuant to this Court's Order of February 23, 2018.

On August 16, 2017, the Investigative Panel of the FJQC filed an Amended Notice of Formal Charges which alleged that Judge DuPont: (1) recklessly posted false or misleading information about an opponent and his family on a website created by his judicial campaign in a contested 2016 election (Paragraphs 1-2, 6-7); (2) made false or misleading statements at a televised judicial forum that his opponent was ticketed for passing a school bus while it was loading or unloading children, and cheated during a Volusia County straw poll (Paragraphs 3-4, 6-7); (3) announced at the same judicial forum that it was not the role of a circuit judge to determine the constitutionality of statutes, because this would be "legislating from the bench" (Paragraph 5); (4) made unspecified personal attacks on his opponent

at a 2010 judicial campaign (Paragraph 8); (5) presided over a hearing when one side was unavailable due to a traffic accident, and the other side was present in *City of Palm Coast, Florida v. The Group Golf of Palm Coast, LLC*, Flagler County Case No. 2016-CA-000639 (Paragraph 9); (6) held first appearance hearings around his campaign schedule, conducted these earlier than noticed, without counsel present, and significantly increased bonds at such hearings (Paragraph 10); (7) held the victim of a domestic violence case in contempt, ordering her indefinitely incarcerated, unless she and her child underwent psychological evaluations, (Paragraph 11); and (8) ordered a deputy sheriff to search and seize the valuables of a party appearing before him in a domestic matter, when that party asserted an inability to pay support (Paragraph 12). The amended notice charged violations of Canons 1, 2A, 2B, 3A, 3B, 3E, 5A and 7A of the Code of Judicial Conduct and Florida Constitution, Article V, §13.

The Hearing Panel, on February 15, 2018, in its Findings of Fact, Conclusions of Law and Recommendations ("Findings"), determined that Judge DuPont was guilty of several of the noticed charges. This Reply will not unnecessarily address the few charges for which Judge DuPont was found not guilty.

In his Response to Order to Show Cause, Judge DuPont begins by stating that "the Commission failed to produce a single witness who testified that Judge DuPont is presently unfit to hold office." (Response, 1). This is correct. The FJQC did, however, prove that Judge DuPont abused his position and showed himself to be unfit by: ordering money taken from litigants unlawfully; intentionally violating judicial campaign rules in a way that caused permanent harm to private citizens; prioritizing campaigning for re-election over lawful performance of his duties; and announcing to the public that he would ignore his judicial oath. Furthermore, Judge DuPont's testimony to the FJQC was, at times, not worthy of belief. (Findings, 18). The FJQC findings, the law, and the expectations of the public mandate that he is presently unfit to serve.

It is curious that the Respondent would try to claim the character witnesses who testified on his behalf gave 'unqualified' opinions about him, when it is clear from the record that most of their assessments regarding his positive character traits were tempered with concerns about his conduct in the present case.

Statements at Televised Campaign Forum

During his 2016 campaign for re-election as a circuit judge, while speaking at a televised candidate forum on July 26, 2016, Judge DuPont told his audience:

> "Thank you very much. I know that this sounds cliché, but-uh, my philosophy is not to legislate from the bench."
>
> "I don't believe that the Constitution is living and breathing. And I don't believe that it evolves on its own. I believe that our founders knew exactly what they were doing when they created it – and that they created a mechanism whereby it can be changed."
>
> "And to be quite honest with you, uh, there have been numerous (sic) where I have actually been asked by attorneys to find that the statute is unconstitutional. **I have refused to do that, because my thought process is there's another way to do that**."
>
> "**If they don't like the decision they can appeal it, and it can start going up the food chain to do it that way**."
>
> "**But even though I've been asked to find a statute unconstitutional as a sitting judge, I have refused to do so. Because again, it's not my job to legislate from the bench**."

(T. 308; FJQC Ex. 41, emphasis added; Findings, 22-23). Remarkably, Judge DuPont made these statements after the forum's moderator highlighted the importance of Canon 7 in preserving public confidence in the judiciary.

Two distinguished experts in judicial ethics, Major B. Harding, Jr., a retired Justice of the Florida Supreme Court, and William VanNortwick, a retired Judge of the First District Court of Appeal, testified that the comments were blatant violations of Canon 7. The comments announced a predetermination by Judge DuPont of how he would decide certain cases, thereby diminishing public confidence in the judiciary. Judge DuPont testified he did not understand how his comments could be interpreted in this manner. (Findings, 25).

Conducting Bond Hearings Without Counsel

The Florida Rules of Criminal Procedure mandate that 1st appearance hearings be provided for defendants arrested in the preceding twenty-four hours, including weekends and holidays. (FRCRP 3.131). No defendant's case can be handled without both defendant's counsel and a prosecutor present. *Id*. Judge DuPont, through his judicial assistant, ordered all appropriate court personnel on Memorial Day Weekend to report to court early each day, and specifically at 7:00 a.m. on Saturday, May 28, 2016. This was so Judge DuPont could make campaign appearances later in the day. (T. 523). When the assigned assistant public defender arrived, before 7:00 a.m., Judge DuPont had completed all hearings and was gone. Most, if not all, of the session was also conducted without an assistant state attorney present.

Before he left, Judge DuPont significantly increased the bonds of two defendants without notice to anyone, in contravention of Supreme Court Rules.

In his testimony at trial, Judge DuPont admitted ignoring the Supreme Court Rules. In his Response, Judge DuPont again admits that he made a "poor decision" (T. 491) and could not say why he started the hearings earlier than the time provided to the attorneys and court personnel. (T. 525).

False and Misleading Campaign Information

In March 2015, Judge DuPont, planning to run for re-election as a Circuit Judge, "received, read and understood the Florida Code of Judicial Conduct." (FJQC Ex. 44). On May 12, 2016, he attended a seminar conducted by the Florida Supreme Court's Judicial Ethics Advisory Committee. (FJQC Ex. 22; T. 551-552). The primary purpose of this seminar was to impress upon candidates for judicial election the pertinent provisions of the Judicial Code of Conduct, especially Canon 7. (T. 45-57). Judge DuPont's opponent, Malcolm Anthony, also attended, as did other judicial candidates, including Circuit Judge Howard McGillin. (FJQC Ex. 22; T. 49-51).

Judges James Edwards and Roberto Arias taught the May 12, 2016 seminar. The program emphasized the responsibilities of judicial candidates identified in Canon 7: "Play by the Rules"; a candidate **cannot** rely on

campaign managers or others; be wary of how others behave because a candidate cannot shift blame to another for misconduct; learn the specific, actual Florida sanctions Canon 7 violations. (FJQC Ex. 23; T. 48, 52-60; emphasis added). A focus of the program was that a candidate blaming anyone else for campaign violations will not be tolerated.

The same month, May of 2016, Judge DuPont terminated the campaign manager who had directed his 2010 campaign and hired Maureen France. She had extensive experience handling other judicial campaigns. (T. 64-66; 470-472). Judge DuPont told France he wanted to do "opposition research" on his opponent, Malcolm Anthony. France responded that she did not have time to "do opposition research" because it was too far into the campaign, and she recommended the hiring of Bill Tavernier as a researcher. (T. 66-68; 74-75; 97-98; 106-107). Judge DuPont never met Tavernier and they had minimal contact. (T. 117, 121, 475). France agreed to pay Tavernier for his "research."

Tavernier conducted two hours of opposition research on the internet. (T. 119-121, 127). He then forwarded the information to France, who sent it to Judge DuPont. (T. 103). Judge DuPont then directed that his campaign publicly post the following about Anthony and his family:

- information suggesting that Anthony's inactive business entity called "Hide-Your-Past" was intended by Anthony to hide

information about himself, when in fact it was created for use in his law firm years earlier to invite potential clients to get records sealed or expunged;

- information stating Anthony's wife had been arrested three times, when in fact she has never been arrested;
- information stating Anthony's 21-year-old daughter had been arrested 23 times, when in fact she has never been arrested, and was at the time a graduate student at the University of Florida, and applying for a military scholarship;
- information that Anthony had gone through a name change to deceive people about his past, when in fact the name change occurred jointly with his wife for legitimate reasons over 20 years earlier;
- information that Anthony had been cited numerous times for speeding through school zones, including while a school bus was unloading children, which was not true. (FJQC Ex. 5).

All of the foregoing was captured under the website heading: "Do You Trust Malcolm Anthony To Be Your Circuit Judge?"

Circuit Judge Matthew Foxman testified that he counseled Judge DuPont not to use the negative information, because it was unnecessary. He

also advised Judge DuPont to make sure it was true and accurate. Judge DuPont's response was that his campaign people were experienced at this type of campaigning. Judge DuPont testified that Judge Foxman never told him not to use the information, and went further claiming Foxman told Judge DuPont "I don't see how (you) can't use it." Judge Foxman testified this claim was "not true." (T. 284).

Circuit Judge Howard McGillin, career military officer, who has taught ethics as a professor at Army law school, warned Judge DuPont to be especially careful about the use of opposition research. Judge McGillin testified that he had done a simple check of some of the claims made by Judge DuPont and determined their inaccuracy just by accessing public court records on his computer.[1] (T. 272-275).

At the televised forum of July 26, 2016, Judge DuPont reiterated much of the same false information about Anthony that was included on his campaign website (ticketed for handicapped parking; speeding in a school zone; changing his name; hiding his past; etc.). He also touted his own character, integrity and qualifications to be re-elected.

[1] Similarly, during the Investigative Panel hearing, a commissioner was able to "verif[y] the information to be false in a full 30 seconds," using nothing more than publicly accessible documents on the St. John's County Clerk of Court's website. (FJQC Ex. 40; T. 48-51).

Subsequently, Judge McGillin became concerned about some of the attacks by Judge DuPont on Anthony, and did a simple check of Duval County court records. He then confirmed the inaccuracy of many of Judge DuPont's allegations (T. 274-277).

Recognizing that the campaign information originating with Tavernier was potentially inflammatory and had not been confirmed as accurate, France told Judge DuPont she wanted Judge DuPont to execute a hold harmless agreement. Judge DuPont refused. The only factual dispute of Judge DuPont in his Response to the elections issues is that the testimony of France may have been "at odds" with Judge DuPont's over the verification of accuracy of some of the information used. (Response, 29). This argument is to pretend that Canon 7 does not exist.

In his Response with respect to the election issues, Judge DuPont stated that he does "… not defend the activity as acceptable conduct. It was not." (Response, 28). He also relies on his initial response to the Amended Notice of Charges in which he claims to recognize the significance of the issue and take "full responsibility." His Response contradicts any acceptance of responsibility. "Judge DuPont acted in good faith, with the belief that the information supplied by William Tavernier, who was retained by Maureen

France, his campaign manager, was accurate." (Response, 29). This statement directly contradicts any acceptance of responsibility.

The Response then reverts to a citation to his testimony before the Hearing Panel, i.e., "…That's why I am here taking responsibility, because the buck stops with me." (T. 562; Response, 29). Judge DuPont does not seem to understand that taking responsibility means to heed the lessons of the JEAC program; to heed the advice of Circuit Judge Howard McGillin; to heed the advice and warnings of Circuit Judge Matthew Foxman; to heed the warnings of Maureen France; and to heed the document executed months earlier stating an understanding of the Canons of Judicial Ethics. Acceptance of responsibility is not to repeatedly testify before the Hearing Panel that you relied on others and yet voice the magic words, "I accept responsibility." "An answer of 'yes, but' and 'yes, with qualifications' falls short of a genuine admission of wrongdoing." *In re Cope*, 848 So. 2d 301, 304 (Fla. 2003).

Seizure of Litigants' Property

The FJQC found that Judge DuPont ordered a deputy sheriff, in court proceedings, to search a litigant for money or things of value. The deputy was uniformed and armed (T. 512); removed a wallet and took money from it; and turned the money over to an adverse party at Judge DuPont's direction. (T. 141). The deputy had never done this before (T. 141). Law enforcement

officers were visibly angry about this and reported it to Administrative Judge Terrell LaRue (T. 184-188, 191). In response to counseling by Judge LaRue, Judge DuPont's response was that "I can do that" and "[w]e do it all the time in St. Johns County." (T. 189-190, 194-195). Judge DuPont testified he did this 3-5 times previously, but not after this event. (T. 512). He also testified he did not understand why the event triggered the response it did. (T. 527-528).

In his Response, while Judge DuPont acknowledged the facts supporting the Findings, his arguments ignored the fact that this outrageous behavior also prompted the case manager, Ms. Katie Bernard, who was also present, to complain about the event to her superior. (T. 166-168). The Response also ignores the testimony of Bernard that Judge DuPont was very disrespectful to this litigant and others. (T. 180-181, Response, 5-13).

The critical concern of the FJQC with respect to Judge DuPont's behavior was two-fold: (1) it was sufficiently outrageous that it prompted complaints by law enforcement and courtroom personnel; and (2) it signaled what become a disturbing pattern of behavior by Judge DuPont in ignoring the advice and counsel of others.

Much of the thrust of Judge DuPont's Response is that the FJQC paid inadequate attention to letters written on Judge DuPont's behalf emphasizing

his honesty and work ethic. It states that the testimony of Judge Berger and Judge Mendoza was mischaracterized in part, and that other judges engaged in similar behavior in ordering parties to be searched by deputies. These arguments have little bearing on Judge DuPont's qualification to continue to hold office. *See In re Henson*, 913 So. 2d 579, 593 (Fla. 2005) ("[w]e have previously removed judges despite strong character evidence or an unblemished judicial record when their misconduct was fundamentally inconsistent with the responsibilities of judicial office or struck at the heart of judicial integrity.")

The critical argument of the Response, however, is that Judge DuPont's behavior during the campaign was "in good faith"; that it was not knowingly intentional; and that he should therefore be excused because his behavior was – at worst – careless. He urges that the result in *In re Decker*, 212 So. 3d 291 (Fla. 2017) militates against removal. Finally, he argues that an unblemished judicial career (five and a half years) outweighs all the misconduct.

The FJQC concluded that Judge DuPont violated Canons 1, 2A and 7A with respect to the election issues; violated Canons 1, 2A, 3B2 and 7A with respect to his personal attacks during the Judicial Candidates Forum; violated Canons 1 and 2A by ordering a deputy sheriff to search a litigant; and violated

Canons 1, 2A and 3A by conducting hearings without counsel required by law and further by increasing the bonds of litigants without counsel.

With respect to Judge DuPont's claim that he enjoyed an unblemished record prior to these proceedings, the claim is belied by the following facts in the record:

- the 2010 illegal search;
- the testimony of Ms. Bernard that he treats many people with disrespect;
- the testimony of retired Circuit Judge Terrell LaRue that Judge DuPont said he could continue the unlawful searches;
- the testimony of then-Chief Judge Terrence Perkins that he received more complaints about Judge DuPont than any other judge, and most related to heavy-handedness; and
- the testimony of Chief Judge Perkins that he never assigned Judge DuPont to a felony division. Judge Perkins was fearful he would constantly have to react to Judge DuPont "putting people in jail all the time." (T. 244).

Despite Judge DuPont's criticism of the FJQC in his Response for overlooking his positive attributes, the FJQC acknowledged that Judge DuPont:

- was hard-working;
- gave willingly of his time;
- was extraordinarily efficient;
- was interested in children;
- established the first truancy court in Putnam County;
- helped to create forms to assist pro se litigants. (Findings, 29).

Conversely, the FJQC specifically found that Judge DuPont could not claim his election mistakes were "careless." He had:

- executed a document attesting to his familiarity with the Judicial Canons;
- attended the JEAC Forum for judicial candidates where the rules of campaign behavior were outlined in painstaking detail, and ignored those instructions;
- ignored the warnings of colleague Circuit Judge Howard McGillin;
- ignored the warnings of colleague Circuit Judge Matthew Foxman;
- repeated scurrilous attacks on his opponent and family by allowing his website to remain in public view for an extended period of time;

- repeated scurrilous attacks in the televised campaign forum;
- repeated scurrilous attacks in a questionnaire submitted to the League of Women Voters;
- ignored the directions of his campaign manager not to publish any material that had not been vetted; and
- refused to execute a "hold harmless" agreement to protect his campaign manager from liability for his behavior. (Findings, 39-40).

This claimed "negligent" behavior caused the potential of serious harm to Anthony's wife who had no role in this election, by representing that she had been arrested three times when in fact she has never been arrested. The potential for far worse harm was present for Anthony's daughter. Judge DuPont's campaign website represented that she had been arrested twenty-three (23) times when in fact she has never been arrested. This behavior is beyond reckless.

The FJQC recommended removal and to argue otherwise defies logic, evidence, and the law. The record conclusively shows that Judge DuPont will not follow rules; will not follow the law; will not abide by his oath; and will not heed the advice of those whom he can, and should, trust.

The Response essentially ignores the FJQC findings that he violated Canons 7 (promise not to find a statute unconstitutional) and 1, 2A and 3A (conducting hearings without counsel so he could campaign). His response to the conclusion that he violated 1, 2A and 7A (publishing false and misleading statements, and imputing criminality to others) is that he was "negligent." His response to the conclusion that he violated 1, 2A, 3B2 and 7A (similar false accusations) is again that he was "negligent." Finally, his response to the conclusion that he violated Canon 1 and 2A (ordering the search of a litigant) is that other judges behaved similarly, despite the significantly differing accounts given by other judges.[2]

A judicial order to seize a litigant's property in court has been condemned. *See In re Turner*, 76 So. 3d 898, at 906 (Fla. 2011).

Explicit campaign promises which compromise impartiality have been condemned. *See In re McMillan*, 797 So. 2d 560, at 566 (Fla. 2001).

The instant proceedings are not designed to inflict punishment but to determine fitness of a judge to serve. *See In re Shepard*, 217 So. 3d 71 (Fla. 2017).

> Canon 7A(3)(e)(ii) furthers Florida's compelling interest in preserving public confidence in the

[2] Despite the Response claiming that other judges engaged in similar behavior regarding searches of litigants, no testimony was offered that the other events triggered serious complaints by the observers.

> integrity of the judiciary. As this Court has explained, "Florida has a compelling interest in protecting the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary …." Florida Bar v. Williams-Yulee, 138 So.3d at 385; see, e.g., In re Kinsey, 842 So.2d at 87; In re Code of Judicial Conduct (Canons 1, 2, & 7A(1)(b)), 603 So.2d 494, 497 (Fla. 1992). "Canon 7A(3)(e)(ii) is intended to preserve the integrity of the judiciary and maintain the public's confidence in a fair, impartial, and independent judiciary." In re Dempsey, 29 So.3d 1030, 1033 (Fla. 2010). "The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling." Williams-Yulee v. Fla. Bar, 135 S.Ct. at 1667. A judicial candidate who knowingly misrepresents any fact concerning the candidate or an opponent necessarily intends to mislead the public concerning the judicial election, thus undermining the public's confidence in the integrity of the judiciary. See, e.g., In re Renke, 933 So.2d 482, 495 (Fla. 2006). Such conduct "raises an appearance of impropriety and calls into question, in the public's mind, the judge's," Florida Bar v. Williams-Yulee, 138 So.3d at 385, integrity. Florida thus has a compelling state interest "in safeguarding the public's confidence in the honesty of its judiciary." Winter v. Wolnitzek, 834 F.3d 681, 693 (6th Cir. 2016).

The argument that proof of knowledge was lacking is immaterial. "Malafides, scienter or moral turpitude on the part of a justice or judge shall not be required for removal from office of a justice or judge whose conduct demonstrates a present unfitness to hold office." *Florida Constitution, Art. V.*

As the FJQC properly held (Findings, 38), judicial misconduct is examined for "present fitness to hold office from two perspectives: its effect on public trust and confidence in the judiciary as reflected by the judge's standing in the community, and the degree to which past misconduct points to future misconduct 'fundamentally inconsistent with the responsibilities of judicial office.' Inquiry Concerning Sloop, 946 So.2d 1046, 1055 (Fla.2007); Inquiry Concerning Murphy, 181 So.3d 1169, 1177 (Fla.2016)."

The elections violations are sufficient to warrant removal. "[W]e find it difficult to allow one guilty of such egregious conduct to retain the benefits of those violations and remain in office." *In re Alley*, 699 So. 2d 1369 (Fla. 1997). Judge DuPont's violations are significantly more outrageous than Alley's. Combining the election violations with the other judicial misconduct findings, this Court has no alternative but to conclude Judge DuPont is presently unfit to continue service on the Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 11th day of April, 2018 to:

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