

Judicial Discipline & Disability Commission

JUDGE KIRK JOHNSON
CHAIRMAN

323 Center Street • Suite 1060
Little Rock, AR 72201
(501) 682-1050 • Fax: (501) 682-1049
E-Mail: jddc@arkansas.gov

DAVID J. SACHAR
EXECUTIVE DIRECTOR

P R E S S R E L E A S E

POINT OF CONTACT: Special Counsel, J. Brent Standridge

PHONE: 501-315-5292

FOR IMMEDIATE RELEASE

September 20, 2018

The Arkansas Judicial Discipline and Disability Commission today announced the filing of Formal Charges in JDDC Cases: 17-181, Supreme Court Chief Justice John Dan Kemp; 17-182, Supreme Court Justice Robin Wynne; 17-183, Supreme Court Justice Courtney Goodson; 17-184, Supreme Court Justice Jo Hart; 17-186, Supreme Court Justice Karen Baker; 17-187, Supreme Court Justice Rhonda Wood. A Statement of Allegations containing the charges follow this press release.

Each of the Justices will be formally served with charges and given 30 days to respond. The Justices are entitled to a hearing before the Judicial Discipline and Disability Commission, wherein all allegations must be proven by clear and convincing evidence. All future pleadings in this case will be public information.

STATEMENT OF ALLEGATIONS AND FINDING OF PROBABLE CAUSE CONCERNING ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY CASE NO. 17-181

I.

The Investigative Panel received a judicial complaint from Circuit Judge Wendell Griffen of the Sixth Judicial District filed April 27, 2017, alleging that the Justices of the Supreme Court of Arkansas (Chief Justice John Dan Kemp, Associate Justice Robin F. Wynne, Associate Justice Courtney Hudson Goodson, Associate Justice Josephine L. Hart, Associate Justice Shawn A. Womack, Associate Justice Karen R. Baker, and Associate Justice Rhonda K. Wood) violated the canons of judicial ethics by improperly ruling on a petition for an extraordinary writ without giving Judge Griffen sufficient notice and an opportunity to be heard and that the Supreme Court engaged in *ex parte* communications with the Office of the Arkansas Attorney General. Chief Justice John Dan Kemp submitted a letter with attachments in response to Judge Griffen's complaint on May 19, 2017, asserting that this Commission did not have jurisdiction over the matter and that, regardless, Judge Griffen was provided adequate notice. The letter served as an "individual response in this matter by the members of the Arkansas Supreme Court."

Judge Griffen's complaint arose from the actions of the Justices in *State of Arkansas, Arkansas Department of Correction; Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction v. Honorable Wendell Griffen, Circuit Judge, and McKesson Medical-Surgical, Inc.*, No. CV-17-299 (per curiam order delivered April 17, 2017), and in *In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen*, No. 17-155 (Per Curiam Order delivered April 17, 2017). The complaint alleged that the Justices violated the canons of judicial ethics by forbidding Judge Griffen from hearing all civil and criminal cases that involve the death penalty or the state's execution protocol. The Justices also directed that the Sixth Judicial District submit a new administrative plan to the Supreme Court for review and approval regarding case assignments to Judge Griffen's court.

This Investigation Panel was assigned to determine what facts were most likely true and whether those facts constituted probable cause to believe the Justices of the Supreme Court of Arkansas violated the Arkansas Code of Judicial Conduct.

II.

A. The Arkansas Code of Judicial Conduct establishes four overarching canons of conduct for judges:

CANON 1 -- A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

CANON 2 -- A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

CANON 3 -- A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

CANON 4 -- A JUDGE, CANDIDATE FOR JUDICIAL OFFICE, OR JUDGE-ELECT SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

B. The Code also sets out rules of conduct. In determining the actions of all parties in this matter, the Panel considered the following rules:

Rule 1.1 Compliance with the Law

A judge shall comply with the law, including the Arkansas Code of Judicial Conduct.

Rule 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 2.2 Impartiality and Fairness

(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

The Comment to Rule 2.2 provides, in part, that to ensure impartiality and fairness to all parties, a judge must be objective and open minded . . .

Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

Rule 2.4 External Influences on Judicial Conduct

- (A) A judge shall not be swayed by public clamor or fear of criticism.
- (B) A judge shall not permit, family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.
- (C) *****

The Comment to the rule provides that an independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Rule 2.6 Ensuring the Right to Be Heard

- (A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.
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The Comment to the rule provides in part that the right to be heard is an essential component of a fair and impartial system of justice.

Rule 2.7 Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.

The Comment to the rule provides that Judges must be available to decide the matters that come before the court. The dignity of the court, the judge's fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use

disqualification to avoid cases that present difficult, controversial, or unpopular issues.

Rule 2.10 Judicial Statements on Pending and Impending Cases.

- (A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
- (B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Rule 2.11 Disqualification.

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

- (5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit a judge to reach a particular result or rule in a particular way in the proceeding or controversy.

Rule 3.1 Extrajudicial Activities in General.

A judge may engage in extrajudicial activities, except as prohibited by law or this Code.

The Comment to this rule provides that to the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious,

charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.

Rule 3.7 Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities.

(A) Subject to the requirements of 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

Rule 4.1. Political and Campaign Activities of Judges and Judicial Candidates in General.

(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

III.

The Panel finds the following facts:

- On Friday, April 14, 2017, McKesson Medical-Surgical, Inc. filed suit against the State of Arkansas, Arkansas Department of Correction, Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction. See *McKesson Medical-Surgical, Inc. v. State of Arkansas, Arkansas Department of Correction; Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction*, No. 60CV-17-1921.

- McKesson sought a temporary restraining order and preliminary and permanent injunctions to prohibit the use of its drugs as part of Arkansas's execution protocol;
- On April 14, 2017, at approximately 4:25 p.m., Judge Griffen entered a temporary restraining order prohibiting the State from using McKesson's drugs in any execution and invited the defendants to appear on April 18, 2017, if any should have objections;
- On April 14, 2017, at 5:56 p.m., the Clerk of the Supreme Court of Arkansas received an email from the Office of the Attorney General ("OAG") attaching Judge Griffen's Order and notifying the Court of its intent to file an emergency request to vacate the Order;
- On Saturday, April 15, 2017, the Clerk of the Supreme Court received an email from the OAG containing its Emergency Petition for Writ of Mandamus, Writ of Prohibition, Writ of Certiorari, or Supervisory Writ;
- The April 15, 2017, email from the OAG included opposing counsel in the email, but did not include Judge Griffen;
- On April 15, 2017, at 11:38 a.m., the Supreme Court, through its clerk, notified all counsel that the Court set a deadline to respond to the State's petition by 3:00 p.m. that day;
- Judge Griffen was not included in that email notification;
- McKesson emailed the Clerk of the Court its response at 2:45 p.m. on April 15, 2017;
- Realizing that Judge Griffen had received no notice, the Clerk of the Court emailed Judge Griffen copies of the State's petition, a certified partial record, and McKesson's response on April 15, 2017, at 4:23 p.m.;
- This email also notified Judge Griffen that if he wished to respond, he should do so by Monday, April 17, 2017, at 9:00 a.m.;
- This email was sent to the email address of Judge Griffen's chambers;
- Judge Griffen did not respond by Monday, April 17, 2017, at 9:00 a.m.;

- On Monday, April 17, 2017, at 10:33 a.m., the Clerk of the Court emailed Judge Griffen the Supreme Court’s per curiam opinion in In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen, No.17-155;
- The per curiam opinion found “it necessary to immediately reassign all cases in the Fifth Division that involve the death penalty or the state’s execution protocol, whether civil or criminal. The administrative judge shall be responsible for determining the appropriate division(s) to receive these cases[;]”
- The per curiam opinion further directed that the Sixth Judicial District submit a new administrative plan that reflected the permanent reassignment of all the above cases to the Supreme Court by Tuesday, April 18, 2017, and referred Judge Griffen to this Committee to determine whether he violated the Code of Judicial Conduct;
- Chief Justice Kemp concurred in part and dissented in part finding that he would reassign Judge Griffen only from the pending case, not all future death penalty or execution protocol cases;
- Judge Griffen has attended anti-death penalty rallies and publicly expressed his views about the state’s execution protocol. See In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen (Kemp, C.J., concurring in part; dissenting in part).

IV.

The Panel finds probable cause to believe that you have violated the canons and rules of judicial conduct. The Panel finds that Judge Griffen was given an opportunity to respond to the extraordinary petition filed with the Supreme Court. The Panel, however, does not find that the notice to Judge Griffen and his ability to respond were sufficient. The OAG notified the Supreme Court it intended to file an emergency petition to Judge Griffen’s Order at 5:56 p.m. on April 14, 2017, a Friday evening. It did not notify Judge Griffen. During the day of Saturday, April 15, 2017, the Supreme Court set a deadline of 3:00 p.m. that day for any response to the state’s petition. The Supreme Court did not notify Judge Griffen of its order. Finally, a member of the Supreme Court Clerk’s Office notified Judge Griffen of the proceedings and extended his deadline until Monday, April 17, 2017, at 9:00 a.m.

This email, the only notification to Judge Griffen, was sent to his chamber's email address on a Saturday evening. It cannot be reasonably assumed that Judge Griffen would receive the email at his chambers address on a weekend. Judge Griffen could not have reasonably been expected to have effectuated a meaningful response to the state's petition to remove him from the McKesson case.

Further, Judge Griffen was never given notice of, and the opportunity to be heard on, the Supreme Court's ultimate action – the removal of Judge Griffen from all death penalty and execution protocol cases pending and in the future. Indeed, none of the parties to the litigation had even raised or argued the issue of Judge Griffen's blanket disqualification with the Supreme Court; disqualification was sought only with respect to the case under review. Nonetheless, the justices (with Chief Justice Kemp dissenting) acted *sua sponte* to remove judicial duties from Judge Griffen which he would otherwise have been legally obligated to discharge regarding other death penalty and execution protocol cases.

In acting on such matters involving judges, it is important to consider the well established case law that judges are presumed to be impartial and unbiased and presumptively will act with honesty and integrity in adjudicating cases. *Robinson Nursing & Rehab. Ctr., LLC, v. Phillips*, 2016 Ark. 388, 502 S.W.3d 519 (2016); *Stilley v. James*, 346 Ark. 28, 53 S.W.3d 524 (2001). A personal belief of a judge, even if expressed publicly by word or conduct, is insufficient to overcome this strong presumption of a judge's impartiality in ruling on matters of law before the court.

We are mindful that pursuant to §4 of Amendment 80 of the Arkansas Constitution, the Supreme Court of Arkansas has superintending control over all courts of this state. Nevertheless, the Arkansas Judicial Discipline & Disability Commission was created to investigate alleged ethical violations of all judges and was empowered to take appropriate action pursuant to the provisions of the Arkansas Code of Judicial Conduct and the Arkansas Judicial Discipline & Disability Rules. Under Ark. Jud. Discipline & Disability Comm'n Rule 6 concerning jurisdiction of the Commission, it is charged with administration of the judicial discipline and disability system and is to perform such duties as are required to enforce the rules. Further, Rule 6 provides that the Commission shall have jurisdiction over any judge regarding allegations of misconduct or disability, pursuant to limitations not applicable herein. Amendment 66 of the Arkansas Constitution, wherein the Arkansas Judicial Discipline & Disability Commission was created, specifically empowers the Commission to discipline all justices and judges. See *In Re Pulaski*

County Circuit Court, Fifth Division, Hon. Wendell Griffen, *supra*, (Chief Justice Kemp concurring in part and dissenting in part).

We do not believe that just because the Supreme Court has superintending control over lower courts, its justices are somehow insulated from the processes of the Arkansas Judicial Discipline & Disability Commission, especially when the Supreme Court's own action results in the *de facto* disciplining of another judge without him being subjected to the safeguards and protections contained within the Rules governing the Arkansas Judicial Discipline & Disability Commission. See *In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen, No. 17-155* (op. del. April 17, 2017), (Chief Justice Kemp concurring in part and dissenting in part).

We also understand that an error of law committed by a judge could not normally form a basis for disciplinary action against the judge making the alleged error. The law is often subject to debate and reasonable minds could differ in good faith with respect to reaching what may be different conclusions or outcomes concerning a myriad of legal issues. Indeed, as is provided for in Ark. Jud. & Disability Comm'n R. 6 B., "In the absence of fraud, corrupt motive, or bad faith, the Commission shall not take any action against a judge for making findings of fact, reaching a legal conclusion or applying the law as he or she understands it." However, where disciplinary action is taken against another judge without sufficient notice to that judge and goes beyond the relief requested by any party, we believe that such arbitrary and capricious conduct could form the basis for disciplinary action by the Commission of the judge or judges ordering the action taken against another judge.

The Panel, after reviewing your response, finds probable cause that you acted arbitrarily and capriciously in your actions and the complaint should proceed further before the Commission.

V.

One final matter involved an allegation that the justices engaged in improper *ex parte* communications in their resolution of these cases.

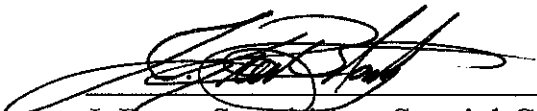
Rule 2.9 Ex Parte Communication

- (A) A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the

presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

The Panel does not find probable cause that any improper ex parte communications occurred. That allegation of the complaint is, therefore, denied and dismissed.

Dated the 20th day of September, 2018.



J. Brent Standridge, Special Counsel

**STATEMENT OF ALLEGATIONS AND FINDING OF
PROBABLE CAUSE CONCERNING ARKANSAS JUDICIAL
DISCIPLINE AND DISABILITY CASE NO. 17-182**

I.

The Investigative Panel received a judicial complaint from Circuit Judge Wendell Griffen of the Sixth Judicial District filed April 27, 2017, alleging that the Justices of the Supreme Court of Arkansas (Chief Justice John Dan Kemp, Associate Justice Robin F. Wynne, Associate Justice Courtney Hudson Goodson, Associate Justice Josephine L. Hart, Associate Justice Shawn A. Womack, Associate Justice Karen R. Baker, and Associate Justice Rhonda K. Wood) violated the canons of judicial ethics by improperly ruling on a petition for an extraordinary writ without giving Judge Griffen sufficient notice and an opportunity to be heard and that the Supreme Court engaged in ex parte communications with the Office of the Arkansas Attorney General. Chief Justice John Dan Kemp submitted a letter with attachments in response to Judge Griffen's complaint on May 19, 2017, asserting that this Commission did not have jurisdiction over the matter and that, regardless, Judge Griffen was provided adequate notice. The letter served as an "individual response in this matter by the members of the Arkansas Supreme Court."

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The Panel finds the following facts:

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- McKesson sought a temporary restraining order and preliminary and permanent injunctions to prohibit the use of its drugs as part of Arkansas's execution protocol;
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- This email was sent to the email address of Judge Griffen's chambers;
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- The per curiam opinion found "it necessary to immediately reassign all cases in the Fifth Division that involve the death penalty or the state's execution protocol, whether civil or criminal. The administrative judge shall be responsible for determining the appropriate division(s) to receive these cases[;]"
- The per curiam opinion further directed that the Sixth Judicial District submit a new administrative plan that reflected the permanent reassignment of all the above cases to the Supreme Court by Tuesday, April 18, 2017, and referred Judge Griffen to this Committee to determine whether he violated the Code of Judicial Conduct;
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- Judge Griffen has attended anti-death penalty rallies and publicly expressed his views about the state's execution protocol. See In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen (Kemp, C.J., concurring in part; dissenting in part).

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Further, Judge Griffen was never given notice of, and the opportunity to be heard on, the Supreme Court's ultimate action – the removal of Judge Griffen from all death penalty and execution protocol cases pending and in the future. Indeed, none of the parties to the litigation had even raised or argued the issue of Judge Griffen's blanket disqualification with the Supreme Court; disqualification was sought only with respect to the case under review. Nonetheless, the justices (with Chief Justice Kemp dissenting) acted *sua sponte* to remove judicial duties from Judge Griffen which he would otherwise have been legally obligated to discharge regarding other death penalty and execution protocol cases.

In acting on such matters involving judges, it is important to consider the well established case law that judges are presumed to be impartial and unbiased and presumptively will act with honesty and integrity in adjudicating cases. *Robinson Nursing & Rehab. Ctr., LLC, v. Phillips*, 2016 Ark. 388, 502 S.W.3d 519 (2016); *Stilley v. James*, 346 Ark. 28, 53 S.W.3d 524 (2001). A personal belief of a judge, even if expressed publicly by word or conduct, is insufficient to overcome this strong presumption of a judge's impartiality in ruling on matters of law before the court.

We are mindful that pursuant to §4 of Amendment 80 of the Arkansas Constitution, the Supreme Court of Arkansas has superintending control over all courts of this state. Nevertheless, the Arkansas Judicial Discipline & Disability Commission was created to investigate alleged ethical violations of all judges and was empowered to take appropriate action pursuant to the provisions of the Arkansas Code of Judicial Conduct and the Arkansas Judicial Discipline & Disability Rules. Under Ark. Jud. Discipline & Disability Comm'n Rule 6 concerning jurisdiction of the Commission, it is charged with administration of the judicial discipline and disability system and is to perform such duties as are required to enforce the rules. Further, Rule 6 provides that the Commission shall have jurisdiction over any judge regarding allegations of misconduct or disability, pursuant to limitations not applicable herein. Amendment 66 of the Arkansas Constitution, wherein the Arkansas Judicial Discipline & Disability Commission was created, specifically empowers the Commission to discipline all justices and judges. See *In Re Pulaski*

County Circuit Court, Fifth Division, Hon. Wendell Griffen, supra, (Chief Justice Kemp concurring in part and dissenting in part).

We do not believe that just because the Supreme Court has superintending control over lower courts, its justices are somehow insulated from the processes of the Arkansas Judicial Discipline & Disability Commission, especially when the Supreme Court's own action results in the de facto disciplining of another judge without him being subjected to the safeguards and protections contained within the Rules governing the Arkansas Judicial Discipline & Disability Commission. See *In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen, No. 17-155* (op. del. April 17, 2017), (Chief Justice Kemp concurring in part and dissenting in part).

We also understand that an error of law committed by a judge could not normally form a basis for disciplinary action against the judge making the alleged error. The law is often subject to debate and reasonable minds could differ in good faith with respect to reaching what may be different conclusions or outcomes concerning a myriad of legal issues. Indeed, as is provided for in Ark. Jud. & Disability Comm'n R. 6 B., "In the absence of fraud, corrupt motive, or bad faith, the Commission shall not take any action against a judge for making findings of fact, reaching a legal conclusion or applying the law as he or she understands it." However, where disciplinary action is taken against another judge without sufficient notice to that judge and goes beyond the relief requested by any party, we believe that such arbitrary and capricious conduct could form the basis for disciplinary action by the Commission of the judge or judges ordering the action taken against another judge.

The Panel, after reviewing your response, finds probable cause that you acted arbitrarily and capriciously in your actions and the complaint should proceed further before the Commission.

V.

One final matter involved an allegation that the justices engaged in improper ex parte communications in their resolution of these cases.

Rule 2.9 Ex Parte Communication

- (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the

presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

The Panel does not find probable cause that any improper ex parte communications occurred. That allegation of the complaint is, therefore, denied and dismissed.

Dated the 20th day of September, 2018.



J. Brent Standridge, Special Counsel

**STATEMENT OF ALLEGATIONS AND FINDING OF
PROBABLE CAUSE CONCERNING ARKANSAS JUDICIAL
DISCIPLINE AND DISABILITY CASE NO. 17-183**

I.

The Investigative Panel received a judicial complaint from Circuit Judge Wendell Griffen of the Sixth Judicial District filed April 27, 2017, alleging that the Justices of the Supreme Court of Arkansas (Chief Justice John Dan Kemp, Associate Justice Robin F. Wynne, Associate Justice Courtney Hudson Goodson, Associate Justice Josephine L. Hart, Associate Justice Shawn A. Womack, Associate Justice Karen R. Baker, and Associate Justice Rhonda K. Wood) violated the canons of judicial ethics by improperly ruling on a petition for an extraordinary writ without giving Judge Griffen sufficient notice and an opportunity to be heard and that the Supreme Court engaged in *ex parte* communications with the Office of the Arkansas Attorney General. Chief Justice John Dan Kemp submitted a letter with attachments in response to Judge Griffen's complaint on May 19, 2017, asserting that this Commission did not have jurisdiction over the matter and that, regardless, Judge Griffen was provided adequate notice. The letter served as an "individual response in this matter by the members of the Arkansas Supreme Court."

Judge Griffen's complaint arose from the actions of the Justices in *State of Arkansas, Arkansas Department of Correction; Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction v. Honorable Wendell Griffen, Circuit Judge, and McKesson Medical-Surgical, Inc.*, No. CV-17-299 (per curiam order delivered April 17, 2017), and in *In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen*, No. 17-155 (Per Curiam Order delivered April 17, 2017). The complaint alleged that the Justices violated the canons of judicial ethics by forbidding Judge Griffen from hearing all civil and criminal cases that involve the death penalty or the state's execution protocol. The Justices also directed that the Sixth Judicial District submit a new administrative plan to the Supreme Court for review and approval regarding case assignments to Judge Griffen's court.

This Investigation Panel was assigned to determine what facts were most likely true and whether those facts constituted probable cause to believe the Justices of the Supreme Court of Arkansas violated the Arkansas Code of Judicial Conduct.

II.

A. The Arkansas Code of Judicial Conduct establishes four overarching canons of conduct for judges:

CANON 1 -- A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

CANON 2 -- A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

CANON 3 -- A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

CANON 4 -- A JUDGE, CANDIDATE FOR JUDICIAL OFFICE, OR JUDGE-ELECT SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

B. The Code also sets out rules of conduct. In determining the actions of all parties in this matter, the Panel considered the following rules:

Rule 1.1 Compliance with the Law

A judge shall comply with the law, including the Arkansas Code of Judicial Conduct.

Rule 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 2.2 Impartiality and Fairness

(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

The Comment to Rule 2.2 provides, in part, that to ensure impartiality and fairness to all parties, a judge must be objective and open minded . . .

Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

Rule 2.4 External Influences on Judicial Conduct

- (A) A judge shall not be swayed by public clamor or fear of criticism.
- (B) A judge shall not permit, family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.
- (C) *****

The Comment to the rule provides that an independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge’s friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Rule 2.6 Ensuring the Right to Be Heard

- (A) A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.
- (B) *****

The Comment to the rule provides in part that the right to be heard is an essential component of a fair and impartial system of justice.

Rule 2.7 Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.

The Comment to the rule provides that Judges must be available to decide the matters that come before the court. The dignity of the court, the judge’s fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge’s colleagues require that a judge not use

disqualification to avoid cases that present difficult, controversial, or unpopular issues.

Rule 2.10 Judicial Statements on Pending and Impending Cases.

- (A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
- (B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Rule 2.11 Disqualification.

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

- (5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit a judge to reach a particular result or rule in a particular way in the proceeding or controversy.

Rule 3.1 Extrajudicial Activities in General.

A judge may engage in extrajudicial activities, except as prohibited by law or this Code.

The Comment to this rule provides that to the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious,

charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.

Rule 3.7 Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities.

(A) Subject to the requirements of 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

Rule 4.1. Political and Campaign Activities of Judges and Judicial Candidates in General.

(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

III.

The Panel finds the following facts:

- On Friday, April 14, 2017, McKesson Medical-Surgical, Inc. filed suit against the State of Arkansas, Arkansas Department of Correction, Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction. See *McKesson Medical-Surgical, Inc. v. State of Arkansas, Arkansas Department of Correction; Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction*, No. 60CV-17-1921.

- McKesson sought a temporary restraining order and preliminary and permanent injunctions to prohibit the use of its drugs as part of Arkansas's execution protocol;
- On April 14, 2017, at approximately 4:25 p.m., Judge Griffen entered a temporary restraining order prohibiting the State from using McKesson's drugs in any execution and invited the defendants to appear on April 18, 2017, if any should have objections;
- On April 14, 2017, at 5:56 p.m., the Clerk of the Supreme Court of Arkansas received an email from the Office of the Attorney General ("OAG") attaching Judge Griffen's Order and notifying the Court of its intent to file an emergency request to vacate the Order;
- On Saturday, April 15, 2017, the Clerk of the Supreme Court received an email from the OAG containing its Emergency Petition for Writ of Mandamus, Writ of Prohibition, Writ of Certiorari, or Supervisory Writ;
- The April 15, 2017, email from the OAG included opposing counsel in the email, but did not include Judge Griffen;
- On April 15, 2017, at 11:38 a.m., the Supreme Court, through its clerk, notified all counsel that the Court set a deadline to respond to the State's petition by 3:00 p.m. that day;
- Judge Griffen was not included in that email notification;
- McKesson emailed the Clerk of the Court its response at 2:45 p.m. on April 15, 2017;
- Realizing that Judge Griffen had received no notice, the Clerk of the Court emailed Judge Griffen copies of the State's petition, a certified partial record, and McKesson's response on April 15, 2017, at 4:23 p.m.;
- This email also notified Judge Griffen that if he wished to respond, he should do so by Monday, April 17, 2017, at 9:00 a.m.;
- This email was sent to the email address of Judge Griffen's chambers;
- Judge Griffen did not respond by Monday, April 17, 2017, at 9:00 a.m.;

- On Monday, April 17, 2017, at 10:33 a.m., the Clerk of the Court emailed Judge Griffen the Supreme Court’s per curiam opinion in In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen, No.17-155;
- The per curiam opinion found “it necessary to immediately reassign all cases in the Fifth Division that involve the death penalty or the state’s execution protocol, whether civil or criminal. The administrative judge shall be responsible for determining the appropriate division(s) to receive these cases[;]”
- The per curiam opinion further directed that the Sixth Judicial District submit a new administrative plan that reflected the permanent reassignment of all the above cases to the Supreme Court by Tuesday, April 18, 2017, and referred Judge Griffen to this Committee to determine whether he violated the Code of Judicial Conduct;
- Chief Justice Kemp concurred in part and dissented in part finding that he would reassign Judge Griffen only from the pending case, not all future death penalty or execution protocol cases;
- Judge Griffen has attended anti-death penalty rallies and publicly expressed his views about the state’s execution protocol. See In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen (Kemp, C.J., concurring in part; dissenting in part).

IV.

The Panel finds probable cause to believe that you have violated the canons and rules of judicial conduct. The Panel finds that Judge Griffen was given an opportunity to respond to the extraordinary petition filed with the Supreme Court. The Panel, however, does not find that the notice to Judge Griffen and his ability to respond were sufficient. The OAG notified the Supreme Court it intended to file an emergency petition to Judge Griffen’s Order at 5:56 p.m. on April 14, 2017, a Friday evening. It did not notify Judge Griffen. During the day of Saturday, April 15, 2017, the Supreme Court set a deadline of 3:00 p.m. that day for any response to the state’s petition. The Supreme Court did not notify Judge Griffen of its order. Finally, a member of the Supreme Court Clerk’s Office notified Judge Griffen of the proceedings and extended his deadline until Monday, April 17, 2017, at 9:00 a.m.

This email, the only notification to Judge Griffen, was sent to his chamber's email address on a Saturday evening. It cannot be reasonably assumed that Judge Griffen would receive the email at his chambers address on a weekend. Judge Griffen could not have reasonably been expected to have effectuated a meaningful response to the state's petition to remove him from the McKesson case.

Further, Judge Griffen was never given notice of, and the opportunity to be heard on, the Supreme Court's ultimate action – the removal of Judge Griffen from all death penalty and execution protocol cases pending and in the future. Indeed, none of the parties to the litigation had even raised or argued the issue of Judge Griffen's blanket disqualification with the Supreme Court; disqualification was sought only with respect to the case under review. Nonetheless, the justices (with Chief Justice Kemp dissenting) acted *sua sponte* to remove judicial duties from Judge Griffen which he would otherwise have been legally obligated to discharge regarding other death penalty and execution protocol cases.

In acting on such matters involving judges, it is important to consider the well established case law that judges are presumed to be impartial and unbiased and presumptively will act with honesty and integrity in adjudicating cases. *Robinson Nursing & Rehab. Ctr., LLC, v. Phillips*, 2016 Ark. 388, 502 S.W.3d 519 (2016); *Stilley v. James*, 346 Ark. 28, 53 S.W.3d 524 (2001). A personal belief of a judge, even if expressed publicly by word or conduct, is insufficient to overcome this strong presumption of a judge's impartiality in ruling on matters of law before the court.

We are mindful that pursuant to §4 of Amendment 80 of the Arkansas Constitution, the Supreme Court of Arkansas has superintending control over all courts of this state. Nevertheless, the Arkansas Judicial Discipline & Disability Commission was created to investigate alleged ethical violations of all judges and was empowered to take appropriate action pursuant to the provisions of the Arkansas Code of Judicial Conduct and the Arkansas Judicial Discipline & Disability Rules. Under Ark. Jud. Discipline & Disability Comm'n Rule 6 concerning jurisdiction of the Commission, it is charged with administration of the judicial discipline and disability system and is to perform such duties as are required to enforce the rules. Further, Rule 6 provides that the Commission shall have jurisdiction over any judge regarding allegations of misconduct or disability, pursuant to limitations not applicable herein. Amendment 66 of the Arkansas Constitution, wherein the Arkansas Judicial Discipline & Disability Commission was created, specifically empowers the Commission to discipline all justices and judges. See *In Re Pulaski*

County Circuit Court, Fifth Division, Hon. Wendell Griffen, *supra*, (Chief Justice Kemp concurring in part and dissenting in part).

We do not believe that just because the Supreme Court has superintending control over lower courts, its justices are somehow insulated from the processes of the Arkansas Judicial Discipline & Disability Commission, especially when the Supreme Court's own action results in the *de facto* disciplining of another judge without him being subjected to the safeguards and protections contained within the Rules governing the Arkansas Judicial Discipline & Disability Commission. See *In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen, No. 17-155* (op. del. April 17, 2017), (Chief Justice Kemp concurring in part and dissenting in part).

We also understand that an error of law committed by a judge could not normally form a basis for disciplinary action against the judge making the alleged error. The law is often subject to debate and reasonable minds could differ in good faith with respect to reaching what may be different conclusions or outcomes concerning a myriad of legal issues. Indeed, as is provided for in Ark. Jud. & Disability Comm'n R. 6 B., "In the absence of fraud, corrupt motive, or bad faith, the Commission shall not take any action against a judge for making findings of fact, reaching a legal conclusion or applying the law as he or she understands it." However, where disciplinary action is taken against another judge without sufficient notice to that judge and goes beyond the relief requested by any party, we believe that such arbitrary and capricious conduct could form the basis for disciplinary action by the Commission of the judge or judges ordering the action taken against another judge.

The Panel finds probable cause that you acted arbitrarily and capriciously in your actions and the complaint should proceed further before the Commission.

V.

One final matter involved an allegation that the justices engaged in improper *ex parte* communications in their resolution of these cases.

Rule 2.9 Ex Parte Communication

- (A) A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

The Panel does not find probable cause that any improper ex parte communications occurred. That allegation of the complaint is, therefore, denied and dismissed.

Dated the 20th day of September, 2018.



J. Brent Standridge, Special Counsel

**STATEMENT OF ALLEGATIONS AND FINDING OF
PROBABLE CAUSE CONCERNING ARKANSAS JUDICIAL
DISCIPLINE AND DISABILITY CASE NO. 17-184**

I.

The Investigative Panel received a judicial complaint from Circuit Judge Wendell Griffen of the Sixth Judicial District filed April 27, 2017, alleging that the Justices of the Supreme Court of Arkansas (Chief Justice John Dan Kemp, Associate Justice Robin F. Wynne, Associate Justice Courtney Hudson Goodson, Associate Justice Josephine L. Hart, Associate Justice Shawn A. Womack, Associate Justice Karen R. Baker, and Associate Justice Rhonda K. Wood) violated the canons of judicial ethics by improperly ruling on a petition for an extraordinary writ without giving Judge Griffen sufficient notice and an opportunity to be heard and that the Supreme Court engaged in *ex parte* communications with the Office of the Arkansas Attorney General. Chief Justice John Dan Kemp submitted a letter with attachments in response to Judge Griffen's complaint on May 19, 2017, asserting that this Commission did not have jurisdiction over the matter and that, regardless, Judge Griffen was provided adequate notice. The letter served as an "individual response in this matter by the members of the Arkansas Supreme Court."

Judge Griffen's complaint arose from the actions of the Justices in *State of Arkansas, Arkansas Department of Correction; Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction v. Honorable Wendell Griffen, Circuit Judge, and McKesson Medical-Surgical, Inc.*, No. CV-17-299 (per curiam order delivered April 17, 2017), and in *In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen*, No. 17-155 (Per Curiam Order delivered April 17, 2017). The complaint alleged that the Justices violated the canons of judicial ethics by forbidding Judge Griffen from hearing all civil and criminal cases that involve the death penalty or the state's execution protocol. The Justices also directed that the Sixth Judicial District submit a new administrative plan to the Supreme Court for review and approval regarding case assignments to Judge Griffen's court.

This Investigation Panel was assigned to determine what facts were most likely true and whether those facts constituted probable cause to believe the Justices of the Supreme Court of Arkansas violated the Arkansas Code of Judicial Conduct.

II.

A. The Arkansas Code of Judicial Conduct establishes four overarching canons of conduct for judges:

CANON 1 -- A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

CANON 2 -- A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

CANON 3 -- A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

CANON 4 -- A JUDGE, CANDIDATE FOR JUDICIAL OFFICE, OR JUDGE-ELECT SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

B. The Code also sets out rules of conduct. In determining the actions of all parties in this matter, the Panel considered the following rules:

Rule 1.1 Compliance with the Law

A judge shall comply with the law, including the Arkansas Code of Judicial Conduct.

Rule 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 2.2 Impartiality and Fairness

(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

The Comment to Rule 2.2 provides, in part, that to ensure impartiality and fairness to all parties, a judge must be objective and open minded . . .

Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

Rule 2.4 External Influences on Judicial Conduct

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit, family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) *****

The Comment to the rule provides that an independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Rule 2.6 Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

(B) *****

The Comment to the rule provides in part that the right to be heard is an essential component of a fair and impartial system of justice.

Rule 2.7 Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.

The Comment to the rule provides that Judges must be available to decide the matters that come before the court. The dignity of the court, the judge's fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

Rule 2.10 Judicial Statements on Pending and Impending Cases.

- (A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
- (B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Rule 2.11 Disqualification.

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

- (5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit a judge to reach a particular result or rule in a particular way in the proceeding or controversy.

Rule 3.1 Extrajudicial Activities in General.

A judge may engage in extrajudicial activities, except as prohibited by law or this Code.

The Comment to this rule provides that to the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law,

the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.

Rule 3.7 Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities.

(A) Subject to the requirements of 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

Rule 4.1. Political and Campaign Activities of Judges and Judicial Candidates in General.

(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

III.

The Panel finds the following facts:

- On Friday, April 14, 2017, McKesson Medical-Surgical, Inc. filed suit against the State of Arkansas, Arkansas Department of Correction, Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction. See *McKesson Medical-Surgical, Inc. v. State of Arkansas, Arkansas Department of Correction; Asa Hutchinson, in His Official Capacity of Governor of the State of*

Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction, No. 60CV-17-1921.

- McKesson sought a temporary restraining order and preliminary and permanent injunctions to prohibit the use of its drugs as part of Arkansas's execution protocol;
- On April 14, 2017, at approximately 4:25 p.m., Judge Griffen entered a temporary restraining order prohibiting the State from using McKesson's drugs in any execution and invited the defendants to appear on April 18, 2017, if any should have objections;
- On April 14, 2017, at 5:56 p.m., the Clerk of the Supreme Court of Arkansas received an email from the Office of the Attorney General ("OAG") attaching Judge Griffen's Order and notifying the Court of its intent to file an emergency request to vacate the Order;
- On Saturday, April 15, 2017, the Clerk of the Supreme Court received an email from the OAG containing its Emergency Petition for Writ of Mandamus, Writ of Prohibition, Writ of Certiorari, or Supervisory Writ;
- The April 15, 2017, email from the OAG included opposing counsel in the email, but did not include Judge Griffen;
- On April 15, 2017, at 11:38 a.m., the Supreme Court, through its clerk, notified all counsel that the Court set a deadline to respond to the State's petition by 3:00 p.m. that day;
- Judge Griffen was not included in that email notification;
- McKesson emailed the Clerk of the Court its response at 2:45 p.m. on April 15, 2017;
- Realizing that Judge Griffen had received no notice, the Clerk of the Court emailed Judge Griffen copies of the State's petition, a certified partial record, and McKesson's response on April 15, 2017, at 4:23 p.m.;
- This email also notified Judge Griffen that if he wished to respond, he should do so by Monday, April 17, 2017, at 9:00 a.m.;
- This email was sent to the email address of Judge Griffen's chambers;

- Judge Griffen did not respond by Monday, April 17, 2017, at 9:00 a.m.;
- On Monday, April 17, 2017, at 10:33 a.m., the Clerk of the Court emailed Judge Griffen the Supreme Court’s per curiam opinion in In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen, No.17-155;
- The per curiam opinion found “it necessary to immediately reassign all cases in the Fifth Division that involve the death penalty or the state’s execution protocol, whether civil or criminal. The administrative judge shall be responsible for determining the appropriate division(s) to receive these cases[;]”
- The per curiam opinion further directed that the Sixth Judicial District submit a new administrative plan that reflected the permanent reassignment of all the above cases to the Supreme Court by Tuesday, April 18, 2017, and referred Judge Griffen to this Committee to determine whether he violated the Code of Judicial Conduct;
- Chief Justice Kemp concurred in part and dissented in part finding that he would reassign Judge Griffen only from the pending case, not all future death penalty or execution protocol cases;
- Judge Griffen has attended anti-death penalty rallies and publicly expressed his views about the state’s execution protocol. See In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen (Kemp, C.J., concurring in part; dissenting in part).

IV.

The Panel finds probable cause to believe that you have violated the canons and rules of judicial conduct. The Panel finds that Judge Griffen was given an opportunity to respond to the extraordinary petition filed with the Supreme Court. The Panel, however, does not find that the notice to Judge Griffen and his ability to respond were sufficient. The OAG notified the Supreme Court it intended to file an emergency petition to Judge Griffen’s Order at 5:56 p.m. on April 14, 2017, a Friday evening. It did not notify Judge Griffen. During the day of Saturday, April 15, 2017, the Supreme Court set a deadline of 3:00 p.m. that day for any response to the state’s petition. The Supreme Court did not notify Judge Griffen of its order. Finally, a member of the Supreme Court Clerk’s Office notified Judge Griffen of the proceedings and extended his deadline until Monday, April 17, 2017, at 9:00 a.m.

This email, the only notification to Judge Griffen, was sent to his chamber's email address on a Saturday evening. It cannot be reasonably assumed that Judge Griffen would receive the email at his chambers address on a weekend. Judge Griffen could not have reasonably been expected to have effectuated a meaningful response to the state's petition to remove him from the McKesson case.

Further, Judge Griffen was never given notice of, and the opportunity to be heard on, the Supreme Court's ultimate action – the removal of Judge Griffen from all death penalty and execution protocol cases pending and in the future. Indeed, none of the parties to the litigation had even raised or argued the issue of Judge Griffen's blanket disqualification with the Supreme Court; disqualification was sought only with respect to the case under review. Nonetheless, the justices (with Chief Justice Kemp dissenting) acted sua sponte to remove judicial duties from Judge Griffen which he would otherwise have been legally obligated to discharge regarding other death penalty and execution protocol cases.

In acting on such matters involving judges, it is important to consider the well established case law that judges are presumed to be impartial and unbiased and presumptively will act with honesty and integrity in adjudicating cases. *Robinson Nursing & Rehab. Ctr., LLC, v. Phillips*, 2016 Ark. 388, 502 S.W.3d 519 (2016); *Stilley v. James*, 346 Ark. 28, 53 S.W.3d 524 (2001). A personal belief of a judge, even if expressed publicly by word or conduct, is insufficient to overcome this strong presumption of a judge's impartiality in ruling on matters of law before the court.

We are mindful that pursuant to §4 of Amendment 80 of the Arkansas Constitution, the Supreme Court of Arkansas has superintending control over all courts of this state. Nevertheless, the Arkansas Judicial Discipline & Disability Commission was created to investigate alleged ethical violations of all judges and was empowered to take appropriate action pursuant to the provisions of the Arkansas Code of Judicial Conduct and the Arkansas Judicial Discipline & Disability Rules. Under Ark. Jud. Discipline & Disability Comm'n Rule 6 concerning jurisdiction of the Commission, it is charged with administration of the judicial discipline and disability system and is to perform such duties as are required to enforce the rules. Further, Rule 6 provides that the Commission shall have jurisdiction over any judge regarding allegations of misconduct or disability, pursuant to limitations not applicable herein. Amendment 66 of the Arkansas Constitution, wherein the Arkansas Judicial Discipline & Disability Commission was created, specifically empowers the Commission to discipline all justices and judges. See *In Re Pulaski*

County Circuit Court, Fifth Division, Hon. Wendell Griffen, *supra*, (Chief Justice Kemp concurring in part and dissenting in part).

We do not believe that just because the Supreme Court has superintending control over lower courts, its justices are somehow insulated from the processes of the Arkansas Judicial Discipline & Disability Commission, especially when the Supreme Court's own action results in the *de facto* disciplining of another judge without him being subjected to the safeguards and protections contained within the Rules governing the Arkansas Judicial Discipline & Disability Commission. See *In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen, No. 17-155* (op. del. April 17, 2017), (Chief Justice Kemp concurring in part and dissenting in part).

We also understand that an error of law committed by a judge could not normally form a basis for disciplinary action against the judge making the alleged error. The law is often subject to debate and reasonable minds could differ in good faith with respect to reaching what may be different conclusions or outcomes concerning a myriad of legal issues. Indeed, as is provided for in Ark. Jud. & Disability Comm'n R. 6 B., "In the absence of fraud, corrupt motive, or bad faith, the Commission shall not take any action against a judge for making findings of fact, reaching a legal conclusion or applying the law as he or she understands it." However, where disciplinary action is taken against another judge without sufficient notice to that judge and goes beyond the relief requested by any party, we believe that such arbitrary and capricious conduct could form the basis for disciplinary action by the Commission of the judge or judges ordering the action taken against another judge.

The Panel, after reviewing your response, finds probable cause that you acted arbitrarily and capriciously in your actions and the complaint should proceed further before the Commission.

V.

One final matter involved an allegation that the justices engaged in improper *ex parte* communications in their resolution of these cases.

Rule 2.9 Ex Parte Communication

- (A) A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the

presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

The Panel does not find probable cause that any improper ex parte communications occurred. That allegation of the complaint is, therefore, denied and dismissed.

Dated the 20th day of September, 2018.



J. Brent Standridge, Special Counsel

**STATEMENT OF ALLEGATIONS AND FINDING OF
PROBABLE CAUSE CONCERNING ARKANSAS JUDICIAL
DISCIPLINE AND DISABILITY CASE NO. 17-186**

I.

The Investigative Panel received a judicial complaint from Circuit Judge Wendell Griffen of the Sixth Judicial District filed April 27, 2017, alleging that the Justices of the Supreme Court of Arkansas (Chief Justice John Dan Kemp, Associate Justice Robin F. Wynne, Associate Justice Courtney Hudson Goodson, Associate Justice Josephine L. Hart, Associate Justice Shawn A. Womack, Associate Justice Karen R. Baker, and Associate Justice Rhonda K. Wood) violated the canons of judicial ethics by improperly ruling on a petition for an extraordinary writ without giving Judge Griffen sufficient notice and an opportunity to be heard and that the Supreme Court engaged in *ex parte* communications with the Office of the Arkansas Attorney General. Chief Justice John Dan Kemp submitted a letter with attachments in response to Judge Griffen's complaint on May 19, 2017, asserting that this Commission did not have jurisdiction over the matter and that, regardless, Judge Griffen was provided adequate notice. The letter served as an "individual response in this matter by the members of the Arkansas Supreme Court."

Judge Griffen's complaint arose from the actions of the Justices in *State of Arkansas, Arkansas Department of Correction; Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction v. Honorable Wendell Griffen, Circuit Judge, and McKesson Medical-Surgical, Inc.*, No. CV-17-299 (per curiam order delivered April 17, 2017), and in *In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen*, No. 17-155 (Per Curiam Order delivered April 17, 2017). The complaint alleged that the Justices violated the canons of judicial ethics by forbidding Judge Griffen from hearing all civil and criminal cases that involve the death penalty or the state's execution protocol. The Justices also directed that the Sixth Judicial District submit a new administrative plan to the Supreme Court for review and approval regarding case assignments to Judge Griffen's court.

This Investigation Panel was assigned to determine what facts were most likely true and whether those facts constituted probable cause to believe the Justices of the Supreme Court of Arkansas violated the Arkansas Code of Judicial Conduct.

II.

A. The Arkansas Code of Judicial Conduct establishes four overarching canons of conduct for judges:

CANON 1 -- A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

CANON 2 -- A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

CANON 3 -- A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

CANON 4 -- A JUDGE, CANDIDATE FOR JUDICIAL OFFICE, OR JUDGE-ELECT SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

B. The Code also sets out rules of conduct. In determining the actions of all parties in this matter, the Panel considered the following rules:

Rule 1.1 Compliance with the Law

A judge shall comply with the law, including the Arkansas Code of Judicial Conduct.

Rule 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 2.2 Impartiality and Fairness

(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

The Comment to Rule 2.2 provides, in part, that to ensure impartiality and fairness to all parties, a judge must be objective and open minded . . .

Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

Rule 2.4 External Influences on Judicial Conduct

- (A) A judge shall not be swayed by public clamor or fear of criticism.
- (B) A judge shall not permit, family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.
- (C) *****

The Comment to the rule provides that an independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Rule 2.6 Ensuring the Right to Be Heard

- (A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.
- (B) *****

The Comment to the rule provides in part that the right to be heard is an essential component of a fair and impartial system of justice.

Rule 2.7 Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.

The Comment to the rule provides that Judges must be available to decide the matters that come before the court. The dignity of the court, the judge's fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use

disqualification to avoid cases that present difficult, controversial, or unpopular issues.

Rule 2.10 Judicial Statements on Pending and Impending Cases.

- (A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
- (B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Rule 2.11 Disqualification.

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

- (5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit a judge to reach a particular result or rule in a particular way in the proceeding or controversy.

Rule 3.1 Extrajudicial Activities in General.

A judge may engage in extrajudicial activities, except as prohibited by law or this Code.

The Comment to this rule provides that to the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious,

charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.

Rule 3.7 Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities.

- (A) Subject to the requirements of 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

Rule 4.1. Political and Campaign Activities of Judges and Judicial Candidates in General.

- (A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

III.

The Panel finds the following facts:

- On Friday, April 14, 2017, McKesson Medical-Surgical, Inc. filed suit against the State of Arkansas, Arkansas Department of Correction, Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction. See *McKesson Medical-Surgical, Inc. v. State of Arkansas, Arkansas Department of Correction; Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction*, No. 60CV-17-1921.

- McKesson sought a temporary restraining order and preliminary and permanent injunctions to prohibit the use of its drugs as part of Arkansas's execution protocol;
- On April 14, 2017, at approximately 4:25 p.m., Judge Griffen entered a temporary restraining order prohibiting the State from using McKesson's drugs in any execution and invited the defendants to appear on April 18, 2017, if any should have objections;
- On April 14, 2017, at 5:56 p.m., the Clerk of the Supreme Court of Arkansas received an email from the Office of the Attorney General ("OAG") attaching Judge Griffen's Order and notifying the Court of its intent to file an emergency request to vacate the Order;
- On Saturday, April 15, 2017, the Clerk of the Supreme Court received an email from the OAG containing its Emergency Petition for Writ of Mandamus, Writ of Prohibition, Writ of Certiorari, or Supervisory Writ;
- The April 15, 2017, email from the OAG included opposing counsel in the email, but did not include Judge Griffen;
- On April 15, 2017, at 11:38 a.m., the Supreme Court, through its clerk, notified all counsel that the Court set a deadline to respond to the State's petition by 3:00 p.m. that day;
- Judge Griffen was not included in that email notification;
- McKesson emailed the Clerk of the Court its response at 2:45 p.m. on April 15, 2017;
- Realizing that Judge Griffen had received no notice, the Clerk of the Court emailed Judge Griffen copies of the State's petition, a certified partial record, and McKesson's response on April 15, 2017, at 4:23 p.m.;
- This email also notified Judge Griffen that if he wished to respond, he should do so by Monday, April 17, 2017, at 9:00 a.m.;
- This email was sent to the email address of Judge Griffen's chambers;
- Judge Griffen did not respond by Monday, April 17, 2017, at 9:00 a.m.;

- On Monday, April 17, 2017, at 10:33 a.m., the Clerk of the Court emailed Judge Griffen the Supreme Court’s per curiam opinion in In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen, No.17-155;
- The per curiam opinion found “it necessary to immediately reassign all cases in the Fifth Division that involve the death penalty or the state’s execution protocol, whether civil or criminal. The administrative judge shall be responsible for determining the appropriate division(s) to receive these cases[;]”
- The per curiam opinion further directed that the Sixth Judicial District submit a new administrative plan that reflected the permanent reassignment of all the above cases to the Supreme Court by Tuesday, April 18, 2017, and referred Judge Griffen to this Committee to determine whether he violated the Code of Judicial Conduct;
- Chief Justice Kemp concurred in part and dissented in part finding that he would reassign Judge Griffen only from the pending case, not all future death penalty or execution protocol cases;
- Judge Griffen has attended anti-death penalty rallies and publicly expressed his views about the state’s execution protocol. See In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen (Kemp, C.J., concurring in part; dissenting in part).

IV.

The Panel finds probable cause to believe that you have violated the canons and rules of judicial conduct. The Panel finds that Judge Griffen was given an opportunity to respond to the extraordinary petition filed with the Supreme Court. The Panel, however, does not find that the notice to Judge Griffen and his ability to respond were sufficient. The OAG notified the Supreme Court it intended to file an emergency petition to Judge Griffen’s Order at 5:56 p.m. on April 14, 2017, a Friday evening. It did not notify Judge Griffen. During the day of Saturday, April 15, 2017, the Supreme Court set a deadline of 3:00 p.m. that day for any response to the state’s petition. The Supreme Court did not notify Judge Griffen of its order. Finally, a member of the Supreme Court Clerk’s Office notified Judge Griffen of the proceedings and extended his deadline until Monday, April 17, 2017, at 9:00 a.m.

This email, the only notification to Judge Griffen, was sent to his chamber's email address on a Saturday evening. It cannot be reasonably assumed that Judge Griffen would receive the email at his chambers address on a weekend. Judge Griffen could not have reasonably been expected to have effectuated a meaningful response to the state's petition to remove him from the McKesson case.

Further, Judge Griffen was never given notice of, and the opportunity to be heard on, the Supreme Court's ultimate action – the removal of Judge Griffen from all death penalty and execution protocol cases pending and in the future. Indeed, none of the parties to the litigation had even raised or argued the issue of Judge Griffen's blanket disqualification with the Supreme Court; disqualification was sought only with respect to the case under review. Nonetheless, the justices (with Chief Justice Kemp dissenting) acted sua sponte to remove judicial duties from Judge Griffen which he would otherwise have been legally obligated to discharge regarding other death penalty and execution protocol cases.

In acting on such matters involving judges, it is important to consider the well established case law that judges are presumed to be impartial and unbiased and presumptively will act with honesty and integrity in adjudicating cases. *Robinson Nursing & Rehab. Ctr., LLC, v. Phillips*, 2016 Ark. 388, 502 S.W.3d 519 (2016); *Stilley v. James*, 346 Ark. 28, 53 S.W.3d 524 (2001). A personal belief of a judge, even if expressed publicly by word or conduct, is insufficient to overcome this strong presumption of a judge's impartiality in ruling on matters of law before the court.

We are mindful that pursuant to §4 of Amendment 80 of the Arkansas Constitution, the Supreme Court of Arkansas has superintending control over all courts of this state. Nevertheless, the Arkansas Judicial Discipline & Disability Commission was created to investigate alleged ethical violations of all judges and was empowered to take appropriate action pursuant to the provisions of the Arkansas Code of Judicial Conduct and the Arkansas Judicial Discipline & Disability Rules. Under Ark. Jud. Discipline & Disability Comm'n Rule 6 concerning jurisdiction of the Commission, it is charged with administration of the judicial discipline and disability system and is to perform such duties as are required to enforce the rules. Further, Rule 6 provides that the Commission shall have jurisdiction over any judge regarding allegations of misconduct or disability, pursuant to limitations not applicable herein. Amendment 66 of the Arkansas Constitution, wherein the Arkansas Judicial Discipline & Disability Commission was created, specifically empowers the Commission to discipline all justices and judges. See *In Re Pulaski*

County Circuit Court, Fifth Division, Hon. Wendell Griffen, supra, (Chief Justice Kemp concurring in part and dissenting in part).

We do not believe that just because the Supreme Court has superintending control over lower courts, its justices are somehow insulated from the processes of the Arkansas Judicial Discipline & Disability Commission, especially when the Supreme Court's own action results in the de facto disciplining of another judge without him being subjected to the safeguards and protections contained within the Rules governing the Arkansas Judicial Discipline & Disability Commission. See *In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen, No. 17-155* (op. del. April 17, 2017), (Chief Justice Kemp concurring in part and dissenting in part).

We also understand that an error of law committed by a judge could not normally form a basis for disciplinary action against the judge making the alleged error. The law is often subject to debate and reasonable minds could differ in good faith with respect to reaching what may be different conclusions or outcomes concerning a myriad of legal issues. Indeed, as is provided for in Ark. Jud. & Disability Comm'n R. 6 B., "In the absence of fraud, corrupt motive, or bad faith, the Commission shall not take any action against a judge for making findings of fact, reaching a legal conclusion or applying the law as he or she understands it." However, where disciplinary action is taken against another judge without sufficient notice to that judge and goes beyond the relief requested by any party, we believe that such arbitrary and capricious conduct could form the basis for disciplinary action by the Commission of the judge or judges ordering the action taken against another judge.

The Panel, after reviewing your response, finds probable cause that you acted arbitrarily and capriciously in your actions and the complaint should proceed further before the Commission.

V.

One final matter involved an allegation that the justices engaged in improper ex parte communications in their resolution of these cases.

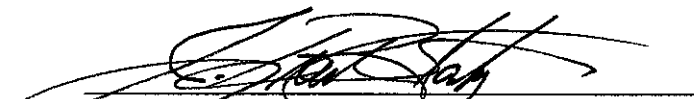
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- (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the

presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

The Panel does not find probable cause that any improper ex parte communications occurred. That allegation of the complaint is, therefore, denied and dismissed.

Dated the 20th day of September, 2018.



J. Brent Standridge, Special Counsel

**STATEMENT OF ALLEGATIONS AND FINDING OF
PROBABLE CAUSE CONCERNING ARKANSAS JUDICIAL
DISCIPLINE AND DISABILITY CASE NO. 17-187**

I.

The Investigative Panel received a judicial complaint from Circuit Judge Wendell Griffen of the Sixth Judicial District filed April 27, 2017, alleging that the Justices of the Supreme Court of Arkansas (Chief Justice John Dan Kemp, Associate Justice Robin F. Wynne, Associate Justice Courtney Hudson Goodson, Associate Justice Josephine L. Hart, Associate Justice Shawn A. Womack, Associate Justice Karen R. Baker, and Associate Justice Rhonda K. Wood) violated the canons of judicial ethics by improperly ruling on a petition for an extraordinary writ without giving Judge Griffen sufficient notice and an opportunity to be heard and that the Supreme Court engaged in *ex parte* communications with the Office of the Arkansas Attorney General. Chief Justice John Dan Kemp submitted a letter with attachments in response to Judge Griffen's complaint on May 19, 2017, asserting that this Commission did not have jurisdiction over the matter and that, regardless, Judge Griffen was provided adequate notice. The letter served as an "individual response in this matter by the members of the Arkansas Supreme Court."

Judge Griffen's complaint arose from the actions of the Justices in *State of Arkansas, Arkansas Department of Correction; Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction v. Honorable Wendell Griffen, Circuit Judge, and McKesson Medical-Surgical, Inc.*, No. CV-17-299 (per curiam order delivered April 17, 2017), and in *In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen*, No. 17-155 (Per Curiam Order delivered April 17, 2017). The complaint alleged that the Justices violated the canons of judicial ethics by forbidding Judge Griffen from hearing all civil and criminal cases that involve the death penalty or the state's execution protocol. The Justices also directed that the Sixth Judicial District submit a new administrative plan to the Supreme Court for review and approval regarding case assignments to Judge Griffen's court.

This Investigation Panel was assigned to determine what facts were most likely true and whether those facts constituted probable cause to believe the Justices of the Supreme Court of Arkansas violated the Arkansas Code of Judicial Conduct.

II.

A. The Arkansas Code of Judicial Conduct establishes four overarching canons of conduct for judges:

CANON 1 -- A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

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CANON 4 -- A JUDGE, CANDIDATE FOR JUDICIAL OFFICE, OR JUDGE-ELECT SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

B. The Code also sets out rules of conduct. In determining the actions of all parties in this matter, the Panel considered the following rules:

Rule 1.1 Compliance with the Law

A judge shall comply with the law, including the Arkansas Code of Judicial Conduct.

Rule 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 2.2 Impartiality and Fairness

(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

The Comment to Rule 2.2 provides, in part, that to ensure impartiality and fairness to all parties, a judge must be objective and open minded . . .

Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

Rule 2.4 External Influences on Judicial Conduct

- (A) A judge shall not be swayed by public clamor or fear of criticism.
- (B) A judge shall not permit, family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.
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The Comment to the rule provides that an independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

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- (A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.
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The Comment to the rule provides in part that the right to be heard is an essential component of a fair and impartial system of justice.

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A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.

The Comment to the rule provides that Judges must be available to decide the matters that come before the court. The dignity of the court, the judge's fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use

disqualification to avoid cases that present difficult, controversial, or unpopular issues.

Rule 2.10 Judicial Statements on Pending and Impending Cases.

- (A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
- (B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

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- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

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Rule 3.1 Extrajudicial Activities in General.

A judge may engage in extrajudicial activities, except as prohibited by law or this Code.

The Comment to this rule provides that to the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious,

charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.

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Rule 4.1. Political and Campaign Activities of Judges and Judicial Candidates in General.

(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

III.

The Panel finds the following facts:

- On Friday, April 14, 2017, McKesson Medical-Surgical, Inc. filed suit against the State of Arkansas, Arkansas Department of Correction, Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction. See *McKesson Medical-Surgical, Inc. v. State of Arkansas, Arkansas Department of Correction; Asa Hutchinson, in His Official Capacity of Governor of the State of Arkansas; and Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction*, No. 60CV-17-1921.

- McKesson sought a temporary restraining order and preliminary and permanent injunctions to prohibit the use of its drugs as part of Arkansas's execution protocol;
- On April 14, 2017, at approximately 4:25 p.m., Judge Griffen entered a temporary restraining order prohibiting the State from using McKesson's drugs in any execution and invited the defendants to appear on April 18, 2017, if any should have objections;
- On April 14, 2017, at 5:56 p.m., the Clerk of the Supreme Court of Arkansas received an email from the Office of the Attorney General ("OAG") attaching Judge Griffen's Order and notifying the Court of its intent to file an emergency request to vacate the Order;
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- Judge Griffen was not included in that email notification;
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- Realizing that Judge Griffen had received no notice, the Clerk of the Court emailed Judge Griffen copies of the State's petition, a certified partial record, and McKesson's response on April 15, 2017, at 4:23 p.m.;
- This email also notified Judge Griffen that if he wished to respond, he should do so by Monday, April 17, 2017, at 9:00 a.m.;
- This email was sent to the email address of Judge Griffen's chambers;
- Judge Griffen did not respond by Monday, April 17, 2017, at 9:00 a.m.;

- On Monday, April 17, 2017, at 10:33 a.m., the Clerk of the Court emailed Judge Griffen the Supreme Court’s per curiam opinion in In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen, No.17-155;
- The per curiam opinion found “it necessary to immediately reassign all cases in the Fifth Division that involve the death penalty or the state’s execution protocol, whether civil or criminal. The administrative judge shall be responsible for determining the appropriate division(s) to receive these cases[;]”
- The per curiam opinion further directed that the Sixth Judicial District submit a new administrative plan that reflected the permanent reassignment of all the above cases to the Supreme Court by Tuesday, April 18, 2017, and referred Judge Griffen to this Committee to determine whether he violated the Code of Judicial Conduct;
- Chief Justice Kemp concurred in part and dissented in part finding that he would reassign Judge Griffen only from the pending case, not all future death penalty or execution protocol cases;
- Judge Griffen has attended anti-death penalty rallies and publicly expressed his views about the state’s execution protocol. See In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen (Kemp, C.J., concurring in part; dissenting in part).

IV.

The Panel finds probable cause to believe that you have violated the canons and rules of judicial conduct. The Panel finds that Judge Griffen was given an opportunity to respond to the extraordinary petition filed with the Supreme Court. The Panel, however, does not find that the notice to Judge Griffen and his ability to respond were sufficient. The OAG notified the Supreme Court it intended to file an emergency petition to Judge Griffen’s Order at 5:56 p.m. on April 14, 2017, a Friday evening. It did not notify Judge Griffen. During the day of Saturday, April 15, 2017, the Supreme Court set a deadline of 3:00 p.m. that day for any response to the state’s petition. The Supreme Court did not notify Judge Griffen of its order. Finally, a member of the Supreme Court Clerk’s Office notified Judge Griffen of the proceedings and extended his deadline until Monday, April 17, 2017, at 9:00 a.m.

This email, the only notification to Judge Griffen, was sent to his chamber's email address on a Saturday evening. It cannot be reasonably assumed that Judge Griffen would receive the email at his chambers address on a weekend. Judge Griffen could not have reasonably been expected to have effectuated a meaningful response to the state's petition to remove him from the McKesson case.

Further, Judge Griffen was never given notice of, and the opportunity to be heard on, the Supreme Court's ultimate action – the removal of Judge Griffen from all death penalty and execution protocol cases pending and in the future. Indeed, none of the parties to the litigation had even raised or argued the issue of Judge Griffen's blanket disqualification with the Supreme Court; disqualification was sought only with respect to the case under review. Nonetheless, the justices (with Chief Justice Kemp dissenting) acted sua sponte to remove judicial duties from Judge Griffen which he would otherwise have been legally obligated to discharge regarding other death penalty and execution protocol cases.

In acting on such matters involving judges, it is important to consider the well established case law that judges are presumed to be impartial and unbiased and presumptively will act with honesty and integrity in adjudicating cases. *Robinson Nursing & Rehab. Ctr., LLC, v. Phillips*, 2016 Ark. 388, 502 S.W.3d 519 (2016); *Stilley v. James*, 346 Ark. 28, 53 S.W.3d 524 (2001). A personal belief of a judge, even if expressed publicly by word or conduct, is insufficient to overcome this strong presumption of a judge's impartiality in ruling on matters of law before the court.

We are mindful that pursuant to §4 of Amendment 80 of the Arkansas Constitution, the Supreme Court of Arkansas has superintending control over all courts of this state. Nevertheless, the Arkansas Judicial Discipline & Disability Commission was created to investigate alleged ethical violations of all judges and was empowered to take appropriate action pursuant to the provisions of the Arkansas Code of Judicial Conduct and the Arkansas Judicial Discipline & Disability Rules. Under Ark. Jud. Discipline & Disability Comm'n Rule 6 concerning jurisdiction of the Commission, it is charged with administration of the judicial discipline and disability system and is to perform such duties as are required to enforce the rules. Further, Rule 6 provides that the Commission shall have jurisdiction over any judge regarding allegations of misconduct or disability, pursuant to limitations not applicable herein. Amendment 66 of the Arkansas Constitution, wherein the Arkansas Judicial Discipline & Disability Commission was created, specifically empowers the Commission to discipline all justices and judges. See *In Re Pulaski*

County Circuit Court, Fifth Division, Hon. Wendell Griffen, supra, (Chief Justice Kemp concurring in part and dissenting in part).

We do not believe that just because the Supreme Court has superintending control over lower courts, its justices are somehow insulated from the processes of the Arkansas Judicial Discipline & Disability Commission, especially when the Supreme Court's own action results in the de facto disciplining of another judge without him being subjected to the safeguards and protections contained within the Rules governing the Arkansas Judicial Discipline & Disability Commission. See *In Re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffen, No. 17-155* (op. del. April 17, 2017), (Chief Justice Kemp concurring in part and dissenting in part).

We also understand that an error of law committed by a judge could not normally form a basis for disciplinary action against the judge making the alleged error. The law is often subject to debate and reasonable minds could differ in good faith with respect to reaching what may be different conclusions or outcomes concerning a myriad of legal issues. Indeed, as is provided for in Ark. Jud. & Disability Comm'n R. 6 B., "In the absence of fraud, corrupt motive, or bad faith, the Commission shall not take any action against a judge for making findings of fact, reaching a legal conclusion or applying the law as he or she understands it." However, where disciplinary action is taken against another judge without sufficient notice to that judge and goes beyond the relief requested by any party, we believe that such arbitrary and capricious conduct could form the basis for disciplinary action by the Commission of the judge or judges ordering the action taken against another judge.

The Panel, after reviewing your response, finds probable cause that you acted arbitrarily and capriciously in your actions and the complaint should proceed further before the Commission.

V.

One final matter involved an allegation that the justices engaged in improper ex parte communications in their resolution of these cases.

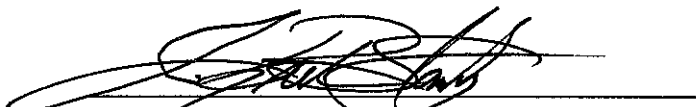
Rule 2.9 Ex Parte Communication

- (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the

presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

The Panel does not find probable cause that any improper ex parte communications occurred. That allegation of the complaint is, therefore, denied and dismissed.

Dated the 20th day of September, 2018.



J. Brent Standridge, Special Counsel