



BEFORE THE COURT OF THE JUDICIARY

In the Matter of: *

M. John Steensland, Jr. * Court of the Judiciary

Retired Inactive and *
Former District Judge * Case No. 39
of the Twentieth Judicial *
Circuit of Alabama *

REPLY BRIEF OF RESPONDENT
AND MOTION TO DEFER TAXING COSTS
WHILE APPEAL TO ALABAMA SUPREME COURT IS PENDING
AND
WHILE COURT OF THE JUDICIARY RULINGS
ON RELATED MOTIONS REMAIN UNDECIDED

Comes now Retired Inactive and Former District
Judge M. John Steensland, Jr., by and through his
undersigned counsel, and replies to the "Brief in
Opposition to Respondent's Motion for Reconsideration
of Order Granting Costs," and moves for this Court to
defer taxing costs while the appeal of this case to the
Alabama Supreme Court is pending, and while this Court
has related post-decision motions remaining undecided,
as follows:

1. Since the aforementioned "Brief in Opposition

to Respondent's Motion for Reconsideration of Order Granting Costs" was filed, Respondent has filed in the Alabama Supreme Court his appellant's brief upon his appeal of the decision of the Court of the Judiciary in the Alabama Supreme Court, and he has filed in that Court and this Court a motion to supplement the record with notice of the Alabama State Bar having invoked its jurisdiction over Respondent in the same matters addressed by this Case No. 39 as of August 11, 2011.

2. Before the Alabama Supreme Court, Respondent alleges that the Judicial Inquiry Commission, and, by accommodation, this Court, have ignored cases before them, including this Case No. 39, where a clear lack of subject matter jurisdiction was obvious. In so doing, Respondent has alleged that this Court and the Judicial Inquiry Commission ignored the Supreme Court's decisions in *Johnson v. Board of Control of the Employees' Retirement System of Alabama*, 740 So.2d 999 (Ala. 1999) and *Ex Parte Alabama State Bar*, 3 So.3d 178 (Ala. 2008) in this Case No. 39.

3. Another issue raised in this Court in this Case No. 39 -- condonation -- is also asserted in the Alabama Supreme Court on appeal.

4. The complaint in this matter was filed against "M. John Steensland, Jr., Retired District Judge" on December 14, 2010. It was filed after he retired, inactive, on May 7, 2010, and at a point in time when he was a "former judge," not a judge.

5. It was filed at the behest of the Judicial Inquiry Commission in this Court, and included a number of allegations, many of which arose from events occurring during Judge Steensland's term of office preceding the term of office during which he retired. (Count V, Charges 36-46).

6. In a timely motion to dismiss, Retired Judge Steensland raised the issue of his inactive retirement divesting this Court of jurisdiction over him for all his charges brought by the Judicial Inquiry Commission. Also, as to the charges made regarding events occurring during his term of office preceding the term of office

from which he retired, he raised condonation by the electors that placed him in office as a defense.

7. Retired Judge Steensland raised jurisdictional and condonation issues that are the subject of his appeal to the Alabama Supreme Court in this Court in a timely motion filed on March 1, 2011.

8. This Court denied Retired Judge Steensland's jurisdictional and condonation motions on March 2, 2011.

9. This Court and the Alabama Judicial Inquiry Commission then proceeded to incur costs of \$15,662.96 prosecuting Retired Judge Steensland upon charges that were clearly heard, considered and decided by this Court without the benefit of jurisdiction over them, or over Retired Judge Steensland, who was then a "former judge" and an "inactive retired judge."

10. The Supreme Court takes notice of a lack of jurisdiction at any time and, upon a determination that a lack of jurisdiction exists, acts swiftly to conserve time, effort, and scarce taxpayer-generated resources

that are wasted when a tribunal like this one insists upon acting without it. *Nunn v. Baker*, 518 So.2d 711, 712 (Ala. 1987).

11. Judge Steensland's inactive retirement before charges were heard against him by this Court left the Alabama State Bar, alone, with jurisdiction to consider whether such charges had merit. *Johnson v. Board of Control of the Employees' Retirement System of Alabama*, 740 So.2d 999 (Ala. 1999); *Ex parte Alabama State Bar*, 3 So.3d 178 (Ala. 2008).

12. This Court erred less dramatically, but no less surely, when it considered (over a timely objection), and held against Retired and Former Judge Steensland events of disputed significance that occurred during a term of office prior to the term of office from which he retired. See *Parker v. State*, 333 So.2d 806 (Ala. 1976); *State ex rel. Attorney General v. Hasty*, 184 Ala. 121, 63 So. 559 (1913). *Mullis v. Mathews*, 259 Ala. 125, 66 So.2d 105 (Ala. 1953).

13. After Judge Steensland retired, inactive, on

May 7, 2010, the Court of the Judiciary and the Judicial Inquiry Commission lost jurisdiction to consider or charge or decide or inquire into events that occurred during his judicial service. He timely raised this deficiency in pleadings responsive to the complaint filed against him. But even had Retired Judge Steensland failed to raise this jurisdictional issue then, this Court would have been compelled to grant him the relief he now seeks in the Alabama Supreme Court because "[j]urisdictional matters are of such magnitude that we take notice of them at any time and do so even *ex mero motu*." *Nunn v. Baker*, 518 So.2d 711, 712 (Ala. 1987). This is because a lack of subject matter jurisdiction cannot be waived by the parties and because it is the urgent duty of an appellate court to consider lack of jurisdiction *ex mero motu*. *Ex Parte Smith*, 438 So.2d 766, 768. (Ala. 1983).

14. *Johnson v. Board of Control of the Employees' Retirement System of Alabama*, 740 So.2d 999 (Ala. 1999) decided this important jurisdictional issue in Retired

Judge Steensland's favor, once and for all, more than a decade ago.

15. In *Johnson*, the Supreme Court was called upon to consider exactly what the status of former Circuit Judge Inge Johnson was after she retired, inactive, from a state court bench in order to become a federal district judge. In order to do so, it went back to the bedrock for determining that status, the Alabama Canons of Judicial Ethics and spoke clearly and decisively, as follows:

The Canons of Judicial Ethics also make distinctions between judges on active-duty status and those on inactive status. "The Canons are not merely guidelines for proper judicial conduct. It is well-settled that the Canons of Judicial Ethics have the force and effect of law." *In re Sheffield*, 465 So.2d 350,355 (Ala. 1984).

The first Code of Legal Ethics in the United States was formulated and adopted by the Alabama Bar Association in 1887. This first Code was adopted with only minor changes by Georgia, Virginia, Michigan, Colorado, North Carolina, Wisconsin, West Virginia, Maryland, Kentucky and Missouri between 1887 and 1907, and, finally, by the American Bar Association in 1908. Thus, Alabama has been a leader in the field of legal ethics. The current version of the

Canons of Judicial Ethics was modeled after the American Bar Association model, but this Court has adopted some of the ABA's recommendations and rejected others.

The Canons of Judicial Ethics, applicable to all judges on active-duty status, became effective February 1, 1976. The Canons state that "[j]udges whose duties are not exclusively judicial or who do not serve on a full-time basis cannot be subjected to a strict, literal compliance with the Canons of Judicial Ethics." ("Compliance with the Canons of Judicial Ethics," section following Canon 7). A part-time judge is not required to comply with Canon 5D., E., F., and G., or with Canon 6C. An acting judge pro tempore is not expected to comply with Canon 5C.(3), D., E., F., and G., or with Canon 6C. A probate judge is not expected to comply with Canon 5B.(2), E. And G., or with Canon 6C, or Canon 7. See "Compliance with the Canons of Judicial Ethics," parts A., B., and C. Retired and supernumerary justices or judges not serving in an active-duty status "shall not be required to comply with any of these Canons."

-- 740 So.2d, at 1011.

16. If the admonition above were not clear enough (which, of course, it is), the Supreme Court recalled later, in the same decision, that the effect of the 1980 adoption of a "Commentary" to the Canons of

Judicial Ethics "to make it clear that retired judges do not continue in office" under § 6.08 was required:

The Commentary reads: "Retired and supernumerary justices or judges are not continuing in office under § 6.08 of Amendment 328, *Constitution of Alabama of 1901.*" Thus, a retired circuit judge on inactive status does not "continue in office."

-- 740 So.2d, at 1012.

17. The Supreme Court minced no additional words on the same subject, concluding:

A retired, inactive judge who meets all of the requirements of the Judicial Retirement Act is not holding an office at all.

-- 740 So.2d, at 1012.

18. Hence, Retired Judge Steensland's contention that this Court (and the Judicial Inquiry Commission) had no jurisdiction over him after May 7, 2010, when he retired inactive. (R. 261).

19. The Supreme Court has spoken eloquently upon this subject further, and spoken in Retired Judge Steensland's his favor. When it did so, it spoke

plainly, and did so at length, drawing upon the very Canons he was charged with violating as the foundation for its conclusion that a retired, inactive judge who meets the requirements of the Judicial Retirement Act is not holding office at all.

20. Chief Justice Hooper spoke eloquently, also in *Johnson, supra*, in a special concurring opinion:

There is a very real distinction between an active retired judge and an inactive retired judge. As an inactive retired judge, I could not perform a marriage ceremony or even give my son, Perry Hooper, Jr., the oath of office to his legislative seat without being specially appointed by Chief Justice C.C. "Bo" Torbert to serve as an active judge. Until a retired circuit court judge is appointed to active duty, he or she is not, by any stretch of the imagination, anything more than an inactive retired circuit judge.

-- 740 So.2d 999, 1013.

21. Without jurisdiction, ignoring the precedent of *Johnson v. Board of Control of the Employees' Retirement System of Alabama*, 740 So.2d 999 (Ala. 1999) at its fingertips, this Court nevertheless proceeded to try Retired Judge Steensland as if his plainly inactive retirement never occurred. In so doing, it ignored

Justice Bolin's opinion, issued for a majority of this Court, in *Ex Parte Alabama State Bar*, 3 So.3d 178 (Ala. 2008).

22. The *Alabama State Bar* decision addressed the manner by which jurisdiction is vested and divested in the State Bar and this Court when a lawyer becomes a judge. Like all circuit judges, Stuart Craig Dubose was a lawyer first. As such, he drafted a will that the Bar deemed unethical and subsequently behaved himself in a manner that the Bar deemed odious. He was elected to the bench in November of 2006, assumed the office of circuit judge on January 15, 2007, and on February 8, 2007 moved the Disciplinary Board of the Bar to grant him summary judgment because his status as a judge had divested the Bar of jurisdiction over him. Ultimately, the Bar's Disciplinary Commission agreed with Judge Dubose, and the Bar unsuccessfully sought a writ of mandamus in the Supreme Court. The Supreme Court denied the petition, and made it clear that Rule 1(a)(3) of the Ala.R.Disc.P., "*Former Judges*," confers

exclusive jurisdiction on the Bar -- not the Judicial Inquiry Commission or this Court -- to determine alleged misconduct that "occurred while they were judges." 3 So.2d, 178, 183.

23. The text of Rule 1(a)(3) was set forth by this the Supreme Court and emphasized for application of one of its phrases ("before they became judges") to the facts of that case, and another of its phrases ("while they were judges") applies with equal force:

Former Judges. Former judges who have resumed their status as lawyers are subject to the jurisdiction of the Supreme Court of Alabama and the Disciplinary Commission and the Disciplinary Board of the Alabama State Bar for misconduct that occurred while they were judges, before they became judges, or after the resumption of the practice of law and that would have been grounds for lawyer discipline."

-- Rule 1(a)(3), Ala.R.Disc.P.
(Emphasis added above)
3 So.3d 178, 183

24. In this case, Retired Judge Steensland is a "former judge," "retired inactive," and currently, a lawyer. Jurisdiction over any of his conduct while a judge is vested in the Alabama Bar, and by separate

pleading filed the same day as this brief we show to this Court that, indeed, the Alabama Bar has invoked its jurisdiction. ("Motion to Supplement the Record").

25. Nothing in Art. VI, §§ 156 or 157 of the *Alabama Constitution* confers jurisdiction over the alleged misconduct of Retired Judge Steensland on the Judicial Inquiry Commission or this Court, and *Ex Parte Alabama State Bar, supra*, makes it clear that there is no concurrent jurisdiction by and between this Court and the Alabama State Bar.

26. This Court was mindful of the Supreme Court's *Johnson* decision when it allowed the Judicial Inquiry Commission to proceed before it after Retired Former Judge Steensland's inactive retirement from the bench; the full text of it appears in the record on appeal now before the Supreme Court. We contend that this Court erroneously chose to ignore it, and *Ex Parte Alabama State Bar, supra*, which is entirely consistent with the Alabama Supreme Court's *Johnson* decision.

27. An error of lesser, but significant, importance

also occurred in this Court when it considered (over the timely objection of Retired Inactive Former Judge Steensland) events occurring during his term of office preceding the term from which he inactively retired. Any significance these events might have had under other circumstances was rejected by the voting citizens of Houston County when they elected Judge Steensland to a successive term of office after the term during which they occurred. In the law of impeachment, a re-election of the same office holder to the same office he or she held during a preceding term is deemed a "condonation" of any and all such events because re-election is an endorsement by the most important political force in our system of government since its inception -- the voting public.

28. In *Parker v. State*, 333 So.2d 806 (Ala. 1976), the Supreme Court wasted no time reversing the Circuit Court of Jefferson County for its impeachment of then Jefferson County Treasurer Horace Parker because "[i]t seems to be the policy of our Constitution

to make each term independent of the other and to disassociate the conduct under one term from the qualification or right to fill another term, at least so far as the same may apply to impeachment proceedings, and as distinguished from the right to indict and convict an offending official." 333 So.2d 806, 808. (Citing *State ex rel. Attorney General v. Hasty*, 184 Ala. 121, 63 So. 559 (1913)).

29. In *Parker, supra*, there was undisputed proof that the Jefferson County Treasurer had offered a woman named Beverly Pratt the office of Deputy-Treasurer if she would agree to pay him \$2,000 annually from her salary. He did so via a telephone conversation that was tape recorded by Ms. Pratt on January 10, 1973 (after his election, but before he took office on January 15, 1973). After taking office, an information of impeachment and prayer for his ouster from office was filed and sustained in the Jefferson County Circuit Court, only to be reversed by this Court on "the condonation theory" that "re-election to an office

operates as a condonation of the officer's conduct during the officer's prior term." 333 So.2d, 806, 808. This Court explained that Parker's offenses occurring prior to the term of office to which he was elected, combined with the fact that he did not actually hire Ms. Pratt after taking office, were directly analogous to allegations of willful neglect of duty, incompetence and corruption leveled against Marengo County Probate Judge A. L. Hasty just after the turn of the century.

30. In *Hasty*, the Supreme Court ruled that because all grounds for Judge Hasty's impeachment were based upon conduct during a previous term of office (prior to his 1910 re-election) he could not be successfully impeached. Its rationale was that Judge Hasty had been re-elected in 1910, and assumed the duties of that office before his impeachment: "this fact alone forecloses the state from impeaching and removing him from the second term for acts done during the previous term." 63 So. 559, 561.

31. Similarly, in *State ex rel Mullis v. Mathews*,

259 Ala. 125, 66 So.2d 105 (Ala. 1953), the Supreme Court held that a sheriff could be removed from office only for acts of omission or commission committed by him during the term of office when an impeachment information was filed, and not for acts or omissions committed during a previous term.

32. This Court was mindful of the *Hasty, Mullis* and *Parker* decisions when it allowed the Judicial Inquiry Commission to "pile on" charges from Judge Steensland's term of office preceding the term from which he retired, inactive, in 2010, because it included them in the text of the record on appeal in the Supreme Court.

33. *Johnson v. Board of Control of the Employees' Retirement System of Alabama*, 740 So.2d 999 (Ala. 1999) has been the law of Alabama for more than a decade. *Ex Parte Alabama State Bar*, 3 So.2d 178 (Ala. 2008) is a more recent, consistent and supplemental affirmation of *Johnson's* limitation upon jurisdiction over disputes regarding allegations of misconduct by inactive retired

or former judges.

34. If the jurisdictional mandates of the *Johnson* and *Alabama State Bar* decisions are reaffirmed by the Supreme Court, there will be no costs to tax.

35. Finally, there are post-decision motions before this Court that bear upon its decision to make a taxing of costs final, or not. Until these motions and the decision of the Alabama Supreme Court on the appeal of this case are determined, it any final decision upon the taxing of costs would be premature.

Wherefore, Respondent Inactive Retired and Former Judge Steensland moves this Court to defer taxing costs while the appeal of this case to the Alabama Supreme Court is pending, and while this Court has related post-decision motions remaining undecided (these include a motion to supplement the record filed the same day as this reply brief, and a motion for supplemental briefing schedule that includes a motion for this Court's Clerk to disclose to Respondent the "very few" occasions when this Court has declined to tax costs).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2011, a copy of the above and foregoing reply brief of respondent has been filed with the Clerk of the Court of the Judiciary, the Honorable John H. Wilkerson, Jr., by email transmission to "coj@appellate.state.al.us." and by paper copy by First Class U.S. Mail, also to him at Post Office Box 301555, Montgomery, Alabama 36130-1555, and that I have similarly served a copy upon opposing counsel, Richard E. Trewhella, Jr., Attorney for the Alabama Judicial Inquiry Commission, by email transmission to "rtrewhella@carallision.com" and by First Class U.S. Mail to him at 100 Vestavia Parkway, Birmingham, Alabama 35216.

s/Joel E. Dillard
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