

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE
HON. KIM SHEPARD
No. 14-488 /

SC15-1746

SURREPLY
TO THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION'S REPLY
TO THE RESPONSE TO THE ORDER TO SHOW CAUSE

Introduction

A significant portion of the Florida Judicial Qualifications Commission's (hereafter "FJQC") Reply (hereafter "the Reply" or "FJQC's Reply") merely restates the Findings and Recommendations of the FJQC Hearing Panel (hereafter "Findings and Recommendations") without addressing the arguments raised by the detailed and fully cited, Response To The Order To Show Cause (hereafter, "the Response") previously filed with this Court. Accordingly, this surreply will confine itself to correcting the many misstatements, bald assertions, and mischaracterizations regarding the record and the unsupported, intentional aspersions cast regarding Judge Shepard's supposed "reactions" to the original allegation and these proceedings as set forth in the FJQC's Reply. It will also illuminate the many instances in which the F.J.Q.C.'s reply seeks to improperly introduce new "findings"

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and “conclusions” not found in the Hearing Panel’s actual authorized report of “Findings and Recommendations” previously filed with this court.

The FJQC’s reply seems to focus more of its attention on Judge Shepard’s alleged personal “reaction” to these proceedings and its own estimation of the propriety of defending the charges at all, than it does on the actual merit of the initiation of these proceedings, the prosecution thereof or the defense thereto. Apparently, the FJQC takes the position, that any action they initiate or pursue against a judge is inherently justified, objectively reasonable, and wholly unchallengeable as a matter of right.

As a consequence of that belief, the expectation, if not demand, seems to be that any prosecution pursued by FJQC should be welcomed and immediately, unquestioningly validated by the targeted judge. A judge who doesn’t instantly “stipulate” to the JQC’s assessment of wrongdoing and acquiesce in the FJQC’s view of an appropriate discipline, runs the risk of being branded “willful”¹, “unable”², “unwilling”³ and having their “fitness”⁴ and “ability”⁵ to serve in office “called into question”⁶ for even the most minor of supposed “transgressions”⁷.

¹ Reply atp.13 ln.19

² Findings And Recommendations p.13 pp. 3 ln. 1, Reply p.12 pp.2 ln.3

³ Findings And Recommendations p.13 pp. 3 ln. 2, Reply p.12 pp.2 ln.4

⁴ Reply p.14 ln.1

⁵ Reply p.12 ln.10

⁶ Reply p.12 ln. 9

⁷ Reply p.12 ln.10

If a subject judge has the temerity to resist the FJQC's characterization of the alleged conduct, offer a different interpretation of events than the FJQC's own, dares to put forward a defense, and requires that any alleged wrongdoing be proven by clear and convincing evidence, as the Canons themselves require, that judge is invariably, pejoratively characterized by the FJQC as "unremorseful"⁸ and then marginalized in pleadings, or additional proceedings, as "conspiratorial"⁹, or worse.

For the subject judge, this inescapable fate pertains even where there is an honest difference of opinion among legal professionals to what the Canons require. Even a judge who genuinely believes in their innocence, is thrust, by the mere filing of an allegation, into the unenviable position of choosing between presenting a sincere, frank and vigorous defense to the charge, at the risk of provoking the personal resentments and prolonged attention of FJQC prosecutors or members, and capitulating to allegations they truly believe themselves innocent of, while accepting the permanent stain of "wrongdoing" on a personal and professional reputation established over decades. This was not the hope, nor the ideal envisioned when the FJQC was established.

There is no judicial Canon which authorizes, or justifies, a finding of guilt or the imposition of discipline based on an accused judge's alleged "reaction" to proceedings initiated against them. When a constitutionally elected judge's

⁸ Findings and Recommendations p.13

⁹ Findings and Recommendations p.22 Reply p.12

fundamental integrity and character are attacked, it should not be considered remarkable, that the attack is not welcomed in a response or that exception is taken to the assertions. Nor should it be seen as somehow unnatural, to question the legitimacy of both factual basis and motivation upon which the attack rests.

When the attack is initiated by the FJQC, it is not only a challenge of the individual judge, it is a rebuke of the electoral choice of those many voters that placed that judge in office. It is therefore incumbent on a judge who sincerely believes the attack to be wrongly taken, to consider, not only their own preference for a swift, minimally costly and minimally taxing resolution, but also their duty to vindicate the electoral rights of those voters, for and against, whose faith and trust provided the legitimate foundation of their office and on whose authority they act.

It is also the responsibility of a judge in such circumstances, to consider the effect, surrendering to such a coerced concession would have on the health of the democracy and judiciary as a whole, and on the future encouragement of the better qualified rather than pre-anointed candidates within a community to seek election to a judicial post. Because of the message such a custom invariably conveys, the routine demand for, and acceptance of, judicial “stipulations” to alleged “wrongdoing” prompted by convenience, expediency, financial risk, disciplinary favor or the FJQC’s goodwill should be skeptically considered and carefully

weighed. This is especially so, where an accused judge can make a fair case for their innocence.

Capitulation under pressure is not a value that should ever be modeled, condoned or promoted among or by the judiciary. A judge facing discipline must also evaluate the true contribution such a compelled admission would make to the public's perception of the judiciary. A judge exercising these responsibilities, should not be punished for doing so, either rhetorically in the public record, or through a judicially imposed discipline.

I.

Factual Misstatements Of The Record, Deliberate Misrepresentation of Case Authority, Unsupported Editorial Commentary, Conjecture, Speculation, and Projection In The F.J.Q.C.'s Reply To The Response To The Order To Show Cause

At the outset, it is important to recognize that, as was true of the Hearing Panel's Findings and Recommendations, many of the conclusory statements, averments and editorial commentary regarding Judge Shepard's alleged personal motives, reactions, and intentions are completely without any evidentiary or factual support. It is not surprising then, that where those statements appear in the FJQC's reply, there is no corresponding citation to the record. By way of specific examples :

1. *“The hearing panel heard testimony from witnesses offered by the JQC and by Judge Shepard, as well as testimony directly by Judge Shepard.”*

(Found **without** record citation at FJQC Reply p.2 ln. 12)

This effort to suggest that the FJQC offered “witnesses”, at least in so far as the intent is to convey that the FJQC produced more than a single, independent witness against Judge Shepard, is without factual support in the record. In fact, the JQC offered the testimony of only **one** witness other than Judge Shepard.

2. *“Her response to the allegation was that it was, in fact, true that the Orlando Sentinel endorsed her and found that she had integrity.”* (Found **without** record citation at FJQC Reply p.4 pp.2 l.3-4)

This is a deliberate misstatement of Judge Shepard’s position. In fact, Judge Shepard’s response to the allegation contained in the Amended Notice of Formal Charge was **not** that *“it was, in fact, true that the Orlando Sentinel endorsed her...”*. It was, instead, that the Orlando Sentinel had, on its own accord, authored four **true** statements about Ms. Shepard’s personal reputation for the abiding qualities of **character** and **integrity**. Those statements have never been retracted, despite ample

opportunity to do so either before or during the judicial campaign at issue, and even after these allegations were brought by the FJQC, and during their pendency.

They were not retracted even in the Orlando Sentinel's "official candidate endorsement" of Judge Shepard's opponent based on their stated preference for his "experience". A preference for "experience" in a particular judicial race, does not negate observations regarding enduring characteristics of personal integrity or character. Neither have any of those four **true** statements ever been shown to be untrue either individually or collectively. It has never been disputed that the Orlando Sentinel authored those statements.

Further, candidate Shepard never intended to, and in fact, did not represent she had obtained the "official candidate endorsement" of the Orlando Sentinel in the instant judicial contest.

Judge Shepard's position has been that her use of four **true** statements, (none of which, in any way referred, to an "official candidate endorsement" of any kind) regarding her **character** and **integrity**, that were properly attributed to the source that authored them, in the context of a comparison, not of "endorsements", but of the candidates' respective reputations for **character** and **integrity**, which appeared directly adjacent to a panel entitled "Proven Integrity", was not an assertion by her of an "official candidate endorsement" by the Orlando Sentinel, any more than the four **true** statements properly attributed to the Florida Supreme Court regarding her

opponent's lack of integrity and character in the same side-by-side comparison, was an assertion of an "official candidate endorsement" by the Florida Supreme Court.

Notably, at no time, throughout these proceedings, did the F.J.Q.C. consider the undated use of *those* four **true**, properly attributed statements, regarding her opponent's character and reputation, to have violated Canon 7A(3)(e)(ii). In fact, those statements were specifically considered by the Investigative Panel, the charges related to them were dismissed, and accordingly, they were not made part of the Notice Of Formal Charge nor the Amended Notice Of Formal Charge.

The F.J.Q.C.'s repeated distortion of Judge Shepard's consistent position in response to the single allegation contained in the Notice Of Formal Charge and repeated in the Amended Notice Of Formal Charge is, itself, intentionally misleading.

3. *"Ms. Shepard believed her opponent, Mr. Katz, to be unworthy of judicial office, and somehow convinced herself that this justified her actions."*

(Found **without** record citation at FJQC Reply p.5 pp.1 ln.1)¹⁰

¹⁰ The Hearing Panel's prior erroneous attribution of a comment by counsel for Judge Shepard regarding *his own* personal experience with Mr. Katz, to Judge Shepard, as support for the Hearing Panel's conclusions about candidate Shepard's motives, has been previously addressed in Judge Shepard's Response To The Order To Show Cause. (Response To The Order To Show Cause at p.65 ln.1-7)

Despite the recorded conclusions drawn by the Florida Supreme Court, itself, about candidate Shepard's opponent, there is no evidence in the record, at all, as to what candidate Shepard "*believed [about] her opponent*" from which either the Hearing Panel or Special Counsel could legitimately conclude that candidate Shepard "*somehow convinced herself that this justified her actions*".

There was no testimony offered or solicited on this point. No mental health expert testified as to the psychological motivations of candidate Shepard. No expert forensic behaviorist offered testimonial analysis of candidate Shepard's actions. The **record** establishes only, candidate Shepard's concern that an unchallenged candidate for the Circuit Court bench "could arrive in office without the public having any real idea what his disciplinary record [was]." (Findings and Recommendations p.6 and T.T. p. 229-230). Nonetheless, the FJQC is undaunted in repeatedly making this naked, surmised, assertion.

Though not properly placed inside a quotation, the recitation here, in the FJQC's Reply, is merely a verbatim regurgitation of the Hearing Panel's original, unsupported "finding of fact" found on page 15 at lines 14-16 of the Hearing Panel's Findings and Recommendations. Just as Special Counsel did not here, in the instant reply, cite to any record support, the Hearing Panel, itself, could cite to no evidence in the record to support its amateur psycho-analysis and projection of motive onto both candidate Shepard's, and Judge Shepard's actions. Personal speculation, and

projected motive are inadequate substitutes for actual evidence in a court of law. In fact, such speculation and conjecture is exactly what professional lawyers and competent judges are trained to recognize and expected to avoid.

4. *“Indeed, the record conclusively refutes many of her assertions.”*

(Found **without** record citation at FJQC Reply p.5 pp.3 ln.3)

After making another bald, unsupported statement, the FJQC’s Reply does not then identify a single “assertion” contained in the Response that the “record conclusively refutes”. The reply then goes on to characterize those responsive arguments to the official Findings and Recommendations, again without any support from, or citation to, **either** the Response To The Order To Show Cause **or** the record, as “misstatements and exaggerations”. (FJQC Reply p.5 pp3 ln.4).

Once the unsupported **characterization** is thus pasted onto the Response, the FJQC’s reply doesn’t even bother to identify what particular “misstatements and exaggerations” in the Response the FJQC takes issue with.

Rather, the Reply then abruptly abandons any analysis, identification of specific “misstatements and exaggerations” or offer of proof to justify its derogatory

characterization, stating merely that “the [F]JQC will not address [these unidentified “misstatements and exaggerations”] further.” (FJQC Reply p.5 pp.3 ln.5)

Yet, the Reply then goes on to try to cement that unsupported *characterization* in the mind of its intended audience by simply underscoring the original unsupported assertion with more unsupported, inflammatory editorial rhetoric.

5. “...except to note that Judge Shepard is now applying the same kind of mischaracterizations and misdirection to defend herself, that attorney Shepard used to obtain office.” (Found without record citation at FJQC Reply p.5 ln. 19- p.6 ln. 2)

While it is understandable that this court would give appropriate deference to such “findings of fact” by the Hearing Panel, if any, which are demonstrably and specifically supported by clear and convincing evidence, the statement above is neither a “finding of fact” arrived at by the Hearing Panel, nor is it a “conclusion of law” drawn from the record facts before the Hearing Panel. It is rather, a completely transparent and wholly unprofessional, attempt by the Reply to “pound the table” in the face of a total absence of either fact or law to support the assertions contained therein.

As a matter of law, the special counsel, as author of the Reply, is neither a finder of fact in this action, nor is he constitutionally authorized to try to unilaterally

introduce to the record, through the Reply, new findings of fact or conclusions of law not originally appearing in the six-member Hearing Panel’s official “Findings and Recommendations”, previously filed with this court.

Not only is the above assertion unsupported by “clear and convincing” evidence in the record, it is no reflection of any representation of the Hearing Panel’s official findings or recommendations as previously filed with this court. The random observation is also not supported by competent and substantial evidence, as again signaled by the lack of any citation to the record, or any specific identification of the “kind of mischaracterizations and misdirection” asserted. As this court first observed in *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957), and reiterated in *Duval Utility Company v. The Florida Public Service Commission*, 380 So.2d 1028 (Fla. 1980), “...conclusory statements... do not provide sufficient support for the findings necessary...” upon which official actions can be recommended.¹¹

¹¹ *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957) “We have used the term ‘competent substantial evidence’ advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Becker v. Merrill*, 155 Fla. 379, 20 So.2d 912; *Laney v. Board of Public Instruction*, 153 Fla. 728, 15 So.2d 748. In employing the adjective ‘competent’ to modify the word ‘substantial,’ we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. *Jenkins v. Curry*, 154 Fla. 617, 18 So.2d 521. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the ‘substantial’ evidence should also be ‘competent.’ Schwartz, *American Administrative Law*, p. 88; *The Substantial Evidence Rule* by Malcolm Parsons, *Fla. Law Review*, Vol. IV, No. 4, p.

The statement is pure, inappropriate and unprofessional, new editorial commentary based on personal animus or speculation, or both, introduced in the Reply.

6. “...in which she **for the first time** raises challenges to the constitutionality of Canon 7A(3)(e)(ii).” (Found **without** record citation at FJQC Reply p.4 pp.1 ln.4-5)

This assertion in the FJQC’s Reply is simply untruthful. In the Answer and Affirmative Defenses to the Notice Of Formal Charge filed in this court on December 8th, 2015 and in the Amended Answer And Affirmative Defenses To The Amended Notice Of Formal Charge, filed in this court on March 15th, 2016, both the facial constitutionality of Canon 7A(3)(b) and 7A(3)(e)(ii) as well as the constitutionality of their application to the particular facts in this case were expressly challenged.¹²

In addition, to the extent that the Reply attempts to argue that it is somehow improper for the Response to flesh out those constitutional challenges, the Reply’s

481; United States Casualty Company v. Maryland Casualty Company, Fla.1951, 55 So.2d 741; Consolidated Edison Co. of New York v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126.”

¹² The Amended Answer And Affirmative Defenses To The Amended Notice Of Formal Charge filed with this Court on March 15th, 2016, was apparently erroneously entered into the official record on that date together with an Order Granting Leave to file it, rather than as a separately filed document. It may be found by reviewing the first docketed entry on March 15th, 2016.

purported rebuttal reveals a basic ignorance of the obvious differences between an “appeal” in the traditional sense, and a “response” to an order to show cause. To start with, the first is discretionary while the second is compulsory. It also demonstrates a complete lack of understanding of this court’s constitutionally established role and repeated explanation of that role in the FJQC’s own jurisprudence. (Fla. Const. Art. V.§15).

The Florida Supreme Court’s review of the findings and recommendations of the FJQC is de novo. **In re Kelly**, 238 So.2d 565, 571 (Fla. 1970) **In re Grazziano**, 696 So.2d 744, 753 (Fla. 1997). As the Eleventh Circuit pointed out in **American Civil Liberties Union v. The Florida Bar**, 999 F.2d 1486, 1494 (11th Cir. 1993), “[t]he JQC is not the final arbiter of the interpretation of the Code Of Judicial Conduct; the Florida Supreme Court is.” The FJQC is not even “...technically a judicial tribunal...) **In re Kelly**, 238 So.2d 565, 571 (Fla. 1970). The FJQC “...is authorized to conduct a hearing for the purpose of aiding this Court in...” carrying out its “...ultimate responsibility [to] mak[e] a determination”... “...that rests on constitutionally permissible standards and emerges from a proceeding which conforms to the...standards of due process.” **In re Kelly**, 238 So. 2d 565, 569 (Fla. 1970)(Emphasis Supplied).

7. *“Judge Shepard for the first time argues that Canon 7A(3)(e)(ii) fails to address a compelling state interest, that it is not narrowly tailored and that*

the integrity of the judiciary is a concept that is vague and overbroad.”

(Found **without** record citation at FJQC Reply p.6 ln. 4-6)

Here, again, the Reply deliberately misstates and distorts the positions, specifically argued in the Response, with supporting cites to both the record and applicable case law. This effort by the FJQC, deliberately avoids any attempt to honestly consider or directly address the arguments presented, and instead, relies solely on unsupported rhetoric in an attempt to provoke and appeal to the Court’s anticipated emotion, rather than engage the Court’s objective and detached legal analysis.

The position actually articulated in the Response, is that Canon7A(3)(e)(ii)’s “other fact” clause imposes a content based restriction on the constitutional guarantees of free speech that does not appear to serve any obvious or supposed compelling state interest, which, may or may not be, served by other provisions of that Canon, other Canons, or by the Code Of Judicial Conduct as a whole. (Response p. 25 pp. 3 ln. 1-3 through p.26 pp.1 ln. 1-8). Further, Canon7A(3)(e)(ii)’s “other fact” restriction is not narrowly tailored to accomplish any proposed compelling interest so far articulated, nor any unidentified, potential “compelling interest” thus far, only imagined. (Response p. 27-33)

The Response also argues that unless this Court finds that Canon 7A(3)(e)(ii) is facially constitutional, not overbroad, not vague, and also constitutionally applied to punish four **true** statements, regarding Ms. Shepard's reputation for **character** and **integrity** which were **accurately attributed to their author**, there can be no finding by the Court that candidate Shepard violated Canon 7A(3)(b).

This is so, because without reference to some other act, anchored in and defined by the established Canons as **in**consistent with the "integrity of the judiciary", the term "integrity of the judiciary" is completely formless, shapeless and susceptible to the whim and personal interpretation of an ever changing composition of FJQC members. Moreover, a judicial candidate would have no reliable way to ascertain, in advance, how a particular composition of the FJQC, would interpret that admonition or divine which conduct the FJQC would seek to prosecute or excuse.

As the 11th Circuit observed, "...because the members of the JQC serve staggered six year terms, ...a change in membership could result in a change in JQC policy regarding... the interpretation and enforcement of Canon 7[]." **American Civil Liberties Union v. The Florida Bar**, 999 F.2d 1486, 1494 (11th Cir. 1993) (Internal citation omitted). "Insofar as the JQC has the discretion to change its policy regarding the interpretation and enforcement of Canon 7[], this case is analogous to other Eleventh Circuit cases...". "As the court noted in *Fire Fighters*,... "...[a]ll

(sic) that remained between the plaintiff and impending harm was the defendant's [JQC's] discretionary decision—which could be changed—..." Id. at 1494 "This process, itself, ...is enough to chill speech." Id. at 1495

The Hearing Panel, itself, apparently recognized this reality, as the alleged violation of Canon 7A(3)(b) was expressly premised on their conclusion that candidate Shepard had violated Canon 7A(3)(e)(ii) by "knowingly misrepresenting" the "other fact" that she had obtained the Orlando Sentinel's "official candidate endorsement" in the instant judicial race.

Though the Reply, again, sneers its distortion of the legal positions taken in the Response, the FJQC well knows the constitutional importance of clearly defining even allegedly "intuitive" or familiar terms, when they are used to punish free speech or to threaten the independence and tenure of constitutionally elected, judicial officers. Countless military service men and women have died to protect that most fundamental of freedoms. Relying on untethered, vague or overbroad language, however common, fails to meet the most basic of constitutional expectation and requirement. The Reply's apparent indignant exception is disingenuous.

8. *"First, the Hearing Panel disregarded the Respondent's testimony that she did not intend to mislead or deceive, and affirmatively found that Judge Shepard's active and intentional manipulation of an endorsement constituted a*

knowing misrepresentation.” (Found **without** record citation at FJQC Reply p.7 ln. 3-7)

This is a wholly improper and blatant attempt to unilaterally introduce through the Reply, **new**, imagined, “factual findings” into the record and consciousness of this Court, that **do not exist** in the official “Findings and Recommendations” of the FJQC Hearing Panel, previously filed with this court. That is why there is **no citation to** the official Findings And Recommendations of the Hearing Panel.

There are **no** words in the Hearing Panel’s official Findings and Recommendations referring to an “*active and intentional manipulation of an endorsement*”, much less that the Hearing Panel “*affirmatively found*” any such thing. Likewise, there are **no** words in the Hearing Panel’s official Findings and Recommendations stating they “*disregarded the Respondent’s testimony*” or that they found the Respondent’s testimony, in whole or in part, not to be credible.

The standard the Hearing Panel was required to apply to the evidence before it, in order to arrive at its finding, was “clear and convincing evidence”. The application of that standard did not inevitably require the panel to “disregard” the Respondent’s testimony, and nowhere in the official Findings and Recommendations, does it say that they did.

The only actual “finding of fact” in this regard, contained in the Hearing Panel’s official Findings and Recommendations, previously filed with this Court,

was that failing to include “...two sentences from the 1994 Orlando Sentinel endorsement (relating to her legislative service)...” together with the four **true** statements regarding her character and integrity, “...was a deliberate act. (T.176-78)” (FJQC Findings and Recommendations p.13 ln. 11) and, “[i]n doing so, she knowingly **misled** the public by campaign literature which implied that she was endorsed by the *Orlando Sentinel*, when this was untrue.” (FJQC Findings and Recommendations p. 15 ln. 16-18) (Emphasis Supplied).¹³

It is important to note as well, that special counsel has **no vote** on the Hearing Panel and is **not constitutionally authorized** to unilaterally decide, alter, or supplement the official “Findings And Recommendations” of the six member, constitutionally appointed, FJQC Hearing Panel with supposed “findings” not contained in the official text.

9. “*In reviewing the false statements clause in the Kentucky Code, **the court, in Walter v. Wolnitzek __ F.3d __ (11th Cir. 2016) 2016 WL 4446081 held :*** ...” (Emphasis Supplied)

¹³ Canon 7A(3)(e)(ii) prohibits a judicial candidate from making a “knowing **misrepresentation**” in a campaign statement. It does not impose a universal duty on a judicial candidate to guarantee that no member of the public could possibly infer something other than is actually stated and thus, personally conclude that they have been “**misled**”. In the latter case, too much is dependent on particular circumstances surrounding the perception of the statement, the inclinations, preferences, motivations, intellect and relative comprehensive abilities of each member of the public. Nevertheless, this was the factual finding of the Hearing Panel.

The cited legal authority in this statement by the FJQC, does not exist.

The reply's use of this **false** case authority to suggest or imply an official endorsement by the 11th Circuit Court of the FJQC's argument before the Florida Supreme Court, is perhaps the most glaring example of the many misrepresentations found throughout their submission. This knowing and intentional misrepresentation of fact and law in the FJQC's reply, is especially egregious, not only because occurs in the course of these disciplinary proceedings,¹⁴ nor simply because of the customary judicial deference paid to precedents generally, but also because of the special deference typically paid to recent precedents, purportedly established within a reviewing court's own federal jurisdiction.

These types of case authorities, generally, are weighed more heavily against competing authority outside the reviewing court's home jurisdiction. Accordingly, a non-existent or stray foreign case, purportedly sympathetic to the FJQC's own position, may, nonetheless, wield an enhanced persuasive effect on the ultimate resolution of questions under review, **if** it is camouflaged as an actual case hailing from the Florida Supreme Court's own federal circuit. Creating the impression that the 11th Circuit has suddenly and recently *abandoned* their steadfast view, as previously articulated in Weaver v. Bonner and repeatedly reaffirmed in the line of

¹⁴ See : 658 So.2d 993 (Table) 1995 WL 227524.

cases that followed, would weaken the persuasive force of the Weaver decision in considering the case currently under review by this Court.

Here, the reply repeatedly refers to the “11th Circuit”, and specifically to the Weaver v. Bonner case, immediately preceding its introduction of the **false** citation. Starting on page six of the reply and continuing for two pages, the reply attempts to distinguish Weaver from the instant case, and escape its holding. In the **false** citation, both the name of the case, as well as jurisdiction from which it came, were “omitted”, “excised” and “removed”.

By introducing a recent citation allegedly from the same federal circuit that appears to contradict that circuit’s earlier established authority, the Reply deliberately seeks to imply the endorsement of the 11th Circuit for the FJQC’s own position, and to undermine the constitutional attack on the FJQCs prosecution in the hope of securing a “win”.

An application of the FJQC’s own analysis, found in its official Findings and Recommendations as well as in the Reply itself, to the appearance of the **false** citation identified above, poetically and perfectly illustrates the random nature of the FJQCs efforts to “preserve the integrity, impartiality and independence of the judiciary” and/or “ensure the integrity of the electoral process”. It also demonstrates in stark relief, the completely capricious and arbitrary application of its own asserted principles and prosecutorial perspective. As the FJQC has itself observed :

The Reply's "...selective editing of the [citation], in context, is much more than a matter of inexact punctuation, or a mistake. Neither, is it simply a typographical error. The FJQC apparently believes Judge Shepard to be worthy of their attack on her judicial office, and that any action it undertakes to defeat and publically tarnish her long established reputation for **character** and **integrity** is justified. In doing so, the Reply knowingly misled the Florida Supreme Court by its pleading which implied that its argument was endorsed by the 11th Federal Circuit Court, when this was untrue.

By knowingly deleting the jurisdiction of the endorsement, and all references to the 6th Circuit, the reply made it appear that the FJQC had received the 11th Circuit's current endorsement of their legal position, which was patently untrue.

The undersigned counsel believes that legal endorsements by local Federal Courts can and do have significant impact on reviewing courts within their jurisdiction, and on the outcome of judicial decisions. Jurists, assigned to those courts, trying to discern the differences between legal arguments, often rely on the case citations provided by professionally trained lawyers to steer them in the right direction. Active and intentional manipulation of those endorsements, represents both a strategic understanding of how important the citation of those endorsements are, and a willingness to mislead for ultimate gain. The reply's representations in this respect are offensive and disturbing.

The availability of a correct citation for the material elsewhere, or an accurate citation to an 11th Circuit Court case first, does not make the instant citation any less misleading. If the Florida Supreme Court “should not be required to read the fine print in [a filing by the FJQC] to correct a misrepresentation contained in large bold letters” in the same filing, then the Court should not be required to read prior citations from the same FJQC or original source material to glean the truth

Through long tradition, practice and habit, Courts routinely rely on the representations of cited case authority appearing in the official filings published in the record. The Florida Supreme Court has repeatedly warned members of the bar, that they should not mislead the Court by placing factually incorrect statements in legal materials.” (All slight alterations of the original text found in the Findings and Recommendations and in the Reply, supplied)

In fact, there is no *Walter v. Wolnitzek* case in the 11th Circuit, period.

“The quoted language following the false citation, purports to be a direct quotation taken from the 11th Circuit, but significantly, (1) omits the actual jurisdiction of the alleged endorsement (2) omits the fact that the quotation is made by an entirely different court, and made in connection with a case that ultimately

*holds that a judicial Canon that prohibits judges from making any misleading statements is facially unconstitutional and (3) is substantially edited to delete all reference to the issuing court's actual holdings. Not just an intervening sentence or sentence at the end of a paragraph in the opinion were removed without any indication. The vast majority of the quoted opinion was completely "omitted" and the opinion is **falsely attributed** to the authors of the Weaver v. Bonner decision cited by the response to the order to show cause." ."* (All slight alterations of the original text found in the Findings and Recommendations and in the Reply, supplied)

In fact, the quoted language is from an entirely different case, with a different name, in the Sixth Circuit. This "knowing misrepresentation" to the Florida Supreme Court, found in the Reply, is particularly significant, especially in the context of proceedings attempting to discipline a constitutionally elected judge for allegedly making a "knowing misrepresentation" of an "other fact" in the course of a political campaign.

In Winter v. Wolnitzek, (6th Cir. 2016), the court reviewed several provisions of Kentucky's Code Of Judicial Conduct after the Kentucky Supreme Court had answered several certified questions referred to it by the local, federal district court.

On appeal to the 6th Circuit thereafter, the court reviewed the challenges by two aspiring judges and one sitting judge, to eight restrictions on their free speech rights during judicial elections, imposed by the Commonwealth's Code Of Judicial

Conduct. The 6th Circuit applied strict scrutiny to examine the Code sections and struck down virtually every one of the restrictive clauses it reviewed either as facially invalid or unconstitutionally vague or overbroad or both, or affirmed as “applied challenges” to their enforcement including : “campaigning clause” (vague and overbroad), “speeches clause”(facially invalid), “false statements clause” (unconstitutional as applied), “misleading statements clause” (facially invalid).

In striking down Kentucky’s “misleading statements clause”, the 6th Circuit did not mince words. “[The]Canon’s ban on misleading statements fails across the board.” (*Id.* at p.8). “Erroneous statement is inevitable in free debate,” and [t]he chilling effect of... absolute accountability for factual misstatements in the course of political debate is incompatible with an atmosphere of free discussion.” (Quoting from *Brown*, 456 U.S. at 60-61, 102 S.Ct. 1523(quotation omitted))The 6th Circuit also affirmed the as “applied challenge” to Kentucky’s attempted enforcement against the use of the word “re-elect” in campaign mailings from a judicial candidate who had originally been appointed to the position by the Governor. The Court observed that while Kentucky had the right to elect its judges on a non-partisan basis... it has no right to suspend the First Amendment in the process. If the Commission wishes to impose mandatory sanctions on the speech of judicial candidates for office, as opposed to nonenforceable guidelines or best practices, it must satisfy the rigors of the First Amendment in doing so.” (*Id.* at 9).

II.

**IF “MAINTAINING THE PUBLIC’S CONFIDENCE IN AN IMPARTIAL JUDICIARY” AND
“PRESERVING THE INTEGRITY OF THE JUDICIARY” ARE THE ASSERTED
COMPELLING INTERESTS ALLEGEDLY PROMOTED BY CANON 7A(3)(E)(II)’S
RESTRICTION ON CONSTITUTIONALLY GUARANTEED “FREE SPEECH”
THE SECTION’S “OTHER FACT” CLAUSE IS NOT NARROWLY TAILORED TO
ACCOMPLISH EITHER OBJECTIVE.**

There is nothing provided in Canon 7A(3)(e)(ii)’s “other fact” restriction that addresses any purported concerns about “judicial impartiality” since the provision merely requires a judicial candidate not to “knowingly misrepresent” an “other fact” about themselves or their opponent. Neither is the “other fact” clause narrowly tailored to further the objective of “maintaining public confidence in the integrity of the judiciary”. The clause could be enforced against any “other fact”... “about”... “themselves or their opponent”, without regard to which “other facts” might actually bear on the “integrity of the judiciary”. As the 6th Circuit observed in striking down several whole sections of Kentucky’s Code Of Judicial Conduct, “the First Amendment does not permit a State to achieve its goal by leaving the principle of elections in place, while preventing candidates from discussing what the elections are about.”(Quoting from **Republican Party v. White**, 536 U.S. at 788) “...The lesson is straightforward: A State may not hold judicial elections, then prevent candidates what makes them qualified for that office.” (*Winter v. Wolnitzek*, (6th Cir. 2016 at p.4)

III.

IF MAINTAINING THE PUBLIC’S CONFIDENCE IN AN IMPARTIAL JUDICIARY AND PRESERVING THE INTEGRITY OF THE JUDICIARY ARE THE ASSERTED COMPELLING INTERESTS ALLEGEDLY PROMOTED BY CANON 7A(3)(E)(II)’S RESTRICTION ON CONSTITUTIONALLY GUARANTEED “FREE SPEECH” APPLYING CANON 7(A)(3)(E)(II) TO PUNISH THE JUDICIAL SPEECH INVOLVED IN THE INSTANT CASE, REVEALS THAT THE CANON SECTION’S “OTHER FACT” CLAUSE NEITHER HELPS MAINTAIN THE PUBLIC’S CONFIDENCE IN AN IMPARTIAL JUDICIARY NOR PRESERVES THE INTEGRITY OF THE JUDICIARY.

The judicial speech punished in the instant case are four **true**, uncontroverted, unchallenged statements regarding a judicial candidate’s character and integrity, which were correctly attributed to the source that uttered them. They are :

Ms. Shepard has done well.

She has worked hard.

She has kept her promises.

She has maintained her integrity.

None of the statements, either individually or collectively, implicate either the judicial candidate’s or her opponent’s “impartiality”. Nor do the statements, in any way, implicate the impartiality of the judiciary as a whole.

If anything, the four true, accurately attributed statements, provided a basis upon which the public could make an informed decision **to** “preserve the integrity of the judiciary” by casting their vote for a judicial candidate who had independently earned an established and abiding reputation for **character** and **integrity**, as

opposed to blindly following the recommendation of “18 former Orange County Bar Presidents” and others to vote for a candidate who had been previously suspended from the practice of law by this very Court, for ...

- 1.) engaging in conduct which [was] unlawful, and contrary to honesty and justice
- 2.) making a false statement of material fact or law to a third person
- 3.) knowingly making a false statement of fact in the course of a disciplinary matter
- 4.) engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

(Record: The Florida Bar v. Norberto Katz, Case No. 83,857)

IV.

**WILLIAMS-YULEE DID NOT OVERRULE
THE 11TH CIRCUIT COURT’S DECISION
IN WEAVER V. BONNER**

The U.S. Supreme Court’s decision in *Williams-Yulee v. The Fla. Bar*, 135 S. Ct. 1656, 1665 (2015), does not overrule the 11th Circuit’s decision in *Weaver v. Bonner*, 309 F.3rd 1312(11th Cir. 2002), and the line of cases thereafter that have consistently reaffirmed it. In *Williams-Yulee*, the U.S. Supreme Court addressed the intersection of money and political expression in the context of judicial elections, and harmonized its other line of cases finding that money can be a symbolic form of

speech afforded a measure of constitutional protection under the First Amendment. The relevant elements of Weaver to the instant case, were not addressed to that concern. Rather, the Weaver court dealt with actual, traditional speech used during a Georgia judicial campaign to convey to important differences between the candidates seeking judicial office.

On appeal from the district court, the Georgia Judicial Qualifications Commission and the Georgia State Bar argued that the state had a compelling interests of “preserving the integrity, impartiality, and independence of the judiciary” and “ensuring the integrity of the electoral process and protecting voters from confusion and undue influence”. In Weaver, the court found that even if, the asserted interests could be said to be “compelling”, the Canon had to be struck down because any Canon that can be utilized to punish “true statements that are misleading or deceptive” or other statements that “omit a fact necessary to make [a] communication as a whole not materially misleading” is blatantly unconstitutional. Id. at 1312. The court explained that the First Amendment requires that judicial candidates be afforded “breathing space” during an election. The court reasoned that for fear of violating broad prohibitions, candidates “will too often remain silent, even when they have a good faith belief that what they would otherwise say is truthful”. Id. at 1320. The chilling effect on a judicial candidate’s and the public’s guarantees to free speech un the First Amendment cannot tolerate such restrictions.

V.

THE F.J.Q.C. KNEW, FROM THE BEGINNING, THAT THE CHARGES IT PURSUED AGAINST JUDGE SHEPARD WERE WITHOUT JUSTIFICATION IN FACT OR LAW

The FJQC, itself, has repeatedly argued that Canon 7A(3)(e)(ii) “does **not** prohibit statements that a candidate should reasonably know are false, fraudulent, misleading or contain material misrepresentations or admissions that could be materially misleading.”¹⁵

In trying to assert the constitutionality of Canon 7A(3)(e)(ii) in the case of In Re : Decker SC14-383, No. 13-25, a case currently pending before this court, special counsel for the FJQC, argues that Florida’s Canon 7A(3)(e)(ii) is narrower than the Georgia Canon reviewed by the 11th Circuit Court in Weaver v. Bonner 309 F.3d. 1312 (11th Cir. 2002). Specifically, the FJQC takes the position that the Georgia Canon prohibits statements that a judicial candidate "knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or **omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation.**" (In Re : Decker, Florida Judicial

Qualifications Commission’s Reply to Judge Andrew J. Decker, III’s Response To

¹⁵ **Florida Judicial Qualifications Commission’s Reply to Judge Andrew J. Decker, III’s Response To Order To Show Cause, Dated November 3rd, 2015, (at page 25)** filed in The Florida Supreme Court. Filing # 35764246 E-Filed 12/21/2015 11:58:38 AM by F. Wallace Pope, Jr., Special Counsel for the Florida Judicial Qualifications Commission, In Re : Decker SC14-383, No. 13-25.

Order To Show Cause, Dated November 3rd, 2015, (**at page 25**) filed in The Florida Supreme Court. Filing # 35764246 E-Filed 12/21/2015 11:58:38 AM by F. Wallace Pope, Jr., Special Counsel for the Florida Judicial Qualifications Commission, In Re : Decker SC14-383, No. 13-25)

The FJQC then distinguishes the Florida canon at issue here, by asserting that unlike the Georgia canon, the Florida canon “**does not prohibit such statements**”. (Id.) The F.J.Q.C. goes on to state that for the Florida canon to be prosecuted against a Florida judicial candidate, the statement at issue “**must** be false [and] the candidate must know that the statement is false...”(Id., Emphasis and [insertion] Supplied).

Since it is the FJQC’s position that Florida’s Canon 7A(3)(e)(ii) survives constitutional scrutiny, precisely because it is not as broad as the Georgia Canon, and, in fact, “does **not** prohibit” **true** statements that allegedly “*omit a fact necessary to make the communication considered as a whole, not materially misleading or... likely to create an unjustified expectation about the results a candidate can achieve*”, as they argued in both Decker, and in their reply here, (FJQC Reply p.7 l. 11-16), the FJQC cannot escape the obvious and contradictory conclusion that the prosecution of Judge Shepard for an alleged violation of Florida Canon 7A(3)(e)(ii) was never legally justified.

By their **own** admission and reasoning, neither the FJQC, nor its prosecutors, could have **ever** legitimately believed there was any basis in fact or law to support

the initiation of these proceedings against Judge Shepard for violation of Canon 7A(3)(e)(ii), based on their own, repeatedly articulated theory.

While “prosecutorial discretion” is certainly recognized as one of our long established and revered legal traditions, the concept is not enshrined as such, to facilitate the arbitrary or indiscriminant exercise of State power by its agents. Prosecutorial discretion is designed facilitate more justice, not less. It certainly is not intended to provide a latitude or special means by which personal offense can exact retribution utilizing licensed, public power. Deliberate amnesia and conflation by design are not generally recognized by the law as sufficient legal justifications for the exercise of prosecutorial discretion to conjure a transgression where, by the prosecution’s own admission, none exists.

The FJQC’s position, from the inception of these proceedings, has been that the four true, accurately attributed, statements about candidate Shepard’s own **character** and **integrity** published on a single campaign postcard for the purpose of comparing her established and enduring reputation for character and integrity with that of her opponent, was a “knowing misrepresentation” of an “other fact” about herself, that violated Canon 7A(3)(e)(ii) because the reference to those statements omitted : 1) the date the statements were originally uttered and 2) a reference to her prior legislative service.

It has never been the position of the FJQC that any of the four statements, regarding candidate Shepard's character and integrity, themselves, were untrue. There is also no evidence or suggestion in the record, at all, that any of the four statements is untrue. It has also never been the position of the FJQC that the Orlando Sentinel did *not*, in fact, utter those four true statements regarding candidate Shepard's reputation for character and integrity. The record unequivocally establishes that the Orlando Sentinel is, without question, the author of the four true statements regarding candidate Shepard's **character** and **integrity**.

The record readily available to the FJQC, clearly and from the beginning, resolved any scintilla of doubt regarding that. Equally obvious and established from the outset of these proceedings, was that no *other statement* suggesting that candidate Shepard had obtained the "official candidate endorsement" of the Orlando Sentinel in the instant judicial race, accompanied the four true statements regarding her character and reputation. No words at all, other than those on the adjacent panel which read in large bold type "Proven Integrity", were anywhere near the four true statements regarding candidate Shepard's reputation for **character** and **integrity**.

Likewise, prosecuting the two additional, alleged violations of Canon 7A(3)(b) and Florida Bar Rule 4-8.2 , both of which derive from the supposed violation of 7A(3)(e)(ii) is, and has been, equally illegitimate. All other alleged

violations were **explicitly** found by the hearing panel to be without **any** basis in fact or law. (Findings and Recommendations p.15 ln. 21-25, p.20 ln.11-15)¹⁶

Three of the hearing panel members on the Decker case are hearing panel members on the instant case. The General Counsel for the F.J.Q.C. in the Decker case is the same F.J.Q.C. General Counsel in the instant case. All were served with the F.J.Q.C.'s Reply to Judge Decker's Response to the Order To Show Cause issued in the Decker case. One of the three panel members is the hearing panel chair in the instant case. Another, was the hearing panel chair on the Decker case. Accordingly, these three hearing panel members, as well as the FJQC's General Counsel were clearly aware, at least since December 21st, 2015 at 11:58 a.m., if not well before, that by the FJQC's **own** admission, the entire case they were prosecuting against Judge Shepard was, from the inception, completely without merit.

Yet, for nearly two years, no member, counsel, or special counsel of the FJQC, nor any of those three hearing panel members sought to dismiss the charge

¹⁶ Hearing Panel's Findings and Recommendations : "Judge Shepard posited, **by way of (sic) Motion to Dismiss**, that all charges relate to her conduct as a candidate for judicial office. Thus, **she cannot be found guilty of violating Canons 1 and 2** of the Code of Judicial Conduct. **The Hearing Panel agrees**, based on In re Kinsey, 842 So.2d 77, 85-86 (Fla. 2003), **which is controlling and applicable.**" (p. 15 ln.21-25, emphasis supplied) "The Hearing Panel finds the Respondent **not** guilty of violating Canon 7A(3)(c) and Canon 7A(3)(d), and that **these provisions of Canon (sic) are inapplicable to the facts**. There was **no allegation or proof** that any employee or official of respondent's campaign or that any person other than the respondent engaged in conduct prohibited by the judicial canons." (p.20 ln. 11-15, emphasis supplied).

against Judge Shepard at any time prior to the ultimate rendering of the instant Hearing Panel's Findings and Recommendations. Neither, did they entertain Judge Shepard's repeated motions, through counsel, to dismiss the same. Nor did the current special counsel, even upon filing an Amended Notice Of Formal Charge on January 8th, 2016, ever dismiss the alleged violation of Canon 7A(3)(e)(ii). Instead, current special counsel amended the Original Notice of Formal Charge to include an alleged additional violation of Florida Bar Rule 4-8.2.

VI.

REMAINING ISSUES

All other remaining issues regarding the due process violations and the absence of clear and convincing evidence have been fully addressed in the Response and so will not be readdressed here. The Reply's characterization of the Hearing Panel's recommendation for discipline of a "public reprimand, 90-day suspension without pay, and the payment of costs" as "favorable", however, again demonstrates the disingenuousness of the of the statements throughout the reply.

Conclusion

Clearly, the FJQC's prosecution of Judge Shepard was **never** well founded and it should have never been brought. The FJQC's inability to recognize or understand that their prosecution of a whole string judicial canons which have been shown, from the very beginning, to be without any factual or legal justification, as well as their prosecution of Canon 7A(3)(e)(ii) against the facts presented here, and their failure to appreciate the consequences of an illegitimate prosecution on the **independence** and integrity of the judiciary and the public's confidence in their courts, calls into question the focus, motives and purpose of the instant prosecution, and arguably demonstrates a lack of integrity or a lack of capacity, or both.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via email to t following this **29th** day of September, **2016**. ORIGINAL AND 7 HARD COPIES TO FOLLOW VIA U.S.MAIL.

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