

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE

No. 04-239

CASE NO. SC05-851

JUDGE RICHARD H. ALBRITTON, JR.

---

**JUDGE ALBRITTON'S REPLY TO THE JUDICIAL QUALIFICATIONS  
COMMISSION'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S  
PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE,  
MOTION TO COMPEL SPECIAL COUNSEL TO PRODUCE  
DOCUMENTS REVIEWED BY THE INVESTIGATIVE PANEL IN  
FINDING PROBABLE CAUSE**

COMES NOW, Judge Richard H. Albritton, Jr., by and through his undersigned counsel, and replies to the Judicial Qualifications Commission's (hereinafter "JQC") Memorandum in Opposition to Respondent's Petition for Writ of Mandamus, or in the Alternative, Motion to Compel Special Counsel to Produce Documents Reviewed by the Investigative Panel in Finding Probable Cause as follows:

**I. The Motion to Compel is ripe for review by this Court.**

Special Counsel contends that the Motion to Compel is premature. In support, Special Counsel incorrectly asserts that the Hearing Panel Chair is still considering the witness summaries in camera. To the contrary, on April 4, 2006, the Hearing Panel Chair again concluded, after in camera review, that Judge Albritton is not entitled to review the witness summaries used by the Investigative

Panel in finding probable cause and that he “was not going to conduct an in camera review.” (See Transcript, dated April 4, 2006, pp. 8-9, attached as Exhibit A).

While the Chair indicated it would review the summaries given by four individuals who were not ultimately listed as JQC witnesses for exculpatory evidence, the Chair ruled on April 10, 2006 that Judge Albritton was only entitled to review the summary given by one of those individuals. Moreover, prior to the Chair’s in camera review, the Chair unequivocally denied Judge Albritton’s Motion to Compel witness summaries on January 24, 2006 and the full Hearing Panel upheld the Chair’s decision on March 14, 2006.

Since July 28, 2005, Judge Albritton has attempted to review the evidence presented against him in finding probable cause to support the thirty-six charges against him. Judge Albritton repeatedly requested this information through discovery demands and informal correspondence prior to filing a Motion to Compel before the Hearing Panel and a Petition for full Hearing Panel review. After nine months, Judge Albritton is no closer to reviewing the evidence that purportedly supported the Formal Charges in this case.

**II. In re Graziano does not require the responding judge to demonstrate prejudice prior to the disclosure of the evidence supporting a probable cause determination.**

This Court previously determined that “discovery pursuant to rule 12(b) allows an accused judge to have full access to the evidence upon which formal

charges are based.” In re Graziano, 696 So. 2d 744, 751 (Fla. 1997). While Special Counsel attempts to limit the scope of this holding, this Court has reasoned that the “liberal discovery rights” afforded to a judge justified the confidentiality of the initial complaint as well as the nondisclosure of the minutes of the Investigative Panel’s discussions. Id. In re Graziano did not require a judge to show “good cause” in order to activate the judge’s right to “full access to the evidence.”

Similarly, Rule 12(b) does not require the judge to show “good cause” prior to reviewing the evidence against him. Rather, Rule 12(b) permits the JQC to request a waiver of the judge’s discovery rights if the JQC can prove “good cause.” The JQC has not proven, or even asserted any “good cause” that would limit the Judge’s discovery rights in this case.

While Judge Albritton is not required to demonstrate good cause prior to viewing the evidence already considered against him, Special Counsel’s refusal to disclose the evidence supporting the probable cause determination does prejudice the Judge’s ability to competently defend himself. Special Counsel attempts to dictate the manner in which Judge Albritton defends this case by suggesting that he could simply submit interrogatories to gather the same evidence. This suggestion underestimates the detrimental impact caused by Special Counsel’s refusal to disclose evidence supporting the probable cause determination. While Special Counsel’s firm may primarily represent institutional clients with unlimited

litigation budgets, Judge Albritton's financial resources are modest in comparison and should not have to be squandered on unnecessarily fighting to review the evidence against him. Moreover, if Judge Albritton had access to the evidence supporting the probable cause determination, his discovery efforts could be streamlined and targeted to address the JQC's evidence rather than engaging in a general fishing expedition in the hope of discovering the evidence the JQC believes supports the thirty-six charges against him.

In order to appreciate the prejudice caused by Special Counsel's failure to disclose the evidence submitted to the Investigative Panel, we respectfully request the Court to consider the nature of the Formal Charges. While many of the Charges address statements allegedly made by Judge Albritton in open court, the JQC has been unable to provide or reference transcripts pertaining to the charges. The absence of transcripts is purportedly due to the witnesses' inability to recall the dates or many of the case names with specificity. Since the JQC depends on the witnesses' recollection to prove these incidents even occurred, discovery of every statement attributed to these witnesses is crucial in evaluating their credibility.

**III. The Investigative Panel’s consideration of “secret” evidence in finding probable cause does not serve the interests of justice or meet minimum expectations of fairness.**

The JQC asserts that its investigations must utilize confidential witness summaries in making probable cause determinations. In pertinent part, Special Counsel points out that it promised witnesses that their statements would be kept confidential and argues, “[i]f the JQC is now ordered to disclose the typed interview summaries, that expectation of privacy will be violated as will the confidentiality policies that guide the JQC during the investigatory stage of its proceedings, and future investigations will be hamstrung.” (p. 11). However, a distinction must be drawn between Special Counsel’s use of confidential witness summaries to investigate and evaluate potential charges that it might submit to the Investigative Panel and using those same summaries as evidence to convince the Investigative Panel to find probable cause and bring public charges against the Judge. If Special Counsel intends to use the witness summaries for its own consideration of the evidence, we would concede that the summaries are confidential work product. On the other hand, once the JQC made the tactical decision to use its summaries as evidence in the Rule 6(b) proceeding to convince the Panel to file Formal Charges, it voluntarily forfeited any expectation of privacy.

It appears that the JQC intentionally sacrifices the accuracy and reliability of the evidence it submits to the Investigative Panel in order to avoid subsequent disclosure to the responding judge. The JQC has made a formalistic argument that it only had to disclose “statements” pursuant to Rule 12(b). The JQC reasons that since it only offers “summaries” as evidence at the probable cause hearings, it can prevent disclosure of the evidence supporting the probable cause findings. Accordingly, instead of using sworn statements or taking sworn testimony from witnesses during the probable cause hearing, the JQC offered witness “summaries” as the primary evidence for finding probable cause.<sup>1</sup> In the end, the JQC circumvents the discovery rules.

Unfortunately, according to the JQC’s own arguments, these witness summaries are inherently unreliable in many respects. First, the summaries were not “contemporaneously recorded.” Second, the summaries were not even “substantially verbatim recitals” of the witness’ statements. Third, the witnesses were further assured that they would never be confronted about the accuracy of their statements, encouraging exaggerations and hearsay. Assuring an individual that his or her statements will not be challenged inevitably results in carelessness, exaggeration or intentional deception. Utilizing witness summaries to prove probable cause supporting formal charges appears to be based on the rather unique

---

<sup>1</sup> While the JQC’s witness list contained twenty-four witnesses, the JQC only provided sworn transcripts from three witnesses in response to the Rule 6(b) request.

proposition that unchallenged opinions and factual descriptions result in accurate and reliable evidence.<sup>2</sup>

Despite these deficiencies, Special Counsel asserts that its prosecutorial efforts would be “hamstrung” without the use of confidential witness summaries. To the contrary, using these secret witness summaries to file public charges does not serve the interest of justice. At best, it demonstrates an alarmingly casual approach to filing charges that, even if proven untrue, could ruin a judge’s career. At worst, it shows a willingness to pursue a judicial prosecution based primarily on spiteful gossip. Regardless of the JQC’s intentions or motivations, we request this Court to prohibit the JQC from manipulating evidence submitted to the Rule 6(b) Panel in order to avoid the discovery provisions set forth in Rule 12(b) and emphasized by this Court’s holding in In re Graziano.

---

<sup>2</sup> Contra Fla. Stat. § 90.803 (permitting hearsay only under circumstances when the declarant’s statements are presumed reliable such as a spontaneous statement and excited utterance (when the declarant is too overwrought to form an intent to deceive), then-existing mental, emotional or physical condition (only to show declarant’s condition at time of statement), statements for purpose of medical diagnosis (declarant has incentive to be accurate) and admissions (declarant has no motive to be deceitful)). There is no suggestion that secret or confidential information is more reliable than statements subject to review.

Respectfully submitted,

---

SCOTT K. TOZIAN, ESQUIRE  
Fla. Bar No. 253510  
GWENDOLYN H. HINKLE, ESQUIRE  
Fla. Bar No. 083062  
SMITH, TOZIAN & HINKLE, P.A.  
109 North Brush Street  
Suite 200  
Tampa, Florida 33602  
(813)273-0063  
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this \_\_\_\_\_ day of May, 2006, the original of the foregoing Reply to the Judicial Qualifications Commission's Memorandum In Opposition to Respondent's Petition for Writ of Mandamus or, in the Alternative, Motion to Compel Special Counsel to Produce Documents Reviewed by the Investigative Panel in Finding Probable Cause have been filed via [e-file@flcourts.org](mailto:e-file@flcourts.org) and furnished by FedEx overnight delivery to:

Honorable Thomas D. Hall  
Clerk  
Supreme Court of Florida  
500 South Duval Street  
Tallahassee, Florida 32399-1927

with copies by U. S. Mail to:

Ms. Brooke S. Kennerly  
Executive Director  
Florida Judicial Qualifications Commission  
1110 Thomasville Road  
Tallahassee, Florida 32303

Judge James R. Wolf  
Chairman, Hearing Panel  
Florida Judicial Qualifications Commission  
1110 Thomasville Road  
Tallahassee, Florida 32303

John R. Beranek, Esquire  
Counsel to the Hearing Panel  
P.O. Box 391  
Tallahassee, Florida 32302

Thomas C. MacDonald, Jr., Esquire  
General Counsel  
Florida Judicial Qualifications Commission  
1904 Holly Lane  
Tampa, Florida 33629

and

David T. Knight, Esquire  
Special Counsel  
Hill, Ward & Henderson, P.A.  
P. O. Box 2231  
Tampa, Florida 33601

---

SCOTT K. TOZIAN, ESQUIRE