

IN THE SUPREME COURT OF FLORIDA

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**CASE NO: SC06-2119**

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**INQUIRY CONCERNING A JUDGE NO: 05-437  
RE: JUDGE CLIFFORD BARNES**

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On Review of the Recommendations of the  
Hearing Panel, Judicial Qualifications Commission

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**JUDGE CLIFFORD BARNES'REPLY TO THE JUDICIAL  
QUALIFICATIONS COMMISSION'S ANSWER BRIEF**

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**JUDGE CLIFFORD BARNES' REPLY TO THE  
JUDICIAL QUALIFICATIONS COMMISSION'S ANSWER BRIEF**

In the Statement of Facts, general counsel for the Commission argues that Judge Barnes used his office as a bully pulpit to advocate a political position. Judge Barnes did not advocate a political position but strongly and steadfastly argued that the law of the State of Florida should be followed in the Nineteenth Judicial Circuit. As he had stated during his campaign, Judge Barnes believed that a judge who takes the time to treat individuals who come before him as individuals and who follows the established rules and procedures can do a lot regarding jail overcrowding. Such a judge can also do a lot in assuring public safety and assuring that the views of victims are considered.

In the Answer Brief, general counsel indicates that Judge Barnes undertook a course of action to reduce the jail population and that prompted complaints by other judges. (Pg. 5). Two judges, Judge Walsh and Judge Yacucci, complained to Chief Judge William Roby. Judge Walsh was and is married to the Public Defender for the circuit. The Public Defender was chastised by the Kalmanoff Report that was commissioned by St. Lucie County and which Judge Barnes had sought to have done while he was a county commissioner. (T. 100)

Judge Yacucci complained to Judge Roby because Barnes was

considering cases that came before him at First Appearances that Judge Yacucci considered "his cases". (T. 98, 102-103). Judge Yacucci was not complaining about Judge Barnes releasing a sex offender. After yelling and cursing at Barnes, Judge Yacucci wrote a letter to the chief judge. (T. 90, 94) Subsequently to writing that letter, Judge Yacucci wrote a follow up letter in which he indicated that he and Judge Barnes had resolved their issues. (T. 229).

Judge Walsh got a copy of the letter sent by Judge Yacucci and was concerned because it would effect his current assignment. (T. 209-211). He had no information that Judge Barnes was doing anything improper at First Appearances other than what he read in the letters from Judge Yacucci. (T. 211) Judge Walsh testified that Judge Barnes conducted First Appearances much like he did and he did not see Barnes releasing dangerous criminals. Barnes did nothing that caused Judge Walsh alarm (T. 213).

General Counsel states that after receiving these letters the chief judge attempted to resolve the dispute. (Answer Brief Pg. 5). In fact, the chief judge did not speak to Judge Barnes after receiving the letters from the two judges before sending a letter to Judge Barnes in which he said he was referring the matter to the JQC. (T. 257-260). The chief judge's letter was dated April 1, 2005. Four days later he received Judge

Yacucci's letter saying the matter had been resolved.

Then in June 2005 an event occurred which caused the Chief Judge to feel like he had had enough. (T. 234). Judge Barnes released a "child molester" according to Chief Judge Roby (T. 232). The man had been sentenced to one year in jail and lengthy probation. (T. 233). Chief Judge Roby was told that a violation of probation was issued and signed off by an Indian River County circuit judge. (T. 233) At first appearances, Judge Barnes agreed to release the individual. Based on that decision, Chief Judge Roby removed Judge Barnes from doing first appearances.

This issue, even though not a charged act of misconduct, became a feature of the hearing. As a result Judge Barnes asked that the recording of the first appearance hearing be played. Over the objection of General Counsel it was played and heard by the Hearing Panel. It became clear that no judge had issued a Violation of Probation warrant and ordered "No Bond". The individual had been arrested based upon an affidavit of a probation officer. Judge Barnes considered the information presented to him and made a decision.

At the hearing in this matter, after the recording of the first appearance was played and all the actual facts were established, the only criticism of the way in which Judge Barnes

conducted the hearing was that he did not appoint an attorney to represent the individual. Even that was misplaced because Judge Barnes had signed the form appointing counsel but it was not reflected on the recording. (T. 399-400) In their Findings and Conclusions, the Hearing Panel specifically stated "We do not fault Judge Barnes for any of his individual rulings on specific cases which were before him. These rulings were his proper functions as a trial judge." (Pg 22-23)

#### **SUMMARY OF THE ARGUMENT**

The evidence presented during the course of the hearing in this case, established and the Hearing Panel found that Judge Barnes had good motives. (Pg. 28). The Hearing Panel also found that Judge Barnes was not motivated by ill-will or any desire to harm the judicial system. "In fact, the motives of Judge Barnes were essentially high-minded and proper." (Pg. 25). The actual evidence presented at the hearing established that Judge Barnes was not consumed with the release of prisoners at first appearances. He was consumed with the belief that the judges in the Nineteenth Judicial Circuit should follow the law.

The actual evidence of what happened at the hearing which caused Judge Barnes to be removed from conducting first appearances was finally presented. Even after the evidence was presented which established without question that Judge Barnes did not do anything improper and did not override a "no bond" warrant

issued by another judge, the JQC still argues that there was a "no bond" warrant.

The findings of the Hearing Panel determined that Judge Barnes violated certain Canons. The Hearing Panel did not find as the JQC argues in their Answer Brief that Judge Barnes abandoned his impartiality and impugned the integrity of the judiciary. The undersigned would submit that conduct such as this is the reason why the Preamble to the Code of Judicial Conduct states: "The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action."

#### **ARGUMENT**

On behalf of Judge Barnes, the undersigned would combine his response to those matters raised by the JQC in their Answer Brief and rely upon the arguments previously made.

First, the filing of the Petition by Judge Barnes did not advocate the position of one side of the criminal justice system but for the adherence to the laws and rules that exist for all citizens in this state. The Commission argues that Judge Barnes "lack of impartiality ultimately manifested itself in his mishandling of the defendant on sex-offender probation." (Answer Brief Pg. 9) No such finding was made by the Hearing Panel

because there was no evidence presented which would support such a statement. The Commission cites to the testimony of Chief Judge Roby who had not been provided accurate information and who testified before the actual recording of the hearing was played. The Chief Judge believed a warrant had been issued by a Circuit Court judge which Judge Barnes ignored. That simply was not the case. This point was emphasized by counsel for Judge Barnes in his closing argument to the panel (T. 502-504). To this argument, there was no rebuttal. The Hearing Panel specifically took no issue with any of the decisions Judge Barnes made.

There was no evidence presented that established that the filing of the Petition impacted Judge Barnes ability to act as a neutral and detached magistrate. Chief Judge Roby removed Judge Barnes from doing first appearances as a result of not having accurate facts upon which to base such a decision.

In their Answer, the JQC argues that the Petition was filed due to anger and aggravation with his fellow judges and cites to Judge Barnes testimony at the hearing (Answer Brief Pg. 10) The cites provided do not support the Commission's argument. First, Judge Barnes said that he was angry at being removed from doing first appearances and the removal from doing first appearances prompted in large part the filing of the Petition because it gave him standing to file the petition. (T. 404-405). When asked

if he filed the Petition because he was mad at the Chief Judge, Judge Barnes said "No. That is your words." (T. 405) When asked if the real motivation for the petition was personal animus, Judge Barnes again said he was not angry at someone. (T. 420). Judge Barnes did say that he was upset by the accusations that had been brought against him. (T. 420).

More importantly, in making the argument that Judge Barnes acted out of anger or animus in filing the Petition of Mandamus, the Commission ignores the clear findings of the Hearing Panel that Judge Barnes was "not motivated by ill-will or any desire to harm the judicial system in the filing of the Petition for Mandamus. In fact, the motives of Judge Barnes were essentially high minded and proper." (Findings and Conclusions Pg. 25) (Emphasis added)

It is disturbing that the Commission would come before this Court seemingly advocating for a finding that Judge Barnes acted with improper motives when the Hearing Panel clearly found otherwise. This is especially so given the Commission's recent recognition that:

The Hearing Panel is charged with receiving and considering the evidence, weighing the credibility of each witness, and deciding which evidence to believe or disbelieve. This Court has ruled that it gives great deference to the JQC's factual findings that are supported by clear and convincing evidence, particularly findings about intent or motive. *In re: Stuart F. LaMotte, Jr.*, 341 So.2d 513, 518 (Fla. 1977)(Justice

England's concurring opinion joined by a majority of the Court).<sup>1</sup>

Finally, the Commission points to the Panel's finding that Judge Barnes could have taken other action than filing the Petition. The Answer states that Judge Barnes failed to fully quote the Hearing Panel's Findings and Recommendations. (Pg. 12) Judge Barnes, in his response, included the language quoted in the Answer and more. As to why Judge Barnes did not take other steps within the system, he testified that he did not know enough to take a different approach. (T. 452-453)

#### CONCLUSION

The Commission maintains that the law regarding first appearances is not entirely settled. The United States Supreme Court in Rothgery v. Gillespie County, Texas, 128 S.Ct. 2578 (2008) and the decisions cited therein explain how clear the law is and for how long it has been clear that those facing accusations by the government are entitled to be represented by a lawyer at first appearance. In Rothgery the Court cited to its decision in McNeil v. Wisconsin, 501 U.S. 171,111 S.Ct. 2204, 115 L.Ed.2d 158(1991) and said that that decision was "17 years ago, the same is true today". Rothgery at 2586. The expert called by Judge Barnes was correct when he said that first appearances are not "critical stages of the proceeding". In Rothgery, the Court said it is "an analytical mistake to make

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<sup>1</sup> Answer Brief of the JQC filed with this Court September 3, 2008 *In Re Judge Michael Allen*, Case No: 07-774 (pg. 30-31)

the assumption that attachment [of the right to counsel] necessarily requires the occurrence or imminence of a critical stage." Rothgery at 2591. Whether the hearing is critical or not is irrelevant. Rothgery at 2591.

We merely reaffirm what we have held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. Rothgery at 2592.

There may have been other ways, unknown to Judge Barnes, to try and correct a wrong that was ongoing in the Nineteenth Judicial Circuit. The Hearing Panel found that Judge Barnes did violate the Canons of Judicial Conduct but that he did so with motives that were essentially proper and not motivated by ill-will or any desire to harm the judicial system. Such conduct is the type of transgression that should not result in discipline to the degree of a public reprimand.

Judge Barnes filed a lawsuit to try and bring change to a system where more than five-thousand indigent defendants a year are herded through first appearance without the assistance of counsel and without the rudimentary protections called for by the Florida Rules of Criminal Procedure or state and federal case law. His motives were high-minded and well intentioned, as determined by the Hearing Panel. His misconduct was to file a lawsuit—to ask a higher court to render a legal opinion on the matter. If such action deserves punishment, Judge Barnes is

willing to accept it.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to Michael L. Schneider, Esquire, Associate General Counsel, Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; The Honorable Thomas B. Freeman, Chair, Hearing Panel, Criminal Justice Center, 14250 49<sup>th</sup> Street, Clearwater, Florida 33762-2801 and to John R. Beranek, Esquire, Counsel Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32302 and to Marvin C. Barkin, Esquire, Special Counsel, P.O. Box 1102, Tampa, Florida 33601 by U.S. Mail on this \_\_\_\_\_ day of September, 2008.

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DONNIE MURRELL, ESQUIRE