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THOMAS D. HALL
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BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE, MATTHEW E. MCMILLAN, CASE NOS. 99-10 & 00-17	:	SC CASE NOS.: 95,886 00-703

JUDICIAL QUALIFICATIONS COMMISSION'S MOTION IN LIMINE TO EXCLUDE MISCONDUCT OF OTHERS

The Judicial Qualifications Commission ("JQC"), by and through its undersigned Special Counsel, hereby moves this Hearing Panel to exclude from the trial of Respondent, Judge Matthew E. McMillan ("McMillan") evidence regarding the alleged misconduct of others and the internal operations of the JQC, upon the following grounds.

I. THE ALLEGED CONDUCT (MISCONDUCT) OF OTHERS IS IRRELEVANT

McMillan's answers and affirmative defenses in Case Nos. 99-10 and 00-17 are replete with allegations regarding the conduct (misconduct) of others. None of these assertions, however, are even arguably relevant to the issues here: (1) Whether the McMillan campaign violated the Judicial Canons as charged; (2) Whether McMillan's conduct in the Ocura and Lohrey matters violated the Judicial Canons as charged; and (3) Whether McMillan is fit to continue to hold office.

A. 99-10: The Good Ole Boy Network

McMillan's answer is bursting with allegations regarding the "Good Ole Boy Network" and the purported misdeeds of his perceived political enemies in Manatee

County. According to McMillan, the "Good Ole Boy Network" is a "group of judges, lawyers, politicians, political spin doctors, hometown newspaper employees and business people who want to quietly destroy him and his family." McMillan's Answer and Affirmative Defenses in # 99-10, p. 5 (hereinafter "Answer in 99-10"). He asserts that the formal charges brought by the Judicial Qualifications Commission "are nothing more than the culmination of sinister conduct vindictively perpetuated by the Pomer Brokers of Manatee County – emphatically labeled by some as the Good Ole Boy Network." Id., p. 1. These largely unidentified "political insiders" have supposedly "harass[ed] Judge McMillan and his family and have manufactured technical campaign violations in an effort to destroy a courageous man who dared to challenge the system." Id., p. 2.

None of these sweeping allegations have anything whatsoever to do with the actual conduct of McMillan's campaign. McMillan has not and cannot contend that the "Good Ole Boy Network" caused him to knowingly misrepresent his opponent's record and work habits during the campaign.[1] The real or perceived machinations of McMillan's "political enemies" in Manatee County are entirely irrelevant to these issues and his present fitness to hold office as a matter of law.

In In re Graham, the Florida Supreme Court expressly held that "the conduct of other officials, attorneys and citizens of Citrus County" were not relevant in a prosecution to remove a County Court judge from office. As the Court explained:

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[1]Similarly, McMillan does not and cannot contend that the "Good Ole Boy Network" somehow caused him to handle Ocura's first appearance on a DUI charge when he was a material witness or to set a $100,000 bond on a DUI misdemeanor. McMillan does not and cannot contend that the "Good Ole Boy Network" was somehow responsible for his mishandling of the Lohrey v. Eastman landlord-tenant dispute.

> [Graham] focuses his arguments on the conduct of other officials, attorneys, and citizens of Citrus County. Regardless of whether his criticisms of these individuals and institutions are well-founded, they are not relevant to our determination of his ability to administer justice fairly and professionally. . . . Unfortunately Graham fails to recognize that the alleged misconduct of others does not justify his repeated departure from the guidelines established in the Code of Judicial Conduct.

620 So. 2d at 1275.[2] The "alleged misconduct of others "simply cannot justify the judge's departure from the guidelines established of Judicial Conduct." In re Shea, 759 So. 2d 631, 638 (Fla. 2000) (rejecting the relevance of "Judge Shea's allegations of improper conduct on the part of others" because it could not "excuse his abuse of his judicial office.") Thus, this motion should be granted and McMillan's various allegations regarding the "misconduct of others" in Inquiry No. 99-10 should be excluded.

B. OO-17: The Conduct (Misconduct) of Other Judges

Similarly, in Inquiry No. 00-17, McMillan attempts to put at issue the conduct (misconduct) of other judges and the JQC by asserting that he is a victim of "selective enforcement" or "selective prosecution." Answer in 00-17, p. 1-2. McMillan apparently intends to defend himself by showing that other judges have committed equivalent or even more egregious transgressions of the Canons without facing formal charges. This is clearly "beyond the permissible scope of inquiry in this proceeding" because it is the respondent and the respondent's conduct (not the conduct of other judges) which is at

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[2]Apparently like McMillan, Graham also fe[lt] that the entire proceedings were an extension of his political enemies . . . ." 620 So. 2d at 1277 (McDonald, J. dissenting in part and concurring in part).

issue here. In re Graziano, 696 So. 2d 744, 752 (Fla. 1997). Accord Shea, Graham and Kelly, supra.

Thus, in Graziano the hearing panel excluded evidence of alleged misconduct by other judges by granting the JQC's motion in limine seeking to do so on relevance grounds. The Florida Supreme Court upheld the hearing panel concluding that "the questioning of any witness about alleged improprieties by judges other than the respondent" was manifestly "beyond the scope of permissible inquiry in this proceeding." 696 So. 2d at 752.

C. The JQC Investigatory and Hearing Panels

McMillan's most recent counsel (Mr. Levine) has made extremely broad and ambiguous assertions implying that the relationship(s) amongst and between the investigatory and hearing panels and their counsel have somehow "compromised" his "right to a fair trial." See McMillan's Pretrial Statement (Statement of Issues). Any such allegations are irrelevant as a matter of law.

The Florida Supreme Court has consistently rejected contentions that it was somehow unfair for the JQC to be "the decision-maker in both the preliminary determination of the existence of probable cause and the final determination of the formal charges." Graziano, 696 So. 2d at 752; In re Kelly, 238 So. 2d 565, 570 (Fla. 1970) (same). Here, the investigatory and hearing panel were separate and distinct with no overlapping membership. Thus it is difficult to conceive how the "composition" of the panels and the "relationships" between them could violate Judge McMillan's due process

rights when the existence of a single panel for both functions could not do so as a matter of law. See Graziano, Graham and Kelly, supra.

It is hardly surprising that the Florida Supreme Court has flatly rejected all efforts by respondent judges to put the institution on trial by litigating the internal JQC process rather than with the charges at issue. McMillan should not be permitted to waste the parties' time and resources in an inevitably futile effort to create a such a smoke screen which will only obscure the real issues: the propriety of his campaign; his handling of the Ocura and Lohrey matters; and his fitness to hold office.

II. CONCLUSION

For all of the foregoing reasons, the JQC respectfully submits that this motion in limine should be granted in its entirety.

Marvin E. Barkin, Esq.
Florida Bar No. 003564
Lansing C. Scriven, Esq.
Florida Bar No. 729353
Michael K. Green
Florida Bar No. 763047
Special Counsel
Post Office Box 1102
Tampa, FL 33601-1102
813/223-7474

and

Thomas C. MacDonald, Jr., Esq.
General Counsel
Florida Judicial Qualifications Commission
100 North Tampa St., Suite 2100
Tampa, FL 33602
813/221-2500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **JUDICIAL QUALIFICATIONS COMMISSION'S MOTION IN LIMINE TO EXCLUDE MISCONDUCT OF OTHERS** has been furnished by Telecopier to **BROOKE S. KENNERLY,** Executive Director, Judicial Qualifications Commission, 400 S. Monroe, The Historic Capitol, Room 102, Tallahassee, FL 32399-6000; **THOMAS C. MacDONALD, JR., ESQ.**, General Counsel, 100 N. Tampa Street, Suite 2100, Tampa, FL 33602; **JOHN R. BERANEK, ESQ.,** Counsel, Hearing Panel, Ausley & McMullen, 227 South Calhoun St., P.O. Box 391, Tallahassee, FL 32301; **MATTHEW E. MCMILLAN**, 3311 46th Plaza East, Bradenton, FL 34203; **ARNOLD D. LEVINE, ESQ.**, Levine, Hirsch, Segall & Brennan, P.A., 100 S. Ashley Dr., Suite 1600, Tampa, FL 33602; and **SCOTT K. TOZIAN, ESQ.**, Smith and Tozian, P.A., 109 N. Brush St., Suite 150, Tampa, FL 33602, this 20th day of October, 2000.

Attorney