IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 92,913

INQUIRY CONCERNING A JUDGE

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RE: STEVEN P. SHEA

REPLY BRIEF OF STEVEN P. SHEA

ON REVIEW OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF THE JUDICIAL QUALIFICATIONS COMMISSION

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IDENTIFICATION OF REFERENCES USED IN THIS BRIEF

This brief follows the format for citations and references used in Judge Shea's initial brief, supplemented with two additional short-hand references:

"IB __" refers to Judge Shea's initial brief;

"AB __" refers to the answer brief filed on behalf of the Judicial Qualifications Commission.

Judge Shea's initial brief provided record citations which were referenced to the record Index filed with the Court by Judge Shea in a Notice of Filing dated June 11, 1999. The Panel's answer brief has cited to the Court's index to the Record on Appeal. As the two indices are not identical, Judge Shea has filed with the Court a Conversion Table, which reconciles the record citations in his initial brief to the Court's index to the Record on Appeal.

Record citations in this brief all refer to the Court's index to the Record on Appeal.

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is “CG Times,” 14 point.

sTATEMENT OF THE CASE AND FACTS

The Panel has provided the Court with 56 pages of text under the label "Statement of the Facts" (AB 6-62), and 6 pages representing the *entirety* of its "Argument" in response to Judge Shea's legal challenge to 18 individual charges of Code violation and one overarching, catch-all "prefatory" charge. (AB 62-67). The Panel's 56-page recitation bears no resemblance to a statement of "facts." It is, rather, an indiscriminate intermingling of record materials with references to the Panel's own Findings, Conclusions and Recommendations (the "FC&R"), with reliance on uncharged, dropped and unproved allegations, and with unmistakable advocacy. It also contains a number of misstatements and mischaracterizations of the record.[1]

As a reply brief is too short a document to permit explication of all factual disagreements, and since the Panel has not said Judge Shea's Statement of the Facts is to any degree inaccurate,[2] Judge Shea respectfully requests that the Court return to the initial brief for an accurate and non-argumentative recitation of the facts on which this case rests.

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[1] A prime example is the representation that Special Counsel to the Panel "streamlined the case" after presentation of her case-in-chief by dropping 12 of the 37 pending charges. (AB 3). The record reflects that she dropped those charges because, in her words, she had "presented no evidence." (T. 1163). After having had to defend against those 12 charges before both the investigative and the hearing panels of the Commission and through all of the Special Counsel's case-in-chief, Judge Shea got little comfort from her attempt to "streamline" the proceeding by acknowledging before *his* case that she had produced ***no*** evidence to support one-third of the charges leveled against him.

[2] The Panel charges that Judge Shea's statement of the facts is *incomplete* (AB 7), but it charges only that his statement of *the case* is inaccurate. (AB 1).

SUMMARY OF ARGUMENT

It does not violate the Code of Judicial Conduct for a judge to enter lawful orders, to converse with other judges in chambers or in conference, to take steps to improve the administration of justice in his or her court or, in a small, closely-knit community, to have private discussions with lawyer/friends concerning the conflict of interest which arises from their representation of a client who has instituted proceedings designed to impact adversely the judge's personal property interests.

Removal from office in this case is not warranted.

ARGUMENT

The Panel has chosen to frame its answer brief as it framed its FC&R — placing reliance on a non-specific "prefatory" overlay which supposedly finds its factual support in the individual charges (IB 6 and AB 61), and arguing matters which had been the subject of complaints against Judge Shea but which were never formally charged or were unproved, dropped or dismissed. (AB 34-35, 36-37, 40-41, 45 n.19, 52-53). In so doing, the Panel's brief ***confirms*** Judge Shea's contention (IB 3) that the Panel cannot sustain its findings, conclusions and recommendations without resort to uncharged and unproved incidents. The Panel's reliance on this improper material, along with its reliance on material which was not the subject of any formal notice,[3] alone warrant rejection of the

[3] The Panel now relies on Judge Shea's conduct (and

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Panel's recommendations on constitutional, due process grounds. (IB 6, 68-69).

There is another fundamental problem with the Panel's position, though. Judge Shea has demonstrated to the Court that the Panel's charges against him constitute an assault on 5 distinct categories of behavior: the entry of lawful judicial orders; conversations between judicial colleagues; actions taken to improve the administration of the court system; disclosure of an adverse position and appropriate discussions regarding impending litigation against Judge Shea's personal property; and the aggregation of these 4 sets of charges into a catch-all charge of vindictiveness against those who were affected by his challenge to the Keys' *status quo*. The Panel nowhere suggests that its 18 specific charges are not properly placed into the 4 categories identified by Judge Shea, and it nowhere offers a legal explanation for its position that the Code of Judicial Conduct is violated by the entry of lawful orders, the holding of private discussions with other judges, the correction of misbehavior by court support personnel, the enforcement of a ban on *ex parte* attorney communications, or a

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> the actions of his attorney) after the filing of the Notice of Formal Charges, but without a formal charge of post-filing misconduct. (AB 43-44). The Court has specifically said that a removal recommendation must be grounded on a specific formal charge. *In re Davey*, 645 So. 2d 398, 407 (Fla. 1994); *In re Ford-Kaus*, 730 So. 2d 269, 274-75 (Fla. 1999).

judge's disclosure of a law firm's conflict of interest and discussions regarding proceedings against his personal property.

Instead, by simply ignoring the lawfulness of these activities and turning a blind eye to the grave import of asserting judicial misconduct in such actions, the Panel's brief echoes its FC&R theme that the Commission need not prove that any individual or discrete act by a judge is illegal or improper in order to seek his or her ouster from office. Judge Shea respectfully suggests that the Commission's approach to its responsibility, as reflected in the entirety of the Panel's case against Judge Shea, is truly dangerous to the independence of the judiciary.

Based on a proper analysis of the record and the law, Judge Shea will again demonstrate that the Panel's charges against him do not warrant disciplinary action, and that the Panel's resort to hyperbole and exaggeration cannot levitate the absence of fact and law into removable offenses.

I. Circuit Judge Steven Shea as a jurist.

The Panel has now acknowledged that the circuit judge it seeks to remove from the bench is a *fine* judge — one who is highly regarded as a jurist by the preponderance of private and public attorneys who practice before him, by bar leaders and ethics counsel in and out of Florida, by judges, and by judicial assistants and bailiffs in his community.[4] The Panel is asking the Court to

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[4] The Panel attempts to diminish the record evidence that Judge Shea is an exceptional jurist (IB 4-5, 81) by

(continued...)

remove from office a judge who bears an approval rating for demeanor and temperament by a remarkable ***100%*** of the jurors who have responded to post-trial questionnaires — a judge who has exhibited courtesy to everyone involved in judicial proceedings, has been diligent in his job beyond normal 9-to-5 requirements, has willingly reconsidered matters called to his attention, has been unfailingly fair, has made his rulings based strictly on the law and the facts, and has dedicated himself to being a sound and competent jurist. (IB 4-5, 81).

As the Court well knows, the public most heavily relies for its perception of the judiciary on the public characteristics exhibited by a judge, and lawyers evaluate judges by their skill and diligence as a jurist. Yet the Panel stridently argues that Judge Shea's "scholastics, his diligence and his dedication as a jurist" are all for naught. (AB 60). It maintains the hard and fast position that it is legally inconsequential that a judicial officer in its cross-hairs may be in every sense a "good judge" (AB 72), and that respected bench skills, diligence, and a recognized dedication to sound and complete legal craftsmanship have no place in the removal matrix it has created for Judge Shea.

These characteristics have been held by the Court to have especial significance, though. (IB 81). As revealed by a careful evaluation of the charges against Judge Shea, the Panel's assertion

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(...continued)
simply *quoting itself*. (AB 5).

that he lacks honesty, fairness and understanding (AB 60) is not supported by the evidence.

II. Evaluation of the charges of judicial misconduct.

A. Orders entered in judicial proceedings.

The Panel makes no substantive response to Judge Shea's contention that there is no legal foundation for the Panel's finding of judicial misconduct in Judge Shea's entry of the six judicial orders. The Panel has confirmed through its answer brief that it has never paused to consider the legal propriety of the actions taken by Judge Shea, and that its finding of fault hinges entirely on its theme that Judge Shea did everything in the course of his judicial duties out of a vindictive motive. That is readily shown not to be the case.

1. Charge 2: Show cause order to Ms. Baptiste.

Ms. Baptiste authored a letter which expressed disrespect to the courts in the circuit and to Judge Shea. Ms. Baptiste's letter was an act of indirect criminal contempt under the law, and the Panel nowhere suggests otherwise. Judge Shea, with no reason whatever to be vindictive toward Ms. Baptiste, issued a show cause order as the proper and measured response contemplated by the law. The Panel does not contend otherwise.[5]

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[5] Judge Shea even pointed out that the Panel misconstrued the case law on which it relied in the FC&R, and that its authorities in fact *support* Judge Shea's order. (IB 35-37). Yet the Panel has made no

Inasmuch as the Panel's entire reliance for a finding of judicial misconduct is placed on the emotional impact of Judge Shea's order on Ms. Baptiste (AB 16-18),[6] it has made no case for a finding of judicial misconduct as to this charge. Ms. Baptiste may well have been upset by Judge Shea's order, and she may well have been an upset but credible witness when the Panel hauled her down to Florida to testify against Judge Shea. None of that matters one whit, however, if the show cause order was a lawful and appropriate means of defending the judiciary as required by Canon 1 of the Code of Judicial Conduct.[7] The Panel does not deny that it was.

Judge Shea respectfully suggests that the Commission steps far beyond its constitutional mandate, and dangerously so, when it charges that the issuance of a lawful show cause order will constitute judicial misconduct if the recipient of the order experiences believable distress.

(...continued)

response.

[6] The Panel cannot escape its own rhetorical flourishes. It has again asserted that Judge Shea ordered her "to appear" in Key West (albeit this time leaving out the misrepresentation in the FC&R that a "personal" appearance was required) and that "only then did he recuse himself" (although the recusal was part and parcel of the text of the show cause order in compliance with the Code of Criminal Procedure). (AB 17).

[7] The Panel's charge is very specific and narrow — it alleges that the show cause order, in and of itself, constituted a violation of the Code.

2. **Charge 3: Show cause order to Barbara Martin.**

This charge sweeps into one charge of a Code violation an amalgam of events surrounding the order to show cause which Judge Shea mistakenly directed to an employee of the Upper Keys Guidance Clinic, but promptly withdrew when notified that she was not subject to his jurisdiction. The Panel does not dispute that the order stemmed from a domestic relations proceeding in which Judge Shea was endeavoring, appropriately, to get a psychological evaluation before ruling on a petition.[8] It expresses no concern for or interest in the problem in Judge Shea's community which the Clinic, despite its generous public funding, was unwilling to address.

The Panel only concerned itself with the views expressed by Guidance Clinic and other Keys personnel who found Judge Shea to be outspoken in his dismay over the problems created by the Clinic's refusal to assist the court in its important work. (AB 20). It only concerned itself with Judge Shea's several ruminations about how to get around the impediment which the Clinic posed to the functioning of his court (AB 21-22), and it faults his awareness that he was given a false picture of the Clinic financial support

[8] The Panel does not dispute that Judge Shea's depth of experience in substance abuse and mental health problems warranted his concern with the dearth of evaluative services available in the Keys for his court's heavy caseload on those matters.

because it came from *documents* rather than direct, word-of-mouth communication. (AB 22-23).

Put in perspective by the entirety of the record evidence, the Guidance Clinic hubbub boils down to diverse views between Judge Shea and clinic personnel as to whether the judiciary was going to get help from the only publicly-funded Clinic in the Upper Keys with the performance of substance abuse and mental health evaluations for parties in litigation, or whether the court would have to seek essential evaluations from some other source. The Panel was totally unconcerned with Judge Shea's view that these services for residents of the Upper Keys were needed. It chose to side only with the view of Clinic personnel that they should be free to continue to shun the needs of the courts, no matter what that might mean to a judicial career or an important need of the community.

The Panel made a poor choice of sides in that dispute. Judge Shea did not *abuse* the power of his office; he sought to *use* the power of his office to advance the interests of Keys' residents. There may well be tension between the courts and publicly-funded private organizations when new court initiatives are sought to solve court support problems, but the Commission does not appropriately use its authority or offer clear and convincing evidence of judicial misconduct when it ignores the public need and appropriate judicial concerns to appease local unhappiness.

3. Charges 15 and 16: *Overton* case orders.

Based on his attentive concern to administrative orders and statements made in capital punishment cases by Justices of this Court, Judge Shea entered the two orders in his first-ever capital punishment case which now form the basis of the Panel's finding of judicial misconduct. The first was an order requiring the appearance of all counsel at hearings in the case unless otherwise excused, after lead counsel for the prosecution and the second chair for the defense failed to attend a scheduled hearing. (R. Ex. 136; T. 203-04, 2633-35, 2641-42). The order recited that non-compliance would result in reference to the Bar and to the Chief Justice, and a copy was sent to the Chief Justice. (R. Ex. 136, T. 2635, 2643-44). The second order effected Judge Shea's recusal from the case. (R. Ex. 159). Both were totally sound orders, one lauded by the chief judge of his circuit and the other entered after Judge Shea's consultation with more experienced judges. (R. Ex. 136; T. 2649-51).

The Panel grounds its finding of misconduct as to the first order on the testimony of a trial judge who faulted the order's warning of consequences for non-compliance, and its transmittal to the Chief Justice. (AB 29-30). The Panel does not claim that the substance of the order was in any way improper, and it offers no legal explanation or case law authority for asserting that the non-compliance recitation and transmittal were, in and of themselves, a violation of the Code. Those omissions leave the finding of a violation groundless, for an expert witness cannot testify as to legal conclusions no matter what his or her status or rank. *Palm Beach*

County v. Town of Palm Beach, 426 So. 2d 1063, 1070 (Fla. 4th DCA 1983).

If Judge Shea had the authority to refer to the Bar a lawyer's disobedience of a court order, which he did,[9] giving advance warning of possible referral for disobedience cannot be judicial misconduct. In fact, that is precisely what Justice Wells has recommended be done in capital punishment cases. *Landry v. State*, 666 So. 2d 121, 129-30 (Fla. 1995).[10] Transmittal of a copy of the order to the Chief Justice is hardly "misconduct" subject to disciplinary proceedings.

The recusal order entered by Judge Shea in *Overton* is faulted for its recitation of concern that defense counsel may have been ineffective. Here again, there is no suggestion that inclusion of comments on that subject are improper.[11] The Panel rests its claim

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[9] *E.g.*, *Cerf v. State*, 458 So. 2d 1071 (Fla. 1984).

[10] The Panel exaggerates the record when it repeats its finding in the FC&R to the effect that Judge Shea stated in open court that he had "discussed this matter with the Chief Justice." (AB 29). What Judge Shea said was that he believed the Chief Justice was concerned that everything be done properly, that the case be moved along, that the defendant be properly represented, and that the state meet its obligation to provide discovery. (P. Ex. 8 at 8, 21). That is most assuredly an accurate statement of the position of the Chief Justice, and also the position of every member of the Court as regards *every* capital case.

[11] Judge Shea's initial brief identified five orders entered by appellate courts in Florida which spelled out perceived attorney misconduct, including one from this

(continued...)

of judicial impropriety entirely on the subjective dismay felt by the criticized attorney, who "perceived" that Judge Shea was retaliating for the recusal motion he filed (AB 32), and on the testimony of the judge who counseled with Judge Shea regarding the content of the order.[12]

The order is admittedly legally proper. It would have served to forestall fundamental error in an impending capital punishment trial if the findings had been upheld. Yet the Panel has disregarded legal propriety altogether, to recommend discipline because Judge Shea "had no threshold or tolerance for criticism." (AB 33).[13] Here again, the absence of impropriety in the order eliminates any possibility that the Panel has proved judicial misconduct by clear and convincing evidence.

4. **Charge 31: Breach of confidence in an order in *Overton*.**

(...continued)

Court in April of this year. (IB 42-43). The Panel takes no account of those orders and makes no effort to distinguish them.

[12] The judge told the Panel it was "utterly impossible" that she advised Judge Shea regarding the order (AB 31), but she acknowledged that ***he*** might have understood her differently. (T. 352-53).

[13] The Panel turns a blind eye to the highly unflattering comments made by defense counsel in his motion to recuse Judge Shea (R. Ex. 156), and discounts entirely Judge Shea's belief that his order had been prepared in conformity with statements made in his 21-minute telephone conversation with the consulting judge. (T. 2651-52).

This charge, originally cast as a violation of a confidence of Chief Judge Taylor by "disclosing the contents of a confidential memorandum from her" (FC&R 57), now rests entirely on bruised feelings. The alleged offense relates to Judge Shea's statement in an order in the *Overton* case that he had been assured by the chief judge that problems he had previously encountered with the managing court reporter would be addressed.

The original "breach of confidence" charge is no longer before the Court, having been abandoned in the Panel's answer brief.[14] This charge has now been buried in a diatribe entitled "Hostility Towards His Judicial Colleagues and Creation of Internal Conflict,"[15] which Chief Judge Taylor described as a "pattern of conduct that *seemed* to be designed to undermine" her effectiveness as chief judge. (AB 51) (emphasis added).[16] When the actual charge regarding Chief Judge Taylor's memorandum is unearthed several pages later, it is revealed as nothing more than the Panel's

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[14] The Panel misstates the evidence of confidentiality. (AB 55; T. 1146). Chief Judge Taylor didn't label her memorandum as confidential, and only *thought* it was being transmitted in a confidential envelope. She had no personal knowledge that it was. (T. 1146).

[15] The discussion in this portion of the Panel's "Statement of the Facts" begins with a "history" largely consisting of uncharged or unproved offenses that the Panel deemed necessary to recite *prior to* addressing "the facts." (AB 51-54).

[16] This alleged "pattern," and the impropriety of using subjective beliefs of judicial colleagues as a basis for a disciplinary proceeding, is discussed later in this brief.

contention, based on a repetition of testimony from Judge Taylor, that the reference in his order to his having being assured she would address his problems with the managing court reporter "was utterly false, *as no such discussion had ever taken place between the two judges*." (AB 56) (emphasis added).

The entirety of the basis for this charge of judicial misconduct, as now framed, bears repeating. Judge Shea rescinded an order on court reporter assignment for his capital punishment trial in *Overton* in which he stated that he had been "assured" by the chief judge that she would "address" managing court reporter problems he had encountered. The rescission order was prompted by Judge Shea's receipt of a hand-typed memorandum from the chief judge which said that she would be happy to meet with him "*to make certain your concerns are addressed . . . .*" (R. Ex. 236) (emphasis added). The Panel now asserts a violation of the Code of Judicial Conduct against Judge Shea from his having paraphrased, *virtually verbatim*, the text of a routine, non-confidential, inter-office memorandum — based *solely* on the testimony of its author that her quoted assurance had not been communicated *orally*.

Judge Shea most respectfully suggests that only a hearing Panel determined to remove him from the bench at *any* cost would bring an unfounded breach of confidence charge and then, when the lack of any support became impossible to ignore, mutate that charge into the even less defensible charge that the Code is violated when a judge accurately repeats a written statement from his or her chief judge but did not also have an *oral* communication.

5. **Charge 20: Mr. Brown's contempt order.**

This charge was brought as an example of Judge Shea's allegedly consistent disagreement with attorneys in the Keys. (FC&R 47). As to this particular matter, Judge Shea established in his initial brief that every one of his actions in the *Brown* case were appropriate exercises of discretion in a domestic violence proceeding, and jurisprudentially sound. (IB 46-50). The Panel has ignored Judge Shea's analysis. Instead, it provides the Court with a mere restatement of what occurred, detached from any identified legal significance, and it offers its judgmental conclusion that judicial misconduct has been shown. A recap of the incident shows otherwise.

As the respondent in a domestic violence proceeding, Mr. Brown was ordered to participate in the Monroe County batterer's program. Judge Shea had the statutory authority to direct his participation with or without a request from Mr. Brown or his counsel, and he exercised his discretion to order participation when neither Mr. Brown nor his counsel bothered to attend the hearing which had been scheduled to consider his accuser's charges. (IB 46-47). Mr. Brown did not comply with the order and was found in contempt.

The Panel asserts that it is untrue to say he disobeyed that order (AB 41), inasmuch as he "signed up" for the program and it simply couldn't accommodate him. (AB 42). He ***did*** disobey the order, though, whatever the excuse. The Panel's explanation is nothing but its disagreement on the manner in which Judge Shea

exercised his judicial discretion — *i.e.*, the Panel would have accepted Mr. Brown's non-attendance excuse. The Panel avoids the fact that Mr. Brown was indisputably in contempt of court for failing to obey a valid court order, and that Judge Shea had wide judicial discretion to accept or reject his excuse based on the totality of the circumstances.

The Panel also criticizes a recitation in the contempt order that Mr. Brown's non-compliance was encouraged by the repetitive motions filed by his counsel, Mr. DeFoor (AB 42-43), essentially embracing the subjective dismay of Mr. DeFoor that Judge Shea was not conducting court proceedings in the comfortable, "little country courthouse" manner to which Mr. DeFoor had become accustomed. (T. 395). That dismay was indisputably the gravamen of Mr. DeFoor's complaint, for he candidly told the Panel that "the biggest flaw in this whole set of facts, is that we never got a chance to just sit down and talk about it." (T. 400). Mr. DeFoor's dismay is echoed in the Panel's declaration that "the crux of the issue of judicial misconduct" was Mr. DeFoor's opinion that Judge Shea "was throwing his weight around . . . ." (AB 43).

Judges do, and sometimes must, throw their weight around. Hopefully, they will continue to have the fortitude to do so in the face of lawyer-encouraged contempt. This charge is not supported by clear and convincing evidence of judicial misconduct.

B. **Communications with judicial colleagues.**

Judges converse. The Panel would charge misconduct based on the subjective feelings of one judge to statements made by another judge in non-public, confidential conversations in court facilities. Without any concern for the corrosive effect on judicial collegiality, the Panel offers not one word in response to the obvious peril created by its encouragement of such judicial treachery. No judge in Florida can possibly feel safe if this group of charges by the Panel are sustained.

1. **Charge 8: Post-election comments to Judge Ptomey.**

This charge, which is based entirely and exclusively on a private conversation between Judge Shea and Judge Ptomey which took place in the chambers of the Upper Keys Courthouse shortly after Judge Shea's election to office, is used by the Panel not as an independent act of judicial misconduct but as evidence of Judge Shea's "motivation" to initiate a pattern of abuse towards court support personnel. (FC&R 31). In its brief, the Panel *describes* the conversation, but nowhere defends its use as the basis for a charge of judicial misconduct. (AB 44-46). Judge Shea suggests that it has no possible defense.

This allegation came to the Panel from a judicial official who willingly breached Judge Shea's right to and expectation of confidentiality in a private conversation held in the Upper Keys Courthouse: Judge Ptomey. This is the judge who labored over the development of a JQC complaint against Judge Shea, and who most vociferously upbraided Judge Shea in front of his colleagues

after the business portion of a court conference.[17] This is the judge who had a long history of involvement as a co-officer and colleague with the Panel's chairman on the faculty of the Florida Judicial College. Is it any wonder that, when the hearing panel was assembled, Judge Shea expressed a well-founded fear that the colleague who so readily violated the sanctity of his private communications (and that of others (*see* P. Ex. 39)), would feel no qualms about privately sharing Judge Shea's confidences with the Panel chairman? (R. 30).

2. **Charge 23: Comments in a court conference.**

This charge is based on the disclosure by judges in the Sixteenth Judicial Circuit of statements made at a circuit judges' conference held on December 5, 1997. From among the several participants, which included Judge Ptomey and another of the Panel chairman's close colleagues on the faculty of the Judicial College, Judge Miller, only Judge Shea has been charged with judicial misconduct for comments which were made at this closed-door, private meeting.

The issue before the Court on this charge, like number 8, is two-fold: whether any charge of judicial conduct can or should

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[17] The Panel has now dropped its assertion that Judge Shea was "disrupting the meeting and preventing a civil dialogue on the agenda" (FC&R 55), admitting finally, as Judge Shea had shown (IB 55), that the subject conversations took place after the business portion of the meeting had concluded. (AB 57-58).

ever be brought on the basis of a judge's subjective reaction to what was said or done by another judge in a private discussion in the courthouse (short of actual or threatened physical violence); and whether any charge of judicial misconduct can or should ever be brought for words passing between judicial colleagues in private and confidential conversations *whatever* the setting. The Panel offers the Court no reason to allow such charges to be made. From all outward appearances, it would seem the Panel never paused to consider the implications of these charges.

C. **Actions taken to improve the administration of justice.**

Judge Shea was the chief administrative judge in the Upper Keys, with 88 miles separating him from any judge of equal rank and the chief judge of his circuit. Administration of the Upper Keys courthouse, in all its manifestations and aspects, fell to Judge Shea. From the day he took office, he made efforts to address the administrative problems he inherited with respect to court support services.

The Panel has rewarded his efforts with charges of violating the Code of Judicial Conduct. Yet in every instance, it has offered no challenge to the propriety of the means he used. In every instance, the Panel's charges are grounded on the *subjective perception* of Judge Shea's motivations by court support personnel who were under-performing, misbehaving or simply resistant to change.

1. **Charge 6: Domestic Abuse Shelter certifications.**

In an effort to eliminate false or inaccurate domestic abuse and repeat violence petitions prepared for *pro se* residents of the Keys by non-lawyer personnel, Judge Shea drafted a form by which each petition preparer would certify that the petitioner understood and agreed to the accuracy of the petition being filed on his or her behalf. Domestic Abuse Shelter personnel, unaccustomed to taking responsibility for their representations to the court, resisted the use of Judge Shea's certificate to the point that its use was discontinued. (T. 2581; P. Ex. 18 at 3). Judge Shea then requested the use of the form which this Court had formulated for non-lawyer-assisted petitions, without even insisting that preparers be personally identified. (T. 2582; P. Ex. 18). Shelter personnel nonetheless resisted this form, too.[18]

The Panel excoriates Judge Shea for these modest attempts to assure accuracy in the domestic abuse petitions which came to his court. Not one word by the Panel acknowledges the value of having more reliable domestic violence petitions submitted to the courts. The Panel's only concern, expressed in passionate detail (AB 23-28), is a recap of the dismay of non-lawyer Shelter personnel based entirely on the subjective fear of these individuals

[18] The Panel has nowhere recognized that the original certificate prepared by Judge Shea was withdrawn, or acknowledged forthrightly that this Court's discontinuance of these forms led to Judge Shea's discontinuance. (IB 18, 58-59).

that they might be held responsible for what they put in court pleadings. (AB 25).[19]

The Panel rewards Judge Shea's effort to improve the handling of domestic abuse cases by charging him with judicial misconduct for trying. The only identified source for this charge is the Panel's reference to the complaints of Shelter personnel. There is no evidence (beyond those complaints) to support the Panel's assertion that Judge Shea had a private agenda which chilled the rights of domestic abuse victims (*see* AB 23), and undisputed statistical evidence established that the number of petitions in fact did not diminish. (R. Ex. 85).

2. **Charge 9: Interview concerning Sheriff Barney's impropriety.**

This charge relates to Judge Shea's interview of a young, female domestic violence offender who was kept overnight by Deputy Sheriff Barney in his home. The charge originally sought to discipline Judge Shea because he "interfered with an internal inquiry by the Sheriff's Office" (FC&R 32), but that grounding is no longer being asserted by the Panel given that no investigation was under way. (IB 19, 60-61).

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[19] The Panel also continues to mislead the Court by repeating the assertion in its FC&R that Judge Shea referred "Shelter Staff" to The Florida Bar. (AB 26 and FC&R 30). The record is unmistakable that the referral was part of an otherwise proper and unobjectionable order entered in a domestic violence proceeding and, as had been pointed out in the initial brief (IB 58), was a referral to the Bar of "***this matter***." (P. Ex. 21).

The charge has now been labeled as the "ruthless pursuit of courthouse personnel" (AB 44), and it is grounded on Judge Ptomey's repetition of statements made to him by Judge Shea in private, courthouse conversations. (AB 46-47). Thus, the ***act*** of interfering with an investigation which originally formed this charge of judicial misconduct has been dropped, and the Panel is now proceeding on the recitations of this less-than-friendly judicial colleague that Judge Shea stated in private that he didn't trust the sheriff's office to clean its own house.[20] This new breach of Judge Shea's confidentiality by the Panel chairman's close friend grounds another charge of judicial misconduct that is improperly lodged, and which is not supported by clear and convincing evidence.

3. **Charges 12 and 18: Statements to bailiff supervisor Wilkinson.**

These charges allege judicial misconduct in Judge Shea's private, non-public criticisms of a bailiff supervisor who repeatedly made mistakes of judgment in the performance of her duties. These charges rest *entirely* on the personal, subjective distress that Ms. Wilkinson expressed to the Panel regarding her inability to

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[20] The Panel's recitation regarding this charge — that Judge Shea "contacted" the young lady and "brought her to his chambers," citing to T. 1273-74 (AB 47) — conveys an impression which the record does not support. The referenced pages are from Ms. Arena's testimony, where she testified that Judge Shea's secretary called her to arrange an appointment after ***she*** had contacted Judge Shea following a referral to him by the supervisor of bailiffs in the sheriff's office. (T. 1272-74).

please Judge Shea with her work. (AB 47-50). Her job performance, in the view of Judge Shea *and others,* is entirely disregarded.

As with the other charges that fault Judge Shea for seeking to improve the performance of court support personnel in the Upper Keys courthouse, the Panel does not deny that judges should be encouraged to undertake improvement in the performance of court support personnel, and that Judge Shea's concern regarding Ms. Wilkinson's substandard performance of her duties was validated when she was found by her supervisors to have violated departmental policy and ordered to get appropriate training. (R. Ex. 115).

4. **Charge 22: Directive suspending all civil court reporting.**

This charge is another tucked under the Panel's banner of hostility to judicial colleagues (AB 51), arising from a vote of circuit judges (without Judge Shea's participation) to eliminate all reporting of civil cases by official court reporters. Judge Shea and bar leaders saw the grave negative impact of that policy on the operation of the Upper Keys courts, as a consequence of which Judge Shea sought an opinion from the appropriate bar committee as to whether the court reporting ban was a valid order to be adopted without the input required of a local rule. This charge by the Panel is based on Judge Shea's public dissemination of that opinion request. (AB 56-59).

In keeping with the Panel's pattern, no attention is paid to the absolute right of Judge Shea, or any other judicial official, to seek

an advisory opinion from the bar committee. Nor is any attention paid to the substance of the concern that prompted Judge Shea's opinion request — the horrific effect of his colleagues' policy on the operation of the Upper Keys circuit court. The Panel has paid attention only to the wails of his colleagues, led again by the Panel chairman's close, Judicial College colleagues, Ptomey and Miller.

Judge Shea respectfully suggests that the Court, unlike the Panel, cannot turn a blind eye to Judge Shea's effort to maintain the integrity of the operation of his court, simply because the manner of his doing so did not satisfy the sensitivities of his judicial colleagues. There is no clear and convincing evidence of judicial misconduct in Judge Shea's effort to maintain court reporter availability in the Upper Keys.

5. **Charge 36: Supervision of the clerk of the court.**

This charge rests on the assertion that Judge Shea's perfectly appropriate submission of one letter of criticism to the clerk of the court constitutes a "threat" to the clerk — another act of "ruthless pursuit of courthouse personnel." (AB 44). The letter itself contains no "threat" whatsoever (R. Ex. 248), and the prosecutor offered ***no*** evidence to the Panel on this charge. The Panel now offers the Court no explanation for bringing it. (AB 50). This unfounded and unsubstantiated charge epitomizes the Panel's overzealous pursuit of Judge Shea.

6. **Charge 17: ASA McClure and *ex parte* communications.**

In this charge, the Panel faults Judge Shea for warning an assistant state attorney that he intended to enforce his policy of no *ex parte* communications in contested proceedings. While the Panel does not come out and say that it favors *ex parte* communications, it also never acknowledges the value or propriety of prohibiting them. Once again, the charge is cast as "retaliation against Attorneys for Doing their Jobs" (AB 33), but only travels on the subjective belief of a beleaguered prosecutor that Judge Shea harbored an improper motive.

The particular offense of this charge is that Judge Shea cautioned assistant state attorney Gina McClure concerning *ex parte* communications after she had called his office regarding an order she thought had a wrong date for jury selection. Inasmuch as judges have an unrestricted right to establish a policy that discourages *ex parte* communications, however, and the unfettered right to warn attorneys of the consequence of violating such a policy (IB 67), nothing supports this charge other than Ms. McClure's emotional distress at having been admonished.

7. **Charges 32 and 33: Communications with ASA Garcia.**

A letter by Judge Shea to assistant state attorney Luis Garcia forms the basis of Charge number 32, grounded on Mr. Garcia's being "devastated" by threats of referral to the Bar for future misreprentations of his communications with Judge Shea or other acts of ethical misconduct. (AB 37-39). The open court comment charged in the FC&R as Charge number 33 is nowhere discussed in the FC&R or the answer brief.

A strong judge who insists on strict ethical propriety will often produce a reaction in attorneys who have to appear in his or her courtroom on a regular basis. The Panel is misguided in criticizing, rather than cheering a judge who sets high ethical standards and is not afraid to enforce them.

D. Eviction of Judge Shea's two mobile homes (FC&R 9-19).

The Panel contends that removal from office is warranted for an admittedly dedicated, competent and highly-respected judge in a small, one circuit court judge community who has made telephone calls to local lawyers he'd known for 15 years when he learned they were actively engaged in eviction proceedings against him. The Panel's perception of these contacts, as reflecting dishonesty and an abuse of power (AB 68-69, 71), is completely unwarranted by the evidence. The Panel acknowledges that Judge Shea had the right to protect the value of his property. (AB 16).

It is undisputed that on Saturday, October 18, 1997, Judge Shea read in the local newspaper that a local, two-man law firm was representing a landowner from whom Judge Shea had received a notice of eviction. It was, to him, "a no brainer" that, in a small community like the Upper Keys, he could not continue to sit in judgment on their cases so long as they were adverse to his personal financial interests. (T. 2464). At the time, he did not know whether *they* knew he owned two mobile homes in the mobile home park.[21] He *did* know, from prior experience with Keys

[21] They knew he did, though, and had known it for a

(continued...)

judges, that he had to do something to address the obvious conflict of interest or face the possibility of a JQC charge of not having acted to disclose the conflict or to step aside. (T. 2471-74, 2483). So he called them.

There is a dispute as to who introduced what subjects into the conversations and how, but there is agreement that their conversations touched on Judge Shea's ownership of the mobile homes, his belief that he had to recuse himself from all of their cases so long as they represented his landlord, the consequences of recusal, and possible means by which the conflict of interest could be resolved. Both Mr. Mulick and Mr. Beckmeyer shared their views on those subjects with Judge Shea. (*E.g.*, T. 86-87, 93, 131-132, 155-56, 174).[22]

The Panel contends Judge Shea should never have called Mr. Mulick or Mr. Beckmeyer, but should have waited until a day they appeared in his courtroom in one of their cases and then simply announced that their conflict of interest required his recusal.[23] That is neither a required means of addressing the problem nor the one that had been used by other Keys judges in conflict situations,

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long time. (T. 87, 111-12, 154-55, 2909; R. Ex. 1, 276).

[22] Mr. Mulick was not intimidated or threatened by the initial call. (T. 114). He thought only that Judge Shea had called the wrong lawyer representing the evicting landowner. (T. 87, 90).

[23] The Beckmeyer and Mulick law firm had an active practice before Judge Shea. (*E.g.*, T. 2493).

however (IB 74), and it certainly would be a most unseemly way of treating the matter. Judge Shea respectfully suggests that the calls were not improper under the circumstances, and that his informal contact with long-time lawyer friends was an acceptable and appropriate way to disclose and address a conflict of interest of this magnitude in a community such as the Upper Keys.

The foundation for this charge of judicial misconduct rests entirely on the subjective perceptions of Messrs. Mulick and Beckmeyer that Judge Shea was applying pressure on them either to terminate their relationship with their client or have their client buy his mobile homes.[24] That pressure was not from Judge Shea, however, but from their being forced to face the untenable position they created for themselves with their knowing concealment of a conflict of interest between their law practice and the property interests of the only circuit judge in their community. The Panel took no account of those facts when it chose to charge Judge Shea with judicial misconduct in reliance on the lawyers' subjective reaction to his calls.

III. **Removal from office is not warranted.**

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[24] The Panel discusses at length its problems with the valuations Judge Shea placed on his two mobile homes (AB 14-15), but the record establishes that neither Mr. Mulick nor Mr. Beckmeyer at any time had *anything* to say about the values Judge Shea referenced in their conversations. The Panel's preoccupation with the value of Judge Shea's mobile homes is another legally irrelevant diversion.

There are two bases on which the Panel contends that Judge Shea should be removed from office. Its first, that Judge Shea was dishonest (AB 68-69), has no support in the record of this case.[25] The case law on which the Panel relies in its answer brief is so facially distinguishable as to require no response.

Its second, that Judge Shea abused the power of his office (AB 69-70), is simply not borne out by the record. There is no clear and convincing evidence that Judge Shea should be removed from office for the ***use*** of the power of his office for the betterment of the Upper Keys court through appropriate judicial orders, through private communications with judicial colleagues, through efforts to correct the practices of non-lawyer, court support personnel, and through his efforts to conform attorneys to standards of practice higher than they were accustomed to observing. Nor is there clear and convincing evidence that the circumstances of Judge Shea's conversations with Messrs. Mulick and Beckmeyer should be a basis for removing him from office. Here, too, precedent suggests otherwise. *See, e.g.*, *In re Wright*, 694 So. 2d 734 (Fla. 1997) (reprimand for rude, abusive and inappropriate comments in open court); *In re Davey*, 645 So. 2d 398 (Fla. 1994) (reprimand for misrepresenting facts and attempted conversion); *In re Perry*, 641 So. 2d 366 (Fla. 1994) (reprimand for misuse of contempt power);

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[25] The Panel *cannot* seek removal based on any perceived dishonesty in Judge Shea's testimony before the Panel, as that was never charged. *In re Davey*, 645 So. 2d 398, 406 (Fla. 1994).

In re Colby, 629 So. 2d 120 (Fla. 1993) (reprimand for convicting criminal defendants without a trial or plea); *In re Glickstein*, 620 So. 2d 1000 (Fla. 1993) (reprimand for public endorsement of fellow judge); *In re Fleet*, 610 So. 2d 1282 (Fla. 1992) (reprimand for displaying a gun while on the bench, loading it, questioning a defendant while holding the gun, and then keeping the loaded gun in a pouch while on the bench); *In re Carr*, 593 So. 2d 1044 (Fla. 1992) (reprimand for inappropriate language in open court); *In re Norris*, 581 So. 2d 578 (Fla. 1991) (reprimand for a 3-day drinking binge, driving while intoxicated, and shooting a firearm); *In re Zack*, 570 So. 2d 938 (Fla. 1990) (reprimand for using profane language in court proceeding); *In re Clayton*, 504 So. 2d 394 (Fla. 1987) (reprimand for conducting *ex parte* proceedings in criminal cases); *In re Muszynski*, 471 So. 2d 1284 (Fla. 1985) (reprimand for castigating police officer and ordering his appearance in court); *In re Gridley*, 417 So. 2d 950 (Fla. 1982) (reprimand for advocating for a defendant in a criminal case).

Viewing the charges brought against Judge Shea by this Panel of the Commission on a microscopic or individual basis, none withstands factual or legal scrutiny. The Panel was carried away by the hostility to Judge Shea which was displayed by some of the Keys judges, by disaffected court support personnel, and by less than a handful of lawyers in the Keys.[26] The Panel showed no

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[26] The alleged outpouring of criticism identified by the Panel (AB 34) can be traced by its record citations to

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inclination to question or balance that hostility with a fair evaluation of the positive contributions made or attempted by Judge Shea.

Viewing the Panel's findings, conclusions and recommendations from a macroscopic perspective produces the same conclusion. Judge Shea was admittedly a willful man dedicated to the improvement of the operation of the Upper Keys courts for the benefit of the public. The Panel took no account of the positive benefits which enhance the public's esteem for the judiciary when an individual of strong character acts forcefully, but in an entirely lawful manner, to dare to challenge an imperfect, prevailing culture. The Panel's unwillingness to recognize merit in Judge Shea's efforts to upgrade the performance of Keys attorneys and court support personnel is a slap at the accomplishments of the innumerable jurists who have dared to introduce *change* in the face of objections from those impacted by disruption of the *status quo.*

This Court has a different mission than the Commission. It is not, as the Panel apparently sees itself, a vengeful guardian of regional harmony among members of the judiciary and court support personnel. The constitutional duties of the Court include the preservation of diversity and initiative, and the recognition of merit in efforts to improve the administration of justice. To that end, the Court has before, and in this case should, fashion a

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> only the very few people whose complaints form the basis of the Panel's 18 charges.

response from this record which will harness, and redirect if necessary, the positive energies of a well-motivated, competent, publicly-respected but chastened jurist.

IV. The Panel chairman should have been disqualified.

The Panel chairman, Judge Frank Kaney, serves on the Florida Judicial College with two of the most stridently complaining witnesses against Judge Shea in this proceeding: County Court Judges William Reagan Ptomey and Wayne Miller.[27] Just as it did in its FC&R signed by chairman Kaney, the Panel in its brief relies heavily on the testimony of these two judges to ground its findings, reach its conclusions, and make its recommendations for Judge Shea's removal from office. (*See* AB 44-47, 52-54, 58-59).

Judge Shea twice moved unsuccessfully for Judge Kaney's disqualification on the basis of his eminently reasonable fear that these judges had engaged in *ex parte* communications with Panel chairman Kaney about Judge Shea. (R. 30, 31). The Panel has dismissed the original disqualification motion as resting on unsubstantiated speculation (AB 76-79), but it says nothing about the *renewed motion* — called to the Panel's attention in Judge Shea's initial brief[28] — in which it was established that Judge Miller had indeed had *ex parte* communications with Judge Kaney about Judge

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[27] Judge Ptomey has acknowledged that he had drafted a JQC complaint against Judge Shea before he and Judge Miller initiated the intra-court colloquy which the Panel now uses as the basis of Charge number 23.

[28] IB 27, 84.

Shea. (R. 31).[29] The Panel proceeding was fatally flawed by the taint of the Panel chairman's inexcusable violation of the Code of Judicial Conduct,[30] and the proceeding against Judge Shea should be declared a nullity. *Cf. Pistorino v. Ferguson*, 386 So. 2d 65 (Fla. 3d DCA 1980).

CONCLUSION

The findings and conclusions of the Panel should be vacated as unsupported by clear and convincing evidence, and the Panel's recommendation for removal from office should be rejected.

Respectfully submitted,

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[29] Judge Kaney maintained his close, private contact with Judge Miller even while the hearing in this matter was in progress. (Proceedings 12/14/98 at 17).

[30] "A judge ***shall*** disqualify himself" when impartiality might reasonably be questioned, as when the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." Fla. Code of Judicial Conduct, Canon 3E(1)(a) (emphasis supplied).

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CERTIFICATE OF SERVICE

I certify that a copy of this reply brief was mailed on August 26, 1999 to:

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