IN THE SUPREME COURT
OF FLORIDA

CASE NO. 96,629

INQUIRY CONCERNING A JUDGE NO. 99-09
RE: Patricia Kinsey

JUDICIAL QUALIFICATIONS COMMISSION'S AMENDED INITIAL SUPPLEMENTAL BRIEF

On Review of the
Findings, Conclusions and Recommendations by the
Hearing Panel of the Judicial Qualifications Commission

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PREFACE

Petitioner, the Judicial Qualifications Commission, will be referred to as the "JQC" in this proceeding. Respondent, the Honorable Patricia Kinsey, was the Respondent below and will be referred to as "Respondent" or "Judge Kinsey."

All references to the official transcript of the hearing in this matter will be designated by the prefix "T," followed by the volume and page number within the transcript. For instance, (T:1-3) refers to Volume 1 of the official transcript at page 3. Judge Kinsey's Response to this Court's Order to Show Cause dated October 30, 2000, will be hereinafter referred to as "Kinsey Response at _____." The JQC filed its initial "Reply Brief" in this matter on January 30, 2001. All references to the JQC's Reply Brief will be designated as "JQC Reply at _____."

STATEMENT OF THE CASE

This case is before the court on the Findings, Conclusions and Recommendations by the Hearing Panel of the Judicial Qualifications Commission (hereinafter referred to as "Findings at ___"). The case was tried before the Hearing Panel on June 12-13, 2000. On October 18, 2000, that body found Judge Kinsey guilty on nine of the twelve charges and recommended that Judge Patricia Kinsey, currently a County Judge for Escambia County, be publicly reprimanded and fined $50,000 for conduct growing out of her 1998 election campaign for the judgeship she now holds.

This Court entered its Order to Show cause directed to Judge Kinsey on October 30, 2000. After briefs were filed, the case was orally argued in this Court on October 4, 2001. Thereafter, on December 3, 2001, the United States Supreme Court granted a petition for *writ of certiorari* in *Republican Party of Minnesota. v. Kelly,* 151 L. Ed. 2d 561, 122 S. Ct. 643 (2001).[1] In *White,* the question presented was whether the First Amendment "permit[ted] the Minnesota Supreme Court to prohibit candidates for judicial office in that State from announcing their views on disputed legal and political issues." *See Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2002 U.S. LEXIS 4883 *5 (2002), Slip Opinion at 1.[2] The particular canon of the Minnesota Code of Judicial Conduct at issue, Canon 5(A)(d)(i), the so-called "Announce Clause," provides that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues." *See* Slip Opinion at 2, 4.

On June 27, 2002, the Supreme Court rendered its decision in *White*. In sum, the Court held that "[t]he Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed

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[1] By Order dated March 15, 2002, the style of the case was corrected to *Republican Party of Minnesota v. White*, 152 L. Ed. 205, 122 S. Ct. 1229 (2002).

[2] All references to *White* will be hereafter referred to as "Slip Opinion at _____."

legal and political issues violates the First Amendment." *See* Slip Opinion at. at 22. Both the JQC and Respondent have previously filed Notices of Supplemental Authority of the *White* opinion in this Court. Thereafter, in light of *White*, the JQC filed a Motion for Leave to File Supplemental Briefs on whether *White* affected any specific canons of the Florida Code of Judicial Conduct and the extent to which *White* may impact the Hearing Panel's Findings in this case. By Order dated July 9, 2002, this Court granted the JQC's Motion for Leave to File Supplemental Briefs and directed the parties "to file briefs addressing the impact, if any," of *White*.

SUMMARY OF ARGUMENT

To evaluate the impact of *White* in this case, one must first recognize that *White* is as significant for what it does *not* hold as for what it holds. In *White*, the Supreme Court invalidated a single canon of the Minnesota Code of Judicial Conduct, the so-called "Announce Clause."[3] Justice Scalia, writing for the majority, did not purport

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[3] As an initial matter, the JQC submits it is unnecessary for this Court to determine whether canon 7(A)(3)(d)(ii), which is Florida's embodiment of the "Announce Clause," is an unconstitutional abridgement on free speech under *White*. Although the language of canon 7(A)(3)(d)(ii) differs from the language of Minnesota canon 5(A)(d)(i), which the Court scrutinized in *White*, the JQC acknowledges that the language difference may have no bearing on *White's* application to canon 7(A)(3)(d)(ii). *Cf.* Slip Opinion at 7, n.5 (noting that no aspect of the Court's constitutional analysis turned on whether Minnesota's version of the Announce Clause was "one and the same" as canon 5(A)(3)(d)(ii) of the 1990 ABA Model Code of Judicial Conduct (after which Florida's canons are also modeled), which prohibits judicial candidates from making "statements that commit or appear to commit the

to invalidate, or otherwise call into question, any other provision of the Minnesota Code of Judicial Conduct. For example, despite a strong intimation by Justice Ginsburg in her dissenting opinion that Minnesota's "pledges or promises" clause was necessarily intertwined with the Announce Clause, the Court emphatically held that its opinion expressed no view on the "pledges or promises" clause. *See* Slip Opinion at 4.[4] It is equally noteworthy that *White* has no bearing on Canon 7(A)(3)(d)(iii) of the Florida Code, which prohibits misleading campaign statements (pertaining to Charges 7 and 9, described, *infra)* nor does it have any bearing on Canon 3(B)(9), which prohibits comments regarding pending cases that might reasonably be expected to affect the outcome or impair the fairness of those proceedings (pertaining to Charge 10, described, *infra*). Accordingly, the core basis for the Hearing Panel's recommendation of discipline are not implicated by the *White* decision.

ARGUMENT

I. THE *WHITE* DECISION HAS NO BEARING ON MOST CANONS OF THE FLORIDA CODE OF JUDICIAL CONDUCT

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candidate with respect to cases, controversies or issues that are likely to come before the court."). This is so because the Hearing Panel's Findings, as argued hereafter, are fully supported by Florida canons that were not at issue in *White.*

[4] As Justice Ginsburg noted in her dissent, "All parties to [*White*] agree that, whatever the validity of the Announce Clause, the State may constitutionally prohibit judicial candidates from pledging or promising certain results." *See* Slip Opinion at 11 (Ginsburg, J., dissenting).

WHICH ARE AT ISSUE IN THIS CASE

As highlighted below, in contrast to the single canon that was at issue in *White*, the Hearing Panel concluded that Judge Kinsey violated several distinct canons of the Florida Code of Judicial Conduct, all of which stand separately and independently from Canon 7(A)(3)(d)(ii), Florida's analogue of the "Announce Clause." Thus, even were this Court to find that the constitutionality of Florida's "Announce Clause" is called into question by *White,* there remain independent grounds upon which to affirm the Hearing Panel's Findings. *Cf. Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) (holding that "if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record."); *cf. Barth v. Khubani*, 748 So. 2d 260 (Fla. 1999) (noting that under the "two issue rule," reversal of a jury verdict "is improper where no error is found as to one of the issues that can independently support the jury's verdict.").

A. THE *WHITE* DECISION DOES NOT IMPLICATE CANON 7(A)(3)(D)(i) OF FLORIDA'S CODE OF JUDICIAL CONDUCT

Although the Court's opinion in *White* is clear that it has no bearing on Minnesota's "pledges or promises" clause (and, concomitantly, Canon 7(A)(3)(D)(i) of the Florida Code), examination of the factual context out of which *White* arose is helpful in order to distinguish between those campaign statements which are now

constitutionally protected as "announcements" versus those statements which merit less protection because they qualify as "pledges or promises." Specifically, *White* emanated from a challenge brought by Gregory Wersal, a candidate for the Minnesota Supreme Court, who claimed that Minnesota's "Announce Clause" violated the First Amendment. *See* Slip Opinion at 3. Among other things, Wersal alleged that "he was forced to refrain from announcing his views on disputed issues during [his] campaign, to the point where he declined response to questions put to him by the press and public, out of concern that he might run afoul of the announce clause."[5] *Id.* After both the District Court, and the Eighth Circuit on appeal, held that the "Announce Clause" did not violate the First Amendment,[6] the Supreme Court granted certiorari. *Id*. at 4.

Before considering its constitutionality, the Court was careful to first define the parameters of the "Announce Clause," noting that:

> Its text says that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i)(2002).

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[5] In a previous campaign for the same office, Wersal distributed campaign literature in which he was critical of several decisions of the Minnesota Supreme Court on issues such as crime, welfare, and abortion. *See* Slip Opinion at 3.

[6] *Republican Party of Minnesota v. Kelly*, 63 F. Supp. 2d 967 (D. Minn. 1999), *aff'd*, 247 F. 3d 854 (8th Cir. 2001).

> ***We know that "announc[ing] . . . views" on an issue covers much more than promising to decide an issue a particular way.*** The prohibition extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election. ***All the parties agree this is the case, because the Minnesota Code contains a so-called "pledges or promises" clause, which separately prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," . . . — a prohibition that is not challenged here and on which we express no view.***

See Slip Opinion at 4 (emphasis added). Accordingly, the Court left intact the "pledges or promises" clause of Minnesota's Code of Judicial Conduct.

Underlying the Supreme Court's condemnation of Minnesota's "Announce Clause" was the Court's fundamental belief that the Announce Clause was not narrowly tailored to serve the compelling state interests of preserving the impartiality and appearance of impartiality of the state judiciary. *See* Slip Opinion at 9-14. While acknowledging that the word "impartiality" might have different connotations in a judicial context, the Court noted that its "root meaning" is:

> the lack of bias for or against either ***party*** to [a] proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.

See Slip Opinion at 9 (emphasis added). Thus, it is the spectre of demonstrated bias for or against either ***party*** to a proceeding, as opposed to generalized campaign statements on ***issues*** that may come before the Court, that is the linchpin of Justice Scalia's constitutional analysis.

Applying *White's* principles to the charges in this case that are predicated on Florida's "pledges or promises" clause (Charge Nos. 1, 2, 3, 4, and 5) underscores the Hearing Panel's determination that Respondent's campaign statements reflecting her commitment to law enforcement fall under the rubric of "pledges or promises" in favor of a party (in this case, the institutional litigant in criminal cases), as opposed to nonspecific announcements on general legal and political issues. Accordingly, this Court should affirm the Hearing Panel's findings with respect to Florida's "pledges or promises" clause.

1. The Evidence Supports The Hearing Panel's Findings That Candidate Kinsey Pledged That She Would Be Biased In Favor Of Law Enforcement If Elected As A Judge

Florida's version of the "pledges or promises" clause is embodied in Canon 7(A)(3)(d)(i), which states that:

A candidate for judicial office:

(d) shall not

> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

In Charge No. 1, the JQC alleged as follows:

> 1. **CHARGE NO. 1** - During the campaign, in violation of Canon 1, Canon 2(A), Canon 3(B)(5), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i) - (ii), you distributed a piece of campaign literature entitled, "*Pat Kinsey: The Unanimous Choice of Law Enforcement For County Judge* " in which you stated that "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . behind bars," as opposed to simply pledging or promising the faithful and impartial performance of your duties in office.

As indicated, this charge is based on a brochure disseminated by the Kinsey campaign entitled, "Pat Kinsey: The Unanimous Choice of Law Enforcement for County Judge."[7] Among other things, the brochure contains a group photo of Pat Kinsey with ten members of a heavily armed police SWAT team holding automatic weapons and wearing flak jackets. Above the picture is the legend,

Who do these guys count on to back them up?

The brochure goes on to describe Pat Kinsey as the "unanimous choice of law enforcement for County Judge" followed by the statement that:

> Law enforcement officers willingly risk their lives every day to protect you. They face the prospect of great bodily harm, even death, in apprehending violent criminals . . . .

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[7] A copy of the brochure is attached hereto as Exhibit 1.

> After facing these threats, ***your police officers expect judges*** to take their testimony seriously and ***to help law enforcement*** by putting criminals where they belong . . . behind bars!

(emphasis added).

In finding that this brochure constituted "clear and convincing evidence that Judge Kinsey intended to convey her ***pro-police position*** to the voters," the Hearing Panel opined as follows:

> Through this brochure, Judge Kinsey was telling the public that she would be very tough on crime ***and that she favored the police*** . . . . [T]his brochure intentionally created and conveyed the message that Judge Kinsey would support the police if elected to the position of County Judge . . . .
>
> . . . ***Candidate Kinsey committed herself to a pro-police position on matters which she affirmatively stated would come before her on a daily basis as a judge***. The Hearing Panel finds this brochure to be clear and convincing evidence that Judge Kinsey intended to convey her pro-police position to the voters.

See Findings at 19-21 (emphasis added).

With respect to Charge No. 2, which arose out of a second brochure that likewise highlighted Judge Kinsey's support of law enforcement, the JQC alleged as follows:

> 2. **CHARGE NO. 2** - During the campaign, in violation of Canon 1, Canon 2(A), Canon 3(B)(5), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i) - (ii), you reiterated ***your commitment to the prosecution***

> ***side of criminal cases*** by distributing a piece of campaign literature entitled, "*If You Are a Criminal, You Probably Won't Want to Read This*," in which you stated that "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . behind bars!," as opposed to simply pledging or promising the faithful and impartial performance of your duties in office.

(emphasis added).[8] Leveling the same criticism at this brochure as it did with respect to the brochure that was the subject of Charge No. 1, the Hearing Panel again made special mention of the fact that Respondent deliberately emphasized that, as a judge, she would be predisposed to favor law enforcement:

> The brochure is entitled "*If You Are a Criminal You Probably Won't Want to Read This!*" Candidate Kinsey was described as a "passionate advocate for victims" who "identifies with the victims of crime." The brochure notes that Kinsey had been "unanimously endorsed" by "area law enforcement officers" and that she had the endorsement of the Florida Police Benevolent Association and the Fraternal Order of Police. Such endorsements may certainly be brought to the attention of voters but this brochure went further and actually stated that police officers risk their lives every day and thus "***police officers expect judges*** to take their testimony seriously and ***to help law enforcement*** by putting criminals . . . behind bars." ***Again the message was clear, Judge Kinsey touted herself as pro-police and committed to "help law enforcement***."

[8] A copy of the brochure is attached hereto as Exhibit 2.

See Findings at 21-22 (emphasis added). To the extent any ambiguity remains concerning the impetus behind the Hearing Panel's finding of guilt, the Panel's admonition of Judge Kinsey removes any doubt:

> She certainly did not say that she would also help the public defenders appearing in her courtroom. ***A candidate's pledge of support for either the public defenders or state attorneys in criminal matters would be obviously improper***.

Id. at 22 (emphasis added).

Likewise, in Charge No. 3, the JQC alleged that Respondent published a third brochure which, like the first two, accentuated her pledge to support law enforcement, if elected:

> 3. **CHARGE NO. 3** - During the campaign, in violation of Canon 1, Canon 2(A), Canon 3(B)(5), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i) - (ii), you distributed a piece of campaign literature entitled, "*Let's Elect 'Pat' Kinsey For County Judge*," in which you reiterated that "a judge should protect victims' rights," and that judges must support "hard-working law enforcement officers by putting criminals behind bars, not back on our streets," as opposed to simply pledging or promising the faithful and impartial performance of your duties in office.

As reflected above, Charge No. 3 was based upon a campaign brochure in which Respondent again dramatized her alliance with law enforcement through the use of a photograph with law enforcement officers.[9] Finding that this brochure continued to

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[9] A copy of the brochure is attached hereto as Exhibit 3.

build upon the overall theme of Respondent's campaign, which was her pledge to support law enforcement, the Hearing Panel reasoned as follows:

> Charge 3 was based upon Exhibit 3 entitled *"Let's Elect Pat Kinsey."* This is the only brochure which was not a part of the series of brochures mailed during the last 18 days of the campaign. Although this brochure, standing alone, is less offensive than the others, when viewed in context along with the other brochures and radio statements, it also constituted a similar improper commitment. Again, Pat Kinsey was pictured with police officers along with the pledge that "Pat Kinsey ***will*** work with our law enforcement officers . . . ."

See Findings at 22-23 (emphasis added).

Charge No. 4 was the only one of the "pledges and promises" charges, which was not predicated on a printed brochure. Rather, Charge No. 4 arose out of comments Respondent made during a call-in radio show on which both she and William Green, the incumbent judge, appeared as guests.[10] In this Charge, the JQC alleged as follows:

> 4. **CHARGE NO. 4** - During the campaign, in violation of Canon 1, Canon 2(a), Canon 7(A)(3)(a) and Canons 7(A)(3)(d)(i)-(ii), you made statements during an interview on a local radio station which exhibited a hostility or apparent hostility towards defendants in criminal cases. By way of example, the following colloquy occurred between you and a caller to the radio show on which you appeared:

[10] A copy of a transcript of the radio debate is attached hereto as Exhibit 4.

> Caller: [M]y question is mainly pertained to Pat Kinsey. Do you believe that as Judge, you would be able to stand up there, uum, because I do know that ***you are pro-law enforcement***, to be able to make a decision without any bias towards the defense or prosecution?
>
> * * *
>
> Pat Kinsey: ***As a prosecutor, I am different from a defense attorney***. I am trained, and I am ethically obliged to look at a case, after an arrest has been made and make a determination, what is just? What is fair? What are the appropriate charges? . . . ***This is something that is much different from what a defense attorney does. Much like Bill Green before he went on the bench, he was a defense attorney, that type of attorney. He is trained, and he is with ethically obliged at that time to zealously advocate for his client. That is, do whatever he could, under the law, to get his client free. And that is why I think we have such a philosophical difference, between us. I think, in my opinion, that Judge Green is still in that defense mode***. (emphasis added)

As evidenced by the caller's belief that you were "pro-law enforcement" coupled with: your i) failure to disavow the caller of your apparent bias towards law enforcement and; ii) attempt to portray the incumbent as "still in that defense-mode," you left the firm and definite impression that, as a judicial officer, you would be in a "prosecution mode" and not rule in an even-handed and impartial manner.

As with its previous finding that Respondent's campaign statements manifested a bias in favor of law enforcement, the Hearing Panel found in this instance that Respondent attempted to distinguish her candidacy from the incumbent's by emphasizing her bias in favor of the prosecution in criminal matters:

> Charge 4 concerned a radio interview quoted in part in the charging document . . . ***[T]here is simply no question as to Judge Kinsey's intentions to portray herself as pro-law enforcement***. When the caller on the radio show stated that he knew she was "pro-law enforcement," he followed up with a question as to whether this constituted bias toward the defense. Judge Kinsey answered by portraying herself as a prosecutor and portraying her opponent as a defense attorney with Judge Green still in the defense mode. ***The Panel finds that Judge Kinsey's statements did leave the firm and definite impression that even as a judge she would remain in the "prosecution mode." She intentionally contrasted herself, painting Judge Green in the defense mode and herself in the prosecution mode***.
>
> The radio interview also included candidate Kinsey's comment:
>
> > I work very closely with law enforcement officers as a prosecutor, And they're left, begging for help. And all they see when they come to court is a judge who either dismisses a case or minimizes it by not holding the criminals accountable. So, I have given up my job; I have turned in my badge and gun, as a prosecutor, I have turned in an irrevocable letter of resignation, so I can run for judge because somebody has to do it. Somebody has to hold these criminals accountable. And that is why I'm here.

See Findings at 23-24. The Panel found that the aforementioned rhetoric again constituted "a very strong statement that Judge Kinsey would assist the police." *Id*. at 24.

Finally, with respect to Charge No. 5, which is best described as an omnibus charge that Respondent touted herself as a candidate predisposed to the prosecution/law enforcement side of cases based on the cumulative effect of her campaign literature, the Hearing Panel reasoned:

> Charge 5 asserts eight different examples drawn from the campaign language with a concluding assertion that Patricia Kinsey deliberately cloaked her candidacy in an umbrella of law enforcement and ***intentionally portrayed herself as pro-prosecution and pro-law enforcement and that she would so act as a judge***. The Hearing Panel agrees and concludes that the Kinsey campaign was just such a deliberate and intentional attempt. Charge 5 is drawn from the six brochures and the radio interview and we will not again repeat each of these excerpts.

See Findings at 25.[11]

II. THE *WHITE* DECISION HAS NO BEARING ON THE HEARING PANEL'S FINDING THAT JUDGE KINSEY MADE A KNOWING MISREPRESENTATION REGARDING HER OPPONENT IN VIOLATION OF CANON 7(A)(3)(d)(iii)

In Charge No. 7, the JQC alleged as follows:

> 7. During the campaign, in violation of Canon 1, Canon 2(A), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i) - (iii), you knowingly misrepresented in your campaign brochure entitled, "*A Shocking Story*

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[11] The text of Charge No. 5 is set forth at pages 5-6 of the JQC's Reply Brief. Because of its length, the text of Charge No. 5 has not been set forth again in this Supplemental Brief. Charge No. 5 is based, in part, on a brochure entitled, "*The Alternative for County Judge*." A copy of that brochure is attached hereto as Exhibit 5.

> *of Judicial Abuse*," that your opponent, the incumbent, had not revoked Grover Heller's bond at an emergency bond hearing when, in fact, he had revoked the defendant's bond. You further implied that your opponent's role in that case was to protect "an elderly law-abiding couple" and that the incumbent's conduct represented a "shocking lack of compassion for the victims of violent crime."

As indicated, this charge was based on a brochure disseminated by the Kinsey campaign entitled, "*A Shocking Story of Judicial Abuse.*"[12] As further elaborated upon in the JQC's Reply Brief, this brochure generally criticized Judge William Green's handling of the criminal case of a defendant (Grover Heller) by giving voters the misleading impression that Judge Green had failed to revoke Heller's bond when, in fact, Judge Green had revoked the bond. *See* JQC's Reply at 20-23. The Hearing Panel found, by clear and convincing evidence, that Respondent made a knowing misrepresentation concerning Mr. Heller's bond and that "[i]n fact, the Heller bond had been revoked and Judge Kinsey knew or should have known it." *See* Findings at 27; *see also* (T:1-121 -124).

Although a knowingly false or misleading representation regarding an opponent's performance in office may qualify as political speech, it is not protected by the First Amendment. *Brown v. Hartlage*, 456 U.S. 46, 60 (1982). Thus, any contention that Respondent had a First Amendment right to knowingly misrepresent

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[12] A copy of the brochure is attached hereto as Exhibit 6.

the record of Judge Green is unavailing. No aspect of the *White* decision undermines the fundamental precept that "a calculated lie about a public official, or a statement uttered out of reckless inattention to its falsity, is beyond the pale of constitutional protection." *Pierce v. Capital Cities Communications, Inc*., 576 F. 2d 495, 506 (3d Cir.), cert. denied, 439 U.S. 861 (1978).

III. THE *WHITE* DECISION HAS NO BEARING ON THE HEARING PANEL'S FINDING THAT JUDGE KINSEY MADE A KNOWING MISREPRESENTATION REGARDING THE FACTS OF A CRIMINAL CASE INVOLVING DEFENDANT STEPHEN JOHNSON

In Charge No. 9, the JQC alleged as follows:

> 9. During the campaign, in violation of Canon 1, Canon 2(A), Canon 3(B)(9), Canon 7(A)(3)(a) and Canons 7(A)(3)(d)(i) - (iii), in your campaign brochure entitled, "*A Vital Message From Law Enforcement,*" you knowingly misrepresented the nature and seriousness of criminal charges which were pending in *State v. Johnson*, Case No. 97-4032, by giving the false and misleading impression that the defendant had been charged with attempted murder and burglary at the time of his appearance for bond consideration when, in fact, no such charges were pending at the time. Your campaign literature also stated that in a restraining order in the case, the defendant is quoted as having told the victim, that he would kill her "just like I buried that bitch in Mississippi," when, in fact, there is no such language in the restraining order.

The Hearing Panel found Respondent guilty of a misrepresentation as to the first allegation only in this charge; specifically, the nature of the charges that were pending against the defendant when he was arrested, "because the brochure left the clear impression that Johnson had been charged with attempted murder and burglary

and no such charges were in fact pending at the time that he appeared at his bond hearing." *See* Findings at 27. The Panel found that as the assistant state attorney to whom the Johnson case had been assigned, Respondent was aware of the charges that were pending at the time of Johnson's arrest. *See* Findings at 29.

Just as with her knowing misrepresentation regarding the incumbent's handling of the Grover Heller matter, the *White* decision provides no solace for Respondent's actions. Simply stated, false and misleading accusations made by candidates during judicial campaigns are not protected under the First Amendment. Nothing in *White* compromises that principle.

IV. THE *WHITE* DECISION HAS NO BEARING ON THE HEARING PANEL'S FINDINGS THAT JUDGE KINSEY IMPROPERLY MADE PUBLIC COMMENTS REGARDING TWO PENDING CRIMINAL MATTERS

In Charge No. 10 of the Formal Charges, the JQC alleged as follows:

> 10. During the campaign, in violation of Canon 1, Canon 2(a), Canon 3(B)(5), Canon 3(B)(9), and Canon 7(A)(3)(d)(ii), in your campaign brochure entitled, "*A Vital Message From Law Enforcement*," you publicized the details of the pending cases of two criminal defendants, Stephen Johnson and Gerard Alsdorf, to the public in a manner that could affect the outcome or impair the fairness and integrity of those proceedings.[13]

[13] A copy of the brochure is attached hereto as Exhibit 7.

In her *VITAL MESSAGE FROM LAW ENFORCEMENT* brochure, which was also the predicate for Charge No. 9, Respondent discussed the facts of two pending criminal cases (defendants Alsdorf and Johnson) as part of her efforts to criticize the incumbent's handling of those matters. Respondent admitted during the proceedings below that at the time this brochure was published, neither Alsdorf nor Johnson had been tried for the crimes she publicized in the brochure. (T:1-99).[14]

Canon 3(B)(9) provides that:

> A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.

The Hearing Panel, in fact, found that "the comments regarding defendants Stephen Johnson and Gerard Alsdorf should have been reasonably expected to affect the outcome of their future cases," not merely that there was a possibility that those comments could affect the outcome of those proceedings. *See* Findings at 28. Nothing in the *White* decision suggests that any aspect of canon 3(B)(9) of the Florida

[14] The brochure is described in greater detail in the JQC's Reply. *See* JQC Reply at 24-30.

canons should be called into question because of *White's* invalidation of Minnesota's "Announce Clause."[15]

CONCLUSION

This Court may affirm the Hearing Panel's Findings, Conclusions, and Recommendations if it finds that they are supported by any evidence in the record, irrespective of the particular grounds articulated by the Hearing Panel. The Hearing Panel properly concluded that Respondent engaged in a deliberate campaign to cloak her candidacy in an umbrella of law enforcement and portray herself as a "pro-prosecution, pro-law enforcement" candidate who, if elected, would strive to help law enforcement. She even went so far as to contrast her candidacy with that of the incumbent, describing herself as still being in a "prosecution mode" while vilifying the incumbent, whom she cast as still being in a "defense mode." Indeed, as the Hearing Panel found, "Judge Kinsey generally testified that she presented herself as

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[15] Judge Kinsey argued in her initial Response to this court's Order to Show Cause that the evidence presented regarding her comments on pending cases did not rise to the level required to limit her First Amendment rights. *See* Kinsey Response at 11. As the JQC argued in its Reply, such arguments have been specifically considered and rejected by cases such as *Broadman v. Commission on Judicial Performance,* 18 Cal. 4th 1079, 959 P.2d 715, 77 Cal. Rep. 2d 408 (1998), *cert. denied,* 525 U.S. 1070 , 142 L. Ed. 2d 662 (1999). *Broadman* recognizes that avoiding material bias to an adjudicatory proceeding is a core governmental interest and that Canon 3(B)(9), or its predecessor, is a reasonable and appropriate way, both facially and as applied, to maintain public confidence in the integrity, impartiality, and independence of the judiciary.

favoring law enforcement because that became the issue in the race due to Judge Green's job performance which was generally condemned by law enforcement." *See* Findings at 13.

This specie of campaigning, which explicitly and implicitly made pledges and promises of performance in office, is not the type of campaign speech protected by the Supreme Court's decision in *White.* *White* only immunizes from disciplinary regulation judicial campaigning that speaks to general legal or political issues, as opposed to Respondent's campaigning, which was calculated to align her candidacy with a particular party in matters she knew would come before her, if elected. Additionally, *White* does not impact the Hearing Panel's findings as to Charges 7, and 9, which relate to misleading campaign statements, or as to Charge 10 relating to commenting on pending cases. Thus, the core basis for the Hearing Panel's disciplinary recommendations remain unaffected by *White*.

Accordingly, the Hearing Panel's recommendation of a public reprimand and a $50,000 fine, previously fully briefed by the parties and presented to this Court at oral argument on October 4, 2001, remain an appropriate discipline for this campaign.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **AMENDED INITIAL SUPPLEMENTAL BRIEF** has been furnished by U.S. Mail to **BROOKE S. KENNERLY,** Executive Director, Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, FL 32303; **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; **THE HONORABLE JAMES R. JORGENSON,** Chair, Hearing Panel, Third District Court of Appeal, 2001 SW 117th Avenue, Miami, FL 33175; and **ROY M. KINSEY, JR.**, Kinsey, Troxel, Johnson & Walborsky, P.A., 438 E. Government St., Pensacola, FL 32501, this _____ day of August, 2002.

_____
Attorney

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief has been prepared in Times New Roman 14-point font and that such font size complies with the requirements of Fla. R. Civ. P. 9.210(a)(2).

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