

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A
JUDGE: CYNTHIA A. HOLLOWAY
NO.: 00-143

Florida Supreme Court
Case No.: SC00-2226

**JUDICIAL QUALIFICATIONS COMMISSION'S OBJECTION TO
JUDGE CYNTHIA A. HOLLOWAY'S MOTION TO COMPEL THE
CONTINUED TESTIMONY OF INVESTIGATOR ROBERT BUTLER**

JUDICIAL QUALIFICATIONS COMMISSION (hereinafter JQC), hereby files its Response to Judge Cynthia A. Holloway's Motion to compel the testimony of investigator Robert W. Butler and Motion for Sanctions as follows:

1. By way of background, in January 2001, Judge Holloway and her lawyers requested the receipt of any and all written interview summaries of witnesses whose name were provided by the JQC in its initial 12(b) response. Following this request, the JQC objected to the production of witness interview summaries drafted by Robert W. Butler, private investigator for the JQC, pursuant to the work product doctrine as said witness summaries were prepared by Mr. Butler in anticipation of litigation.

2. The requested written summaries prepared by Robert W. Butler were not written statements authored by a witness or signed or otherwise adopted by any of the witnesses interviewed as such, in furtherance of its objection to the production of the written summaries, the JQC relied on the well settled law that although a party may be ordered to provide the names and addresses of individuals who have furnished statements in anticipation of litigation, absent rare and exceptional circumstances, *See Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 113

(Fla. 1970), the party may not be required to furnish the statements themselves because such statements are work product. *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 S.Ed. 451 (1947); *Miami Transit Co. v. Hurns*, 46 So.2d 390 (Fla. 1950), *Karch, MacKay*, 453 So. 2d 452 (Fla. 4th DCA 1984).

3. Following the JQC's objection to the production of the written interview summaries, Judge Holloway and her lawyers filed a Motion to compel the witness summaries with the Florida Supreme Court. The Court ordered the production of the witness interview summaries, "used (by the JQC) in determining probable cause." (Exhibit 1)

4. In accordance with the ruling of the Florida Supreme Court, the JQC produced Robert W. Butler's typed written interview summaries of his conversations with Mark Johnson, Leslie A. Hoffman, Detective John Yaratch, Sharron K. Cosby, David A. Rowland, Michael Sinacore, Ronald J. Russo, Kimberly K. Fernandez, Sylvia F. Carra, Ph.D., David Bowers, Judge Ralph C. Stoddard, Detective Donna J. Keene, Christine Taylor and Pamela Dato.

5. Furthermore, as a gesture of good faith and in the interest of avoiding unnecessary delay, prior to the deposition of Robert W. Butler taken on June 6, 2001, the JQC also provided witness interview summaries of Judge Katherine G. Essrig, Marie L. Folsom and Deputy Angela L. Martin. Robert W. Butler drafted

the additional witness summaries pursuant to the continuing JQC investigation regarding Judge Holloway. These additional summaries had been produced to the JQC's Investigative panel in preparation for a supplemental 6(b) hearing scheduled for June 8, 2001. Therefore, consistent with the Supreme Court's ruling and to afford Judge Holloway's lawyers an opportunity to depose Robert W. Butler regarding the content of the new interviews, the JQC provided copies of the additional interview summaries prior to their use in the determination of probable cause during the upcoming 6(b) hearing.

5. Similarly, in light of the Florida Supreme Court's ruling granting the production of witness summaries used in the determination of probable cause and as a further gesture of good will, the JQC did not object nor move for a protective order to prevent the deposition of Robert W. Butler. The contrary is in fact true; the undersigned special counsel rearranged her schedule and flew to Tampa two days before the scheduled 6(b) hearing to accommodate Judge Holloway's lawyer's request to take Robert W. Butler's deposition prior to the 6(b) hearing. (This response is being drafted while the undersigned is out of the office taking depositions and without the benefit of the case file. Therefore, pursuant to undersigned's recollection, Robert W. Butler appeared for said deposition voluntarily without a subpoena.)

6. Additionally, prior to the deposition and repeatedly during the course

of the deposition, the undersigned advised Judge Holloway's lawyers that Robert W. Butler was appearing for deposition to answer questions relating to the preparation and content of the witness interview summaries ordered for production by the Florida Supreme Court and that any other questioning would be objected to pursuant to the work product doctrine and attorney client privilege. Nevertheless, Robert W. Butler was repeatedly asked questions relating to the investigation and matters outside the parameters of the witness interview summaries. Judge Holloway's lawyers terminated Robert W. Butler's deposition after repeated objections raised by the undersigned to questions pertaining to matters concerning Robert W. Butler's investigation outside the parameters of the witness interview summaries. (A copy of the transcript of the June 6, 2001, deposition of Robert W. Butler is attached as Exhibit 2.)

7. As previously stated in our initial objection to Judge Holloway's motion to compel the interview summaries, the rationale supporting the work product doctrine is that one person is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures. *DeBartolo-Aventura, Inc. v. Hernandez*, 638 So. 2d 988, 990 (Fla. 3rd DCA 1994); *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377, 1385 (Fla. 1994). Judge

Holloway has not suffered prejudice by the JQC's failure to agree to a full discovery deposition of its private investigator. Judge Holloway has been provided the names and contact information of the relevant witnesses in this matter. Nothing precludes her from speaking to or taking the deposition of these witnesses in the preparation of her defense.

8. Judge Holloway's claim that the JQC has operated in bad faith and their Motion for Sanctions is without merit. The JQC has provided through witness lists in accordance with the requirements of rule 12(b). In addition, the JQC has timely provided witness interview summaries of its private investigator as ordered by the Florida Supreme Court and has provided witness summaries before they were used in the determination of probable cause as a gesture of good will and to avoid unnecessary delays to this case. Furthermore, the JQC voluntarily provided its private investigator for deposition to answer questions consistent with the Florida Supreme Court's ruling regarding the production of witness summaries used in the determination of probable cause. The JQC's repeated objections on the bases of work product and privilege during the deposition of Robert W. Butler were made in good faith, in a professional manner and in an effort to preserve the JQC's rights. Accordingly, the JQC should not be punished for attempting to preserve its rights and privileges.

9. Finally, the undersigned received Judge Holloway's motion to compel and motion for Sanctions on August 20, 2001. The undersigned was scheduled to take depositions in the present matter in Tampa on August 23, 2001 and is scheduled to appear for a hearing in Bartow, Florida on Friday, August 24, 2001. John R. Beranek, Counsel to the Hearing Panel, requested a response from the JQC on or before Friday, August 24, 2001. Accordingly, the undersigned reiterates that this response has been prepared from a remote location without the benefit of the case file or supplemental legal research capabilities. Therefore, the undersigned respectfully requests the right to supplement this response upon returning to Miami.

WHEREFORE, the undersigned Special Counsel, on behalf of the JUDICIAL QUALIFICATIONS COMMISSION, hereby files its Response to Judge Cynthia A. Holloway's motion to compel the testimony of Robert W. Butler, and motion for sanctions and respectfully asks this Hearing Panel to enter an Order denying Judge Holloway's motion to compel the testimony of Robert W. Butler, and motion for sanctions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 Duval Street, Tallahassee, Florida 32399-1927; Scott K. Tozian, Esquire, SMITH & TOZIAN, P.A., 109 North Brush Street, Suite 150, Tampa, Florida 33602; Michael S. Rywant, Esquire, RYWANT, ALVAREZ, JONES, RUSSO & GUYTON, P.A., 109 North Brush Street, Suite 500, Tampa, Florida 33602; John Beranek, Esquire, AUSLEY & MCMULLEN, Washington Square Building, 227 Calhoun Street, P.O. Box 391, Tallahassee, Florida 32302; Honorable James R. Jorgenson, Chair, Hearing Panel, Third District Court of Appeals, 2001 S.W. 117th Avenue, Miami, Florida 33175-1716; Honorable James R. Wolf, Chairman, Investigative Panel, 301 S. Martin Luther King Blvd., Tallahassee, Florida 32399; and Brooke Kennerly, Executive Director, Judicial Qualifications Commission, Mount Vernon Square, 1110 Thomasville Road, Tallahassee, Florida 32303, this ____ day of August, 2001.

CERTIFICATE OF FONT SIZE

I hereby certify that type font used in this document is 14-point Times New Roman.

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