

IN THE SUPREME COURT OF FLORIDA

Case No. SC03-1171

INQUIRY CONCERNING
A JUDGE, NO. 02-487

RE: GREGORY P. HOLDER

RESPONDENT'S INITIAL BRIEF

David B. Weinstein
Florida Bar No.: 604410
Kimberly S. Mello
Florida Bar No.: 0002968
Bales Weinstein
Post Office Box 172179
Tampa, Florida 33672-0179
Telephone: (813) 224-9100
Telecopier: (813) 224-9109

Juan P. Morillo
Florida Bar No.: 0135933
Steven T. Cottreau
Specially Admitted
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Telecopier: (202) 736-8711

Counsel for Judge Gregory P. Holder

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STATEMENT OF THE CASE

More than two and a half years ago, in July of 2003, the Florida Judicial Qualifications Commission (“JQC” or the “Commission”) filed a Notice of Formal Charges (“Charges”) alleging that Hillsborough County Circuit Court Judge Gregory P. Holder (“Judge Holder” or “Respondent”) had plagiarized an Air War College (“AWC”) paper and falsely stated that it was his original work. Among other things, the JQC alleged that Judge Holder violated 18 U.S.C. § 1001 [a felony], by making a materially false statement to the federal government. The JQC also alleged that the charged conduct “would demonstrate [Judge Holder’s] present unfitness to hold the office of judge, and would warrant discipline, including, but not limited to, [his] removal from office.” [Notice of Formal Charges, at App. 1.] The Commission also took the extraordinary step of issuing an Order to Show Cause “why the [JQC Investigative] Panel should not recommend to the Supreme Court that [Judge Holder] be suspended from office” while this matter remained pending. [Commission’s Amended Order to Show Cause, at App. 2.]

To support its allegations, the JQC relied on a copy of an AWC paper submitted by E. David Hoard in 1996 (“Hoard paper”) (Exhibit “B” to the Charges) and copies of a paper that contained significant amounts of material from the Hoard paper and which the JQC alleged was submitted by Judge Holder to the

AWC in 1998 (“purported Holder paper”) (Exhibit “A” to the Charges). Judge Holder never contested that the purported Holder paper contained approximately ten pages of nearly verbatim text from the Hoard paper. Instead, he steadfastly maintained that the purported Holder paper was fabricated, most likely to discredit him because of his role as a cooperating witness in a federal criminal investigation of corruption at the Hillsborough County Courthouse (“courthouse corruption investigation”).

The seriousness of the Charges, coupled with the factual and legal complexities of this case, required Judge Holder to retain experienced counsel, conduct extensive discovery, file and litigate (including full briefing and oral argument) numerous motions,¹ and secure experts regarding document

¹ Judge Holder filed the following motions on the referenced dates: 1) Motion in Limine to Exclude Testimony of David Leta (8/27/04); 2) Motion in Limine to Exclude All Documents Provided to the JQC by Jeffrey Del Fuoco (8/27/04); 3) Motion in Limine to Exclude All Documents Provided to the JQC by the United States Air Force (8/27/04); 4) Motion in Limine to Exclude Testimony of Jeffrey Downing (8/27/04); 5) Motion in Limine to Exclude Testimony of Jeffrey Del Fuoco (8/27/04); 6) Motion in Limine to Exclude Evidence on Best Evidence Grounds (8/27/04); 7) Motion in Limine to Exclude Evidence on Due Process Grounds (8/27/04); 8) Motion in Limine to Exclude Copies of the Purported Holder Paper on Authentication Grounds (8/27/04); and 9) Motion to Dismiss the Pending Charges or in Limine to Exclude the Purported Holder Paper and Hoard Paper Based on Evidentiary Improprieties (3/21/05). The JQC Hearing Panel did not rule dispositively on the evidentiary motions prior to trial. Instead, evidence at trial was taken subject to such motions, which were ultimately denied by the Order of Dismissal.

authentication, the creation of documents (*i.e.*, the purported Holder paper) using Photoshop® software, forensic computer analysis, and applied linguistics.

Formal discovery commenced in August of 2003, and continued for nearly two years. During this time, extensive written discovery was served, including six sets of interrogatories, three requests for production of documents, as well as requests for admission. Additionally, the depositions of at least 24 witnesses were taken in this action, many of whom resided outside the State of Florida. Judge Holder's counsel also conducted extensive informal discovery, including dozens of witness interviews, and secured over two dozen witness affidavits. Judge Holder also had to expend substantial resources attempting to obtain access to United States military personnel and Assistant United States Attorneys, who were critical witnesses in this case, because of the severe restrictions imposed by 28 C.F.R. § 1621, et seq., on a civil litigant's right to obtain the testimony of federal employees.

This case was tried from June 6 to June 14, 2005, before the JQC Hearing Panel, and included the testimony of more than 25 witnesses. During the trial, Judge Holder presented compelling evidence that the purported Holder paper was fabricated to retaliate against him for participating in the courthouse corruption

investigation. [Bartoszak Tr. pp. 7, 12-13, at App. 3.]² On June 23, 2005, the Hearing Panel of the JQC voted unanimously to dismiss the charges against Judge Holder. [Order of Dismissal, at App. 4.] Research indicates that this is the first trial defense verdict against the JQC in almost twenty years.

On July 25, 2005, based on his successful defense of the Charges, Judge Holder moved this Court to enter an order awarding attorneys' fees incurred by him in the JQC proceeding. In support of his motion, Judge Holder relied on the well-settled common law doctrine [referred to in the Initial Brief as the "*Thorner* doctrine"], which requires that a public official be reimbursed at public expense following the successful defense of litigation that a) arises out of or in connection with performance of his or her official duties, and b) serves a public purpose.

² Pursuant to its September 8, 2005 Order ("Order"), the Court did not require the Commission to provide a trial transcript. However, Judge Holder's counsel obtained uncertified trial transcripts of certain witnesses' testimony, which are included in the Appendix to the Initial Brief and cited as "____ Tr. p. ____ at App. ____." While these trial transcripts are not certified, Judge Holder does not believe that the accuracy of the transcribed testimony cited by Respondent is reasonably subject to dispute. However, should such a dispute arise, Judge Holder will respectfully request an opportunity to supplement the record with a certified transcript.

In its response to Judge Holder's motion, the JQC conceded that a) the *Thorner* doctrine applies to these proceedings, and b) this litigation served a public purpose. [JQC Resp. p. 5, at App. 5.]³ The JQC's sole argument was that there was an insufficient nexus "with the performance of Judge Holder's official duties as a Circuit Court Judge to satisfy the first prong of the *Thorner* list [sic]." [JQC Resp. pp. 5-6, at App. 5.] Judge Holder subsequently filed a Memorandum of Law in Support of Respondent's Motion for Award of Attorneys' Fees as well as Respondent's Request for Oral Argument.

On December 2, 2005, this Court entered an Order granting Judge Holder's Request and ordering additional briefing on the following issues:

- a) The specific basis and authority for an award of attorneys' fees in this case;
- b) Any prohibitions or limitations with regard to a monetary award in this case including, but not limited to, issues of sovereign immunity or otherwise; and
- c) The joinder of any additional parties, if any, necessary or proper for a full determination of issues presented.

³ The Commission's Response to Respondent's Motion for Award of Attorneys' Fees will be cited as "JQC Resp. p. _____, at App. _____."

STATEMENT OF THE FACTS

Prior to and during his service as a civilian judge, Judge Holder had a distinguished career in the United States Air Force, beginning with his graduation from West Point in 1975. Judge Holder was one of 16 graduating cadets commissioned into the Air Force. He served at Eglin Air Force Base in Florida, where he concentrated in the study and development of armaments. Judge Holder was one of the youngest Air Force officers ever to receive the Meritorious Service Medal, as well as one of the youngest distinguished graduates of Squadron Officer School. [Holder Tr. pp. 8-14, at App. 6.]

After earning his MBA in 1978, Judge Holder was one of only 25 officers in the Air Force selected for the highly competitive Air Force Funded Legal Education Program. [*Id.* at p. 11.] He graduated in 1981 from Stetson University College of Law, where he served as an Associate Editor of the Law Review. [*Id.* at p. 14.] After graduation, Judge Holder volunteered to go to Korea, where he served as Area Defense Counsel. Following his tour of duty in Korea, Judge Holder was transferred to MacDill Air Force Base in Tampa, Florida. In 1988, Judge Holder resigned his active duty commission, joined the Air Force Reserves, and was assigned to U.S. Special Operations Command at MacDill. During his distinguished military career, Judge Holder was one of only five Air Force Reserve

Officers in the world assigned as a Military Judge entrusted with jurisdiction over special and general courts martial. [*Id.* at pp. 21-38.]

Judge Holder was elected to the Hillsborough County Court bench in 1994, and to the Thirteenth Judicial Circuit Court in 1996.⁴ While serving on the bench, Judge Holder continued to serve as an officer in the U.S. Air Force Reserve. In 1997, Judge Holder enrolled in the U.S. Air Force Air War College. To graduate, Judge Holder was required to pass a series of examinations and write a research paper. Accordingly, in late 1997 and early 1998, Judge Holder researched and wrote a paper on the Combined Bomber Offensive during World War II, for which he received a satisfactory grade, and subsequently graduated from the Air War College. [*Id.* at p. 78]

In 1999, Judge Holder reported to former Chief Judge Dennis Alvarez that certain judges were engaging in improper conduct. [Nasco Tr. pp. 17-19, at App. 8.] In July of 2000, Judge Holder's bailiff, Sylvia Morgan, discovered former Judge Robert Bonanno in Judge Holder's chambers, after normal business hours, while Judge Holder was out of state on Air Force Reserve duty. [Sylvia Gay's

⁴ Since taking the bench, Judge Holder has been described as a jurist of "unquestioned credibility and unassailable integrity and an officer of the highest possible standards of behavior." Aff. of Colonel John S. Odom, Jr., Mobilization Assistant to the Staff Judge Advocate, U.S. Air Force Reserve ("Odom Aff.") ¶ 8, at App 7.

(n/k/a Sylvia Morgan) grand jury testimony (Oct. 11, 2000), pp. 55-60, at App. 9.]⁵ Judge Bonanno left Respondent's chambers carrying unidentified documents. [*Id.*] Judge Holder reported this incident, and a law enforcement investigation ensued. [*Id.* at pp. 102, 105-07.] Ultimately, impeachment proceedings were commenced against Judge Bonanno and he resigned from office.

During 2001 and 2002, Judge Holder cooperated with the FBI in the courthouse corruption investigation. [Bartoszak Tr. pp. 4-5, at App. 3.] Because of Judge Holder's cooperation, the investigation's targets had motive and resources to seek retribution against him. [*Id.* at pp. 7-8] Indeed, these targets faced not just loss of position but potential incarceration. [*Id.*]

In early 2002, in the midst of the courthouse corruption investigation, Assistant United States Attorney Jeffrey Del Fuoco, who also served in the United States Army Reserve, claimed that an unmarked manila envelope was anonymously placed under his office door at the Army Reserve Headquarters in St. Petersburg. [Del Fuoco Tr., pp. 89, at App. 10.] Del Fuoco testified that the unmarked envelope contained an unsigned typewritten note to the effect that "I thought you would be interested in this," or "something should be done about this." [*Id.* at p. 10.] The note was purportedly signed "A concerned citizen," or "A

⁵ Transcript of Grand Jury Testimony of Sylvia Gay also is available in Supreme Court Case No. SC01-2078, Inquiry Concerning a Judge, No. 00-261, Re: Robert H. Bonanno.

concerned taxpayer.” [Id.] The note allegedly accompanied a copy of the purported Holder paper and a copy of the Hoard paper (the “Papers”). [Id. at pp. 10-12.]

The United States Attorney’s Office did not provide the papers to the JQC until December of 2002, approximately 11 months after it received them. Tellingly, the referral to the JQC occurred just weeks after Judge Holder wrote a letter to the Department of Justice Office of Professional Responsibility complaining about the lack of progress in the courthouse corruption investigation. [Bartoszak Tr. p. 8, at App. 3.] However, by that time, the purported note and envelope had inexplicably disappeared from the file in the United States Attorney’s Office. [Del Fuoco Tr., pp. 50-52, at App. 10.] Consequently, the only evidentiary documents received by the JQC were the purported Holder paper and the Hoard paper.

However, notwithstanding the Commission’s knowledge that the central issue in this case was whether the purported Holder paper was genuine, the JQC vigorously prosecuted this case despite the following facts:

- The JQC admitted that it had no witness who could testify based on personal knowledge that the purported Holder paper was an authentic copy of the actual paper that Judge Holder submitted to the Air War College [Commission’s Response to Resp.’s 1st Req. for Admissions ¶ 1, at App. 11.];

- Both the note and the manila envelope (i) inexplicably vanished from the U.S. Attorney's Office and (ii) were never forensically tested for fingerprints, DNA, or otherwise to attempt to identify their source [Del Fuoco Trans., pp. 53-56, at App. 10.];
- No original of Judge Holder's actual AWC paper was ever located [Commission's Response to Resp.'s 1st Req. for Admissions ¶ 1, at App. 11.]; and
- Judge Holder and four third-party witnesses who saw Judge Holder's actual paper at or about the time he submitted it to the Air War College swore that the purported Holder paper was not genuine⁶ [Vento Dep. pp. 71, 73, at App. 12.]; [Affidavit of Lt. Col. James Russick ¶ 9, at App. 13.]; [Lawson Dep. pp. 15, 16, at App. 14]; [Nasco Tr. p. 13, at App. 8]; [Holder Tr. p. 76, at App. 6.]

Judge Holder incurred significant attorneys' fees in his successful defense against the Commission's Charges, which he is entitled to recover based on the authority set forth below.

SUMMARY OF THE ARGUMENT⁷

Judge Holder is entitled to an award of attorneys' fees based on the well-settled common law doctrine that a public official is entitled to be reimbursed at public expense following the successful defense of litigation that a) arises out of or

⁶ The depositions of John Vento and Ken Lawson were admitted into evidence during the trial due to their unavailability.

⁷ This is not an appellate proceeding. Therefore, Respondent has not included a section on the applicable standard of review.

in connection with performance of his or her official duties, and b) serves a public purpose.

Here, the Charges and the resulting litigation clearly arose out of or in connection with an attempt by an anonymous person or persons to interfere with Judge Holder's participation in the courthouse corruption investigation. Indeed, the overwhelming evidence at trial established the requisite connection to the courthouse corruption investigation, including the fact that the purported Holder paper was fabricated as a result of Judge Holder's participation in that investigation. Significantly, the Judicial Canons required Judge Holder's participation in the courthouse corruption investigation as part of his judicial duties. In addition, from the inception of this proceeding, the JQC maintained that the Charges were sufficiently related to Judge Holder's judicial duties to justify his suspension from the bench—despite the fact that the alleged conduct took place over five years earlier. Under these circumstances, this litigation clearly arose out of or in connection with the performance of Judge Holder's official duties.

Not surprisingly, the Commission has conceded the second prong of the *Thornber* test—that the litigation served a public purpose. From its inception, this proceeding has been highly publicized and viewed as inextricably entwined with the courthouse corruption investigation. Accordingly, the public clearly had an interest in, and the judiciary the responsibility to ensure, the proper functioning of

the JQC process as it related to these highly publicized Charges. Moreover, this litigation served a public purpose because a) the successful defense of Judge Holder resulted in an accomplished and respected jurist remaining on the bench; b) the overall functioning of the Circuit Court, as well as the interests of the attorneys and the litigants with matters pending before the judge, were not adversely impacted; and c) the litigation has not only restored or enhanced public confidence in Judge Holder's position as a jurist, but restored or enhanced public confidence in the judiciary.

Judge Holder's entitlement to attorneys' fees under this common law doctrine is not barred or limited by sovereign immunity or any other doctrine. This proceeding is simply not a suit against the State. Rather, the Judicial Qualifications Commission, an "element" of the State courts system, investigated and made the decision to institute this proceeding against Judge Holder. Indeed, to find that the doctrine of sovereign immunity applied in this circumstance would prevent Judge Holder from enforcing a right guaranteed to him by the law of this State. As a result, Judge Holder would have been forced to defend a complex, protracted, and very expensive case because of a State agency's deliberate decision to proceed against him, but without meaningful legal recourse for the significant expenses that he has necessarily incurred. Such an application would transform the doctrine of

sovereign immunity into a sword not a shield in direct contravention of Florida law.

Finally, in determining Judge Holder's entitlement to reimbursement for his attorneys' fees under the *Thornber* doctrine, no additional parties are proper or necessary. If this Court rules that Judge Holder is entitled to reimbursement, the issue of a reasonable amount of attorneys' fees and an appropriate funding mechanism will become ripe for this Court's consideration. Likewise, no additional parties are necessary in order to determine the amount of attorneys' fees to be awarded. When the issue of an appropriate funding mechanism becomes ripe, the State Courts Administrator ("SCA") may have an interest in the proceeding, though Judge Holder does not believe that the SCA is a necessary party. This is based on the fact that this Court is vested with the responsibility of submitting budget requests to the legislature for the purposes of obtaining the necessary funding. Therefore, any funding necessary for an award of attorneys' fees should be requested by this Court, through its SCA who appears before the legislature on the Court's behalf.

ARGUMENT

I. JUDGE HOLDER IS ENTITLED TO REIMBURSEMENT OF THE ATTORNEYS' FEES INCURRED IN HIS SUCCESSFUL DEFENSE OF THE JQC'S CHARGES UNDER THE *THORNBUR* DOCTRINE.

It is well-established under Florida law that a public officer is entitled to be reimbursed at public expense for the attorneys' fees incurred in successfully defending a lawsuit or misconduct charges while performing public duties and serving a public purpose. *See e.g. Thornber v. City of Fort Walton Beach*, 568 So. 2d 914 (Fla. 1990); *Estes v. City of N. Miami Beach*, 227 So. 2d 33 (Fla. 1969); *Ellison v. Reid*, 397 So. 2d 352 (Fla. 1st DCA 1981). As this Court has stated, "the purpose of the common law rule is to avoid the chilling effect that a denial of representation might have on public officials in performing their duties properly and diligently." *Thornber*, 568 So. 2d at 917. In order to be entitled to attorneys' fees, a public official must establish the following:

1. the litigation arose out of or in connection with the performance of his or her official duties; and
2. the litigation served a public purpose.

Id.

Indeed, this common law entitlement to attorneys' fees, which arises independent of any statute, has been broadly construed. *See, e.g., Ellison*, 397 So. 2d 352 (awarded fees to county property appraiser for defense of charges that he plagiarized an appraisal report and engaged in other misconduct while attending

Department of Revenue training program). In fact, this Court has held that section 111.07, Florida Statutes, which provides for reimbursement of public officials' attorneys' fees for the defense of civil actions, does not supplant the common law doctrine. *Thornber*, 568 So. 2d at 918. Rather, the common law doctrine provides to public officials the clear right to seek reimbursement for attorneys' fees in proceedings other than civil actions. *Id.* at 918, 919 n. 7 (public officials should be reimbursed for the fees incurred by successful defense of charges relating to ethical misconduct in connection with their official duties).

Importantly, Florida's Attorney General has expressly recognized that judges should be reimbursed for their legal fees in successfully defending JQC charges if the two-pronged test set forth in *Thornber* ("*Thornber* test") is met. Op. Att'y Gen. Fla. 93-21 (1993). This Court has held that these opinions, while not binding, are highly persuasive. *Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459 (Fla. 2005).

Given this overwhelming authority, the JQC has conceded that the *Thornber* doctrine applies to this case. [JQC Resp. p. 5, at App. 5.] Indeed, without the ability to seek such reimbursement, judges would face a choice between loss of reputation and removal from the bench on one hand, and mounting an effective defense—which could lead to financial ruin—on the other. *See In re Hapner*, 737 So. 2d 1075, 1077 (Fla. 1999) ("an accused judge should not be placed in the

position of foregoing a defense against unwarranted charges because he or she might otherwise face financial ruin if unsuccessful in the proceeding”); Fla. Jud. Qual. Comm’n R. 15(a). Florida law does not require a judge to make such a Hobson’s choice. Instead, as set forth below, Judge Holder is entitled to an award of attorneys’ fees pursuant to the *Thornber* doctrine.

A. This litigation arose out of or in connection with the performance of Judge Holder’s official duties.

The first prong of the *Thornber* test focuses on whether the litigation “arise[s] out of or in connection with the performance of [Judge Holder’s] official duties.” *Thornber*, 568 So. 2d at 917. Here, the Charges and the resulting litigation clearly arose out of or in connection with an attempt by an anonymous person or persons⁸ to interfere with Judge Holder’s participation in the courthouse corruption investigation. Significantly, Judge Holder’s participation in this corruption investigation was not just in connection with, but, in fact, was required by, his judicial duties. Codes of Judicial Conduct, Canon 3D(1) states as follows:

A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action.

⁸ *i.e.*, whoever fabricated the purported Holder paper, typed the note, and slipped the unmarked envelope under Jeffrey Del Fuoco’s Army Reserve Office door.

(Emphasis added.) Consequently, when Judge Holder was approached by law enforcement agents in connection with the courthouse corruption investigation, he did exactly what the Judicial Canons required of him—he told the agents what he knew and suffered the attendant consequences.⁹ Thus, by cooperating in the courthouse corruption investigation, Judge Holder discharged responsibilities that the Canons required.

In fact, Canon 3D(3) states that “[a]cts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) *are part of a judge’s judicial duties....*” Codes of Jud. Conduct, Canon 3D(3) (emphasis added). It was Judge Holder’s discharge of his “judicial duties” that motivated an anonymous person or persons to steal Judge Holder’s actual AWC paper from his chambers. Special Counsel for the JQC effectively conceded this point during closing argument when he stated that Holder’s actual paper and the Hoard paper were stolen from Judge Holder’s chambers.

Indeed, the overwhelming evidence at trial established the requisite connection to the courthouse corruption investigation, including the fabrication of the purported Holder paper. Significantly, the fact that the envelope containing the

⁹ Detective Bartoszak testified at trial that the courthouse corruption investigation team was concerned that Judge Holder’s activities were being monitored by targets of the investigation. Judge Holder was advised by federal law enforcement agents to carry a weapon, and he was provided with a secure cell phone to communicate with the authorities. [Bartoszak Tr. pp. 7-8, at App. 3.]

Papers was slipped under the door of Mr. Del Fuoco—who had been the prosecutor assigned to that case—demonstrates that the objective of this scheme was to derail the courthouse corruption investigation. [Bartoszak Tr. p. 4, at App. 3.] Moreover, the testimony of a) Judge Holder, b) four third-party witnesses who saw Judge Holder’s actual Air War College paper at or about the time it was submitted, and c) an expert on applied linguistics, established that the purported Holder paper was not the paper that Judge Holder actually submitted to the AWC in 1998. This testimony included the following:

- Judge Holder testified that he was “absolutely certain” that the purported Holder paper was not his paper. [Holder Tr. p. 76, at App. 6.];
- John Vento, a respected member of The Florida Bar and retired Air Force Colonel, reviewed Judge Holder’s AWC paper shortly after it was written and testified that the purported Holder paper “cannot be the same paper . . . [n]o doubt in my mind about it.” [Vento Dep. pp. 71, 73, at App. 12];
- James Russick, another respected member of The Florida Bar and retired Air Force Lieutenant Colonel, testified that he also reviewed the actual Holder paper and did not “recognize any part of this [purported Holder] paper as being [Judge Holder’s] work.” [Aff. of Lt. Col. Russick ¶ 9, at App. 13.];

- Ken Lawson, a former federal prosecutor, testified that he did not notice any similarities between the Hoard paper and the actual Holder paper that he had received from Judge Holder in early 1998, and that he never gave Jeffrey Del Fuoco a graded copy of Judge Holder's paper, directly refuting Mr. Del Fuoco's testimony. [Lawson Dep. pp. 15, 16, at App. 14.];
- Lorraine Nasco, Judge Holder's former judicial assistant, testified that the purported Holder paper was not the one she typed and submitted to the Air Force. [Nasco Tr. p. 13, at App. 8]; and
- Dr. John T. Crow, a Fulbright lecturer and professor of linguistics, carefully examined Judge Holder's writing style, syntax, and use of grammatical constructs from multiple writing samples of Judge Holder dating back several years. After analyzing the purported Holder paper, Dr. Crow testified that it was his opinion that Judge Holder was not the author of the purported Holder paper. [Crow Dep. pp. 15-16, at App. 15.]

This testimony regarding fabrication was further buttressed by the testimony of Detective Bartoszak that another cooperating witness in the courthouse corruption investigation had also been retaliated against through the use of fabricated documents. [Bartoszak Tr. p. 19, at App. 3.]

From the inception of this proceeding, the JQC maintained that the Charges were sufficiently related to Judge Holder's judicial duties to justify his suspension from the bench—despite the fact that the alleged conduct took place over five

years earlier.¹⁰ For the Commission to now argue that this litigation arises neither out of nor in connection with the performance of Judge Holder’s official duties—particularly given the overwhelming evidence presented at trial—is, at best, a convenient change in position and, in any event, is unavailing. While there may be JQC proceedings involving alleged personal moral failures of judges that do not involve official conduct but which would directly affect their fitness to serve, this was not such a case. Here, a judge prevailed in a proceeding which arose out of an attempt to prevent him from effectively performing a judicial duty—cooperating with a law enforcement investigation of alleged courthouse corruption. Accordingly, this litigation clearly arose out of or in connection with the performance of Judge Holder’s official duties.

¹⁰ The JQC alleged as follows: “These acts, if they occurred as alleged, would impair the confidence of the citizens of this State in the integrity of the judicial system and in you as a judge, would demean your judicial office, would constitute a violation of the cited Canons of the Code of Judicial Conduct and the Rules of Professional Conduct, would constitute conduct unbecoming a member of the judiciary, would demonstrate your present unfitness to hold the office of judge, and would warrant discipline, including, but not limited to, your removal from office.” [Commission’s Notice of Formal Charges, at App. 1.] The Commission also took the extraordinary step of issuing an Order to Show Cause “why the [JQC Investigative] Panel should not recommend to the Supreme Court that [Judge Holder] be suspended from office, either with or without compensation, while . . . [this matter] is pending.” [Commission’s Am. Order to Show Cause, at App. 2.]

B. This litigation served a public purpose.

The Commission has conceded that this litigation clearly served a public purpose stating:

Unquestionably, the resolution of the highly publicized charges against Judge Holder *and matters relating thereto* served a public purpose....

[JQC Resp. pp. 5-6, at App. 5 (emphasis added)]. The related matters acknowledged by the Commission involve Judge Holder's participation as an undercover agent in the courthouse corruption investigation. [*Id.* at p. 6 n.1] The decision of the Commission to concede the public purpose prong of the *Thornber* test is not surprising. From its inception, this proceeding has been highly publicized and viewed as inextricably entwined with the courthouse corruption investigation, in which Judge Holder was a cooperating witness. [Appendix to Respondent's Motion for Award of Attorneys' Fees, filed August 9, 2005.] Thus, it simply cannot be reasonably disputed that this proceeding directly raised issues relating to the public's confidence in, and proper functioning of, the judiciary, particularly in Hillsborough County, Florida. Accordingly, the public clearly had an interest in, and the judiciary the responsibility to ensure, the proper functioning of the JQC process as it related to these highly publicized Charges. *Thornber*, 568 So. 2d at 917 (public had interest in knowing that the proper procedures were being followed with regard to recall petition to remove council members from office).

Moreover, this Court has clearly recognized that there is a public purpose to be served in protecting public officials from improper charges. *Thornber*, 568 So. 2d at 917 (there is a public purpose to be served in the City “protecting its officers from untimely and illegal recall petitions”). The successful defense of Judge Holder resulted in an accomplished and respected jurist remaining on the bench. Indeed, Judge Holder is extremely well regarded in both the legal community and the community at large. He was elected by the voters of Hillsborough County with over 63% of the vote when he ran for an open County Court judgeship. [Holder Tr. p. 55, at App. 6.] Throughout his tenure on the bench, Judge Holder has not only carried a significant case load, but has earned the confidence and respect of the citizens of Hillsborough County as well as his peers. This is exemplified by the fact that in 2000, Judge Holder was selected by his peers as the Judge Patton Jurist of the Year for the Thirteenth Judicial Circuit. [*Id.* at p. 60]

In addition, because of Judge Holder’s vindication, the overall functioning of the Circuit Court, as well as the interests of the attorneys and the litigants with matters pending before the Judge, were not adversely impacted. Ensuring the overall effective and efficient functioning of a government body—in this case, the judiciary, has been repeatedly recognized as serving a public purpose. *Thornber*, 568 So. 2d at 917; *See also Estes v. City of N. Miami Beach*, 227 So. 2d 33 (Fla. 1969); *Miller v. Carbonelli*, 80 So. 2d 909, 909 (Fla. 1955). Ultimately, Judge

Holder's successful defense of the Charges not only restored or enhanced public confidence in his position as a jurist, but restored or enhanced public confidence in the judiciary, and has prompted discussion regarding whether reform of the JQC is appropriate. Based on these factors, Judge Holder's defense of the JQC proceeding clearly served a public purpose.

II. NEITHER THE DOCTRINE OF SOVEREIGN IMMUNITY, NOR ANY OTHER DOCTRINE OR STATUTE, PROHIBITS OR LIMITS THE AWARD OF ATTORNEYS' FEES IN THIS PROCEEDING.

The doctrine of sovereign immunity is a “fundamental tenet of Anglo-American jurisprudence” that prohibits suits against the State. *Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 471 (Fla. 2005). Accordingly, under the Florida Constitution, no suit can be brought against the State unless authorized by the Legislature through general law. Art. 3, § 22, Fla. Const.

This proceeding is simply not a suit against the State. Rather, the Commission, an “element” of the State courts system, investigated and made the decision to institute this proceeding against Judge Holder. *See* § 29.004, Fla. Stat. (declaring the JQC to be an “element” of the State courts system for purposes of funding). When, as here, the State voluntarily decides to bring an action, it cannot hide behind the cloak of sovereign immunity. *See Dade County v. Carter*, 231 So. 2d 241 (Fla. 3d DCA 1970) (when the State brings an action, it cannot hide behind

the cloak of sovereign immunity); § 768.14, Fla. Stat. (waiving sovereign immunity when the State institutes an action in tort); *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So. 2d 481 (Fla. 2001) (sovereign immunity does not apply “to restrict award of damages against a governmental entity for the erroneous issuance of a temporary injunction”). For this reason, the doctrine of sovereign immunity does not apply to this proceeding.

Indeed, even in suits brought against the State, the doctrine is not a universal concept except in tort suits—which this proceeding was not. As this Court has stated:

As to tort actions, the rule is universal and unqualified unless relaxed by the State, but in other fields, it is not universal in application and cannot be said to cover the field like the ‘dew covers Dixie.’

State Road Dep’t of Fla. v. Tharp, 1 So. 2d 868 (Fla. 1941). Thus, among other things, sovereign immunity does not afford protection against an unconstitutional statute, against a duty imposed on a State officer by statute, or against illegal acts of the State. In fact, it has been expressly held that sovereign immunity “does not apply to suits in which the interest of the State is merely in the vindication of its laws, or their enforcement as affecting the public at large or the rights of individuals or corporations.” *State ex rel. Fl. Dry Cleaning and Laundry Board v. Atkinson*, 188 So. 834 (Fla. 1938).

Moreover, Judge Holder's right to be reimbursed for his attorneys' fees at public expense has expressly been made part of Florida law. Art. 12, § 6(a), Fla. Const. (laws in effect upon 1968 revision to Florida Constitution remain in force in this state). Therefore, to find that the doctrine of sovereign immunity applied in this circumstance would prevent Judge Holder from enforcing a right guaranteed to him by the law of this State. In essence, this would have the effect of judicially abolishing a common law right—at least in this context. *See, e.g., State of Fla. v. Koch*, 582 So. 2d 5 (Fla. 1st DCA 1991) (sovereign immunity statute does not abolish common law right in existence as part of the laws of Florida of 1968); *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). This, of course, is almost never done. *See State v. Egan*, 287 So. 2d 1, 6-7 (Fla. 1973).

Consequently, Judge Holder would have been forced to defend a complex, protracted, and very expensive case because of a State agency's deliberate decision to proceed against him, but without meaningful legal recourse for the reasonable expenses that he has necessarily incurred. Such an application would transform the doctrine of sovereign immunity into a sword not a shield. *Provident Mgmt. Corp.*, 796 So. 2d at 487 (sovereign immunity intended to be a shield not a sword); *See also Am. Home Assurance Co.*, 908 So. 2d at 471 (sovereign immunity intended to protect government from profligate lawsuits). Accordingly, for these reasons, sovereign immunity simply should not, and does not, apply in this circumstance.

To find otherwise would render would render a public official's right to reimbursement "nothing more than a tinkling of empty words." *State Road Dept. of Florida*, 1 So. 2d at 870.

III. NO ADDITIONAL PARTIES ARE PROPER OR NECESSARY FOR THE ADJUDICATION OF JUDGE HOLDER'S ENTITLEMENT TO ATTORNEYS' FEES.

In determining whether Judge Holder is entitled to reimbursement for his attorneys' fees under the *Thornber* doctrine, no additional parties are proper or necessary. If this Court rules that Judge Holder is entitled to reimbursement, the issue of a reasonable amount of attorneys' fees and an appropriate funding mechanism will become ripe for this Court's consideration. Likewise, no additional parties are necessary in order to determine the amount of attorneys' fees to be awarded. When the issue of an appropriate funding mechanism becomes ripe, the State Courts Administrator ("SCA") may have an interest in the proceeding, though Judge Holder does not believe that the SCA is a necessary party. *See Fla. R. Jud. Admin. 2.030(e)*.

Importantly, funding for the state courts system, which includes the Commission, is provided by state revenues appropriated by general law. Art. 7, § 1, Fla. Const. ("no money shall be drawn from the treasury except in pursuance of appropriation made by law"); Art. 5 § 14(c), Fla. Const. (Court has no power to fix appropriations). This Court is vested with the responsibility of submitting budget

requests to the legislature for the purposes of obtaining the necessary funding. Fla. R. Jud. Admin. 2.030(e). Therefore, any funding necessary for an award of attorneys' fees should be requested by this Court, through its SCA who appears before the legislature on the Court's behalf. *Id.* In fact, counsel for Judge Holder previously placed the SCA on notice of Judge Holder's attorneys' fee claim. [Letter from David B. Weinstein to the Hon. Manuel Menendez (July 25, 2005), at App. 16.]

Ultimately, the failure to establish an appropriate funding mechanism would render Judge Holder's entitlement to attorneys' fees illusory. As recognized by Florida courts, "a right without a remedy is a ghost in the law and difficult to grasp." *Dade County v. Certain Lands*, 247 So. 2d 787, 790 (Fla. 3d DCA 1971). The most obvious funding mechanism would be the submission of a line item in the Court's yearly budget request. A similar procedure is followed in the federal system. Specifically, 28 U.S.C. § 361 provides as follows:

Upon the request of a judge whose conduct is the subject of a complaint under this chapter, the judicial council may, if the complaint has been finally dismissed under section 354(a)(1)(B), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation which would not have been incurred but for the requirements of this chapter.

This statute makes the Director of the Administrative Office of the United States Courts (the apparent federal equivalent of the SCA) the person responsible for obtaining the necessary appropriation. Under the statute, the Director regularly submits a specific appropriation request to Congress. Congress, in turn, approves a general appropriations bill for the entire amount of salaries and other expenses, from which a specific portion of the amount appropriated is allocated for reimbursement of attorneys' fees or other expenses incurred by judges in successfully defending themselves in disciplinary proceedings. The Director then approves reimbursement of legal expenses, as recommended by the Circuit Judicial Council.¹¹

Another recognized funding mechanism is through an established Court contingency or trust fund. This process is followed in Delaware, which has a rule that provides for reimbursement to private counsel for attorneys' fees incurred by judges in disciplinary proceedings. Del. R. Ct. 68. If an award of attorneys' fees is approved in accordance with this rule, the Supreme Court Administrator pays the amount from the Supreme Court's "pro hac vice" fund, which is comprised of

¹¹ This information was provided by Mr. William Burchill, General Counsel for the Administrative Office of the United States Courts.

money collected yearly from pro hac vice applicants.¹² In Florida, based on research conducted to date, the Court presently appears to have existing trust or contingency funds for different purposes. However, it is not clear at this juncture whether any of those funds could be utilized for this purpose and, if so, whether legislative approval would be required.

Based on the above analysis, no other additional parties, other than perhaps the SCA, appear to be proper or necessary parties to any part of this attorneys fees proceeding. However, while a public official's common law right to reimbursement of attorneys' fees has been in existence for well over a hundred years, it is a very rare occurrence for a Florida JQC matter to proceed to trial and for the respondent judge to prevail. Indeed, the issue of reimbursement in this context has never been directly addressed by this Court. Therefore, if additional parties or possible other avenues for funding are identified, Judge Holder respectfully requests that he be afforded the opportunity to supplement his brief on this issue.

¹² Information relating to Delaware procedure was provided by Ms. Margaret Naylor, the Clerk of the Court on the Judiciary, and Mr. Stephen Taylor, the Supreme Court Administrator. Mr. Taylor further advised that if the contingency funds are insufficient, the Court would inform the State Budget Director that this was a legitimate bill that needed to be paid on behalf of a state officer.

CONCLUSION

A decision by this Court that Judge Holder is entitled to recover reasonable attorneys' fees would not be the beginning of a "raid on the treasury." As a historical matter, judges rarely prevail in JQC hearings. In fact, the last time a judge prevailed at trial against the JQC was approximately 20 years ago in 1986. In this rare case, Judge Holder denied all wrongdoing and has prevailed, notwithstanding a lengthy and vigorous prosecution by the JQC. As set forth above, this litigation clearly arose out of or in connection with the performance of Judge Holder's official duties and served a public purpose. Under these circumstances, Judge Holder is entitled to be reimbursed from public funds for his attorneys' fees incurred in his successful defense against the Commission's Charges. Accordingly, Judge Holder respectfully requests that this Court enter an Order granting reimbursement of his reasonable attorneys' fees in accordance with the *Thornber* doctrine.

(Attorney signature appears on following page.)

Dated: February 3, 2006.

Respectfully Submitted,

David B. Weinstein
Florida Bar No.: 0604410
Kimberly S. Mello
Florida Bar No.: 0002968
Bales Weinstein
Post Office Box 172179
Tampa, FL 33672-0179
Telephone: (813) 224-9100
Telecopier: (813) 224-9109

-and-

Juan P. Morillo
Florida Bar No.: 0135933
Steven T. Cottreau
Specially Admitted
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Telecopier: (202) 736-8711

Counsel for Judge Gregory P. Holder

CERTIFICATE OF SERVICE

I certify that on February 3, 2006, a copy of the foregoing, Respondent's Initial Brief, has been served by regular U.S. Mail to Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; John Beranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, FL 32302; Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell, Ditmar, DeVault, Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202; and John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501.

Attorney

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Attorney