STATE OF MICHIGAN
IN THE SUPREME COURT

COMPLAINT AGAINST:

HON. BRUCE U. MORROW
3RD Circuit Court
1441 St. Antoine, Courtroom 404
Detroit, Michigan 48226
_____/

DOCKET NO. 146802

FORMAL COMPLAINT NO. 92

BRIEF IN SUPPORT OF THE COMMISSION'S DECISION AND RECOMMENDATION FOR ORDER OF DISCIPLINE

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

JUDICIAL TENURE COMMISSION
OF THE STATE OF MICHIGAN

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JURISDICTION

Respondent is, and at all material times was, a judge of the 3RD Circuit Court for the County of Wayne. As a judge, Respondent is subject to all the duties and responsibilities imposed on him by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205. The Michigan Constitution of 1963, Article 6, Section 30, confers authority upon this Court to act upon the recommendation of the Judicial Tenure Commission. MCR 9.224 and MCR 9.225 provide the method for review by this Court.

STANDARD OF PROOF

The standard of proof in judicial disciplinary proceedings is by a preponderance of the evidence. *In re Justin,* 490 Mich 394, 413 (2012).

STANDARD OF REVIEW

The Supreme Court reviews the Commission's findings of fact on a *de novo* basis. *In re Jenkins,* 437 Mich 15 (1991). The Court also reviews the recommendation of the Commission *de novo. In re Hathaway,* 464 Mich 672 (2001).

COUNTER-STATEMENT OF PROCEEDINGS

On March 6, 2013, based on a Request for Investigation from Wayne County Prosecutor Kym Worthy and after a preliminary investigation, the Judicial Tenure Commission filed Formal Compliant No. 92 (FC) against the Honorable Bruce U. Morrow, a judge of the Third Circuit Court in Wayne County. A request for appointment of a Master was filed with the complaint, and, on March 15, 2013, the Supreme Court appointed the Hon. Edward Sosnick as Master.

Respondent, represented by attorney Donald Campbell, filed his Response to the JTC Complaint and Affirmative Defenses on March 20, 2013. The Master entered a scheduling order on April 18, 2013.

The Examiner's witness list and exhibit list were filed May 14, 2013. Respondent's witness list and exhibit list were filed the same day. On May 21, 2013 Respondent filed motions for Summary Disposition and to Allow Serial Questioning of Respondent. The Examiner filed responses to those motions on May 28, 2013.

On May 29, 2013 Respondent filed his Response to the JTC Amended Complaint.[1] On May 31 Respondent filed his supplemental witness list. The Commission's Amended Complaint was filed on June 3.

On June 3, 2013 the Master heard oral arguments on Respondent's motions. At the conclusion of the arguments the Master stated he would take Respondent's Motion for Summary Disposition under advisement until the end of the formal hearing. Respondent's Motion to Allow Serial Questioning of Respondent was resolved by the parties prior to arguments and the resolution was placed on the record. The Examiner filed an amended exhibit list on June 4.

[1] The Amended Complaint was provided to Respondent as a courtesy prior to filing and Respondent filed his response before it was officially filed.

The formal hearing began on June 10, 2013. Testimony was taken June 10, June 11, June 12, June 13, and concluded on June 17. The Master heard closing arguments on June 19.

The Master issued a post-hearing Scheduling Order on June 28, 2013. The Examiner's Proposed Findings of Fact and Conclusions of Law was filed July 10. Respondent's Proposed Findings of Fact and Conclusions of Law was filed July 17.

The Commission issued a Scheduling Order on August 5. The Master issued his report on August 8, 2013. Both Respondent and the Examiner filed Objections to the Report of the Master on September 13. Respondent filed a Response to the Examiner's Objections on September 27. The Commission conducted a public hearing and heard oral arguments from the parties on October 14. The Commission issued its Decision and Recommendation on December 9, 2013.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE COMMISSION PROPERLY FOUND THAT RESPONDENT COMMITTED JUDICIAL MISCONDUCT?

The Commission answers "YES."

Respondent answers "NO."

II. WHETHER THE COMMISSION'S RECOMMENDATION OF A 90-DAY SUSPENSION FROM OFFICE IS WARRANTED BASED UPON RESPONDENT'S ACTS OF MISCONDUCT?

The Commission answers "YES."

Respondent answers "NO."

INTRODUCTION

Based on a request for investigation filed by the Wayne County Prosecutor's Office (WCPO) and after a preliminary investigation, the Judicial Tenure Commission (Commission) filed Formal Compliant 92 (FC)[2] against the Honorable Bruce U. Morrow (Respondent), judge of the Third Circuit Court, Wayne County. The FC sets out factual allegations for ten cases (labeled A through J) and includes conclusions of law that Respondent's conduct violates various canons of judicial ethics, as well as statutes, court rules, and the Michigan Constitution. A formal hearing was held before the Court's appointed Master, the Hon. Edward Sosnick.

Although the Master found that the factual allegations of the FC were proven, he concluded that Respondent committed misconduct in only two of the cases. The Master accepted Respondent's arguments that Respondent had acted in "good faith." The Master's conclusions of law were thus based on his erroneous assessment of Respondent's subjective motivations.

The Master admitted in his findings in the *McGee* case (one of the two cases in which the Master found that Respondent committed misconduct) that he "has consistently given Respondent leeway where there is a good faith explanation of his actions." (Master's Report, hereafter MR, p 22) In his findings in the *Boismier* case the Master stated,

> Though his methods are sometimes unorthodox, "his heart is in the right place" ensuring in his mind, that justice prevails in the criminal justice system. (MR p 38)

"His heart is in the right place" is a conclusion based on the Master's belief of Respondent's subjective intent, not an objective finding based on the facts the Master found were proven by a preponderance of the evidence.

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[2] An Amended Formal Complaint correcting some minor errors regarding dates etc. was filed by the Examiner without objection by Respondent. In this brief, FC will refer to the Amended Formal Complaint.

After a review of the record of the Formal Hearing, the Master's Report, and oral argument by the parties, the Commission filed its Decision and Recommendation (D&R)[3] and properly rejected the Master's conclusions of law as to misconduct in six cases. The Commission correctly stated that Respondent's conduct must be evaluated *objectively*, rather than focus on subjective elements and cited *In Re Ferrara*, 458 Mich 350, 362, (1998), citing *In re Tschirhart*, 422 Mich 1207, 1209 – 1210; 371 NW2d 850 (1985):

> The proper administration of justice requires that the Commission view the Respondent's actions in an objective light. The focus is necessarily on the impact his statements might reasonably have upon knowledgeable observers. Although the Respondent's subjective intent as to the meaning of his comments, his newly exhibited remorsefulness and belated contrition all properly receive consideration, any such individual interests are here necessarily outweighed by the need to protect the public's perception of the integrity of the judiciary.
>
> (D&R pages 2-3)

The Commission's majority decision found that based on this objective standard Respondent committed judicial misconduct in eight of the ten cases in the FC.[4]

Respondent's Petition and Brief to Reject and/or Modify the Commission's Recommendations makes three general arguments that Respondent committed no misconduct and that the sanction recommended is too harsh. Respondent argues that the small number of cases in the FC means that Respondent cannot be held accountable for misconduct in those cases because the misconduct is not *persistent*, a word used in MCR 9.205(B)(1). Respondent's argument fails for several reasons. Respondent ignores the words in that court rule preceding the

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[3] The Commission's majority D & R was signed by seven of the eight Commissioners involved in the case (one Commissioner was recused.) One Commissioner, the Honorable Michael M. Hathaway, signed the D & R but filed a concurring and dissenting opinion disagreeing with the majority's conclusion of misconduct in the *Orlewicz, Wilder,* and *Boismier* cases, but agreeing with the majority that Respondent committed judicial misconduct in five cases and as to the sanction of a 90-day suspension.

[4] The Commission's majority decision inexplicably makes no findings and fails to even mention two of the cases in the FC, the *Slone* and *Jones* cases. The concurring and dissenting opinion states that the Commission agreed with the Master that there was no misconduct in these cases.

word "persistent" that state "Misconduct in office, *includes but is not limited to*...." Respondent also ignores paragraph (B)(2) of the court rule which states,

> Conduct of violation of the Code of Judicial Conduct or the Rules of Professional Conduct may constitute a ground for action with regard to a judge whether the conduct occurred before or after the respondent became a judge or was related to judicial conduct.

The Michigan Code of Judicial Conduct (MCJC) requires that a judge be faithful to the law and impartial, and the Commission found that Respondent repeatedly violated these and other tenets in the Code. Respondent argues that because these cases represent only a small fraction of the thousands of cases Respondent has heard they cannot be the basis for misconduct. The numbers are irrelevant. Every judge hears thousands of cases in the course of a career, and is expected to follow the MCJC in all of the cases he or she handles. A judge is not immune from discipline simply because he violates the Code in only a few cases.

Respondent minimizes his actions and inaccurately argues that this disciplinary case is based solely on his legal and procedural decisions. Respondent argues that he is being disciplined for decisions made in "good faith." Respondent uses the "slippery slope" argument of dire consequences if judges are disciplined for such decisions. Respondent simply fails to recognize or acknowledge that it is not merely his rulings but the *manner* in which he made those rulings as well as *how* he acted in the cases in the FC that form the basis for the Commission's conclusions that he committed misconduct. Respondent ignored the law, based decisions on discussions and proceedings for which he failed to make proper records, failed to remain impartial, advocated for the defendant, refused to give written orders, either acted improperly or created the appearance of impropriety, and ignored the safety of others. While MCR 9.203 (B) states that, "An erroneous decision by a judge made in good faith and with due diligence is not misconduct" the Commission concluded that the evidence proved that Respondent's conduct

could not be excused as merely "good faith" decisions. It is not only the decisions themselves, but the process in which they were made by which Respondent committed misconduct. In at least three cases (*Moore, Redding,* and *Hill*) the misconduct does not involve *any* legal decision, but involves conduct that a responsible, fair, and impartial judge should not do.

For the cases involving his legal decisions, Respondent is now, *after the fact,* attempting to legally justify his actions. He presents lengthy legal arguments to try to persuade this Court that the law he allegedly violated was ambiguous and his decisions, while erroneous, cannot be misconduct. His arguments only demonstrate the point he misses: that he made no such analysis at the time and gave no legal reasons when he acted.

- In the *Orlewicz, Boismier,* and *Wilder* cases he failed to make any record of off-the-record discussions that he later acted upon;
- In the *Orlewicz, Fletcher,* and *McGee* cases, he failed to give *any* reasons for his decisions including why he was not following the law;
- In the *Orlewicz,* and *McGee* cases, he failed or refused to sign written orders;
- He failed to hold hearings as required by court rule (*Orlewicz*) or by order of the Court of Appeals (*Boismier*). The Court of Appeals (COA) remanded the both cases to Respondent to make a record of the reasons for his actions, and in both he made a record based solely on his own memory and his own justifications and did not allow the parties to even attend or have any input;
- In *Wilder* he created a fictitious concept of a "conditional dismissal" to justify his actions in dismissing a case;
- In the *Moore* and *Redding* cases he failed to make a record of actions he took (*Moore*) or that occurred (*Redding*) off the record.

There was little factual dispute, if any, in the cases in the FC. The Master found the factual allegations proven. Respondent's actions are a matter of record in the court documents, transcripts, and Court of Appeal orders and opinions in evidence and are facts which he cannot dispute. Because he cannot dispute the facts, Respondent's attempts to justify his actions after

the fact are instead intended to deflect attention from his own conduct. All of Respondent's erroneous decisions that the WCPO appealed were reversed. Some of the cases in the FC involved conduct that could not be appealed. The complaint filed by the WCPO was not about wrongfully-decided rulings by Respondent. The complaint was about Respondent continually doing what he wanted regardless of the law or his responsibility to be fair and impartial.

In his brief, Respondent provides a factual and procedural history that is argumentative and somewhat selective of the facts. This brief will address the facts of the cases in each individual section. The factual record clearly supports the Decision and Recommendation of the Commission. Respondent's actions cannot be excused simply because Respondent might have *thought* he was doing the right thing. Contrary to Respondent's explanations, the evidence shows that Respondent simply did what he wanted to, regardless of the requirements of the law or his obligation to be impartial.

ARGUMENT

1. *People v Orlewicz* (Case A in the FC)

A. Facts

Defendant's attorney, Elizabeth Jacobs, found out that there was a media request to allow cameras in the hearing on her post-conviction motion for a new trial that was scheduled for February 27, 2009. She requested a meeting with Respondent and the assistant prosecuting attorney (APA), Jeffrey Caminsky, to discuss the media request. The attorneys met with Respondent on February 13 in his chambers. At this meeting, Ms. Jacobs stated her objections to the media coverage and also asked to close the court to the public. The same day she filed "Defendant's Objections to Request by WXYZ-TV to Record a Post-Conviction Hearing." (Exhibit (Ex) 3) The last line requested the court to reject the media request and close the court.

On February 18, 2009 Respondent signed an order denying the motion for media coverage. This order *did not* state that the courtroom was closed to the public. (Ex 4) Respondent never placed the in-chambers conversation on the record, never held a hearing on the request to close the court to the public, and never signed an order closing the court to the public. Respondent simply closed the courtroom.

The next action was the hearing on February 27. When the hearing began, the courtroom was already closed before Respondent made any record as to why he closed the court. At the beginning of the hearing Ms. Jacobs stated that the defense asked that this be a closed proceeding (Ex 5, p 3). Mr. Caminsky objected (Ex 5, p 4-5) and stated that the Sorensen family (the parents of the murdered victim) was going to attempt to attend and that they have a right to attend (Ex 5, p 5). The Sorensens were not in the courtroom at the time, but when they entered Respondent excluded them. (Ex 5, p 6) Mr. Caminsky identified them to the court as the Sorensens and stated they had a constitutional right to attend the proceeding. Respondent stated,

> Okay. Well, I don't think any constitutional right is absolute in and of itself, and I think in this particular case the record sufficiently supports the need for this to be closed so I'm gonna close it. (Ex 5, p 6)

The prosecutor filed a complaint for a writ of superintending control (Ex 7) and Ms. Jacobs filed a response (Ex 8). Ms. Jacobs filed a motion to obtain the transcript of the February 27 hearing. (Ex 9) The prosecutor filed a motion in the COA to allow a supplement to the complaint for superintending control. (Ex 10) At an April 3, 2009 hearing on Ms. Jacob's motion, Respondent did not allow APA Caminsky to renew his objection to closing the court nor allow him to address Ms. Jacobs's motion because he had not filed a written response. (Ex 11, p 4-7) Respondent denied the motion for the transcript. (Ex 12) The COA entered an order dated April 14, 2009 (Ex 13) remanding the case to the trial court to make appropriate findings

regarding closing the court. Respondent made a record without the parties or attorneys present on April 27, 2009. (Ex 14) On April 29, 2009 the COA entered an order stating that Respondent failed to articulate any valid reason for closing the proceeding, and directing that future proceedings be conducted in open court. (Ex 15) The order also ruled the prohibition of the transcript was without basis and directed Respondent to permit transcription.

B. <u>Respondent's Actions Constitute Judicial Misconduct</u>

MCR 8.116 (D) (1) states,

> (1) Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding unless
>
> (a) a party has filed a written motion that identifies the specific interest to be protected, or the court *sua sponte* has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;
>
> (b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and
>
> (c) the court states on the record the specific reasons for the decision to limit access to the proceeding.

While Ms. Jacobs did not file a written *motion* to specifically request closure of the court to the public, she requested such in her written objection to the media coverage, and both she and Mr. Caminsky agreed that she made the request for closure in their in-chambers discussion with Respondent. (Transcript of the formal hearing (T), p 71-72; 73; p 691-692) Respondent then completely ignored MCR 8.116 (D). Respondent did not hold a hearing on the request. Respondent did not state his reasons for closing the court. MCR 8.116(D) (3) requires the court to forward a copy of the order limiting access to a proceeding to the State Court Administrative Office (SCAO). Respondent of course could not comply because he had *never signed* a written order closing the court.

When the hearing on February 27 began, the court was *already* closed before Respondent made *any* record.[5] The transcript shows that when Respondent stated that the Sorenson's constitutional right was not absolute and said "the record sufficiently supports the need for this to be closed so I'm gonna close it" there was *no* record of the reasons for closing the court other than Respondent's conclusory statement of a *fait accompli.* Respondent closed the courtroom without making *any* record of his reasons for doing so.

The evidence established:

- Respondent relied on an off-the-record discussion to close the court despite the prosecutor objection;
- There was no record made of the in-chambers meeting;
- There was no hearing on the defendant's request to close the court;
- The only order Respondent signed denied the media request for coverage;
- Respondent *never* signed an order closing the court;
- The *only* record made regarding closing the court is contained in pages 3 through 6 (Ex 5) of the transcript of the February 27 hearing. (See testimony of Ms. Jacobs, T p 716-717; 720)
- Contrary to the requests of *both* parties, Respondent ordered his reporter not to transcribe the hearing.

Respondent now has the temerity to claim that he cannot be disciplined for failing to follow a court rule that the prosecutor failed to cite. (Respondent's Brief (Brief) p 23) Respondent blames his failure to follow the court rule on the prosecutor's failure to cite the rule as well as his failure to file a brief opposing closing the court. Respondent's Petition to Reject and/or Modify the JTC's Recommendation (Petition) states that while Ms. Jacobs filed a written response to the television station's motion and requested the courtroom be closed entirely, the

[5] As evidenced on the record in Ex 5 page 4 when Respondent stated on lines 20-21 "Excuse me, sir, there's a sign on the door" when someone tried to enter the courtroom, and again on page 6 lines 6-7 when Respondent stated "You're not allowed in, sir, it's a closed courtroom" when the Sorensens entered the courtroom. See also Mr. Caminsky's testimony, T p 75-76; 145; 156-157.

"prosecution filed nothing at all on the subject of closure." (Brief, p 6) Respondent further argues,

> But a review of the record shows that the prosecution never filed a written objection to closure of the court (and therefore never briefed the application of this rule) and never mentioned Rule 8.116 during arguments on the day that Judge Morrow made the contested ruling.
>
> (Brief, p 23)

Mr. Caminsky did not file a written objection to closing the court because the defendant never filed a written motion to close the court (defendant only filed a written "objection" to the media request, which also requested closing the court),[6] and because Respondent never held a hearing regarding closure or signed an order on this issue. Respondent is now arguing that Mr. Caminsky should have filed a written objection and brief regarding a matter that was only discussed in an off-the-record, in-chambers discussion on a media request to record the hearing[7], for a hearing that Respondent did not hold, and in opposition to an order to close the court that *did not exist.* The only order Respondent signed *did not close the court.* Mr. Caminsky did not know the court was closed until the morning of the hearing. (T p 75-76; 145) This is not a situation of "raise or waive" as Respondent's suggests. (Brief p 24) This court rule cannot be "waived." This is a court rule that every judge is required to follow whenever the issue of closing a court to the public arises. It is *Respondent's* responsibility to know and follow the law.

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[6] See Mr. Caminsky's testimony in the formal hearing transcripts pages 72, 134-137, 150-152. Ms. Jacobs testified that the "objection" to the media coverage was the only document she filed that requested the court be closed to the public, and she did not file a motion specifically requesting closure. (T, p 715-716)

[7] Mr. Caminsky testified that on February 13 the subject of closing the court "came up in passing" (T, p 73,) and was a "fairly minor component of our discussion" (T, p 72) and "most of my part of the discussion was about the media." (T, p 72). Mr. Caminsky also testified that while he heard the day before the hearing that Respondent was going to close the courtroom, he believed it was a misunderstanding of the February 18 order Respondent signed that only denied media coverage (T p 75).

Respondent's Response to the FC contradicts the position he now advocates. Respondent stated "he relied heavily on the joint nature of the request for closure by counsel." (Pleading Index No. 14, Respondent's Response to the Amended FC, (Response), paragraph 7, page 3) and that "the parties' representatives had made it clear in pre-hearing discussions that they both desired the courtroom closed." (Response, paragraph 8 page 4) Respondent has now abandoned this rationalization for failing to follow the court rule because the record proves that it is completely false.

Even if the prosecutor *had* agreed to closure, Respondent is not excused from following the court rule. However, the evidence is clear that the prosecutor did not agree and in fact objected. Regarding that conversation, Mr. Caminsky testified that he stated that he had no objection to barring media coverage, as that was in the court's discretion. (T, p 71) But Mr. Caminsky said he would object to closing the courtroom. While Ms. Jacobs and Mr. Caminsky differed on the exact conversation[8] (T, p 73, 76; T, p 692, 710) and Ms. Jacobs characterized Mr. Caminsky's objections as perfunctory or not vociferous in her testimony during the formal hearing (T, p 692, 693; 713), there is no doubt that the prosecutor said he objected to closing the court to the public. Describing the February 13 in-chambers meeting, Ms. Jacobs told the COA in her pleading dated March 23, 2009, "Defense counsel also requested that there be full closure. **The prosecution said it would object to closure.**" (Ex 8, p. 2 of the brief, emphasis added) Though Ms. Jacobs attempted to minimize the strength of Mr. Caminsky's objection (T, p 728) (contrary to Mr. Caminsky's testimony of his *own* position), she verified that he did object. This directly contradicts Respondent's answers in paragraphs 7 and 8 of his Response to the FC.

[8] The footnote on page two of Ms. Jacobs' brief to the COA (Ex 8) states that she and Mr. Caminsky had differing recollections of the exact position taken by the People at the in-chambers discussion.

Respondent also violated the deceased victim's parents' constitutional right to attend the hearing. Michigan Constitution of 1963 Article 1, Section 24 states in pertinent part,

> (1) Crime victims,[9] as defined by law, shall have the following rights, as provided by law:
>
> ****
>
> **The right to attend trial and all other court proceedings the accused has the right to attend.**
>
> ****
>
> The right to information about the conviction, sentence, imprisonment, and release of the accused.

(Emphasis added)

Respondent now argues that his "constitutional analysis was correct" (Brief p 21) and goes to great lengths to try to convince this Court that the defendant, and therefore the victims, had no right to attend this hearing because it was post-conviction. This argument ignores the fact that when Respondent said "I don't think any constitutional right is absolute in and of itself" *he made no constitutional analysis, made no findings, and gave no reasons on the record to justify this ruling.* His statement is his entire "analysis." His argument now is again an after-the-fact attempt to justify his shoot-from-the-hip actions. Respondent made *no* legal analysis when he expelled the Sorensens out of the courtroom. He just did it. Respondent gave no reason on the record why *this* right was not absolute and no reason why the right of *this* victim should be violated.

[9] MCL 780.752 (1) (m) (ii) (c) states that if the victim is deceased, "victim" means a parent if there is no spouse or child of the deceased. APA Caminsky testified that the victim had no spouse or children. (T, p 76-77) The Sorensens were the parents of deceased victim and therefore qualified as victim under the Crime Victim's Rights Act and as used by Michigan Constitution of 1963 Article 1, Section 24.

There is no restriction on this constitutional right. The language is not ambiguous. This was a hearing for a new trial in the trial court, not in any appellate court. And the defendant was in fact present for this hearing.

Respondent again raises the slippery slope specter that if this Court disagrees with his legal analysis "the Court will not only mint a new constitutional right for criminal defendants but will impose a duty on judges to research arguments that parties themselves fail to raise[.]" (Respondent's brief p 2) The Constitutional right in this case belonged to the victims. This Court need not even reach a determination as to the interpretation of this Constitutional provision to decide that Respondent's conduct in this case is wrong. It is ludicrous to now suggest that the prosecutor had the responsibility to research this issue when there was no way he could have known in advance that not only was Respondent going to close the courtroom, he was going to evict the victim's family from the courtroom,[10] and even more absurd for Respondent to now blame the assistant prosecutor for his failure to follow the law. This Court may or may not agree with the narrow interpretation of this State's own Constitution that Respondent now urges, but regardless of whether Respondent is correct *now*, the misconduct occurred at the time of the hearing when Respondent simply did what he wanted.

After the COA remanded the case for Respondent to comply with the court rule and give the reasons for closing the court, Respondent made a record without the attorneys present. In doing so, Respondent denied the attorneys an opportunity to put their recollections of the in-chamber meeting on the record. Respondent's reasons were found inadequate by the COA. (Ex 15) The COA also found that there was no basis for Respondent's refusal to allow the transcript

[10] Mr. Caminsky testified that the rights of the victim's family were never discussed during the February 13 in-chamber meeting. (T p 74) He also testified that he did not expect to have to deal with the issue on the morning of the hearing. (T p 162-163)

of the February 27 hearing to be prepared. On December 22, 2009, Respondent granted the defendant's motion for a new trial. (Exs 18a and 18b) On June 14, 2011 the COA issued a published opinion reversing Respondent as well as affirming defendant's convictions. (Ex 20)

If a judge follows the court rule, holds a hearing, and issues an order closing the court that the Court of Appeals reverses because the judge's reasons are inadequate, it can reasonably be argued that the judge followed the requirements of the court rule and that the ruling, though erroneous, was made in "good faith." Respondent did none of those things. There is more than adequate support in the record for the Commission's findings of fact and conclusion that Respondent committed judicial misconduct in this case.

2. *People v Fletcher* (Case B in the FC)

A. **Facts**

On October 31, 2008, the defendant pled guilty in Case No. 08-10018 to Operating a Motor Vehicle While Intoxicated (OWI) third offense, a 5-year felony under MCL 257.625, and Driving with a Suspended License (DWLS), a 93-day misdemeanor. (Ex 22) On December 5, 2008 Respondent sentenced the defendant to five years' probation, community service, and AA meetings. (Ex 24, pages 11-12) The following exchange occurs between Respondent and the prosecutor,

> MS. WALSH: As to the 30 days, Your Honor—
>
> THE COURT: What 30 days?
>
> MS. WALSH: 30 days by statute.
>
> THE COURT: No. It says at least 48 hours to be served consecutive. She's served that.
>
> MS. WALSH: No. It says or probation with 30 days to one year in jail, at least 48 hours to be served consecutively—

> THE COURT: Right. So she's served that and so The Court—in the next five years, we'll decide when she does her alternative incarceration.
>
> (Ex 24, page 13, lines 3 through 15)

Respondent signed an Order of Probation which states "jail sentence to be determined as to start time." (Ex 25) Respondent also signed an Order of Conviction and Sentence which stated "jail sentence start time to be determined." (Ex 26)

Defendant was again charged with OWI third offense and DWLS in December 2009 in circuit court Case No. 10-1184. (Ex 23) Defendant pled guilty as charged. On April 2, 2010 Respondent sentenced defendant to another probation term, including at least 30 days jail (2 days jail in the first six months and 15 additional weekends per Ex 23). On the same day, April 2, 2010, Respondent signed a Motion and Order for Discharge from Probation in Case No. 08-10018, and closed the probation without improvement. (Ex 27) The defendant never served the minimum 30-day jail term mandated by statute in the 2008 case.

B. <u>Respondent's Actions Constitute Judicial Misconduct</u>

What Respondent did in this case is not in dispute. The pertinent part of MCL 257.625 regarding sentencing for third offenses is contained in section (9)(c) which states,

> (c) If the violation occurs after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, the person is guilty of a felony and shall be sentenced to pay a fine of not less than $500.00 or more than $5,000.00 and to either of the following:
>
> (i) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.
>
> (ii) **Probation with imprisonment in the county jail for not less than 30 days or more than 1 year** and community service for not less than 60 days or more than 180 days. Not less than 48 hours of the imprisonment imposed under this subparagraph shall be served consecutively. (Emphasis added)

Respondent deliberately failed to follow the requirements of this statute. Respondent's sentence of "jail start time to be determined" does not comply with the statute. The prosecutor

reminded Respondent of the statute, yet Respondent still failed to sentence the defendant as required. Respondent never imposed the 30 days and never complied with the statute. It is not a valid excuse for failing to follow the statute that he sentenced the defendant to 30 days in the new case as that case also required its own 30-day minimum jail term. Respondent argues that the Commission disregarded his actual ruling "incorrectly presuming that Judge Morrow never intended to impose the mandatory term of imprisonment." (Brief p 24-25) Rather, the Commission found that based *on* his actual ruling, Respondent ignored the statutory language at the time of the original sentencing, willfully refused to comply with the law after being reminded of its requirements, and ultimately *never* imposed the mandatory term of imprisonment. The Commission was not "presuming" anything about Respondent's intent when he failed to sentence the defendant to the required jail term. The Commission's findings are based on Respondent's *actions* that are on the record and indisputable. There is ample support in the record for the Commission's findings.

Respondent gave no explanation or reason why he failed to abide by the statute. By failing to give the mandatory minimum 30-day jail term, Respondent in essence, without saying so, either took that part of the sentence under advisement or suspended it, neither of which he had authority to do. MCL 257.625 (9) (d) states,

> (d) A term of imprisonment imposed under subdivision (b) or (c) shall not be suspended.

The statute clearly prohibits suspending the minimum 30-day jail term. In the case of *People v Pennebaker,* 298 Mich App 1 (2012) the Court of Appeals reversed a sentence under 257.625(7)(a)(ii)(B) (regarding OWI with a person under 16 years old in the vehicle; a second

offense within 7 years or a third offense has the same 30-day minimum requirement as in this case[11]) which granted work-release electronic tether instead of the 30-day jail term and stated,

> And, although in general, "[t]he imposition of a sentence is reviewed for an abuse of discretion," [citations omitted], when, as here, there is a **clear statutory direction** regarding sentencing, then **this is not a matter of trial court discretion, but rather a failure to comply with a legislative mandate** which requires reversal. (298 Mich App at p 4, emphasis added)

The Court cited the statutory language and stated,

> This language **unequivocally** means that the trial court must sentence a defendant to a minimum 30 days in the county jail. (298 Mich App at p 6, emphasis added)

While that case dealt with section 7 of MCL 257.625 rather than section 9, the same mandatory language appears in both sections.

Respondent uses the *Pennebaker* (a case decided *after* Respondent's sentence in this case) and *People v Cullen,* an unpublished COA opinion dated October 2, 2007 (docket no. 272986), to argue "see, other judges did it, too, so the statute's mandatory jail requirement was subject to interpretation." This argument ignores the factual differences in the cases,[12] but more importantly misses the point entirely. In both cases, the COA held that the statute was clear and that it was mandatory that the required jail term be imposed at sentencing. This is again

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[11] (ii) If the violation occurs within 7 years of a prior conviction or after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, a person who violates this subdivision is guilty of a felony and shall be sentenced to pay a fine of not less than $500.00 or more than $5,000.00 and to either of the following:

(A) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

(B) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of this imprisonment shall be served consecutively. This term of imprisonment shall not be suspended.

[12] In *Cullen* the judge said that a 60-day jail sentence was "subject to review" as to whether it would be imposed. The COA held that this was a suspended sentence in violation of the statute and reversed. Respondent's "to be determined" start date is different in that he claims it meant that he always intended to impose the jail term (though he just never got around to it) but the effect is the same as a suspended sentence. In *Pennebaker* the judge sentenced the defendant to work release with a tether as a substitute for jail.

Respondent's after-the-fact attempt to justify his conduct. Respondent gave no explanation and cited no law when he sentenced the defendant and ignored the prosecutor's reminder of the law.

Respondent's argument that he could have given the defendant a jail term in the 2008 case concurrent with the jail term in the 2010 case (essentially a "no harm, no foul" rationalization) misses the point that his misconduct did not occur in 2010 but in 2008 when he originally sentenced the defendant and deliberately ignored the mandatory 30-day jail term. It also ignores the fact that while Respondent *could* have run the sentences concurrently, he did not. Instead, he closed the probation, never having imposed the jail term.

Respondent argues that if this Court accepts the Commission's findings in this case it "will hold that judges can be disciplined for declining to read language into statutes[.]" (Brief p 2) To the contrary, this Court will be holding, as the Commission found, that judges are required to follow the clear, unambiguous, *mandatory* language of a statute.

3. *People v McGee* (Case D in the FC)

A. **Facts**

The defendant was charged with multiple counts of CSC of a minor. (Ex 41 the ROA) Respondent presided over a jury trial on December 14 and 15, 2005. On December 15 the jury returned a verdict of guilty of one count of CSC 1st Degree of a minor. (Ex 41; Ex 42 page 161) After the jury was dismissed, APA Keith Clark asked Respondent to remand the defendant pending sentencing as required by statute (MCL 770.9b (1)). Respondent stated, "Bond will be continued." (Ex 42 p 163) The following exchange then occurred:

> MR. CLARK: You're not going to remand him? Not going to follow the statute in this case?
>
> MR. JACKSON:[13] January, what date?

[13] Mr. Jackson was defense counsel.

THE CLERK: January 13th. See you January 13th.

MR. CLARK: Your Honor, can I have a reason for—

THE COURT: Because we disagree.

MR. CLARK: So you're saying the statute doesn't apply to this case, judge?

THE COURT: I've already said what I've said.

(Ex 42 pages 163-164)

APA Clark sought a written order and was refused. (T, p 327-328; 363) On December 20, 2005, the Wayne County Prosecutor's Office filed a complaint for superintending control together with motions for immediate consideration and to waive transcripts. (Ex 43; Ex 44 is the appellate docket sheet) On December 21, 2005 the COA issued an order citing MCL 770.9b (1) and stating,

> Therefore, the trial court is directed that, if the defendant in the underlying action was, as the prosecutor asserts to this Court, convicted of first-degree criminal sexual conduct, in violation of MCL 750.520b, then the trial court has a clear legal duty to immediately "detain" the defendant, and not allow him to be admitted to bail, while awaiting sentencing. (Ex 45)

The defendant filed a motion for a new trial, and a hearing was held on April 28, 2006. (Ex 46) The hearing was continued to May 26, 2006. On May 26 Respondent granted the motion for a new trial because of Mr. Clark's use of the word "fucking" during his rebuttal closing argument. (Ex 47; Ex 48) The prosecutor appealed the order. (Ex 49, COA docket sheet) On August 22, 2006 the COA issued an order reversing Respondent's order granting the new trial. (Ex 50)

B. <u>Respondent's Actions Constitute Judicial Misconduct</u>

MCL 770.9b states in pertinent part,

> **(1) A defendant convicted of sexual assault of a minor and awaiting sentence shall be detained and shall not be admitted to bail.**

****

(3) As used in this section:

(a) "Minor" means an individual less than 16 years of age.

(b) "Sexual assault of a minor" means a violation of any of the following:

(i) **Section 520b**, 520c, 520d(1)(b), (c), (d), or (e) of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, in which the victim of the offense is a minor.

(Emphasis added)

Respondent intentionally violated this statute.

This is not a question of a "good faith" mistake as the statute is mandatory and leaves the court no discretion. The defendant was convicted of CSC of a minor under MCL 750.520b. The statute required that Respondent remand the defendant to custody pending sentence. APA Clark reminded Respondent of the statutory mandate, and Respondent still did not follow the statute and refused to give a reason. In his brief, Respondent falsely contends that the prosecutor "elected not to seek an order or submit a proposed order." (Brief p 9) APA Clark testified that he went back to the courtroom and asked for a written order. Respondent refused to sign a written order, (T, p 327-328; 363) so the prosecutor had to seek superintending control.

Respondent contended in his Response to the FC that he intended to give a written opinion but did not have time because of the prosecutor's petition for superintending control. (Response, paragraph 36, p 11-12) The violation of the statute was not a matter of "opinion," as the statute is unambiguous and requires no interpretation. Nothing Respondent later wrote could justify his failure to follow the statute.

In his brief, Respondent "admits" his error but then tries to justify his failure to follow the law by claiming that his real error was permitting the conviction to stand and failing to declare a mistrial. (Brief p 27; 29) Respondent's reason for violating the statute was allegedly the offense

he took at Mr. Clark's language. If Mr. Clark's language was the Respondent's rationale for violating the statute and Respondent's reason he believes he should have declared a mistrial, that same reason was rejected by the COA in reversing Respondent's order granting a new trial five months after the fact. Respondent said nothing at the time the remark was made, said nothing after the trial, took no action during the trial or jury deliberations, and never made any record regarding the allegedly offensive remarks. Respondent did not give this as his reason (and refused to give *any* reason when APA Clark asked) why he did not obey the statute. It was over five months later in May 2006 that Respondent granted defendant's motion for new trial because of Mr. Clark's language. Mr. Clark testified that Respondent also sought to hold him in contempt in January 2006, a month after the trial, because of his language. The show cause for contempt was dismissed by the chief judge. (T, p 335)

There is simply no justification for Respondent deliberately violating this statute. Respondent failed to follow the law, failed to make any record regarding what he later claimed was prosecutorial misconduct, and refused to sign an order documenting his actions. He failed to remain impartial and his actions after the trial regarding Mr. Clark's conduct were improper. Even the Master, who gave Respondent every benefit of the doubt possible, could not find a way to excuse this. The Commission's finding that "Respondent's handling of this case shows a blatant disregard for the law" (D & R p 12) is well supported by the record.

4. *People v Wilder* (Case E in the FC)

A. **Facts**

The defendant was charged with Possession with Intent to Deliver/Manufacture Marijuana in case 08-7126. (Ex 53) The case was set for trial on June 27, 2008. On that day P.O. James Napier and the Officer in Charge (OIC) Sgt. Ronald Murphy did not appear in court.

One officer, P.O. Mark Stevelink, appeared. The prosecutor said that the People were not ready. Defense counsel moved to dismiss, which Respondent granted "for lack of ability to proceed." (Ex 56, p 3-4) Respondent signed an order of dismissal which stated "people not ready to proceed." (Ex 55)

The WCPO reissued the warrant and defendant was recharged with the same offense in Case No. 09-3577. (Ex 54) At a calendar conference held on February 20, 2009, defense counsel Mr. Mehanna stated that the defendant would like to plead guilty. (Ex 58, p 2) Respondent said he would take the plea conditionally but would hold a hearing on why the officers failed to appear previously. Respondent said he remembered that he said he was going to have the witnesses explain why they were not here. (Ex 58, p 3-4) APA Teana Walsh stated that there should be a show cause hearing beforehand, but Respondent stated he would take the plea and get a presentence report so he would not have to backtrack. (Ex 58, p 4) Respondent proceeded with the plea procedure, and then said the original dismissal was a "conditional dismissal." (Ex 58, p 10) APA Walsh stated that she never heard of such a thing, and Respondent said he just took a conditional plea. (Ex 58, p 10) The matter was continued to April 24, 2009, and then continued again until May 29, 2009 because the transcript of the June 27, 2008 dismissal was not obtained. (Ex 59)

On May 29, APA Walsh pointed out to the court that the transcript of the dismissal did not say that it was a conditional dismissal. (Ex 60, p 4) Respondent stated that "It was conditional with prejudice." (Ex 60, p 4 lines 22-23) After a discussion regarding with or without prejudice, Respondent stated "And we'll hold a hearing to see if I'll grant his motion to dismiss with prejudice." (Ex 60, p 5 lines 18-19) Respondent ordered the officers to appear and the matter was continued to June 19.

On June 19, P.O. Napier informed the court that he had not received a subpoena because he had broken his hand and was separated from the police department. (Ex 61, p 4 lines 4-6) Sgt. Murphy told the court he had received a subpoena but was in another courtroom. When he appeared in Respondent's courtroom the case had already been dismissed. (Ex 61, p 5, lines 20-22) He also told the court that the subpoenas for the officers were not sent to him, but were sent to the Western District where the officers were assigned. (Ex 61, p 6) Respondent ordered the prosecutor to obtain the Western District subpoena book and continued the matter to July 10. On that date, Respondent examined the subpoena book and determined that neither P.O. Napier nor P.O. Stevelink signed for their subpoena. (Ex 62, p 5) Respondent dismissed the case, and stated,

> Based on the record that I've made, the fact that the police officers weren't able to provide a reason for their failure to appear promptly and go forward with this case, I am going to dismiss the case with prejudice against Mr. Wilder on 09-3577 and urge everybody to act more consistent with respect for the power of the subpoena and for the system itself. (Ex 62, p 10-11)

Respondent signed on order dismissing the case with prejudice. (Ex 63)

B. <u>Respondent's Actions Constitute Judicial Misconduct</u>

There is no factual dispute, as the transcripts establish the record. The Master found that there was no misconduct because he believed Respondent's argument that he was not advocating for the benefit of the defendant but to protect the integrity of the justice system. (MR p 27, 28) The Master concluded that Respondent, though legally incorrect, did not act in bad faith. (MR p 28) The Commission disagreed with the Master's conclusion that this was not misconduct. Respondent contends that the Commission's rationale for finding judicial misconduct in this case is "unclear." (Brief p 30) The rationale is quite clear, "Respondent's handling of this case demonstrated his willingness to ignore established legal procedures to achieve his intended result." (D & R p 15)

The record shows that Respondent, on his own accord, pursued a course of conduct to dismiss the case, failed to remain an impartial jurist, and advocated for the defendant. A reading of the transcripts shows that *from the start* Respondent intended to dismiss the new case because the officers had not appeared at the trial seven months earlier. Respondent stated,

> Okay. This is what I'll do. I'm going to accept his plea of guilty conditionally, and then I'm going to hold hearing because when I dismissed Mr. Wilder's case the last time, I said **before I dismiss it with cause**, that we were going to have it **explained why somebody who was subpoenaed to show chose not to show up.**
>
> (Ex 58, p 3 lines 1-8; emphasis added)

On April 24, 2009, when the transcript of the June 27, 2008 dismissal was not available, Respondent stated to the defendant,

> Mr. Wilder, I'm sorry we're going to have to keep bringing you back, all right. **But I'm hoping that it resolves in a wonderful way, hoping that.** Come back in a month why not, can we do that?
>
> (Ex 59, Transcript of April 24, 2009, p. 5 lines 15-18; emphasis added)

Respondent implied the result he eventually reached. That is not the remark of an impartial judge.

Respondent was inconsistent with his reasoning, stating he wanted to know why the officers ignored their subpoenas, but eventually dismissing the case even though the record showed that *no* officer had ignored a subpoena. Officer Napier never received a subpoena due to his injury and did not appear at the trial because he had no notification of the date. The OIC appeared late because he was in another courtroom. Respondent created a fictitious concept of "conditional dismissal," a phrase with no legal meaning, which he erroneously analogized to a conditional plea when challenged by the prosecutor. The record made when the original case was dismissed did not reference a "conditional dismissal." Nothing of the sort was placed on the record (Ex 56, p 3-4) or in the court's written order of dismissal. (Ex 55) Respondent relied on

his memory in February of something he *might* have said *off the record* when the case was originally dismissed the previous June. (February 20 transcript Ex 58, p 3-4) Three months later, when it was clear that Respondent was looking to dismiss the case, defense counsel Mr. Mehanna told the court that the defendant remembered "something of that sort." (May 29 transcript Ex 60, p 5 lines 13-16)

Mr. Mehanna testified that he and the defendant wanted to "address" the issue that the officers did not appear for trial and the case was re-issued. (T, p 873-876) His testimony is contradicted by what was placed on the record at the first hearing on February 20,

> MR. MEHANNA: Mr. Wilder would like to plead guilty on this case. The offer is attempt PWID of marijuana, which makes it a two-year high misdemeanor. They are withdrawing the habitual fourth. Mr. Wilder is on probation to this court.
>
> THE COURT: No.
>
> MR. MEHANNA: Judge, this is a case where it was previously in front of this court. It was dismissed on the day of trial because I believe the complainant witness failed to show up. I would assume this particular case would be a police officer. It was reissued. So that's why we're here today. We talked to the prosecutor, and they've made us an offer.

(Ex 58, p 2)

While Mr. Mehanna acknowledged that the case had been reissued, he did not request a hearing as to why the officers failed to appear, a dismissal, or a conditional plea. Mr. Mehanna stated that the defendant wanted to plead guilty. It was then that Respondent stated he would take a conditional plea and hold a hearing. (Ex 58, p 3) APA Walsh testified that Mr. Mehanna had never made a motion to dismiss the case. (T, p 426, lines 20-22; T p 468-469) Mr. Mehanna testified that he had moved to have the matter dismissed (T, p 881), but was not shown any transcript where this occurred because there is no such record. Nowhere in five transcripts (Exs 58, 59, 60, 61, and 62 for the hearings in February, April, May, June, and July) did Mr. Mehanna

move on the record to dismiss the new case either with or without prejudice. When Respondent stated that he needed the hearing to determine whether to grant defendant's motion to dismiss with prejudice (Ex 60, p 5 lines 18-19; p 6 lines 16-22), he was in fact pursuing his *own* agenda to dismiss the case that he announced at the first hearing in February after the defense counsel stated that the defendant wanted to plead guilty.

Respondent's taking of a "conditional plea" -- something not requested by either party nor consented to by the prosecutor -- violated MCR 6.301 (C)(2), which states,

> (C) Pleas That Require the Consent of the Court and the Prosecutor. A defendant may enter the following pleas **only with the consent of the court and the prosecutor**:
>
> (2) A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. The appeal is by application for leave to appeal only.
>
> (Emphasis added)

Ms. Walsh clearly did not consent to the "conditional plea" (See for example Ex 58, p 11 lines 4-5; it is clear throughout the hearings that she did not consent) nor is the reason for the "conditional plea" proper. There was no specific pretrial ruling that the defendant sought to preserve, and no request for such made by defense counsel. Respondent now attempts to excuse this by saying his words "may have been imprecise" (Brief, p 31 fn 3) and he really meant "under advisement." Respondent, however, used the words "conditional plea" at the time to justify his invented term "conditional dismissal." Respondent never stated on the record that this was a plea under advisement as allowed by MCR 6.302 (F), and neither party ever requested such. Even had Respondent stated "under advisement," this does not mean he can dismiss the case. Whether the plea was a conditional plea or a plea under advisement is immaterial as to Respondent's

misconduct. *Neither* court rule gives Respondent the authority to dismiss the case without prosecution approval.

The course of action taken in the case was initiated by Respondent, not the defendant or his attorney. The record in this case shows that Respondent went far beyond his role as a neutral jurist and became an advocate for the defendant. Rather than take proper legal action against the police for failing to appear at the original trial, Respondent pursued his own course to dismiss the reissued case, even when the facts did not support his original premise to enforce compliance with a subpoena. The Commission recognized Respondent's frustration with police witnesses failing to appear for court but found that it did not excuse him from following proper legal procedures to dispose of the cases before him.[14] (D & R p 15) Respondent violated the Canons that a judge is to be faithful to the law and remain neutral and impartial as well as MCR 6.301 (C)(2).

5. *People v Boismier* (Case G in the FC)

A. **Facts**

The defendant was charged with two counts of Criminal Sexual Conduct (CSC) Third Degree-person thirteen to fifteen and furnishing alcohol to a minor. (Ex 81) APA Angela Povilaitis testified that prior to jury selection, she interviewed a witness named Starr Gasidlo who had previously refused to speak to the police or prosecutor or give a statement. (T, p 541) APA Povilaitis testified that Ms. Gasidlo said that her father David Gasidlo told her that the defendant (their next door neighbor) told him that there was no rape but that it was consensual sex. (T, p 542) Ms. Povilaitis testified that she immediately informed defense counsel Mr. Mateo there was the possibility of a new witness and asked the Officer in Charge (OIC) to locate and interview the

[14] APA Teana Walsh testified that she remembered Respondent saying "This happens too frequently" but that in the ten months she had been in Respondent's court it had not happened. (T p 458)

father. (T, p 542-543) There was an exchange on the record prior to jury selection on February 4, 2009 regarding the potential new witness. Lt. LaPointe stated that he had attempted without success to contact the father. (Ex 82A, p 3; T, p 544-545) The trial continued with jury selection. The matter was next addressed at the end of jury selection after the jury was removed from the courtroom. Mr. Mateo stated that he understood that the father had been interviewed and told the police that there was no admission by the defendant, and that the father would not be called by either party. Ms. Povilaitis withdrew her motion to amend the witness list to include him. (Ex 82A, p 147)

The prosecution presented its witnesses on February 5 and rested. Nothing regarding any statement by the defendant to Mr. Gasidlo was asked of any of the witnesses, including Starr Gasidlo. (Ex 82B, transcript of February 5; T p 575) The trial continued on February 9 with the defense case. The defendant and his wife testified. (Ex 82C, transcript of morning session February 9) During Ms. Povilaitis's cross-examination of the defendant, the following occurred,

Q Isn't it true that you told Mr. Gasidlo that you had consensual sex with Corrin?

A No.

Q Did you tell anybody that you had consensual sex with Corrin?

A No.

MR. MATEO: Your Honor, may we approach the bench?

THE COURT: Sure.

(Discussion at bench at 12:01 p.m., not on record, outside hearing of the jury.)

BY MS. POVILAITIS:

Q Do you know what the word "consent" means?

A Yes

Q. Did you tell anyone that you had consensual sex with Corrin Vonseeno?

A No

(Ex 83, p 102; Ex 83 is the transcript excerpt of the morning session from pages 101 to 104)

Mr. Mateo continued with a short re-direct examination and the court broke for lunch. (Ex 82C, Ex 83 p 103-104)

At the start of the afternoon session Mr. Mateo addressed the court regarding Ms. Povilaitis' questions to the defendant. He asked Respondent for an instruction that the questions were improper and should be disregarded. (Ex 82D, p 4) Respondent engaged Mr. Mateo in a dialogue regarding whether he had a professional responsibility to report Ms. Povilaitis to the Attorney Grievance Commission and never ruled on or gave the requested instruction. (Ex 82D, p 4-7; Ex 84 is pages 1 through 7 of that transcript; Mr. Mateo's testimony T p 787) On February 10 the jury convicted the defendant of one count of CSC 3rd Degree and furnishing alcohol to a minor. (Ex 82E)

Mr. Mateo filed a motion for a judgment of acquittal or in the alternative a new trial, and a hearing on the motions was held on February 26, 2009. (Ex 85) Ms. Povilaitis stated that she did not file a written response because she received the motion the day before, and Respondent adjourned the matter until April 3. (Ex 85, p 29) On that date Respondent stated,

> I think that there, as a result of a direct disobeying of a Court order, not order as such, but a conference that was had between all the lawyers and the Court instructing the lawyers on how to proceed with the questioning of the defendant as it relates to accusations and information, I think that this rises to prosecutorial misconduct.
>
> I think that in this particular case there was a strict direction that as given to the prosecution on how to approach cross-examination. It was, in my mind, intentionally violated. And, as such, I think tainted the entire trial.

(Ex 86, p 9-10)

Respondent granted the motion for a new trial and denied the prosecutor's request for a stay. (Ex 86, p 10; Ex 87; Ex 88)

The prosecutor appealed the order granting a new trial. (Ex 89) On July 31, 2009 the COA issued an order vacating the new trial order and remanding the case back to the trial court to resolve whether the prosecution had a good-faith basis for asking the questions, and if not, whether the defendant was prejudiced and denied a fair trial as a result of the prosecutor's questions.[15] (Ex 90) On October 20, 2009 Respondent made a record without the parties or attorneys present. (Ex 91)

On December 28, 2009 the COA issued an unpublished opinion reversing Respondent's order for a new trial. The three appellate judges each issued a separate opinion. Judge Saad held that the prosecutor had a good-faith basis to ask the question. Judge Servitto concurred in the result, but held that there was no good-faith basis for the question. Judge Servitto held that the question did not deny defendant a fair and impartial trial. Judge Shapiro dissented and held that there was no good-faith basis and the error was not harmless.

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[15] The order read in part:

Defendant moved for a new trial on the basis that prosecutor's questions posed during cross examination of defendant falsely suggested that he admitted to his neighbor that he had consensual sex with the complainant and constituted misconduct that denied him a fair trial. The prosecution responded that it had a good-faith basis for asking the questions, and the questions did not deny defendant a fair trial. Rather than resolving these arguments, the trial court ruled that the prosecution's questions violated a direct order, apparently made during a side-bar conference off the record, and then summarily stated that the questions "tainted the entire trial."

The matter is REMANDED to the trial court to resolve whether the prosecution had a good-faith basis for asking the questions, and if not, to address whether defendant was prejudiced and denied a fair trial as a result of the prosecutor's questions. See *People v Taylor*, 110 Mich App 823; 314 NW2d 498 (1981). The trial court should consider that defense counsel addressed the matter during his closing argument, and the trial court shall also explain on the record the substance of the conversation between the court and the attorneys during the side-bar conference to which it referred in is April 3, 2009 ruling. The trial court is instructed to hear and decide this matter within 56 days of the Clerks' certification of this order, and shall cause a transcript of any hearing on remand be prepared and filed within 21 days after completion of the proceeding. (Ex 90, Order July 31, 2009 case no. 291642)

B. Respondent's Actions Constitute Judicial Misconduct

Simplifying the facts of this case into a mere disagreement on the law between the COA and Respondent ignores the failures of Respondent that caused the conflicts in this case (including the conflict in the COA opinions) and ignores the opinions of both the majority and dissenting COA judges that Respondent failed to obey the COA's order. In this case it is not merely the errors of law but Respondent's failure to make a proper record of his alleged sidebar order, his failure to address defense's counsel's request for an instruction, and his failure to properly follow the COA's remand order that prove Respondent committed misconduct.

Respondent granted a new trial because he ruled that APA Povilaitis had violated his off-the-record directive when she asked the defendant whether he had told his neighbor Mr. Gasidlo or anyone that he had had consensual sex with the victim. The COA reversed Respondent's decision. The issue would have been avoided had Respondent properly dealt with Ms. Povilaitis's alleged conduct during the trial or properly followed the order of the COA on remand. During the trial:

- Respondent failed to make a record of the sidebar conference that Mr. Mateo requested after Ms. Povilaitis asked the first two questions. It was during this sidebar that Respondent supposedly gave the order Ms. Povilaitis allegedly violated.
- Respondent claims Ms. Povilaitis violated his direct order by asking again whether the defendant told anyone he had consensual sex with the victim. Yet defense counsel made no objection at the time. Respondent said *nothing* and made no record then or after the jury was excused of Ms. Povilaitis's alleged misconduct, which Respondent later claims was severe enough to "taint" the entire trial and cause him to grant a new trial.
- Mr. Mateo attempted to raise the issue regarding the questions immediately after the lunch break, and he asked for a curative instruction. Respondent ignored the request and engaged Mr. Mateo in a discussion as to whether he must report Ms. Povilaitis to the AGC.

Because Respondent failed to make any record of the sidebar conversation and Ms. Povilaitis's alleged violation of his off-the-record order, the COA remanded the matter to the trial court to make the record and to address whether the defendant was denied a fair trial. (Ex 90) Respondent claimed in his Response to the FC that he "did not interpret the Court of Appeals' order as requiring him to hold a hearing." (Response paragraph 75, p 24) Respondent continues to argue that the COA order was "ambiguous." (Brief p 7) Two COA judges disagreed. The order stated,

> The trial court is instructed to **hear and decide** this matter within 56 days of the Clerk's certification of this order, and shall cause a transcript of any **hearing** on remand be prepared and filed within 21 days after completion of the **proceeding**. (Ex 90; emphasis added)

Respondent made a record without the attorneys being present. (Ex 91) The problem is that this record is based solely on Respondent's recollection in October of the events that occurred in February, and his own subjective interpretation, without any opportunity for either Ms. Povilaitis or Mr. Mateo to state their positions on the record. The record Respondent made is not supported by the transcripts of the trial record. In that record, Respondent claimed:

- Ms. Povilaitis asked for a sidebar and moved to withdraw her motion to endorse Mr. Gasidlo "as the prosecution was winding up their case". (Ex 91, p 4 lines 15-24)
- Mr. Mateo then asked Respondent to instruct the prosecutor not to ask any questions regarding the admissions. Respondent granted the motion to withdraw the witness and ordered the APA not to ask any questions regarding "an admission that was never made." (Ex 91, p 5 lines 5-21)
- After being ordered not to ask the questions, Ms. Povilaitis did so, and there was a discussion at the bench and with her "even being warned again" she asked two more questions. (Ex 91, p 5 lines 19-25; p 6 lines 1-10)
- Based on the sidebar conversations the prosecution violated a direct order if the Court. (Ex 91, p 6 lines 11-13)

The record proves that the *actual* sequence of events was:

- Ms. Povilaitis moved to withdraw her motion to add the witness not at a sidebar or at the end of her case, but on the record on the first day of trial after jury selection, the day *before* she started testimony in her case. (Ex 82A, p 147) Mr. Mateo did not ask for any instruction that she not ask questions about the alleged admission. Respondent did not give any order limiting cross-examination to the prosecutor.
- Nothing further about the matter is reflected on the record until Ms. Povilaitis asked defendant the first two questions. It is at that point that Mr. Mateo asked for a sidebar conference. That is the *only* time Respondent could have instructed Ms. Povilaitis to not ask further questions regarding the admission.

Ms. Povilaitis testified that there were no other sidebars or off-the-record discussions regarding the matter other than the one after she asked the first two questions. She testified that she was never instructed not to ask any such questions. (T, p 560) The trial transcripts confirm her testimony. Ms. Povilaitis testified (consistent with the affidavit she filed in the COA[16]) that the only thing Respondent said during the sidebar was whether she was going to ask the defendant if he told President Obama he had consensual sex with the victim. (T, p 551) She also testified that she was *never* instructed by Respondent not to ask the questions. (T p 560-561) Mr. Mateo testified that he did not recall what Respondent or Ms. Povilaitis said at the sidebar (T, p 757; p 783) but had the "impression" that she would not ask any further questions. (T, p 757; 784; 788)

Respondent granted the new trial based on her alleged violation of his order which was never placed on the record. While the COA judges disagreed as to whether Respondent had abused his discretion in granting the new trial, both the lead opinion and the dissenting opinion agreed that Respondent had failed to comply with the COA order (the concurring opinion did not discuss the issue.) Judge Saad stated,

[16] The affidavit is included in Respondent's formal hearing exhibits for the *Boismier* case under tab 19.

> Moreover, based on the record before us, **the only indication of a violation of a court order was by the trial judge in failing to address this matter on remand as directed by this Court.**
>
> * * *
>
> The trial court failed to hold a hearing, failed to address the substance of the disputed sidebar discussion and defense counsel's closing argument, and outside the presence of the parties and counsel, and in derogation of this Court's instructions, simply stated on the record its reasons for granting the motion for a new trial.
>
> **Not only did this violate this Court's direct order, the trial record does not support the trial court's explanation for its ruling.**
>
> (Ex 92, lead opinion p 3; emphasis added)

In his dissenting opinion, Judge Shapiro stated,

> **Finally, I agree with the lead opinion that the trial court did not comply with the spirit, if not the letter, of our remand order.** The order was intended to require the trial court to take testimony and determine whether in fact the prosecutor had a good faith basis for her questions. The trial court did not do so and according to the prosecutor, intentionally refused to take evidence or even to conduct the hearing in the presence of the parties. **This is disturbing, as is the trial court's refusal to rule on defense counsel's repeated requests for a curative instruction. Had the trial court given that instruction, which was so plainly appropriate, my disagreements with the lead opinion and concurrence would never have arisen.**
>
> (Ex 92, dissenting opinion p 6; emphasis added)

When Mr. Mateo requested the instruction, Respondent engaged in a pointless dialogue regarding Mr. Mateo's professional responsibility rather than rule on the request. Judge Shapiro pointed out that had Respondent given the instruction, he would not have dissented from the majority decision reversing the order for a new trial.

Consistent with Respondent's actions in other cases in the FC, the evidence proves a pattern that Respondent simply does what he wants. In this case Respondent did so in defiance of the COA. The Commission found that "Respondent's deliberate failure to follow proper legal procedures constituted judicial misconduct in this case." (D & R p 20) The record supports this

finding. Respondent's conduct created the problems in this case. If he had made a proper record of the sidebar conference, there would have been no need for remand. If he had ruled on defense counsel's request for a curative instruction, there would have been no dissent and split COA decision. If he had obeyed the COA's order instead of only making the record *he* wanted, two judges of the COA would not have had to chastise him for disobeying the order of a superior court.

6. *People v Redding* (Case H in the FC)

This case, as well as the *Moore* and *Hill* cases discussed subsequently, does not involve Respondent's legal decisions but rather Respondent's personal conduct. There is no issue of a "good faith" excuse.

A. **Facts**

In Case No. 07-3989 the defendant was charged with Assault with Intent to Murder (AWIM), Child Abuse 1st Degree (CA 1st), Assault with Intent to do Great Bodily Harm (AGBH), Assault with a Dangerous Weapon (FA), and Felony Firearm. (Ex 96) The two victims were the defendant's sons. (T, p 526) The defendant had been convicted of a misdemeanor in a bench trial before Respondent in a prior case in 2004. (Case No. 03-11978, Ex 95) As a result of that conviction, the defendant was placed on probation. The probation was terminated in March 2005. (Ex 97)

The trial in the 2007 case began on April 11, 2007. APA Povilaitis testified that at the beginning of the trial while in open court she observed Respondent leave the bench, come down, and shake hands with the defendant, who was in custody at the time. She then observed Respondent hand papers to the defendant. (T, p 529) Respondent made no record of his actions or what the documents were until she questioned him. (T, p 530; Ex 98) The questioning

occurred after jury selection was completed and the jury excused. (Ex 98a, excerpt of the April 11 transcript) Ms. Povilaitis testified she had looked at the documents very briefly and saw that they were high school records of the AWIM complainant. (T, p 531-532) Respondent acknowledged on the record that he shook the defendant's hand (Ex 98a, p 111) and that he gave the documents to defense counsel. (p 112) He stated that the documents were given by the defendant to the court's deputy to give to Respondent a couple of months before the case began. (p 113-114) Respondent denied reading the documents (p 111) and denied there was ex parte communication with the defendant. (p 109)

B. Respondent's Actions Constitute Judicial Misconduct

In his Response to the FC, Respondent conceded the factual allegations. Respondent admitted that he shook the defendant's hand the first day of trial, and that he gave an envelope to his counsel. (Response paragraph 85 p 27) In his Brief he also admits his conduct, again contending that he gave "an unopened envelope" to defendant counsel[17] rather than to the defendant as Ms. Povilaitis testified. (Brief p 14)

A judge should not come off the bench and give documents to the defendant in open court at the start of a trial. A judge should not fail to make a record regarding documents he was given by a defendant over whose case he is to preside *before* he gives them to the defendant off-the-record and in open court. A judge should not fail to explain *on the record* how he came into possession of the documents and why he is returning them to the defendant. A judge should not

[17] While Respondent in his Brief cites the testimony of APA Povilaitis for this contention, the transcript references are actually to her reading the trial transcript (Ex 98) where she questioned Respondent as to the documents. It is *Respondent* who stated that the he did not read the documents. Likewise when Respondent cites APA Povilaitis's testimony to claim that the defendant had given the envelope to Respondent's deputy for the court to hold sometime before Redding was bound over on the 2007 charges (Brief p14) it is again her reading the transcript of Respondent's explanation that he gave when she inquired on the record.

create the appearance in open court that he has some relationship with the defendant or bias on the defendant's behalf. A judge should not create the appearance of impropriety.

Respondent contends that the Commission erred in finding that Respondent gave the papers to the defendant rather than his counsel. (Petition, paragraph 5f; Brief p 15)[18] There is a basis in the record for the Commission's finding. APA Povilaitis testified that Respondent gave the documents to the defendant (T p 529); on cross-examination when asked whether Respondent gave the papers to counsel, she testified that it was her memory that he gave them to the defendant. (T p 589) But it is irrelevant to whom Respondent delivered the documents. The fact that Respondent even tries to claim that the Commission got it wrong shows that Respondent fails to understand why his conduct is improper. He shook hands with the *defendant* in open court at the *beginning* of a trial over which he was to preside and handed documents to either the defendant or his counsel. These actions alone would raise questions to anyone in the courtroom as to whether the judge knows the defendant or whether the judge is impartial. The actions certainly caused the assistant prosecutor to wonder what was going on. Respondent failed to make any record regarding documents the defendant supposedly gave him months before. Rather than sua sponte raising the issue and making a record as to the documents, Respondent left the bench and delivered them to the defense. Respondent made no comment until the prosecutor raised the matter.

Respondent's argument that "it would be much more troubling for a judge to return papers to a party outside the presence of opposing counsel" (Brief p 36) tries to suggest that what Respondent did is okay because APA Povilaitis was present when it happened. While it may be

[18] As indicated in the previous footnote, in all cases where Respondent claims that the record shows he gave the papers to counsel rather than the defendant, or how he came to have them, or that he did not read them, he is citing *himself* and the explanation he gave on the record at trial, *not* to what APA Povilaitis testified she herself saw.

worse if she was not present, this misses the point that a judge should not do this *at all.* This is well beyond mere poor judgment. These are simply not actions of a neutral and impartial jurist. Respondent indisputably created the appearance of impropriety.

Respondent tries to excuse this blatant violation of the Code of Judicial Conduct Canon 2A's prohibition against impropriety and the appearance of impropriety by claiming that it was "not unusual for Judge Morrow shake hands *(sic)* with people in his courtroom" (Brief p 15) and proposing that if he is disciplined for this conduct this Court will be holding that "judges can be disciplined for extending common courtesies to criminal defendants." (Brief p 3) Rather, this Court would in fact be holding that judges *should not do this.* Shaking hands, running a friendly courtroom, and common courtesies are fine in the right context. This is *not* the right context. An impartial judge simply does not do this.

7. *People v Moore* (Case I in the FC)

Contrary to Respondent's contention that this is another case involving a legal or procedural decision, (Petition paragraph 2) the misconduct in this case stems from Respondent's own conduct.

A. **Facts**

The defendant was charged with Robbery Armed (RA) and other felonies. The case was set for a jury trial before Respondent on August 1, 2006. There was a discussion between the prosecutor Lori Dawson and defense counsel Kim McGinnis regarding a bench trial before Respondent. (T p 212) Further discussion resulted in a plea agreement. (T p 215; Ex 101) Respondent then took a guilty plea from the defendant. (Ex 102) After both attorneys indicated that they were satisfied with the factual basis for the plea, Respondent stated,

> THE COURT: Okay. I took the liberty of getting his medical records because I believe that the prosecution should look at what occurred to

Mr. Moore. I know that the transcript boasts of one of the witnesses saying, yes, she kicked "the shit out of him," or something of that nature, because they drug him back in the store and all of them abused him. You can't abuse somebody that commits a crime.

MS. DAWSON: Yes, sir.

THE COURT: I don't know if you know if I got the medical records showing the abuse that was done to him by this group of vigilantes after he was disarmed in the parking lot, but it was shameful.

MS. DAWSON: Yes, sir.

THE COURT: You didn't know I got those records either, did you?

DEFENDANT MOORE: No, sir.

THE COURT: I sure did.

(Ex 102, p 8)

B. <u>Respondent's Actions Constitute Judicial Misconduct</u>

There is no factual dispute. Respondent subpoenaed medical records of the defendant in a case over which he was to preside before the trial date. He did this because he had formed an opinion that the defendant had been physically abused by the witnesses. Respondent performed his own private investigation in a case over which he was to preside. It is simply improper for a neutral and impartial jurist to perform his own investigation prior to hearing the case.

As Respondent admitted on the record that he did this, he cannot deny the act but tries to justify his reason for inserting himself into the case. Respondent continues to argue that he was justified because of his concern over vigilante justice. He claims,

> There is no evidence that the vigilante violence leading to Moore's apprehension would have played any role at all in Moore's criminal proceeding. Even the quotation selected by the Commission shows that Judge Morrow was concerned that *others* may have committed crimes, not that Moore himself was innocent: "I believe that the prosecution should look at what occurred to Mr. Moore...You

can't abuse somebody that commits a crime." (Decision and Recommendation at 22 Apx. l: 72)

(Brief p 37; emphasis in original)

Respondent fails to recognize that this very statement shows that *prior to the trial* he had concluded that there was "vigilante violence," that the witnesses abused the defendant, and that they may have committed a crime *before* he heard any testimony in the case. Respondent may be correct that the acts of the witnesses in apprehending Mr. Moore did not affect whether Mr. Moore was factually guilty, but Respondent's argument that what he said to Mr. Moore at sentencing proves he was not biased (Brief p 37 footnote 7) again misses the point that the misconduct occurred before the case had come to trial. The misconduct is *not* that Respondent was biased for the defendant; it is that a fair and impartial judge does not form opinions about a case and perform his own independent investigation before the trial begins. When Respondent ordered the defendant's medical records, he was the presiding judge in the case regardless of whether it would be a jury or a bench trial. It is clear from the remarks that Respondent made on the record that he had formed a negative opinion as to the conduct of some of the witnesses in the case.[19] Whether Respondent would be the fact-finder or not, he had been influenced enough to do his own investigation and form his own opinions regarding the facts and the witnesses before any testimony was presented at trial. The fact that Respondent accepted the defendant's guilty plea is irrelevant as to whether he committed misconduct. When Respondent subpoenaed the records he did not know that the case would be resolved with a guilty plea.

[19] Respondent's negative opinion about the witnesses' actions is reflected by his comments "I know that the transcript boasts of one of the witnesses saying, yes, she kicked 'the shit out of him,' or something of that nature, because they drug him back in the store and all of them abused him. You can't abuse somebody that commits a crime." and "I don't know if you know if I got the medical records showing the abuse that was done to him by this group of vigilantes after he was disarmed out in the parking lot, but it was shameful." (Ex 102 p 8)

Respondent apparently formed the opinion that the witnesses abused the defendant in an act of "vigilante" justice based on his reading of the preliminary examination transcript. The record shows that Respondent appears to be greatly exaggerating the actions of the witnesses. One witness testified at the preliminary examination that the defendant assaulted her and the security guard with a box cutter. She testified that the defendant pushed her and she fell on the ice. She admitted that she was mad and kicked the defendant one time when he was down. The witness testified that no one else did anything to him. This was hardly "kicking the shit" out of the defendant, nor does it describe a group of vigilantes dragging the defendant back in the store and abusing him. (See the portion of the examination transcript in Respondent's formal hearing exhibit for the Moore case, ex tab 3, pages 12 to 14)

Respondent's argument that the Commission got it wrong because the parties could have asked to recuse him before the sentencing (Brief p 36-37) entirely misses the point that by then it was already too late. Respondent did not reveal that he had obtained the records until the plea was taken. He had a responsibility to inform the parties of his actions and his opinions *before* presiding over the case.[20] Respondent also had the responsibility to raise the issue so either party could consider whether they would ask Respondent to recuse himself *before* the trial was to begin.

Respondent also demonstrates his preconceived opinion that there *had been* "vigilante violence" in the case in his "dire consequences" argument. Respondent claims that if the Court follows the Commission's recommendation in this case it would,

[20] A judge having personal knowledge of disputed evidentiary facts concerning the proceeding is grounds for disqualification, MCR 2.003 (C) (1)(c), which could have been addressed, had the parties known about it timely. Furthermore, Respondent had a duty to raise the issue under MCJC Canon 3 (C) which states that a judge should raise the issue of disqualification whenever the judge has cause to believe grounds for disqualification may exist under MCR 2.003 (B).

> hold that judges can be disciplined for taking steps to ensure that courts do not inadvertently sanction vigilante violence...
>
> (Brief p 3)

To the contrary, this Court would properly be holding that judges must remain neutral and impartial and not perform their own investigations. This is not sanctioning anything; Respondent could have taken whatever steps he thought appropriate *after* the case was disposed.

The Commission's findings are correct and supported by the record. The misconduct occurred when Respondent subpoenaed the records. The misconduct was compounded by Respondent's failure to inform the parties of his actions. Respondent failed to remain impartial and neutral in this case, advocated on behalf of the defendant, failed to make a proper record of his actions at an appropriate time, and failed to raise the issue of recusal. Respondent's conduct violated the MCJC Canons that he remain a fair and impartial jurist and that he avoid the appearance of impropriety.

8. *People v Hill* (Case J in the FC)

A. **Facts**

The defendant pled guilty to Robbery Armed, Carjacking, and Felony Firearm. (Ex 103) The defendant was in custody and facing a prison term. On March 8, 2010, while the court was open to the public, Respondent took the deputy's lockup keys and brought the defendant from the lockup in back. Respondent left the courtroom, returned with his robe, and then sentenced the defendant to 5 to 30 years prison (plus two for the felony firearm). Respondent then returned the defendant to the lockup. There were no deputies or court security in the courtroom during these events. (T, p 222-225; Ex 103)

B. Respondent's Actions Constitute Judicial Misconduct

There is no dispute that Respondent did this. The facts show again that Respondent believes he can do what he wants. The Commission, as well as the Master, found that there was no justification for Respondent's actions and that being in a hurry was no excuse for placing the public in potential danger. (D & R p 23; MR p 48) Respondent's actions endangered the people in the courtroom as well as the people in the courthouse. Ms. Dawson testified that she was angry and upset and that the situation was frightening. (T p 226) It is no excuse that nothing happened. Respondent created an unnecessary risk to the safety of others.

Conclusion

The evidence proves that Respondent's actions in these cases are not "good-faith" mistakes of law, but an intentional disregard for it, and, in some cases, an abandonment of any pretense of remaining an impartial and neutral jurist. Respondent did what he wanted regardless of his duty to follow the law or act impartially. The evidence shows that Respondent acted on matters discussed outside of the record for which he failed to make a proper record. Respondent repeatedly failed or refused to give written orders.

These cases are not matters of the prosecutor's office choosing to take issues to the JTC rather than the COA. It is not an "either-or" proposition. The prosecutor brought the cases to the attention of the JTC not as an alternative to the appellate process, but because Respondent continually engaged in unethical conduct, not all of which could be addressed on appeal. In the *Orlewicz*, *Slone*, *McGee*, *Jones*, and *Boismier* cases, the WCPO appealed Respondent and won each time. Twice, in *Orlewicz* and *McGee,* the prosecutor had to take the rare action of seeking superintending control to get Respondent to comply with the law. The fact that the prosecutor chose not to spend its limited resources to appeal the *Fletcher* case does not excuse Respondent's

failure to abide by the statute. Nor does the failure to appeal Respondent in the *Wilder* case mean that Respondent's conduct in dismissing the case with prejudice did not violate of the law regarding dismissals with prejudice and ethical standards to remain fair and impartial. Respondent's actions in the *Redding, Moore,* and *Hill* cases do not involve conduct that could be appealed.

Respondent's misconduct can be summarized in several categories:

A. *Ignoring or failing to follow the law:*

- *Orlewicz*: failure to follow MCR 8.116; violation of Michigan Constitution Article 1 Section 24; Respondent reversed on appeal
- *Fletcher*: failure to follow MCL 257.625
- *McGee*: failure to follow MCL 770.9b, reversed on appeal
- *Wilder*: violation of MCR 6.301(C)(2) regarding conditional pleas; no legal basis to dismiss the case with prejudice
- *Boismier*: failing to follow the order of the Court of Appeals

B. *Failing to remain impartial, advocating for the defendant:*

- *Wilder*: pursues dismissal of case without prompting from defendant; invents legal fiction of "conditional dismissal" never found in the record to justify actions
- *Boismier*: grants new trial based on violation of alleged off-the-record order, reversed by COA; fails to make proper record during trial; fails to obey COA order
- *Redding*: shakes hands with defendant and gives documents to defense at beginning of trial in open court
- *Moore*: performs private investigation; obtains medical records of the defendant without knowledge or consent of either party; forms opinions regarding the facts and the witnesses prior to trial; advocates for the defendant

C. *Failing to make records or give written orders; acting on matters never placed on the record:*

- *Orlewicz*: closes court after an in-chambers discussion two weeks prior to hearing; makes no record of off-the-record discussion; fails to sign order

closing the court; on remand order from COA makes own record without input from either counsel, record found inadequate by COA

- *McGee*: fails to remand after conviction as required by statute, fails to state any reason on the record; refuses to sign written order; grants new trial based on alleged prosecutorial misconduct yet makes no record of such at any time during the trial
- *Wilder*: bases pursuit of dismissal on his memory of a fictional "conditional dismissal" not in the record or in written order
- *Boismier*: fails to make record of sidebar conversation and alleged order, yet grants new trial based on an alleged violation of the off-the-record order; ignores defense request for proper curative instruction; fails to follow COA order; makes own record without input from either counsel; Respondent's version of facts not supported by the record, Respondent's order reversed on appeal
- *Redding*: regardless of how he came into possession of documents from the defendant, fails to make record as to how or why he has them or why he is giving them to the defense at the beginning of the trial until prompted later by the prosecutor
- *Moore*: obtains medical records of the defendant without knowledge or consent of either party and fails to disclose such until case is resolved

D. *Engaging Impropriety or creating the appearance of impropriety:*

- *Orlewicz*: removes victim's family from proceeding without reason in violation of constitutional rights
- *Wilder*: makes comments on the record indicating his ultimate intention to dismiss the case
- *Redding*: shakes defendant's hand and gives documents to the defense in open court
- *Moore*: obtains medical records without knowledge or permission of either party; fails to properly disclose actions or preconceived opinion

E. *Creating a Safety Issue:*

Hill: brings prisoner into courtroom without security

Contrary to Respondent's assertion that he committed no misconduct, the record supports the Commission's findings that Respondent breached the standards of judicial conduct and is responsible for the following:

(a) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205;

(b) Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;

(c) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205;

(d) Conduct that is prejudicial to the proper administration of justice, in violation of MCR 9.104(1);

(e) Failure to establish, maintain, enforce and personally observe high standards of conduct to that the integrity and independence of the judiciary may be preserved, contrary to the MCJC, Canon 1;

(f) Persistent incompetence in the performance of judicial duties, contrary to MCR 9.205(B)(1)(a);

(g) Conduct involving impropriety and the appearance of impropriety, contrary to MCJC, Canon 2A;

(h) Failure to be faithful to the law, contrary to the MCJC, Canon 3A(1);

(i) Conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2);

(j) Conduct which is contrary to justice, ethics, honesty or good morals, contrary to MCR 9.104(3);

(k) Conduct in violation of MCL 770.9b;

(l) Conduct in violation of MCR 8.116 (D), and

(m) Conduct in violation of MCL 257.625.

DISCIPLINARY ANALYSIS

A. The *Brown* Factors

The Michigan Supreme Court set forth the criteria for assessing proposed sanctions in *In re Brown,* 461 Mich 1291, 1292-1293 (1999). The Commission properly considered and assessed the factors in determining the recommendation of a 90-day suspension.

(1) *Misconduct that is part of a pattern or practice is more serious than isolated instances of misconduct.*

The evidence reveals a pattern that Respondent simply does what he wants. Respondent cannot choose to disregard the law or fail to remain impartial when it suits him. The Commission found that the evidence showed that Respondent repeatedly failed to follow statutes, even when the mandatory language was pointed out to him by the prosecutor, repeatedly failed to enter written orders or acted on unwritten orders, and repeatedly took actions that violated his duty to remain impartial and to uphold the appearance of impropriety. Respondent acted in an intentional and deliberate manner that violates the law and the Canons of the Michigan Code of Judicial Conduct. The Commission determined that this factor weighs in favor of a more serious sanction.

(2) *Misconduct on the bench is usually more serious than the same misconduct off the bench.*

The record supports the Commission's finding that all of Respondent's misconduct occurred on the bench and that this factor weighs in favor of a more serious sanction. The *Orlewicz, Fletcher, Slone, McGee, Wilder, Jones, Boismier* cases all involve Respondent's conduct on the bench during court hearings. In *Moore* Respondent abused his judicial power to subpoena the defendant's medical records, which then affected Respondent's attitude towards the case that was set for trial in his courtroom. The *Redding* case involved Respondent creating the appearance of impropriety in open court prior to presiding over the trial. In the *Hill* case Respondent used his judicial authority to act in disregard of the safety of the public in open court.

(3) ***Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.***

The Commission concluded that much of Respondent's misconduct was prejudicial to the actual administration of justice. The Commission found that Respondent failed to follow MCR 8.116 in *Orlewicz* before closing the courtroom to the public. In *Fletcher* he failed to sentence a defendant according to the relevant statute. In *McGee* he released a convicted sex offender of a minor despite being aware of mandatory statutory language that the defendant be remanded. In *Wilder* he dismissed a case of engaging in several improper procedures even when defense counsel never moved to dismiss and the defendant was prepared to plead guilty. In *Boismier* he failed to rule on a request for a curative instruction, granted a new trial on the basis of an alleged violation of an off-the-record order, and failed to comply with the Court of Appeals remand order. This factor weighs heavily in favor of a severe sanction.

(4) ***Misconduct that does not implicate the actual administration of justice, its appearance of impropriety, is less serious than misconduct that does.***

As stated in Factor 3, the nature and scope of Respondent's misconduct goes to the very heart of the proper administration of justice. In several cases Respondent clearly created the appearance of impropriety.

(5) ***Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.***

The Commission found that the evidence revealed that the misconduct was deliberate rather than spontaneous. Respondent repeatedly ignored relevant law even when he was clearly made aware of it. The evidence showed deliberate instances where Respondent appeared to act as an advocate for the defendant rather than remaining neutral. This factor weighs in favor of a more serious sanction.

(6) ***Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.***

The Commission found that a judge who fails to follow the law necessarily undermines the ability of the justice system to reach just result. This factor weighs heavily in favor of the imposition of an extreme sanction.

(7) ***Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.***

There is no evidence that Respondent's misconduct involved the unequal application of justice. This factor is not in issue in this case.

The Commission concluded that six of the seven of the *Brown* factors support the imposition of a serious sanction. Even the Commissioner who disagreed with the majority's finding of misconduct in three of the cases agreed that the recommended sanction was appropriate based on the misconduct in only five cases.

B. Proportionality

In *In re Ferrara,* 458 Mich 350, 372 (1998), the Michigan Supreme Court stated,

> Our primary concern in determining the appropriate sanction is to restore and maintain the dignity and impartiality of the judiciary and to protect the public.

In the case of *In re James*, 492 Mich 553 (2012), Justice Stephen J. Markman emphasized that our judicial system "is only as good as its constituent judges." Justice Markman relied on *In re Probert*, 411 Mich 210 (1981) wherein the Supreme Court declared,

> [W]hen one commits judicial misconduct he not only marks himself as a potential subject of judicial discipline, he denigrates an institution. Accordingly, a decision on judicial discipline must also be responsive to a significant institutional consideration, "the preservation of the integrity of the judicial system." Institutional integrity, after all, is at the core of institutional effectiveness. *Id.,* at 231

While there are no prior disciplinary cases that deal precisely with the same types of misconduct involved in this case, two cases provide guidance as to the proper sanction. Based on allegations that the respondent engaged in a pattern of judicial intemperance in eight cases, the Supreme Court suspended the respondent in *In re Moore*, 464 Mich 98 (2001) without pay for 6 months. The misconduct in the case of *In re Hathaway,* 464 Mich 672 (2001) involved one case in which the respondent improperly arraigned a defendant at the police station, and additional misconduct regarding docket mismanagement problems that included repeated adjournments and frequent absences. The Supreme Court suspended respondent for 6 months.

The misconduct in both *Moore* and *Hathaway* did not rise to the level of Respondent's misconduct in this case. Neither case involved a judge intentionally and deliberately failing to follow the law. In neither case did the judge engage in a course of conduct of his own volition to dismiss cases. Neither case involved a judge defying the order of a superior court. The Commission held that Respondent's misconduct involved repeated failures to follow the law and proper legal procedures, failing to maintain impartiality and avoid the appearance of impropriety, and failed to maintain appropriate security in the courtroom. The evidence abundantly supports the recommendation of a 90-day suspension without pay.

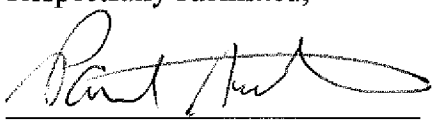
CONCLUSION

Respondent still fails to recognize that he did anything wrong. In these cases, Respondent could have avoided not only his own misconduct but the complications and appellate issues by simply doing what all judges are expected to do: remain fair and impartial and follow the law. In *Orlewicz, Fletcher,* and *McGee* he just needed to follow the law. The problems and appellate issues in *Boismier* would have been avoided had he made a proper record and given a requested instruction. If he had given written orders, there would have been no need for writs for

superintending control. In other cases, he needed to restrain his apparent need to insert himself in cases and remain a neutral and impartial jurist. Respondent must be reminded of his judicial responsibilities, the public must be protected, and the integrity of the judiciary must be preserved. The Commission's recommendation is appropriate.

WHEREFORE, the Examiner requests that this Honorable Court accept the Commission's recommendation and suspend the Respondent for 90 days without pay.

Respectfully submitted,



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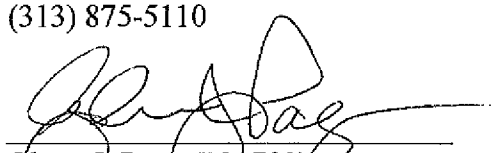

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Dated: January 27, 2014

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