STATE OF MICHIGAN
IN THE SUPREME COURT

COMPLAINT AGAINST:

Case No. 146802

Formal Complaint No. 92

HONORABLE BRUCE MORROW,
JUDGE, 3RD CIRCUIT COURT
DETROIT, MICHIGAN

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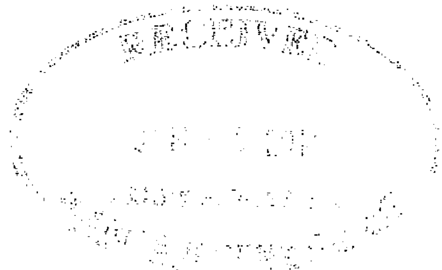
RESPONDENT HON. BRUCE MORROW'S PETITION AND BRIEF IN SUPPORT TO REJECT AND/OR MODIFY THE JUDICIAL TENURE COMMISSION'S RECOMMENDATION

*****ORAL ARGUMENT REQUESTED*****



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RESPONDENT HON. BRUCE MORROW'S PETITION TO REJECT AND/OR MODIFY THE JUDICIAL TENURE COMMISSION'S RECOMMENDATION

Oral Argument Requested

Respondent Bruce Morrow, through his attorneys, Collins Einhorn Farrell P.C., petitions this Court under Michigan Court Rule 9.224 to reject or modify the recommendation of the Judicial Tenure Commission as authorized by Michigan Court Rule 9.225. In support of this petition, Judge Morrow states:

1. The Commission concludes that Judge Morrow committed judicial misconduct in eight cases over which he presided during his twenty-one-year career as a judge, and therefore recommends a 90-day suspension without pay.

2. Six of these alleged instances of misconduct concern Judge Morrow's legal and procedural decisions (*People v Orlewicz, People v Fletcher, People v McGee, People v Boismier, People v Wilder, People v Moore*). In the other two cases, Judge Morrow supposedly created an appearance of impropriety by shaking an accused's hand and returning unread papers to his counsel (*People v Redding*) and allegedly jeopardized public safety by conducting a brief and uncontested sentencing hearing with no deputies present (*People v Hill*).

3. The Commission's recommendation should be rejected or modified for the three primary reasons.

4. First, the Commission concludes that a single erroneous ruling on an issue of law is misconduct. But "misconduct in office" is defined by Michigan Court Rule 9.205, which states that "misconduct includes but is not limited to

(a) *persistent* incompetence in the performance of judicial duties;

(b) *persistent* neglect in the timely performance of judicial duties;

(c) *persistent* failure to treat persons fairly and courteously;

(d) treatment of a person unfairly or discourteously because of the person's race, gender, or other protected personal characteristic;

(e) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another; and

(f) failure to cooperate with a reasonable request made by the commission in its investigation of a judge. [MCR 9.205, with added emphasis].

The examples listed in the Michigan Court Rules show that a single instance of malfeasance supports a finding of misconduct only for truly extraordinary acts like discrimination (d), abuse of the public trust (e), or noncooperation with the Commission (f). *Id.* When allegations of judicial misconduct are based on a judge's everyday tasks like "performance of judicial duties," the Michigan Court Rules provide that there must be *persistent* incompetence, neglect, or failure. *Id.* Issuing legal and procedural rulings is part of a judge's everyday work. Therefore, contrary to the Commission's conclusions, only *persistent* legal errors should constitute judicial misconduct.

5. Second, contrary to the Commission's conclusions, there was legal and factual support for each of the actions with which the Commission takes issue:

a. In *People v Orlewicz,* Judge Morrow correctly concluded that there is no constitutional right for a criminal defendant to attend a post-trial hearing

and, thus, no right for a victim or a victim's family to attend a post-trial hearing. Const 1963, art I, § 24. In addition, the assistant prosecutor did not cite the court rule that the Commission relies on in its recommendation for discipline. (Respondent's Ex. A, Orlewicz Tab 19, Apx 371-376). A judge has no obligation to conduct research on parties' behalf. *Walters v Nadell,* 481 Mich 377; 751 NW2d 431 (2008).

b. In *People v Fletcher*, Judge Morrow stated at sentencing that he would impose the mandatory term of imprisonment later. (Respondent's Ex. B, Fletcher Tab 6, at 13, Apx. III: 518, Respondent's Ex. B, Fletcher Tab 8, Apx. 524). The plain language of the statute at issue does not require an immediate sentence and, therefore, Judge Morrow did not violate this statute. MCL 257.625(9)(c)(ii). Although Judge Morrow subsequently closed the case without imposing a term of imprisonment after Fletcher committed another offense, he was arguably correct in concluding that, because Fletcher's sentence for the subsequent offense would have run concurrently with her sentence for the previous offense, imposing a sentence for the previous offense would have been a formality. See, e.g., *People v Thompson,* 117 Mich App 210, 213; 323 NW2d 656 (1982).

c. In *People v McGee,* Judge Morrow concedes that he erred in failing to vacate the defendant's conviction and further acknowledges that, because the conviction was not set aside, the statute required incarceration pending sentencing. But a single legal error is not judicial misconduct, see MCR 9.203(B), and Judge Morrow had a good faith basis for concluding that McGee's

conviction was tainted by prosecutorial misconduct. (Testimony of Keith Clark, Hearing v.2, at 334-335, 346, Apx. I: 173).

d. In *People v Wilder*, the Commission cites no authority requiring judges to follow the procedures that the Commission prefers. It also bases a finding of judicial misconduct on Judge Morrow's assessment of witness credibility, despite Michigan Court Rule 9.203(B).

e. In *People v Boismier*, the Commission cites no authority supporting its findings and legal conclusions. Contrary to the Commission's conclusions, the record shows that Judge Morrow did issue in off-the-record warning to the prosecutor. (Testimony of Juan Mateo, Hearing v.3, at 757-758, Apx. II: 280-281). The Commission's conclusions as to the Court of Appeals order are also mistaken because that order does not expressly require a hearing with advocates present. (Respondent's Exhibit D, Boismier Tab 17, Apx. III: 548).

f. In *People v Redding,* Judge Morrow's decision to shake an accused's hand did not create an appearance of impropriety. The Commission also errs in concluding that Judge Morrow returned papers to the accused rather his counsel. (Testimony of Angela Povilaitis, Hearing v.3 at 535, 589, Apx. II: 225, 238).

g. In *People v Moore*, the Commission incorrectly concludes that Judge Morrow's actions did not give the parties an opportunity to seek recusal if they felt it appropriate. In fact, the parties had to appear for sentencing after learning that Judge Morrow had subpoenaed the defendant's medical records, and

could have sought recusal at that time. (Respondent's Ex. A, Moore Tab 13, Apx. III: 531-541). Moreover, Judge Morrow was not acting as an advocate for the defendant when he investigated the role of vigilante violence in the defendant's apprehension. He properly recognized that all judges should be interested in preventing unnecessary violence from tainting criminal legal proceedings.

h. In *People v Hill*, the Commission disregarded Judge Morrow's authority to determine when sheriff's deputies shall attend court. MCL 600.581

6. Third, the Commission failed to follow *In re Brown*, 461 Mich 1291; 625 NW2d 744 (2000), and this court's instruction that judicial discipline in one case must be proportionate to discipline imposed in other cases. The Commission gave no consideration at all to other judicial discipline cases. Had it done so, it would have determined that a 90-day suspension is grossly disproportionate and that the alleged misconduct warrants no more than a reprimand.

WHEREFORE this Court should (1) dismiss all claims against Judge Morrow, (2) enter no more than a reprimand, or (3) remand this matter to the Commission for entry of a recommendation that complies with the Michigan Court Rules and *Brown*.

Respectfully submitted,

Collins Einhorn Farrell, PC

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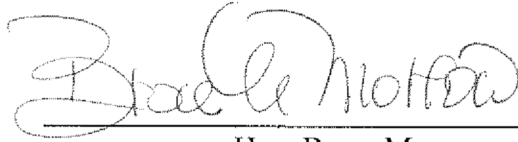
Dated: January 6, 2014

Verification

I, Hon. Bruce Morrow, hereby certify that the information contained in this Petition to Reject and/or Modify the Judicial Tenure Commission's Recommendation is correct to the best of my information, knowledge and belief.



Hon. Bruce Morrow

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BRIEF IN SUPPORT OF RESPONDENT HON. BRUCE MORROW'S PETITION TO REJECT AND/OR MODIFY THE JUDICIAL TENURE COMMISSION'S RECOMMENDATION

Oral Argument Requested

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Argument 1 .... *17*

Much of the alleged misconduct concerns rare and unrelated instances in which Judge Morrow allegedly failed to follow the law. Only a "persistent" failure to follow the law can justify a finding of judicial misconduct. Alleged errors in eight cases—a vanishingly small portion of Judge Morrow's total caseload—is not a "persistent" failure. Therefore, this Court should find that Judge Morrow did not commit judicial misconduct. 17

Argument 2 .... *20*

The Commission's recommendation is based on the premise that Judge Morrow deliberately failed to follow unambiguous law. When one examines the individual cases discussed in the recommendation, however, it is apparent that the law is far less clear than the Commission acknowledges and may indeed support Judge Morrow's decisions. This Court should not discipline a judge based on rulings about which reasonable minds can disagree. 20

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2.7 Judge Morrow did not commit judicial misconduct in *People v Moore* by looking into whether the defendant was apprehended through vigilante violence. 36

2.8 Judge Morrow did not commit judicial misconduct in *People v Hill* by conducting a sentencing hearing without Sheriff deputies present. 38

Argument 3 .... *39*

Judge Morrow did not commit judicial misconduct and should not receive discipline of any kind. If the Court imposes discipline, however, the Court's sanction must be commensurate with discipline imposed in other cases — a fact that the Commission's recommendation overlooks. Judge Morrow should receive no more than a reprimand. The Commission's recommendation of a 90-day suspension is disproportional and out of step with this Courts jurisprudence 39

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1	Report of the Master
2	JTC Decision and Recommendation
3	JTC Proof of Service
4	Day 1: June 10, 2013
5	Day 2: June 11, 2013

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Number	Description
6	Day 3: June 12, 2013
7	Day 4: June 13, 2013
8	Day 5: June 17, 2013
9	*People v Boismier,* unpublished opinion per curiam of the Court of Appeals, issued December 28, 2010 (Docket No. 291642)
10	*People v Cullen*, unpublished opinion per curiam of the Court of Appeals, issued October 4, 2007 (Docket No. 272986)
11	*People v McGee,* unpublished opinion per curiam of the Court of Appeals, issued June 10, 2008 (Docket No. 277714)
12	*People v Thomas,* unpublished opinion per curiam of the Court of Appeals, issued November 25, 2003 (Docket No. 241586),

APPENDIX 3: Respondent's exhibits

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14	Defendant's Response to WXYZ Motion in *Orlewicz*
15	Transcript of February 27, 2009 Hearing in *Orlewicz*
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18	Court of Appeals' April 14, 2009 order in *Orlewicz*
19	Transcript of April 27, 2009 hearing in *Orlewicz*
20	Court of Appeals' April 29, 2009 order in *Orlewicz*
21	Transcript of December 5, 2008 hearing in *Fletcher*
22	Trail Court order in *Fletcher*
23	Register of Actions for 2010 offense in *Fletcher*
24	August 16, 2006 transcript in *Moore*
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ORDER APPEALED AND JURISDICTIONAL STATEMENT

On December 9, 2013, the Judicial Tenure Commission issued its Decision and Recommendation under MCR 9.220. On December 10, 2013, the Commission served Respondent Hon. Bruce Morrow as required under MCR 9.223 (Proof of Service, Apx 1: I:87). Judge Morrow's petition and supporting brief are being filed within 28 days of being served. MCR 9.224(A). Therefore, this Court has jurisdiction to accept, reject or modify the Commission's recommendation. MCR 9.225.

STATEMENT OF QUESTIONS PRESENTED

1. Six of the eight cases cited in the Judicial Tenure Commission's recommendation for a 90-day suspension concern alleged legal errors. These cases represent, at most, less than one tenth of one percent Judge Morrow's decisions. The Michigan Court Rules suggest that only "persistent" legal errors qualify as judicial misconduct. Do these six cases establish "persistent" error or incompetence?

   The Judicial Tenure Commission answered: Yes.

   Respondent Judge Morrow answers: No.

   This Court should answer: No.

2. The Judicial Tenure Commission recommends that this Court discipline Judge Morrow based on "repeated failures to follow the law and proper legal procedures..., failure to maintain impartiality and to avoid the appearance of impropriety..., and failure to maintain appropriate security." With the exception of one case (*People v McGee*), Judge Morrow's actions were arguably consistent with governing law. Should the Court find misconduct based on rulings about which reasonable minds can disagree?

   The Judicial Tenure Commission answered: Yes.

   Respondent Judge Morrow answers: No.

   This Court should answer: No.

3. This Court's decision in *In re Brown* requires similar sanctions for similar levels of misconduct. The Court has previously imposed a 90-day suspension where a judge violated Michigan's criminal laws and jeopardized public safety. Under *Brown*, can the Court impose a suspension of 90 days or more based on six contested legal rulings, one instance in which a judge shook a criminal defendant's hand, and a brief sentencing hearing conducted without security present?

   The Judicial Tenure Commission answered: Yes.

   Respondent Judge Morrow answers: No.

   This Court should answer: No.

INTRODUCTION

The Judicial Tenure Commission's Decision and Recommendation concludes that Judge Bruce Morrow committed judicial misconduct in eight cases. Six of these alleged instances of misconduct concern Judge Morrow's legal and procedural decisions. In the other two cases, Judge Morrow supposedly created an appearance of impropriety by shaking a criminal defendant's hand and returning unread papers to his counsel (*People v Redding*) and allegedly jeopardized public safety by conducting a brief and uncontested sentencing hearing with no security personnel present (*People v Hill*).

There has never been a judicial discipline case like this one in Michigan before. Neither the Commission nor this Court has ever treated legal or procedural decisions—even unambiguously erroneous ones—as judicial misconduct. Yet legal and procedural decisions are the primary focus of the Commission's recommendation that this Court suspend Judge Morrow for 90 days.

Consequently, this case puts Michigan's judiciary at a crossroads. To one side lies familiar terrain, where judges are disciplined only for true misconduct and abuses of office. To the other side lies uncharted territory, where members of the judiciary can be disciplined because they happen to have different philosophies about a judge's role.

This Court has always taken the former road, and for good reason. Judges in Michigan are elected by the People. According to the democratic principles that have shaped the government of this state for almost two centuries, the People are entitled to determine what kind of judge best represents their understanding of justice.

For twenty-one years, the people of Wayne County have endorsed Judge Bruce Morrow's approach to criminal justice and his view that judges should focus above all on the humanity of

those who are subject to the court's power. Not every judge conceives of his or her role in this way. But Judge Morrow does, and it is this view that the people of Wayne County have chosen again and again.

With its unprecedented Decision and Recommendation, the Commission has taken the position that a judge who conceives of his role in a manner that differs from the majority view does so at risk to his livelihood and his reputation. If this Court accepts the Commission's view and disciplines Judge Morrow based on the content of his judicial decisions, it will usher in a new age for Michigan's judiciary. Judges will have to consider not just the legal arguments raised by parties but the likelihood that their decisions may prove so unpopular with the Commission or their colleagues on the bench that they will be subject to discipline.

Worse, following the Commission's recommendation will add a new and poisonous arrow to the quivers of advocates aggrieved by courts' decisions. Losing parties will be able to say with credibility what an assistant prosecutor said to Judge Morrow's colleague, Judge David Allen: *Rule in my favor or I'll report you.* (Testimony of Hon. David Allen, Hearing Tr., v.4, at 815, Apx. II: 296). Judicial decisions will be motivated by fear and self-preservation more than dispassionate views of law and justice.

The consequences of adopting this view will be dire for Michigan, for Michigan's judiciary, and for the rule of law. And the negative effects of adopting the Commission's Decision and Recommendation will not end there:

- If it follows the Commission's recommendation about *People v Orlewicz*, 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;
- If it follows the Commission's recommendation about *People v Fletcher*, the Court will hold that judges can be disciplined for declining to read language into statutes;

- If it follows the Commission's recommendation about *People v Wilder*, the Court will hold that a judge acting within his authority can be disciplined if other judges conclude that this authority should have been exercised differently;
- If it follows the Commission's recommendation about *People v Boismier*, the Court will depart from its traditional focus on "plain language," and hold that judges can be disciplined for failing to follow "implicit" directions in an ambiguous order from an appellate court;
- If it follows the Commission's recommendation about *People v Redding*, the Court will hold that judges can be disciplined for extending common courtesies to criminal defendants;
- If it follows the Commission's recommendation about *People v Moore*, the Court will hold that judges can be disciplined for taking steps to ensure that courts do not inadvertently sanction vigilante violence; and
- If it follows the Commission's recommendation about *People v Hill*, the Court will hold that judges can be disciplined for exercising authority expressly granted by the Michigan legislature.

In each of these ways, the Commission's recommendation is unsound. Unless the Court rejects the Commission's recommendation, it will sow these unsound principles into Michigan law.

People v McGee is the only case cited by the Commission where Judge Morrow truly erred. His ruling in that case was prompted by good faith concerns about the fairness of the trial that led to the jury's guilty verdict. A single legal error in a single case, particularly one prompted by good faith concerns about prosecutorial misconduct, does not justify discipline.

Each of these cases might be different if the Court of Appeals had concluded that Judge Morrow erred and he refused to follow explicit instructions from a superior court. If a lower court fails to correct an error based on a superior court's instructions, that legal error becomes something more—it becomes willful lawlessness. But not one of the cases cited by the Commission evinces this sort of misconduct. In each case, Judge Morrow respected that other judges may have different views. This Court should do no less, and should therefore dismiss the Commissions' charges. At most, it should impose no more than a reprimand.

STANDARD OF REVIEW

This Court reviews the Commission's recommendations and findings of fact de novo. See *In re Chrzanowski,* 465 Mich. 468, 478; 636 NW2d 758 (2001). The Examiner must prove that judicial discipline is warranted by a preponderance of the evidence. See *In re Noecker,* 472 Mich 1, 8; 691 NW2d 440 (2005), citing *In re Lloyd,* 424 Mich 514, 521-522, 384 NW2d 9 (1986). A judge may not be disciplined for actions taken in good faith and with due diligence. MCR 9.203(B).

FACTS AND PROCEDURAL HISTORY

A. Background on Judge Morrow

Judge Morrow has served as a judge for the criminal division of the Wayne County Circuit Court since 1992. In that role, he has adjudicated thousands of criminal matters. Judge Morrow has a reputation for being prompt and for running a fair and "user-friendly" courtroom. (Testimony of Steven Fishman, Hearing v.5, at 910-911, 921-922, Apx. II: 321, 324; Testimony of William Winters, Hearing v.4, at 843-845, Apx. II: 303; Testimony of John Johnson, Hearing v.4, at 852, Apx. II: 305; Testimony of Shannon Walker, Hearing v.4, at 858-859, Apx. II: 307). He is also known for his personal warmth to all who appear before him, and for greeting jurors, counsel, defendants, and defendants' families with a handshake. (Testimony of Angela Povilaitis, Hearing v.3, at 589-590, Apx. II: 238-239). Judge Morrow is motivated by a desire to help defendants avoid factors that lead to criminal behavior. (Testimony of Steven Fishman, Hearing v.5, at 925, Apx. II: 324).

B. People v Orlewicz

The Commission concluded that Judge Morrow committed judicial misconduct in eight separate cases. The Master appointed by this Court—Judge Edward Sosnick, who served as an

Oakland County judge for twenty-four years—made a finding of no misconduct in *People v Orlewicz*, Wayne County Circuit Court Case No. 07-023972-01-FC. But the Commission found misconduct in this case.

Jean Paul Orlewicz was tried before Judge Annette Berry and convicted of first-degree murder and mutilation of a dead body. (Testimony of Jeffrey Caminksy, Hearing v.1, at 67-68, Apx. I: 105; Testimony of Elizabeth Jacobs, Hearing v.3, at 684, Apx. II: 262). Judge Berry closed the courtroom during a pretrial proceeding because there was not enough room for all the prospective jurors. *People v Orlewicz,* 293 Mich App 96, 112; 809 NW2d 194 (2011). Judge Berry did not enter a written order closing the court or follow the MCR 8.116(D) factors cited in the Commission's Decision and Recommendation.

Judge Berry sealed a report prepared by a psychiatrist who examined Orlewicz. (Testimony of Elizabeth Jacobs, Hearing v.3, at 688, Apx. II: 263). The order stated that the seal was to remain in place until further order of the court. (Testimony of Jeffrey Caminsky, Hearing v.1, at 121, Apx. I: 119). This psychiatrist's testimony was the subject of the post-trial hearing that prompted the Examiner's charges against Judge Morrow.

After his conviction, Orlewicz filed a motion for a new trial, arguing that exclusion of his v.3, at 689, Apx. II: 263). The defense moved to disqualify Judge Berry from post-trial proceedings. (*Id.* at 685, Apx. II: 262). After Judge Berry denied the motion, the Chief Judge of the Wayne County Circuit Court granted the disqualification motion and reassigned the case to Judge Morrow. (*Id.* at 685-686, Apx. II: 262-263).

A local television station filed a motion to film a post-conviction hearing on the exclusion of the psychiatrist's testimony. (Testimony of Elizabeth Jacobs, Hearing v.3, at 690, Apx. II: 264). Judge Morrow met in chambers with Orlewicz's attorney, Elizabeth Jacobs, and assistant

prosecutor Jeffrey Caminsky to discuss the television station's request. (*Id.* at 691, Apx. II: 264). At that meeting, Jacobs stated that her client objected to the television station's request and that the courtroom should be closed entirely for the post-trial hearing. (*Id.,* Apx. II: 264). Caminsky stated that he would join the objection to the request and, although he felt he had to object to closure, it would be only a perfunctory objection. (*Id.* at 692, Apx. II: 264).

Jacobs also filed a written response on Orlewicz's behalf to the television station's motion, arguing that the psychiatric testimony would be embarrassing to both Orlewicz and his family and would invade his family's right to privacy. (Respondent's Ex. A, Orlewicz Tab 15, Apx. III: 366-369). She also argued that publicity could prejudice potential jurors necessary for retrial. This response requested that the Court close the courtroom entirely. (*Id.* at 4, Apx. III: 369). The prosecution filed nothing at all on the subject of closure. (Testimony of Jeffrey Caminsky, Hearing v.1, at 150, Apx. I: 126).

When the parties went on the record at the February 27, 2009 hearing, Caminsky stated that the prosecution had no objection to excluding cameras but saw "no reason why the entire hearing should be closed." (Respondent's Ex. A, Orlewicz Tab 19, at 4, Apx. III: 374-375). He represented that the prosecution "[would] not be appealing ... the Court's decision to close the proceedings" and "[left] that to the interested parties...." (*Id.* at 4-5, Apx. III: 374-375). Caminsky also stated that "victims have a right to attend proceedings" under state law and asked the Court to allow "the Sorensen family" to attend the hearing. (*Id.* at 5, Apx. III: 375). Caminsky did not cite MCR 8.116(D) in his presentation to Judge Morrow. (*Id.* at 3-6, Apx. III: 373-376).

After hearing argument from counsel and considering Orlewicz's motion, Judge Morrow concluded that the right to attend proceedings, like all constitutional rights, is not absolute and

found that "the record sufficiently supports the need for [the hearing] to be closed." (Respondent's Ex. A, Orlewicz Tab 19, at 6, Apx. III: 376). Accordingly, he closed the post-trial hearing.

Judge Morrow had to stop the post-trial hearing after a couple hours because it was scheduled at the last minute and he was not informed that the hearing would last as long as it did. (Respondent's Ex. A, Orlewicz Tab 19, at 81-82, Apx III:451-452). Therefore, Judge Morrow continued the matter to April 24, 2009.

On March 17, 2009, the prosecution filed a motion for superintending control with the Michigan Court of Appeals. (Respondent's Ex. A, Orlewicz Tab 20, Apx. III: 454-480). It sought superintending control instead of filing an appeal because Judge Morrow had not entered a written order. (Testimony of Timothy Baughman, Hearing v.3, at 638-639, Apx. II: 251). The prosecution never proposed or sought a written order because, as the head of the Wayne County prosecutor's appellate division testified, seeking superintending control is faster than pursuing ordinary appellate channels. (*Id.*). Failing to ask for a written order, therefore, was a strategic decision by the prosecutor.

The court reporter did not prepare a transcript of the February 27, 2009 hearing. (Respondent's Ex. A, Orlewicz Tab 24, Apx. III: 482-489). On April 3, 2009, Judge Morrow heard Orlewicz's motion to release the transcript. (*Id.*). He denied Orlewicz's motion, finding that preparation of a transcript would undermine his order closing the proceeding.

On April 14, 2009, the Court of Appeals held that Judge Morrow had not made a record of findings sufficient to support closure and therefore remanded the matter to Judge Morrow, noting that he was free to use the already-scheduled April 24, 2009 hearing, "to issue [the Courts] findings to the parties." (Respondent's Ex. A, Orlewicz Tab 26, Apx. III: 491).

Judge Morrow placed his findings on the record about two weeks later, without the parties or their attorneys present. (Respondent's Ex. A, Orlewicz Tab 27, Apx. III: 493-501). He stated that it was his understanding that the public's right to access to pretrial proceedings is more limited and that this rule applies to post-trial proceedings as well. He was concerned about post-trial media coverage because it could prejudice potential jurors if a new trial was required. Finding a conflict between a defendant's right to a fair trial if retrial was warranted and the public's right to open access, Judge Morrow concluded that, under the constitution, the defendant's right to a fair trial must prevail. (*Id.,* Apx. III: 499).

The Court of Appeals issued an order finding that Judge Morrow "failed to articulate any valid reason for closing the proceeding to the public" and that future sessions were to be conducted "in open court." (Respondent's Ex. A, Orlewicz Tab 28, Apx. III: 504). The panel also held that there was no basis to prohibit transcription of the February 27, 2009 hearing but that Judge Morrow could "enter the appropriate written order" if he wished to "prohibit the parties from discussing the case with the media..." (*Id.,* Apx. III: 504).

C. People v Fletcher

Next, the Commission takes issue with *People v Fletcher,* Wayne County Case No. 08-10018, another case in which the Master found no misconduct. Lamiya Fletcher was charged with a third offense operating a vehicle while intoxicated. (Testimony of Teena Walsh, Hearing v.2, at 397, Apx. I: 189). After pleading guilty, Fletcher was scheduled for a December 5, 2008 sentencing hearing before Judge Morrow.

Judge Morrow was required to impose either (1) a term of imprisonment or (2) probation, community service, and at least 30 days of imprisonment, with at least 48 hours of that imprisonment to be consecutive. MCL 257.625(9)(c)(ii). Fletcher had already served 48

consecutive hours in jail. (Testimony of Teena Walsh, Hearing v.2, at 398-399, Apx. I: 189). Judge Morrow sentenced her to probation and community service, stating that he would decide "when" Fletcher would serve her mandatory sentence later: "The Court—in the next five years, we'll decide *when* she does her alternative incarceration days." (*Id.* at 400, Apx. I: _190_; Respondent's Ex. B, Fletcher Tab 6, at 13, Apx. III: 518, with added emphasis). Similarly, the written order in *Fletcher* states: "Jail sentence *start time to be determined.*" (Respondent's Ex. B, Fletcher Tab 8, Apx. III: 524, with added emphasis).

Fletcher was charged with a new offense in 2010. (Respondent's Ex. B, Fletcher Tab 12, Apx. III: 526-527). After she was sentenced in the new case, Fletcher's 2008 case was closed. (Testimony of Teena Walsh, Hearing v.2, at 402, Apx. I: 190). Had she been sentenced for the 2008 conviction as well, it appears that the sentences would have run concurrently. (Master's Report at 17, Apx. I: 18). The prosecutor did not appeal Judge Morrow's order in *Fletcher.*

D. People v McGee

Both the Commission and the Master found misconduct in *People v McGee*, Wayne County Case No. 05-8641. In 2005, a jury convicted Tyrant McGee of first-degree criminal sexual conduct with a person under age thirteen. (Testimony of Keith Clark, Hearing v.2 at 323, Apx. I: 170). The prosecution moved to remand McGee to Wayne County Jail under a statute providing: "A defendant convicted of sexual assault of a minor and awaiting sentence shall be detained and shall not be admitted to bail." MCL 770.9b(1). Judge Morrow denied this motion. (Testimony of Keith Clark, Hearing v.2, at 326-327, Apx. I: 171).

After Judge Morrow declined to remand McGee, the prosecution elected not to seek an order or submit a proposed order. Instead, as in *Orlewicz*, it obtained a writ of superintending control from the Michigan Court of Appeals. (*Id.* at 329, Apx. I: 172). The Michigan Court of

Appeals issued an order holding that Judge Morrow was required to "detain" McGee under MCL 770.9b. (*Id.* at 331, Apx. I: 172). Judge Morrow complied with this order. (*Id.* at 332, Apx. I: 173).

Post-trial proceedings in *McGee* focused on the prosecution's conduct during trial. On May 26, 2006, Judge Morrow granted McGee's motion for a new trial, finding that assistant prosecutor Clark committed misconduct when he stated during closing argument: "McGee saw the look on [the victim's] face, saw she was crying, he suddenly realized, 'Man I'm f***ing a 12-year-old girl." (*Id.* at 334-335, Apx. I: 173). Judge Morrow also issued a separate show-cause order as to why the assistant prosecutor should not be held in contempt for his conduct during trial. (*Id.* at 335, Apx. I: 173).

The prosecution appealed Judge Morrow's grant of a new trial, and the Court of Appeals reversed through a preemptory order. (*Id.* at 339, Apx. I: 174). The Court of Appeals panel held that, because the prosecutor's remarks were supported by the evidence and "reasonable inferences therefrom," Judge Morrow had erred in granting a new trial. (*Id.*).

During the hearing in this proceeding, Clark explained that he "tried to speak in the language that I thought would be more appropriate to the defendant," thereby suggesting that this statement may have been motivated by racial bias. (*Id.* at 346, Apx. I: 176).

E. People v Wilder

The Master found no misconduct in *People v Wilder,* Wayne County Case No 09-003577-FH, but the Commission disagreed. Eric Wilder was charged with possession with intent to distribute marijuana and a bench trial was scheduled for June 2008. (Testimony of Teena Walsh, Hearing v.2, at 403, Apx. I: 190). Two of the prosecution's complaining witnesses did not appear for trial. Accordingly, that matter was closed.

The prosecution re-filed its case against Wilder in 2009. (*Id.* at 404, Apx. I: 191). At a pretrial conference in the second action, Wilder's attorney informed Judge Morrow that the prosecutor had extended a plea offer. Judge Morrow stated:

> Okay. This is what I'll do. I'm going to accept the plea of guilty conditionally, and then I'm going to hold a hearing because when I dismissed Wilder's case the last time, I said before they re-issued and before I dismiss it with cause, that we were going to have it explained why somebody who was subpoenaed to show up chose not show up. [See *id.* at 408, Apx. I: 192.]

Judge Morrow then stated that he would accept Wilder's plea as a "conditional plea right now" and set sentencing for April 24, 2009. (*Id.* at 408-410, Apx. I: 192).

Judge Morrow was unable to hold Wilder's sentencing hearing on April 24, 2009 because the prosecution ordered the wrong transcript. (*Id.* at 413, Apx. I: 193). Wilder appeared again for sentencing on May 29, 2009. Judge Morrow found that he would need Sgt. Murphy to explain his absence from the 2008 bench trial and the case was adjourned for three weeks. At the June 2009 hearing, Officer Napier insisted that he did not receive a subpoena because he had broken his hand and was separated from the police department. (*Id.* at 420, Apx. I: 195). Judge Morrow determined that it was necessary to review the subpoena book to assess Officer Napier's statement.

On July 10, 2009, Judge Morrow reviewed the Western District police department's subpoena book to determine which officers had signed for subpoenas. He found that, although neither Officer Napier nor Officer Stevelink signed for their subpoenas, Officer Stevelink did appear for trial in June 2008 and Officer Murphy was present but in another courtroom. (*Id.* at 424, Apx. I: 196). Therefore, Judge Morrow found that the prosecution was not able to present a valid reason for the officers' absence from Wilder's trial and dismissed the 2009 charges. (*Id.* at 425, Apx. I: 196). The prosecution did not appeal this decision.

F. People v Boismier

Unlike the Master, the Commission concluded that Judge Morrow committed judicial misconduct in *People v Boismier,* Wayne County Case No 08-12562-01. Jason Boismier was convicted of third-degree criminal sexual conduct and furnishing alcohol to a minor. (Testimony of Angela Povilaitis, Hearing v.3, at 538, Apx. II: 226). Before trial, Starr Gasidlo, a minor who lived next door to the victim, spoke to the prosecution. (*Id.* at 542, Apx. II: 227). She allegedly said that the defendant did not rape the victim because their intercourse was "consensual." She claimed to have learned of the "consensual" nature of this encounter from her father, David Gasidlo, who had supposedly been told by the defendant himself. (*Id.,* Apx. II: 227).

The prosecution sought to add David Gasidlo, but later withdrew its request when Mr. Gasidlo denied being told by the defendant that the defendant engaged in "consensual" intercourse with the victim. (*Id.* at 547-548, Apx. II: 228). Nevertheless, at the end of her cross-examination, assistant prosecutor Angela Povilaitis asked Boismier if he ever told his neighbor or anyone else that he had consensual sex with the victim. (*Id.* at 500-551, Apx. II: 229). Boismier replied in the negative.

Defense counsel Juan Mateo requested a bench conference, after which he understood that the prosecution would stop inquiring about what Boismier allegedly said to Gasidlo and had been directed by the Court to do so. (Testimony of Juan Mateo, Hearing v.3, at 757-758, Apx. II: 280-281). But Povilaitis asked another question suggesting that the prosecution had evidence that Boismier told someone that he had consensual intercourse with the victim. (*Id.* at 758, 768, Apx. II: 281, 283). The trial then adjourned for lunch. When the parties appeared again on the record, Mateo was extremely bothered and expressed his view that the prosecutor did not have a good faith basis to ask about the alleged statement to Gasidlo. (Testimony of Angela Povilaitis,

Hearing v.3, at 554-557, Apx. II: 230). When Mateo averred that Povilaitis's conduct was unethical, Judge Morrow asked whether defense counsel intended to report the prosecutor to the Attorney Grievance Commission. (*Id.*). Mateo did not intend to do so.

After Boismier was convicted, he filed a motion for a new trial, arguing that the prosecution engaged in misconduct by referencing the alleged statement to Gasidlo without a good faith basis. (*Id.* at 564, Apx. II: 232). Judge Morrow granted the motion, holding that Povilaitis's questioning violated instructions given in the off-the-record bench conference.

The prosecution appealed Judge Morrow's ruling. On July 31, 2009, the Court of Appeals vacated Judge Morrow's order and remanded the case for Judge Morrow to make factual findings on the record. (Testimony of Angela Povilaitis, Hearing v.3, at 565-566, Apx. II: 232-233). When contacted by Judge Morrow's chambers about holding a hearing, Mateo stated that he did not think the Court of Appeals' order required counsel to be present and did not feel it was necessary. (Testimony of Juan Mateo, Hearing v.3, at 773, Apx. II: 284). Judge Morrow stated his findings on the record without counsel present. (Testimony of Angela Povilaitis, Hearing v.3, at 568, Apx. II: 233).

When the case returned to the Court of Appeals, a different panel of judges held in a fractured opinion that Judge Morrow had abused his discretion by ordering a new trial. *People v Boismier,* unpublished opinion per curiam of the Court of Appeals, issued December 28, 2010 (Docket No. 291642), Apx. II:335-346.

There was no single controlling rationale for the opinion. A majority consisting of Judges Servetto and Shapiro concluded that the prosecutor's questions *were* improper. *See id.* at 1 (SERVITTO, J., concurring); *id.* at 1 (SHAPIRO, J., dissenting). Judge Shapiro wrote in dissent that he "would not, based on this record, conclude that the trial court erred in finding prosecutorial

misconduct," that he concluded the misconduct was not harmless, and that he "would not find that the trial court abused its discretion in granting a new trial." *Id.* at 1 (SHAPIRO, J., dissenting). Judge Servitto concurred only in the result, finding that the error did not deny Boismier a fair trial. *Id.* at 1 (SERVITTO, J., concurring).

G. People v Redding

The Master found no judicial misconduct in *People v Redding,* Wayne County Case No 07-003989-01-FC, but the Commission disagreed. The defendant in *Redding* had been in Judge Morrow's courtroom for other previous proceedings. (Respondent's Ex. C, Redding Tab 2, Apx. III: 544-546). These include a prior bench trial where he was convicted by Judge Morrow and the probation period attendant to that sentence. That case involved Redding becoming embroiled in a fight to defend his sons. Redding was charged subsequently in 2007 with assault with intent to murder, first-degree child abuse, assault with intent to do great bodily harm, and felony firearm. (Testimony of Angela Povilaitis, Hearing v.3, at 525-526, Apx. II: 222-223). The alleged victims were Redding's sons, and Redding asserted that he was acting in self-defense. (*Id.* at 592, Apx. II: 239).

Before the start of Redding's trial, Judge Morrow shook hands with the accused and gave defense counsel an unopened envelope that had previously been given to Judge Morrow's staff. (*Id.* at 535, 589, Apx. II: 225, 238). Redding had given the envelope that turned out to contain papers to Judge Morrow's courtroom deputy for the court to hold sometime before Redding was bound over on the 2007 charges. (Testimony of Angela Povilaitis, Hearing v.3 at 535-536, Apx. II: 225). They had no relevance to the charges against Redding. Judge Morrow never read them. (*Id.* at 535, Apx. II: 225). Redding's counsel stated on the record that she did not intend to

introduce them at trial. (*Id.* at 601, Apx. II: 241). There is no allegation that Judge Morrow engaged in improper *ex parte* contact.

Although the Commission states without citation that Judge Morrow gave the papers to Redding himself (Decision and Recommendation at 21, Apx. I: 71), the record shows that Judge Morrow actually gave those papers to defense counsel. (Testimony of Angela Povilaitis, Hearing v.3 at 535, 589, Apx. II: 225, 238). These actions occurred outside of the presence of the jury, as shown by Povilaitis's testimony that she did not have an opportunity to address her concerns about Judge Morrow's actions before the jury was brought into the courtroom. (*Id.* at 595-596, Apx. III: 240).

It was not unusual for Judge Morrow shake hands with people in his courtroom. (*Id.* at 590, Apx. II: 239). At the time of the Redding trial, Judge Morrow explained: "And just so that the record can be straight, I probably have shaked [sic] Redding's hand ten times over the course of our relationship as Judge and accused and prisoner." (Testimony of Angela Povilaitis, Hearing v.3, at 536, Apx. II: 225).

H. People v Moore

People v Moore, Wayne County Case No 06-003221-01-FC, is another case in which the Master found no judicial misconduct but the Commission disagreed. George Moore was charged with armed robbery, felonious assault, and assault with intent to do great bodily harm. (Testimony of Lori Dawson, Hearing v.1, at 211, Apx. I: 141). His case was assigned to Judge Morrow and scheduled for a jury trial. (*Id.* at 211-212, Apx. I: 141). Before the case was called for trial, the prosecution and defense agreed to a bench trial. (*Id.* at 212, Apx. I: 141). After notifying Judge Morrow that they had agreed to a bench trial, the prosecution and defense

engaged in further settlement discussions. (*Id.* at 215, Apx. I: 142). They reached an agreement before the case was called again. (*Id.*).

When the case returned before Judge Morrow, the assistant prosecutor informed the court that the parties had reached an agreement. (*Id.* at 217, Apx. I: 143). Based on the parties' agreement, Moore pleaded guilty to armed robbery.

After taking Moore's plea, Judge Morrow explained that he had obtained Moore's medical records because there was information suggesting that Moore had been beaten by store employees who apprehended him. (*Id.* at 218, Apx. I: 143). When Judge Morrow asked if either side felt that he had not complied with the Michigan Court Rules, neither side expressed concern. (Respondent's Ex. A, Moore Tab 7, at 9, Apx. III: 558). Judge Morrow then accepted the parties' plea agreement.

I. People v Hill

Both the Master and the Commission concluded that Judge Morrow committed judicial misconduct in *People v Hill*, Case No 09-018346-02-FC. Brandon Hill was charged with armed robbery, carjacking, and felony firearm. (Transcript of Lori Dawson, Hearing v.1, at 221, Apx. I: 144). He pleaded guilty to all counts and the court scheduled sentencing for March 8, 2010 at 8:30 a.m. (*Id.* at 221-222, Apx.I:144). Hill's attorney advised the court that he had another matter and was hoping to complete Hill's sentencing as early as possible. (Testimony of Capers Harper, Hearing v.3, at 736, Apx.II:275).

No deputies were present in the courtroom at 8:30 a.m. (*Id.* at 736-737, Apx. II: 225). The court waited for the deputies to arrive but they did not. (*Id.* at 737, Apx. II: 275). There were no other attorneys besides Capers Harper and Lori Dawson at the time the Hill matter was called. (*Id.*, Apx. II: 275). Finally, Judge Morrow took the lockup keys from the deputy's desk

and went into the prisoners' lockup area. (Testimony of Lori Dawson, Hearing v.1, at 224, Apx. I: 224. Defense counsel went with him to lockup. (Testimony of Capers Harper, Hearing v.3, at 738, Apx. II: 276). Judge Morrow brought Hill into the courtroom. Hill was sentenced with a brief hearing that lasted five to ten minutes. (*Id.* at 739, ApxII:276). Judge Morrow then returned Hill to lockup and replaced the keys on the deputy's desk.

ARGUMENT 1

Much of the alleged misconduct concerns rare and unrelated instances in which Judge Morrow allegedly failed to follow the law. Only a "persistent" failure to follow the law can justify a finding of judicial misconduct. Alleged errors in eight cases—a vanishingly small portion of Judge Morrow's total caseload—is not a "persistent" failure. Therefore, this Court should find that Judge Morrow did not commit judicial misconduct.

Under the Michigan Constitution, this Court can discipline a judge only if that judge is convicted of a felony, subject to a physical or mental disability that "prevents performance of judicial duties," or guilty of one of the following: "misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice." Const 1963, art 6, § 30. The Commission's Decision and Recommendation focuses on "judicial misconduct," which presumably refers to "misconduct in office."[1]

"Misconduct" is not a Rorschach ink blot test, subject to whatever content the reader cares to give it. "Misconduct in office" is defined by the Michigan Court Rules, which state that "misconduct includes but is not limited to

(a) *persistent* incompetence in the performance of judicial duties;

[1] The Decision and Recommendation also cites "conduct clearly prejudicial to the administration of justice" and other rules in a list of "standards of judicial conduct" that Judge Morrow allegedly violated. (Decision and Recommendation at 24, Apx. I: 74). The focus of its decision, however, appears to be "misconduct." See Section 3.1, *infra*.

(b) *persistent* neglect in the timely performance of judicial duties;

(c) *persistent* failure to treat persons fairly and courteously;

(d) treatment of a person unfairly or discourteously because of the person's race, gender, or other protected personal characteristic;

(e) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another; and

(f) failure to cooperate with a reasonable request made by the commission in its investigation of a judge. [MCR 9.205, with added emphasis].

These court rules must be construed and applied according to their plain language, just like a statute. See, e.g., *Henry v Dow Chemical Co*, 484 Mich 483, 495; 772 NW2d 301 (2009), stating: "This court uses the principles of statutory construction when interpreting a Michigan court rule."

The examples listed in the Michigan Court Rules show that a single instance of malfeasance supports a finding of misconduct only for truly extraordinary acts like discrimination (d), abuse of the public trust (e), or noncooperation with the Commission (f). *Id.* When allegations of judicial misconduct are based on a judge's everyday tasks like "performance of judicial duties," the Michigan Court Rules provide that there must be *persistent* incompetence, neglect, or failure. *Id.*

Although misconduct is not limited to the examples in the Michigan Court Rules, the rule's use of the phrase "including but not limited to" shows that other kinds of misconduct must be similar to the examples listed in the rule. See, e.g., *In re Forfeiture of $5,264,* 432 Mich 242; 439 N.W.2d 246 (1989) (interpreting "including but not limited to" as "an illustrative listing"); *Sharp v City of Benton Harbor,* 292 Mich App 351, 355-356; 806 NW2d 760 (2011) (explaining that "including" indicates that the listed items are either exhaustive or illustrative). See also Antonin Scalia & Bryan A. Garner, READING LAW (2012), 132-133.

Because other forms of misconduct must be treated in the same fashion as the examples listed in the Michigan Court Rules, it follows that misconduct based on a judge's routine acts must be based on *persistent* actions; misconduct based on unusual acts like discrimination or misuse of office may be based on a single instance. Construing and applying statutes are part of judges' daily work. To be consistent with the Michigan Court Rules, the Court cannot base a finding of misconduct on a single instance of misapplying a statute. Only *persistent* misapplication of governing law should support a disciplinary proceeding.

Here, the Commission cites eight cases in which Judge Morrow allegedly committed misconduct. Despite the language of the Michigan Court Rules, the Commission concludes that each disputed legal ruling is an individual instance of judicial misconduct. (See Decision and Recommendation at 7, 9–10, 11, 15, 20, 23, and 24, Apx. I: 57, 59-60, 61, 65, 70, 73, 74). This erroneous conclusion undermines the Commission's entire analysis.

The eight cases are taken from the *thousands* of cases that Judge Morrow has adjudicated over his twenty-one years on the bench. Assuming that Judge Morrow heard just one hundred cases per year over these twenty-one years—which is a conservative estimate, given his busy docket—the eight cases cited in the Commission's recommendation represent just .004 of Judge Morrow's cases. In other words, these eight cases are *less than one tenth of one percent* of his total cases.

This rate of error cannot be considered to be "persistent." Cf. MCR 9.205. The Commission's recommendation is fundamentally flawed, therefore, because it bases a finding of misconduct on vanishingly small percentage of Judge Morrow's cases. This result is inconsistent with Rule 9.205. Those rules do not contemplate that a single erroneous legal decision or even a handful of erroneous legal decisions will support a finding of judicial misconduct.

The Commission's recommendation does violence not only to the Michigan Court Rules but to the Michigan Constitution as well. The Constitution provides that Michigan's courts are to function as "one court of justice," with appellate courts correcting the legal and factual errors of lower courts. Const 1963, art I, §§ 1, 4, 6. The Judicial Tenure Commission, on the other hand, is not vested with authority to act as an appellate court. Const 1963, art I, § 30, But if a single legal error is now "judicial misconduct," then that is exactly what Commission will be—a *de facto* appellate court.

The Commission's recommendation misconstrues the Michigan Court Rules and does so in a manner that will fundamentally change the nature of judicial discipline in Michigan. The Court should reject the Commission's recommendation because arguable legal error alone cannot properly support a finding of judicial misconduct.

ARGUMENT 2

The Commission's recommendation is based on the premise that Judge Morrow deliberately failed to follow unambiguous law. When one examines the individual cases discussed in the recommendation, however, it is apparent that the law is far less clear than the Commission acknowledges and may indeed support Judge Morrow's decisions. This Court should not discipline a judge based on rulings about which reasonable minds can disagree.

The Commission's recommendation is based on the theory that Judge Morrow's "repeated failures to follow the law and proper legal procedures and handling of cases, the failure to maintain impartiality and to avoid the appearance of impropriety and handling of cases, and the failure to maintain appropriate security in the courtroom." (Decision and Recommendation at 28, Apx. I: 78). It also concluded that Judge Morrow repeatedly failed to follow statutes, even when the mandatory language was pointed out to him by the prosecutor …." (*Id.* at 25, Apx. I: 75).

Reading this recommendation, one would presume that the law at issue in each case is so clear that reasonable minds could not disagree. This presumption does not withstand scrutiny. With the single exception of *McGee,* the disputed rulings concern laws and procedures that are, at the very least, debatable. The Court cannot accept the Commission's recommendation and it should not impose discipline based on rulings about which reasonable minds can disagree.

2.1 Judge Morrow did not commit judicial misconduct by closing the courtroom in *People v Orlewicz.*

The Commission concluded that Judge Morrow committed judicial misconduct in *Orlewicz* because he "completely ignored the applicable law and closed the courtroom without even entering a written order ...." (Decision and Recommendation at 7, Apx. I: 57). Its conclusion is based on a court rule that the prosecutor did not cite before or at the hearing at which Judge Morrow ordered the courtroom closed, and is irreconcilable with the constitutional principles actually cited in arguments before Judge Morrow.

2.1.1 Judge Morrow's constitutional analysis was correct.

The assistant prosecutor argued before Judge Morrow that excluding the victim's family from a post-trial hearing would violate the Michigan Constitution. He was wrong. The Michigan Constitution provides that "crime victims, as defined by law," have a "right to attend trial and all other court proceedings the accused *has the right to attend.*" Const 1963, art I, § 24, with added emphasis. This clause means that a victim's family has a right to attend a court proceeding *only if the defendant has a right to attend that proceeding.* No one—not the Examiner and not the Commission—has cited any authority that even arguably gives a defendant a constitutional right to attend *post-trial* proceedings. In fact, no such right exists.

If the Constitution created a right to attend post-trial proceedings, it would arise from (a) the confrontation clause of the Sixth Amendment of the U.S. Constitution (as incorporated by the

Fourteenth Amendment), (b) the due process clause of the Fourteenth Amendment, (c) the First Amendment, or their analogues in the Michigan constitution. See *United States v Gagnon,* 470 US 522 (1985); *Kentucky v Stincer*, 482 US 730 (1987). But courts have not found this right arising from any of these clauses.

Under the confrontation clause, a defendant's right to attend is a "*trial right*" designed to "promote reliability in the truth-finding functions of a criminal trial." *Stincer,* 482 US at 737, 738 n 9, with added emphasis. It is violated only when a defendant is deprived of his opportunity for effective cross-examination. That means that a defendant's right to attend applies to *trial,* not to post-trial hearings. Likewise, the First and Sixth Amendments guarantee only a right to a public *trial*, as does the Michigan Constitution. *Id.,* citing U.S. Const., amend I. See also *People v Vaughn,* 491 Mich 642, 650; 821 NW2d 288 (2012), citing U.S. Const., amend VI and Const 1963, art I, § 20.

That leaves only the due process clause, and courts have held that this clause does not create a right to attend post-trial proceedings. See, e.g., *United States v Boyd,* 131 F3d 951, 954 (CA 11 1997), holding that criminal defendant's exclusion from post-trial hearing on motion for new trial did not violate his rights under the Sixth and Fourteenth amendments or his due process rights.

Thus, defendants have no constitutional right to attend post-trial proceedings. It follows that the victim and victim's family have no right to attend post-trial proceedings. Const 1963, art I, § 24. This conclusion is also supported by the plain language of the Michigan Court Rules, which expressly permit closure in some circumstances. MCR 8.116(D).

If the Court finds that Judge Morrow committed judicial misconduct by rejecting the prosecutor's constitutional arguments, it will mint a constitutional right—one that criminal

defendants will assert in the future. Worse, accepting the Commission's conclusion requires disciplining a judge for failing to recognize a constitutional right that *no Michigan court has ever recognized.*

2.1.2 This Court should not discipline a judge for failing to follow a court rule that the parties did not cite.

In concluding that Judge Morrow committed judicial misconduct in *Orlewicz,* the Commission ignores the relevant constitutional arguments and focuses solely on Michigan Court Rule 8.116(D). 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. (Respondent's Ex. A, Orlewicz Tab 19, Apx. 371-376). Instead of focusing on Judge Morrow's adjudication of the arguments that were actually presented to him, the Commission concludes that Judge Morrow committed misconduct by failing to follow a rule that *nobody cited.*[2]

Michigan courts are not required to make parties' arguments for them and need not look for authority that the parties themselves fail to cite. See, e.g., *Patterson v Allegan County Sheriff,* 199 Mich App 638, 640; 502 NW2d 368 (1993) ("We will not search for authority to sustain a party's position."); *Schadewald v Brule,* 225 Mich App 26, 34; 570 NW2d 788 (1997) (same). For example, this Court itself has declined to consider a "mandatory" statutory provision because it was not cited below. *Walters v Nadell,* 481 Mich 377; 751 NW2d 431 (2008). *Walters* concerned the federal Servicemembers Civil Relief Act, which contains a mandatory tolling

[2] One cannot excuse the assistant prosecutor's failure to cite the applicable court rule by arguing that Caminsky was surprised. Caminsky knew before the hearing that Orlewicz wanted the entire courtroom closed because it was raised in Orlewicz's filing and during a conference before Judge Morrow. (Testimony of Jeffrey Caminsky, Hearing v.1 at 72-73, Apx. I: 106-107).

provision. This Court held that a plaintiff could waive this "mandatory" tolling provision by failing to raise it before the trial court, reasoning: "Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. *Trial courts are not the research assistant of the litigants*; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." *Id.* at 388, with added emphasis.

The "raise or waive" rule applied in *Walters* has been the law in Michigan for decades and is backed by sound policy. A contrary rule—one that would allow a party to simply announce its position and impose on the court a duty to search for authority—would incentivize sloppy briefing, lead to inefficient adjudication, and impose an impossible burden on courts.

Adoption of the Commission's rationale about *Orlewicz* would not only eradicate this "raise or waive" rule but would subject judges who fail to act as "research assistants" to discipline. It would open a Pandora's Box of complaints against Michigan judges, and the primary beneficiaries of this new disciplinary regime would be attorneys who present inadequately briefed arguments.

The Commission's recommendation about *Orlewicz* is therefore unsound in many ways. It is contrary to the record, it ignores a body of law that justifies Judge Morrow's decision, it tacitly recognizes a new constitutional right, and it guts the "raise or waive" rule that prevents Michigan's overtaxed courts from becoming parties' "legal assistants." It should be rejected.

2.2 Judge Morrow did not commit judicial misconduct in *People v Fletcher* by deferring the start date of the defendant's mandatory sentence.

The Commission concluded that Judge Morrow committed judicial misconduct in *People v Fletcher* because he "ignore[d]" the "mandatory language" of MCL 257.625(9)(c)(ii). In reaching this conclusion, however, the Commission disregarded Judge Morrow's actual ruling, incorrectly presuming that Judge Morrow never intended to impose the mandatory term of

imprisonment. (Decision and Recommendation at 9, Apx. I: 59). Judge Morrow did *not* state that he was suspending Fletcher's sentence, as the Commission suggests. At the sentencing hearing, Judge Morrow stated: "The Court—in the next five years, we'll decide *when* she does her alternative incarceration days." (Respondent's Ex. B, Fletcher Tab 6, at 13, Apx. III: 518, with added emphasis). Similarly, the written order in *Fletcher* states: "Jail sentence *start time to be determined*." (Respondent's Ex. B, Fletcher Tab 8, Apx. 524, with added emphasis). Judge Morrow stated that Fletcher *would* serve her mandatory sentence but that its start time was yet to be determined. The Commission's conclusion that Judge Morrow "ignored" mandatory statutory language is a fiction.

A sentence that imposes a term of imprisonment but defers its start date does not violate the plain language of the statute at issue. The statute states, in pertinent part:

> (c) If the violation occurs after 2 or more prior convictions, ... 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: ...
>
> (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.
>
> (d) A term of imprisonment imposed under subdivision (b) or (c) shall not be suspended. [MCL 257.625 (9)(c)(ii).]

This statute provides that the mandatory term of imprisonment must not be suspended. It does not state, however, that the court must impose imprisonment right away. Nor does it prohibit a court from postponing the question of when the mandatory term of imprisonment shall be served. And one cannot add a requirement of immediate imprisonment without violating the long-standing principle that courts may not "engraft upon [a statute] a restriction which the

legislature might have added but left out." *People v Jahner*, 433 Mich 490, 504; 446 NW2d 151(1989) (citation and quotations omitted).

Indeed, the statute has been interpreted by other judges in a fashion far more radical than Judge Morrow's. In *People v Cullen*, unpublished opinion per curiam of the Court of Appeals, issued October 4, 2007 (Docket No. 272986), Apx. II:348-349, a Kalamazoo Circuit Court judge suspended a defendant's sentence instead of imposing a mandatory minimum term of imprisonment. The Court of Appeals held that a court may not suspend a sentence entirely under this statute. However, it did not address *when* a court must set a term of imprisonment.

In *People v Pennebaker*, 490 Mich 910; 805 NW2d 427 (2011), an Oakland County trial court applied the same statute at issue in *Fletcher* and sentenced the defendant to a supervised work-release program in lieu of prison. The Court of Appeals denied the prosecution's application for leave to appeal, and this Court reversed and remanded to the Court of Appeals. On remand, the Court of Appeals held that the sentence did not comport with MCL 257.625 and remanded for resentencing.

Both *Cullen* and *Pennebaker* show that other judges, apparently in good faith but erroneously, concluded that MCL 257.625 does not require imprisonment at all. Judge Morrow concluded that imprisonment was necessary but that it was not required to be immediate. In *Pennebaker,* the Court of Appeals denied the Prosecution's application for leave to appeal, which means that the Court concluded the prosecution's appeal did not even warrant review. Even on remand, the Court of Appeals did not hold that imprisonment must be imposed right away; it held only that the defendant must serve thirty days in prison. Therefore, Judge Morrow's interpretation of the statute is hardly unique and certainly not judicial misconduct.

The Commission's decision is also based on Judge Morrow's decision to close Fletcher's 2008 case without imposing a jail term. Fletcher was sentenced for a new offense in 2010. (Respondent's Ex. B, Fletcher Tab 12, Apx. 526-527; Transcript of Teena Walsh, Hearing v.2, at 402, Apx. I: 190). As the Master observed, the new 30-day sentence "would have run concurrent with the old sentence." (Master's Report at 17, Apx. I: 18). This conclusion is consistent with Michigan law, which provides: "In general, concurrent sentences are the norm and consecutive sentencing is not to be employed except when specifically authorized by statute." *People v Thompson,* 117 Mich App 210, 213; 323 NW2d 656 (1982). Thus, Judge Morrow had a good faith basis for his belief that imposing a concurrent sentence after Fletcher was convicted of a new crime would have been a mere formality and, thus, unnecessary.

Consequently, the Commission's recommendation distorts the record, improperly adds language to the applicable statute, and contends that Judge Morrow should be disciplined for failing to impose a redundant sentence. At the very least, reasonable minds can disagree about whether Judge Morrow was required to sentence Fletcher right away and whether sentencing after the 2010 conviction was necessary, given the likelihood of concurrent sentences. As such, Judge Morals rulings in Fletcher do not support a finding of judicial misconduct.

2.3 Judge Morrow did not commit judicial misconduct in *People v McGee* because his decision was based on a good faith belief that an injustice had been committed.

Both the Master and the Commission concluded that Judge Morrow committed judicial misconduct in *McGee*. Judge Morrow has admitted all along that he erred. He should not have permitted the conviction to stand, given the prosecution's conduct during the closing but, having failed to set the conviction aside, Michigan law required remand pending sentencing. By treating this legal error as judicial misconduct, however, both the Master and the Commission made the

same two mistakes: (1) treating a single legal error as judicial misconduct and (2) overlooking the record that prompted Judge Morrow's decision.

First, as shown above, a single erroneous legal decision is not "misconduct" within the meaning of Rule 9.205. Misconduct based on a judge's everyday activities must be "persistent." A single legal error, such as the erroneous legal ruling in *McGee*, is not "persistent."

Second, although there is no dispute that the statute at issue required that Judge Morrow remand the defendant, Judge Morrow had a good faith basis for his conclusion that McGee had been improperly convicted and, thus, that remained was inappropriate. Unfortunately, the Commission gave no consideration at all to the factual context in which Judge Morrow made his ruling.

As noted above, McGee was tried before a jury on a charge of first-degree criminal sexual conduct with a person under age thirteen. (Testimony of Keith Clark, Hearing v.2, at 323, Apx. I: 170). During his closing argument, assistant prosecutor Keith Clark stated: "McGee saw the look on [the victim's] face, saw she was crying, he suddenly realized, 'Man I'm f***ing a 12-year-old girl." (*Id.* at 334-335, Apx. I: 173). Clark explained in this proceeding that he "tried to speak in the language that [he] thought would be more appropriate to the defendant," who is African-American. (*Id.* at 346, Apx. I: 176).

Clark's choice of language was disturbing because the assistant prosecutor seems to be motivated by racial bias in concluding that vulgar language was "more appropriate to the defendant." As the Master found below, this language and its impact on the jury were on Judge Morrow's mind when Judge Morrow declined to remand McGee to the Wayne County Jail. (Master's Report at 22, Apx. I: 23).

Judge Morrow's concern that the assistant prosecutor's rhetoric had tainted the trial was well-founded. Prosecutorial rhetoric can be so improper that it requires a new trial. See, e.g., *People v Dalessandro,* 165 Mich App 569; 419 NW2d 609 (1988) (holding that a new trial was necessary where prosecutor referred to the defense counsel's "damnable lies"); *People v Tarpley,* 41 Mich App 227; 199 NW2d 839 (1972) (reversing because, among other reasons, the prosecutor cast aspersions on the defendant's homosexuality).

Indeed, the Court of Appeals later found that Clark committed misconduct in *McGee* by making a different but related statement to the jury. Clark told the jury that "McGee 'couldn't maintain an erection.'" *People v McGee,* unpublished opinion per curiam of the Court of Appeals, issued June 10, 2008 (Docket No. 277714), Apx. II: 351-357. This statement, the Court of Appeals held, was not supported by the evidence: "When viewed in context, this statement is an attempt to posit a narrative of McGee's state of mind, as ascertained from the complainant's testimony. This statement, however, bears no reasonable relationship to any evidence or to the prosecutor's theory of the case." *Id.* at 3. The panel concluded, however, that this error was harmless.

Judge Morrow's concerns about the fairness of McGee's conviction were fully justified and held in good faith. His real error was in failing to immediately declare a mistrial, rather than deferring the issue until after the prosecution had already requested that he remand the defendant. When this decision is seen in context, therefore, it is a single legal error prompted by good faith concerns about the legitimacy of the jury's verdict. Under the circumstances, Judge Morrow's ruling in *McGee* should not be treated as judicial misconduct.

2.4 Judge Morrow did not commit judicial misconduct by conducting an investigation in *People v Wilder.*

The Commission's rationale for finding judicial misconduct in *Wilder* is unclear. The Commission seems to believe that it would have been preferable for Judge Morrow to hold a hearing about the officers' absence before dismissing the 2008 case rather than after the case against Wilder was re-filed. (Decision and Recommendation at 15, Apx. I: 65). But the Commission cites no authority *requiring* this procedure. Absent legal authority decisively showing that Judge Morrow's decision was wrong, that decision should not be treated as judicial misconduct.

The Commission also seems to conclude that the officers' explanations for their absences should have been more persuasive to Judge Morrow. Even if these explanations should have been more persuasive to him, the Commission cites no authority for the idea that this difference of opinion amounts to judicial misconduct. All judicial officers should be very concerned if every difference of opinion about the persuasiveness of testimony can support a finding of judicial misconduct.

The Commission also concludes that dismissal of Wilder's case was Judge Morrow's "intended result." (*Id.,* Apx. I: 65). But ensuring that witnesses respect courts' subpoena authority and appear promptly for hearings are hardly concerns unique to Judge Morrow. The Michigan Court Rules provide that parties must show up promptly for a hearing and be ready to conduct their business before the Court. MCR 8.116(B). This Court has held time and again that Michigan's Court Rules must be enforced according to their plain language. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271, 277 (2011). That is exactly what Judge Morrow did when he conducted an investigation into the witnesses' failure to appear for trial. Thus, as the Master concluded, Judge Morrow's decision to dismiss the first case was based on his concern

that the prosecution's witnesses willfully violated subpoenas and not a desire to aid the defendant. (Master's Report at 28, Apx. I: 29).

For these reasons, the Commission's conclusions about *Wilder* find support in neither governing law nor the record.[3] At the very least, Judge Morrow's handling of this case did not violate clear and unambiguous legal authority, and was conducted in good faith.[4] Therefore, the Commission's conclusion that Judge Morrow committed judicial misconduct in *Wilder* should be rejected.

2.5 Judge Morrow did not commit judicial misconduct in *People v Boismier* by granting a new trial based on the prosecutor's improper questioning.

The Commission concluded that Judge Morrow committed judicial misconduct in *Boismier* in the following ways: (1) he "never placed on the record any order issued during a sidebar conversation prohibiting the prosecutor from questioning the witness regarding an admission of consensual sex"; (2) his assertion that he instructed the prosecutor to refrain from asking improper questions was supposedly unsupported by the record; (3) he "never ruled on defense counsel's request for a curative instruction, but instead engage defense counsel and a

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[3] In a footnote, the Commission adopts the Examiner's canard about the so-called "conditional plea." It concludes that, in accepting Wilder's plea conditionally and subject to his further investigation, Judge Morrow violated the Michigan Court Rules because there is no rule allowing a "conditional plea." (Decision and Recommendation at 15 n 2, Apx. I: 65). This argument overlooks the fact that the Michigan Court Rules allow courts to take pleas under advisement. MCR 6.302(F) ("The court may take the plea under advisement."). Although his words may have been imprecise, that is exactly what Judge Morrow did when he concluded that he needed to conduct further inquiry into lapses that led to dismissal of the first case.

[4] Judge Michael Hathaway' cogently makes this point in his concurring and dissenting statement to the Commission's recommendation; "[I]t is also apparent that Respondent thought he was onto something worth exploring and that the problems of dismissals on the day of trial in Wayne County Circuit Court because police officers do not show up, and then offer, through the assistant prosecutors, various and often questionable excuses, was an epidemic. Again, an erroneous decision is not judicial misconduct if it is made in good faith and with due diligence." (Concurring and Dissenting Opinion at 4, Apx. I: 84).

pointless discussion regarding whether defense counsel intended to report the prosecutor to the Attorney Grievance Commission"; and (4) he "failed to follow the Court of Appeals order to hold a hearing with respect to whether the prosecutor had a good faith reason for asking the questions at issue, and instead made a record of his findings based on his own recollection of the events, without the parties' presence." (Decision and Recommendation at 20, Apx. I: 70). Not one of these conclusions withstands scrutiny.

The Commission cites no law or court rule that prohibits a judge from warning or instructing counsel during sidebar conversations. This is a common practice, as shown by a survey of Michigan case law. The Court of Appeals discussed a sidebar conference without expressing any disapproval in *People v Thomas,* unpublished opinion per curiam of the Court of Appeals, issued November 25, 2003 (Docket No. 241586), Apx. II:359-362. See *id.* at *3, stating "Thomas's testimony came in response to a question from defense counsel. Immediately prior to the exchange, the trial court held a sidebar at which defense counsel was warned to be cautious in her questioning of Thomas on this issue. Defendant cannot now predicate error on a response he elicited after fair warning. To find otherwise would allow defendant to harbor error as an appellate parachute."

The Commission's conclusion that there was no evidentiary support for Judge Morrow's assertion that he instructed the prosecutor to refrain from asking improper questions is mistaken. Both Judge Morrow and defense attorney Juan Mateo understood that Povilaitis had been so instructed. (Testimony of Juan Mateo, Hearing v.3, at 757-758, Apx. II: 280-281). The Commission may believe that evidence for the contrary position is stronger, but it can hardly

assert that there is no support in the record for Judge Morrow's recollection. It is even less appropriate to treat this disputed issue of fact as judicial misconduct.[5]

As for the rest of the Commission's findings of misconduct, neither the Examiner nor the Commission has ever cited authority suggesting that a judge commits judicial misconduct by failing to rule on an oral motion or by engaging in what other judges might consider a "pointless discussion." If judges can now be disciplined for engaging in actions that other judges consider "pointless," then the Judicial Tenure Commission can expect to become significantly busier in the future.

Finally, as to Judge Morrow's alleged failure to follow the Court of Appeals' instruction that he hold a hearing, this issue is another one where reasonable minds can disagree. Nothing in the Court of Appeals' July 31, 2009 Order *expressly* required a full hearing. It simply asked Judge Morrow to make his own findings clear:

> This 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 .... 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 their side-bar conference to which it referred in its April 3, 2009 ruling. [Respondent's Exhibit D, Boismier Tab 17, Apx. III: 548, with added emphasis].

Juan Mateo read this order in the same manner as Judge Morrow (Testimony of Juan Mateo, Hearing v.3, at 773, Apx. II: 284) and even Judge Shapiro's opinion stated only that Judge

[5] Whether Povilaitis had been instructed not to continue her line of questioning is ultimately beside the point. A *majority* of the Court of Appeals found that her questions lacked a good faith basis. *See Boismier, supra* at 1 (Servitto, J., concurring); *id.* at 1 (Shapiro, J., dissenting). It is hard to see how Judge Morrow could be disciplined based on this case when a *majority* of the Court of Appeals panel agreed that Povilaitis's questions were improper and when Judge Shapiro agreed that the improper question warranted a new trial.

Morrow did not follow the "spirit" of the order. A judge should not be disciplined for failing to follow the "spirit" of what is, at best, an ambiguous order.

In short, Judge Morrow's decision was reasonable, as evidenced by the disagreement among the Court of Appeals judges, and his post-order statements on the record were consistent with the plain language of the Court's order.[6] At the very least, Judge Morrow had a good faith basis for his actions in *Boismier*. MCR 9.203(B). Under the circumstances, the Commission's finding of misconduct in *Boismier* should be rejected.

2.6 Judge Morrow did not commit judicial misconduct in *People v Redding* by shaking the defendant's hand and returning unread papers to his attorney.

The Commission concludes that Judge Morrow committed judicial misconduct in *Redding* because his actions supposedly undermined the appearance of impartiality. The Commission writes: "By coming down off the bench to shake the defendant's hand and hand-deliver papers to the defendant, without explaining the nature of the papers, Respondent created the appearance of impartiality and impropriety to the opposing party and to others in the courtroom." (Decision and Recommendation at 21, Apx. I: 71). In other words, the Commission's conclusion that there was judicial misconduct in *Redding* is based on two facts: (1) Judge Morrow shook a defendant's hand and (2) he returned some unread papers to the defendant's attorney.

The Commission apparently believes that these actions created an appearance of impartiality. Unfortunately, it devotes little analysis to this point. Thoughtful consideration shows that this is at least an area in which reasonable minds can disagree. A criminal defendant

[6] There was even disagreement among the Commission's members about *Boismier*. (Concurring and Dissenting Opinion at 4-5, Apx. I: 84-85). Judge Hathaway noted, "If one agrees with the extent or propriety of Respondent's — shall we say — hand-wringing, such as his point of view as a member of the elected judiciary."

is the most vulnerable individual in the courtroom. He stands accused of violating the law and is at risk of losing his liberty. No other participant in criminal litigation is subject to the same risk, the same negative perceptions, the same stigma. Unlike every other individual in the courtroom, the criminal defendant has no choice about where to stand, what to wear, when to come or go. The machinery of the state is never at its more fearful than in criminal proceedings and the sole target of that machinery is the man or woman who must stand in the dock to defend himself or herself against charges of wrongdoing.

In this light, shaking a criminal defendant's hand does not suggest favoritism. It does not suggest that the defendant is somehow above or more privileged than other actors in a criminal proceeding. A judge who shakes a criminal defendant's hand shows that the defendant is a fellow human being, entitled to the same respect as every other individual. A judge who shakes a criminal defendant's hand exemplifies civility and judicial dignity, not "partiality and impropriety."

This point is emphasized in an article about Judge D. Brook Bartlett, the late chief judge of the United States District Court for the Western District of Missouri. Teresa L. Clark, *Judge D. Brook Bartlett: A Legacy of Civility*, 68 UMKC L. Rev.507 (2000). In discussing Judge Bartlett's legacy of civility, the author recounts the story of a defendant who was opposed the judicial system as a whole and refused to stand when Judge Bartlett entered the courtroom. *Id.* at 537. Judge Bartlett considered her views and allowed her to remain seated when he entered the courtroom, provided that she stood for the jury. He also allowed her to shake his hand every day at the start of trial and — unlike Redding — in front of the jury:

> ...Judge granted the defendant's request that she be permitted to approach the bench and shake his hands as equals when the court convened each morning. Throughout the trial, when the deputy called "All Rise" and Judge entered the courtroom, this defendant would remain seated. As soon as the attorneys, jurors

> and spectators were comfortably seated, this defendant would walk to the Bench, extend her hand and proclaim loudly, "Good morning, Bartlett." Judge would lean over the Bench, shake her hand and the day would begin. From Judge's perspective, it was more important to the judicial process that he show respect to the defendant than that the defendant show respect to him. [*Id.* at 509-510.]

Judge Morrow is not the only judge who believes that judges can and should extend common courtesies to criminal defendants — and that doing so exemplifies judicial dignity and impartiality.

As for returning unread papers to a criminal defendant's counsel, it would be much more troubling for a judge to return papers to a party outside of the presence of opposing counsel. Judge Morrow avoided ex parte contact and any appearance of ex parte contact by handing the unread papers back in the presence of both attorneys. This action gave the prosecutor an opportunity to ask about the content of those papers, to receive assurances that the papers would not be used at trial, and to learn that Judge Morrow had never even read them.

For these reasons, the Court should reject the Commission's conclusion that Judge Morrow committed judicial misconduct or created the appearance of impropriety in *Redding*.

2.7 Judge Morrow did not commit judicial misconduct in *People v Moore* by looking into whether the defendant was apprehended through vigilante violence.

The Commission concludes that Judge Morrow committed judicial misconduct by failing to inform the parties that he obtained Moore's medical records until after Moore's plea was taken. (Decision and Recommendation at 22, Apx. I: 72). It adds that, "[r]ather then remaining impartial, by *sua sponte* issuing a subpoena for the medical records, [Judge Morrow] acted as an advocate for the defendant." (*Id.*).

The Commission's conclusion that Judge Morrow did not give the parties an opportunity to seek recusal if they felt it was necessary is incorrect. In fact, after Judge Morrow accepted

Moore's plea, the parties had to appear for sentencing. (Respondent's Ex. A, Moore Tab 13, Apx. III: 531-541). Either party could have sought recusal or disqualification before sentencing. Neither party did so. This fact undermines the Commission's conclusions about this case.[7]

The Commission's conclusion that Judge Morrow was acting as an advocate for the defendant is contrary not only to the record but to the very notion of the rule of law. 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. I: 72).

Moreover, the Commission's suggestion that a judge expressing a concern about vigilante violence is somehow favoring a criminal defendant overlooks due process requirements and prohibitions on cruel and unusual punishment that have been part of American law since the country's founding. Judge Morrow recognized that the entire criminal justice system will be tainted if it appears to condone unnecessary violence in the apprehension of suspects. This concern ought to be lauded rather than disparaged.

The Master correctly determined, therefore, that *Moore* does not establish misconduct or bias. Again, this is at least an area about which reasonable minds can disagree. The Commission's finding of judicial misconduct should therefore be rejected.

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[7] The Commission also overlooked evidence showing that Judge Morrow was not biased in Moore's favor. At Moore's sentencing hearing, Judge Morrow took issue with Moore's assertion that the prosecution coerced him into accepting a plea agreement. (Respondent's Ex. A, Moore Tab 13, Apx. 531-541).

2.8 Judge Morrow did not commit judicial misconduct in *People v Hill* by conducting a sentencing hearing without Sheriff deputies present.

The Commission's recommendation of misconduct in *Hill* is based solely on Judge Morrow's decision to conduct a brief sentencing hearing while the sheriff's deputies were not in the courtroom. This recommendation is erroneous as a matter of law.

Under Michigan law, a judge is charged with regulating and directing his courtroom deputies. Indeed, this principle has been codified in the Revised Judicature Act, which states that a judge has the discretion to determine when sheriffs and sheriff deputies attend court sessions:

> The sheriff of the county, or his deputy, shall attend the circuit court, probate court, and district court sessions, when requested by these courts, and the sessions of other courts as required by law. The judge in his discretion:
>
> (a) shall fix, determine, and regulate the attendance at court sessions of the sheriff and his deputies;
>
> (b) may fine the sheriff and his deputies for failure to attend. [MCL 600.581].

This statute shows that a judge has the authority to direct courtroom security.[8] It cannot be judicial misconduct for a judge to exercise discretion conferred by the Michigan Legislature. At the very least, Judge Morrow's decision to conduct a sentencing without deputies present was arguably proper. In any event there has been no allegation or even hint that this situation ever occurred again. Under these circumstances, the Commission's recommendation that the Court finds misconduct in this case should be rejected.

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[8] This discretion has been part of Michigan law for over a century. As this Court itself held in 1883, "[The county's clerk and sheriff] are officers of the court, and subject to its direction in all things necessary to a proper administration of the law during its sessions." *Whallon v Ingham Circuit Judge*, 51 Mich 503, 508; 16 N.W. 876 (1883) (emphasis added).

ARGUMENT 3

Judge Morrow did not commit judicial misconduct and should not receive discipline of any kind. If the Court imposes discipline, however, the Court's sanction must be commensurate with discipline imposed in other cases — a fact that the Commission's recommendation overlooks. Judge Morrow should receive no more than a reprimand. The Commission's recommendation of a 90-day suspension is disproportional and out of step with this Courts jurisprudence

Judge Morrow did not commit judicial misconduct in any of the eight cases cited by the Commission. Consequently, all charges against Judge Morrow should be dismissed. If the Court finds misconduct, however, it should limit any discipline to a reprimand. This conclusion follows from two analyses required by this Court's decision in *In re Brown*, 461 Mich 1291; 625 NW2d 744 (2000): (1) consideration of the seven "*Brown* factors," and (2) analysis of other judicial discipline cases to ensure that discipline is proportionate.

3.1 Application of the *Brown* factors shows that, if this Court imposes discipline, it should issue only a reprimand.

In *Brown*, this Court adopted a non-exclusive list of factors for determining the appropriate sanction for judicial misconduct. It held that "all else being equal,

(1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;

(2) misconduct on the bench is usually more serious than the same misconduct off the bench;

(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;

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

(5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;

(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. [*Id.* at 1292-1293.][9]

In this case, the *Brown* factors militate in favor of lighter discipline, assuming any discipline is warranted at all.

3.1.1 There is no meaningful "pattern" in these cases.

The *Brown* court did not define what it meant by a "pattern or practice." A "pattern," as used in this context, is "a combination of qualities, acts, tendencies, etc., forming a consistent or characteristic arrangement." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed., 2001), 1423. A "practice," is a "habitual or customary performance; operation" or "habit; custom." *Id.* at 1517. These definitions suggest that a "pattern or practice" consists of *similar* acts. Moreover, the acts must be *frequent*. Similar but in frequent acts — three or four similar acts out of a thousand, for example — would not be "consistent" or a "habit or custom."

If one adopts the theories of misconduct propounded by the Commission, then Judge Morrow committed the following kinds of misconduct: (1) failing to follow a court rule (*Orlewicz*); (2) failing to follow a statute (*Fletcher* and *McGee*); (3) ignoring "established legal procedures" (*Wilder*); (4) failing to enter an order on the record and follow an ambiguous Court of Appeals order (*Boismier*); (5) shaking hands with the defendant and returning papers to defense counsel (*Redding*); (6) issuing a subpoena for a defendant's medical records (*Moore*); and (7) conducting a sentencing without having security personnel present (*Hill*).

As noted above, these cases form less than one tenth of one percent of the total cases that Judge Morrow has adjudicated over his twenty-one year career as a judge. These isolated

[9] *Brown* also cites discrimination as a factor militating in favor of a more severe sanction. But all the parties agree that there is no evidence of discrimination and the contestant rulings.

instances are not consistent, and can hardly be characterized as a habit or custom. The Commission reaches its conclusion by looking only at the contested cases. But there is neither illegal nor logical support for this approach. After all, the Commission's approach would support a finding of a "pattern" based on two out of two *million* cases if one only looks at the cases allegedly forming a pattern.

Moreover, *Orlewicz, Fletcher,* and *McGee*—cases in which Judge Morrow allegedly failed to follow a statute or court rule—have nothing in common with *Wilder, Boismier, Redding, Moore,* and *Hill.* And *Wilder, Boismier, Redding, Moore,* and *Hill* have nothing in common with each other. These are different forms of "misconduct." To find a "pattern," the Commission viewed these eight cases at the highest level of abstraction possible ("willfully disregarding the law and proper legal procedures"). Again, this approach renders the notion of a "pattern" meaningless.

3.1.2 The alleged misconduct occurred on the bench but is not the type of "on the bench" conduct that has ever prompted a finding of misconduct before.

The alleged misconduct occurred "on the bench." But "on the bench" misconduct that has warranted discipline in the past included "fixing" t raffic tickets (*Justin*) and appointing an attorney with whom a judge was having an intimate relationship in fifty-six cases. (*Chrzanowski*). These are cases in which a judge used the judicial office to improperly advance a personal agenda. There is no precedent in Michigan for a finding of misconduct based on an allegedly erroneous application of a statute (*McGee*), a single instance of holding a hearing while sheriff's deputies were still absent from the courtroom, as permitted by statute (*Hill*), or any of the other cases cited in the Commission's report.

3.1.3 The alleged misconduct caused no prejudice.

The alleged misconduct cited the Commission's recommendation caused no prejudice:

- Any legal error in *Orlewicz, McGee,* and *Boismier* was corrected on appeal.
- Fletcher served the same sentence she would have received had Judge Morrow imposed concurrent sentences.
- The papers returned in *Redding* had no relevance to Redding's trial.
- The subpoenaed medical records were not used at all in *Moore*.
- Hill was sentenced without incident.

Wilder was the only case in which any arguable legal error was allowed to stand. But *Wilder* was not appealed by the prosecution.

3.1.4 The alleged misconduct did not implicate the administration of justice.

None of the alleged misconduct implicated "the actual administration of justice" because, as the Master found, Judge Morrow was consistently focused on *ensuring* justice, not interfering with its administration. The record shows that, in every single case, Judge Morrow made rulings intended to guarantee that criminal defendants received fair trials and that the criminal justice system was not tainted by things like improper prosecutorial rhetoric and vigilantism. In other words, the alleged misconduct does not concern the deliberate subversion of justice for personal ends. In every case, Judge Morrow was doing what he thought his judicial office required. One may disagree with his conclusions, but there can be no dispute that his focus at all times was promoting justice.

3.1.5 Most of the disputed rulings and actions were spontaneous.

Most of the disputed rulings were made without briefing and were therefore more spontaneous than premeditated:

- There was no briefing at all on the relevant court rule in *Orlewicz*. Judge Morrow's failure to consider this rule can hardly be considered "premeditated" when the rule was not raised at the time.
- In *Fletcher*, there was no briefing on whether the relevant statute required an immediate term of imprisonment.
- In *McGee*, there was no briefing on the statute requiring remand – nor did the prosecutor file a motion for reconsideration addressing Judge Morrow's apparent legal error.
- In *Boismier*, the Commission focuses on actions and statements made in the heat of trial.
- There was no evidence that Judge Morrow's decision to shake the defendant's hand and return papers in *Redding* was premeditated. Both appear to be spontaneous acts.
- Judge Morrow's decision to retrieve the defendant from lockup in *Hill* was a spontaneous reaction to security personnel's continued failure to return to appear in the courtroom.

Not every contested decision was spontaneous. Judge Morrow's decision in *Wilder* occurred after several adjourned hearings, and Judge Morrow had an opportunity to contemplate his actions in *Moore* and *Boismier*. But most of the decisions at issue were made without premeditation. The Commission overlooks this fact in its analysis of the *Brown* factors.

3.1.6 None of the alleged misconduct undermined the search for truth.

None of the misconduct described in the Commission's report interfered with the search for truth. To the contrary, the contested actions in *Wilder* (an inquiry into the officers' failure to attend a hearing) and *Moore* (subpoenaing medical records) actually advanced the search for truth. The alleged misconduct in *Orlewicz, Fletcher, McGee, Boismier, Redding*, and *Hill* had no bearing at all on the search for truth.

For these reasons, the Commission's conclusion that "six of the seven *Brown* factors weigh in support of the imposition of a more serious sanction" is mistaken. (Decision and Recommendation at 28, Apx. I: 78). Factors one, four, six, and seven — four of the seven *Brown*

factors — weigh in favor of lighter sanction. And the remaining factors are far more nuanced than the Commission's recommendation suggests.

3.2 Comparing this case with other Judicial Tenure Commission cases shows that this Court should issue a reprimand at most.

One of this Court's central points in *Brown* was that judicial discipline should be proportionate — that similar misconduct should receive a similar sanction. The Court noted that "unexplained disparities and punishment" have the effect of undermining "the public's faith in [the] just and fair administration" of the judicial system. *Brown*, 461 Mich at 1293. The Court therefore stressed that the Commission *must* undertake a review to ensure that discipline recommended in one case is commensurate with its recommendations and other cases: "[I]t is incumbent upon the [Commission] that it undertake a reasonable effort... To ensure a consistent rule of law with respect to its constitutional responsibilities as well as to enable this Court to effectively carry out its own constitutional responsibilities." *Id.* at 1295

Despite this Court's admonition in *Brown*, the Commission gave *no consideration at all* to discipline imposed in other cases when it recommended a 90-day suspension for Judge Morrow. Had the Commission considered discipline imposed in other cases, it would have seen that a 90-day suspension is grossly disproportionate to this Court's jurisprudence and that recommending such a severe sanction was inconsistent with the role of proportionality established by *Brown*.

This Court has removed judges only for the most severe acts of misconduct, such as perjury, *In re Adams,* 494 Mich 162; 833 NW2d 897 (2013); misuse of public funds and misrepresentations during disciplinary process, *In re James,* 492 Mich 553; 821 NW2d 144 (2012); abuse of the judicial power and false testimony, *In re Justin,* 490 Mich 394; 809 NW2d 126 (2012); and false statements to police after drunk driving accident. *In re Noecker,* 472 Mich

1; 691 NW2d 440 (2005). Nothing of which Judge Morrow is accused is remotely close to the level of misconduct that justified removal in these cases.

Similarly, conduct justifying a suspension of one year was not only severe but accompanied by misrepresentations. See *In re Chrzanowski,* 465 Mich 468; 636 NW2d 758 (2001) (appointment of attorney with whom judge was having intimate relationship in 56 cases, false statement to detective, failure to disclose intimate relationship). Again, Judge Morrow is not accused of misconduct on this scale.

This Court removed a judge for 90 days in *In re Nebel,* 485 Mich 1049; 777 NW2d 132 (2010). Judge Nebel drove while intoxicated at speeds in excess of 100 miles per hour. *Id.* at 1049. When he was pulled over, he "acted in a confused and disoriented manner," and "admitted to having consumed 'four – maybe five – Oberon draft beers.'" *Id.* at 1050. Judge Nebel violated the criminal laws of Michigan and did so in a manner that seriously jeopardized public safety.

The Commission recommended a 90-day suspension in Judge Morrow's case without citing *Nebel* or noting that it had previously imposed the same sentence for *violating criminal laws and jeopardizing public safety.* This disproportionate recommendation cannot be justified under *Brown.*

Indeed, this Court has imposed *lesser* sanctions for *more severe* misconduct than that alleged against Judge Morrow. In *In re Hathaway,* 464 Mich 672; 630 NW2d 850 (2001), a judge received a 60-day suspension for conducting and arraignment without a prosecutor present, threatening to jail a defendant if he did not waive his right to a jury trial, and manifesting a pattern of untimeliness and adjournments. In *In re Post,* 493 Mich 974; 830 NW2d 365 (2013), a judge received a 30-day suspension for refusing to allow a party to invoke his rights under the Fifth Amendment of the United States Constitution and even jailed an attorney for counseling his

client to exercise those constitutional rights. In *In re Halloran,* 486 Mich 1054; 783 NW2d 709 (2010), a judge received only a 14-day suspension despite a record showing dishonesty in reports to the State Court Administrator's Office.

Judges have received reprimands for conduct such as moving outside of the judicial district in violation of state law and drawing lewd pictures (*In re Servaas,* 484 Mich 634; 774 NW2d 46 (2009)), accepting football tickets from an attorney in open court (*In re Haley,* 476 Mich 180; 720 NW2d 246 (2006)), having an excessive delay between arraignment and trial (*In re Moore,* 472 Mich 1207; 692 NW2d 834 (2005)), arranging for release on bond of another elected official (*In re Logan,* 486 Mich 1050; 783 NW2d 705 (2010)), and sending a defamatory letter (*In re Fortinberry,* 474 Mich 1203; 708 NW2d 96 (2006)). Although there is no precedent for the allegations against Judge Morrow, these cases are most similar to the alleged misconduct cited in the Commission's recommendation.

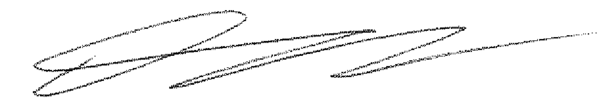
Had the Commission considered other cases, therefore, it would have been compelled to conclude that the only proportionate sentence for Judge Morrow is a reprimand. This Court should therefore rejects the Commission's recommendation and either dismiss the claims against Judge Morrow or enter no more than a reprimand.

CONCLUSION

For the foregoing reasons, this Court should (1) dismiss all claims against Judge Morrow, (2) enter no more than a reprimand, or (3) remand this matter to the Commission for entry of a recommendation that complies with the Michigan Court Rules and *Brown*.

Respectfully submitted,

Collins Einhorn Farrell, PC

By: 

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