STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST

Hon. Bruce Morrow
3rd Circuit Court
Wayne County, MI

Docket No. 161839
Formal Complaint No. 102

Respondent Hon. Bruce Morrow's Objections to Master's Report

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Introduction

Disciplinary Counsel accuse respondent Hon. Bruce Morrow of using improper language in off-the-bench discussions with assistant prosecutors during a 2019 homicide trial. Those allegations are contrary to Michigan law—and this proceeding violated governing law in several other ways, too.

The first problem is one that the Commission can't resolve: Michigan's judicial-discipline system is unconstitutional. In *Williams v Pennsylvania* (2016),[1] the United States Supreme Court held that the Due Process Clause prohibits those who make prosecutorial decisions from participating in the adjudication of the same case. The Commission directed Disciplinary Counsel to file a complaint against Judge Morrow—the complaint itself says so—and the Commission is now deciding whether its own allegations have merit. Under *Williams,* that constitutional error is so serious that it is not subject to "harmless error" analysis. But only the Michigan Supreme Court can address this constitutional issue.[2] Judge Morrow raises these arguments only to preserve them.

The second problem is one that the Commission *can* address. Under the plain language of Michigan Court Rule 9.231(B), Judge Morrow was entitled to an in-person hearing. The Master denied his motion for an in-person hearing without providing a reason—although it was ostensibly because of the COVID-19 pandemic. That was an error. There was no legal basis for the Master to decline to apply the Michigan Court Rules. Judge Morrow is entitled to rehearing in person.

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[1] *Williams v Pennsylvania,* 136 S Ct 1899 (2016).
[2] *Grievance Administrator v Fieger,* 476 Mich 231, 254; 719 NW2d 123 (2006).

Third, there's the legal error at the heart of the Master's conclusions. In finding that Judge Morrow committed misconduct, the Master failed to apply the Michigan Supreme Court's controlling opinion in *Matter of Hocking* (1996).[3] There, the Court held that a judge did not commit misconduct by making statements that were "tasteless and undoubtedly offensive to the sensibilities of many citizens."[4] Disciplinary Counsel accuse Judge Morrow of making tasteless and offensive comments. The rules that applied to Judge Hocking should apply to Judge Morrow as well. The Commission should therefore find that Judge Morrow did not commit misconduct.

Finally, if the Commission finds that Judge Morrow committed misconduct, it must determine the appropriate sanction. The *Brown* factors indicate that Judge Morrow should receive no more than a public censure. Indeed, since the Michigan Supreme Court imposed public censure when Judge Lisa Gorcyca was discourteous to *children*,[5] Judge Morrow should receive no more than public censure for his allegedly discourteous comments to adults working within the justice system.

Those are the core legal issues in this proceeding—but there's also a question of doing justice. Legal scholars have noted that one of the themes in American racism is portraying Black men as hypersexual predators of white women.[6] Unfortunately, that kind of rhetoric has infected this case since the beginning. It began with assistant

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[3] *Matter of Hocking,* 451 Mich 1; 546 NW2d 234 (1996).
[4] *Id.* at 14.
[5] *In re Gorcyca,* 500 Mich 588; 902 NW2d 828 (2017).
[6] N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo Rev 1315 (2004).

prosecutor Anna Bickerstaff, who falsely accused Judge Morrow of "hitting on" her. Bickerstaff disowned that statement when testifying under oath. But her lie persisted. According to Disciplinary Counsel, Judge Morrow didn't just glance at a prosecutor; he was "overtly eyeing" her.[7] He didn't just sit next to Bickerstaff; he was "intimately … seated" next to her.[8] He didn't just refer to sex as part of an extended analogy; he "inject[ed] explicit sex into his conversation with this young woman."[9]

It's hard to dismiss that rhetoric as accidental after another racist theme reared its head. William Noakes, a Black attorney who has a resume that would put anyone to shame, gave testimony that undermined Disciplinary Counsel's case. Then Disciplinary Counsel dismissed Noakes as "pompous"—an echo of the racist "uppity" label used to dismiss accomplished Black men.[10] This rhetoric is deeply troubling. Whatever the Commission's answers to the core legal questions, it cannot do justice without addressing that rhetoric and its historical context. Overlooking racism only allows it to fester and spread. The Commission should clearly and forcefully reject this rhetoric.

Relevant Facts

A. Background on Judge Morrow

Hon. Bruce Morrow has been a judge at the Wayne County Circuit Court since his election in 1998.[11] Before that, he served as a judge at the Recorder's Court. Ever since he

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[7] *Disciplinary Counsel's Proposed Findings of Fact and Conclusions of Law*, p. 12.
[8] *Id.*, p. 5.
[9] *Id.*, p. 6.
[10] Jennifer Lisa Vest, *What Doesn't Kill You: Existential Luck, Postracial Racism, and the Subtle and Not So Subtle Ways the Academy Keeps Women of Color Out*, 12 Seattle J. for Soc. Justice. 471, 510 (2013).
[11] *Answer*, ¶1.

took the bench, Judge Morrow has been trying to demystify and humanize the judicial process, particularly for jurors.[12] For example, he discourages attorneys from referring to those accused of crimes as "defendants," and insists that attorneys use each defendant's name.[13] He treats defendants and their families with the same care and concern that he offers to victims and their families.[14] At all times, Judge Morrow tries to demonstrate humility and to ensure equality and fairness.[15] And as part of his effort to ensure justice and equal protection in his courtroom, Judge Morrow instructs jurors about confronting and challenging their own biases.[16]

Judge Morrow has also tried to make the criminal-justice system more humane by mentoring inmates in the correctional system.[17] As attorney Jeffrey Edison testified, Judge Morrow "encourage[s] those who have been caged for many years, sometimes caged for life, and tr[ies] to uplift their spirits and enhance their quality of life."[18] His former judicial assistant, Joan Kennedy-Hughes, described his "inspirational speeches to help the young men that were in prison to know that there is hope once they get on the other side."[19]

Judge Morrow has a reputation for integrity and for being one of the best trial judges in the criminal division.[20] In a previous disciplinary proceeding, witnesses described him as "hardworking and punctual," "fair," and "as someone who reaches out

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[12] Vol. III, p. 669; Vol. III, p. 794.
[13] Vol. I, p. 302.
[14] Vol. IV, p. 969.
[15] Vol. I, p. 670.
[16] Vol. III, p. 795.
[17] *Id.*, p. 688.
[18] *Id.*
[19] Vol. IV, p. 1028.
[20] Vol. III, pp. 674, 811.

to defendants and tries to encourage them to change their ways."[21] (This report is a public record subject to judicial notice.[22])

Nevertheless, the Wayne County Prosecutor's Office has a long history of animosity toward Judge Morrow.[23] Attorney Nicole James recalled that, when she worked in the prosecutor's office, she was told that Judge Morrow was a "bad judge."[24] (That was well before Judge Morrow's suspension in 2014.[25]) She formed a very different impression of Judge Morrow after she left the prosecutor's office.[26] James also knew that the Wayne County Prosecutor's Office kept a "book" on Judge Morrow's supposed errors—but she had never heard of similar books for other judges.[27] This history of animosity arises in part from Judge Morrow's willingness to hold prosecutors to their burden of proof and to dismiss cases or suppress evidence when the law requires it.[28]

B. The Matthews case and its voir dire

This disciplinary matter arises from the June 2019 homicide trial of James Edward Matthews for the 2003 murder of Camille Robinson.[29] Judge Morrow presided. William Noakes was the defense attorney, while Ashley Ciaffone and Anna Bickerstaff were the prosecutors.[30] The prosecution didn't charge Matthews with any crimes relating to sexual

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[21] *Attachment A, Master's Report re: Formal Complaint No. 92* at 4.
[22] *Johnson v Dep't of Natural Resources,* 310 Mich App 635, 649; 873 NW2d 842 2015; MRE 201.
[23] Vol. III, p. 691; Vol. IV, p. 1005.
[24] Vol. IV, p. 1005.
[25] *In re Morrow,* 496 Mich 291; 854 NW2d 89 (2014).
[26] Vol. IV, p. 1007.
[27] *Id.*, p. 1009.
[28] Vol. III, p. 691.
[29] *People v Matthews,* Wayne County Circuit Court Case No. 18-7023-01-FC.
[30] Vol. I, pp. 31-32; Vol. II, p. 376.

activity but Matthews acknowledged to the police in 2003 that he had a sexual encounter with the victim before her death.[31]

During voir dire, Judge Morrow used the example of his height to illustrate bias for the jury.[32] He said, "I'm gonna say: The man was tall. I can almost guarantee everybody has a different height for tall. Because mine is 6'7". And why is it 6'7"? Because I'm 6'4". And our definitions are always personal. Nobody knows. But if I said the man was 6'7", now you have the information. Now you can make your own conclusion."[33]

C. The prosecution's 404(b) error

Matthews was a difficult case for the prosecution. The homicide occurred 16 years before trial, one of the key witnesses had a checkered background, and the press was critical of the prosecution's handling of the case.[34] Media reported that the prosecutor's office and the Detroit Police Department were trying to shift blame to each other.[35]

One significant issue at trial involved "other acts" evidence under MRE 404(b). The prosecution wanted to introduce evidence that Matthews committed a 1999 homicide in addition to the 2003 homicide at issue.[36] Judge Morrow excluded that evidence under MRE 404(b) at a pretrial hearing.[37] The Court of Appeals issued an interlocutory ruling that allowed the prosecution to renew its attempt to admit this evidence at the close of

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[31] Vol. I, p. 31.
[32] Vol. II, p. 415.
[33] *Id.,* p. 482.
[34] *Id.,* pp. 462-463.
[35] *Id.,* p. 463.
[36] Vol. III, p. 757.
[37] Vol. I, p. 106.

the prosecutor's case (or sooner).[38] Ciaffone and Bickerstaff never renewed their Rule 404(b) motion during their case-in-chief.[39] They couldn't do so through rebuttal witnesses because there was no testimony about those homicides to rebut.[40] Ciaffone renewed the Rule 404(b) motion on the last day of trial and Judge Morrow denied it.[41]

D. The prosecution's reliance on disputed statements

Another major issue concerned alleged statements from the defendant's siblings. Emory Matthews, the defendant's brother, supposedly told a police officer in 2005 that the defendant confessed to multiple homicides.[42] By the time of trial, he refused to confirm his alleged 2005 statement.[43] He was adamant that the 2005 report was inaccurate and he made the officer in charge, Lt. Derrick Griffin, aware of that fact before trial.[44] The defendant's sister also notified Lt. Griffin that she would not testify in a manner consistent with statements attributed to her in police reports.[45]

Lt. Griffin told Ciaffone or Bickerstaff that the defendant's siblings would not provide favorable testimony.[46] The prosecution also had a chance to speak to Emory Matthews before trial.[47] Bickerstaff acknowledged learning that the defendant's siblings denied their previous statements, but she couldn't recall when.[48] Nevertheless, Ciaffone

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[38] Vol. III, p. 757.
[39] Vol. I, p. 279.
[40] *Id.,* p. 283.
[41] *Id.,* p. 283.
[42] *Id.,* p. 190; Vol. II, p. 498-99.
[43] Vol. III, p. 760.
[44] *Id.*
[45] *Id.,* p. 761-762.
[46] *Id.,* p. 763.
[47] Vol. II, pp. 465, 501-02.
[48] *Id.*, p. 502.

told the jury in her opening statement that Emory Matthews would testify that James Matthews admitted to *two* homicides.[49] She acknowledged that her only basis for making that statement about two more homicides was Emory Matthews's alleged statements—which he denied making.[50] Moreover, the court had suppressed any reference to the other homicide when it denied the prosecution's motion under MRE 404(b).[51] The prosecution's reliance on testimony that they knew Emory Matthews would not provide was a significant misstep in a high-profile trial—and it was highly prejudicial to Matthews.

E. The prosecution's struggles with basic trial mechanics

Throughout the trial, the prosecution violated basic procedures and needed reminders from Judge Morrow about how to form proper arguments and questions. During her opening statement, for example, Ciaffone warned the jury against "red herrings."[52] As Ciaffone's co-counsel testified, that kind of argument is improper in an opening statement.[53] Judge Morrow had to stop Ciaffone and remind her not to do that.[54] Ciaffone acknowledged that Judge Morrow was correct to stop her from being argumentative in her opening statement.[55]

The prosecution ran into trouble again when Ciaffone examined the defendant's neighbor. This witness—who was supposed to perform the key task of identifying the

[49] Vol. I, p. 190; Vol. II, p. 498-99.
[50] *Id.*
[51] *Id.,* p. 190.
[52] Vol. I, p. 176.
[53] Vol. II, p. 507.
[54] *Id.,* p. 178.
[55] Vol. I, p. 182.

defendant—only identified the defendant by saying, "I think that's him."[56]

Then came another prosecution misstep. Ciaffone "confront[ed]" the neighbor with a transcript of his previous testimony, even though Masterson never said that he was unable to recall his previous testimony.[57] Judge Morrow had to explain that Ciaffone was not refreshing the witness's recollection properly.[58] And he was right: even Bickerstaff acknowledged that Ciaffone's attempt to "refresh" Masterson's recollection was improper.[59]

Ciaffone had repeated problems with leading questions, even after Judge Morrow corrected her.[60] For example, when Camille Leak testified for the prosecution, Ciaffone used leading questions.[61] As a result, Judge Morrow had to remind Ciaffone of the proper way to question a witness. *Id.* (That wasn't the only issue with Leak. Her t-shirt said something like, "I don't give a fuck."[62] When Noakes sought to highlight that language during his examination, Judge Morrow intervened and said, "That's not relevant."[63]).

Bickerstaff had difficulties during the trial, too. When she conducted the direct examination of Officer Deborah Stinson, she began most of her questions with the word *and*.[64] She had similar issues in other examinations.[65] Judge Morrow told Bickerstaff to

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[56] Vol. I, p. 184.
[57] *Id.*, p. 200-201.
[58] *Id.*, pp. 202-203.
[59] Vol. II, pp. 510-511.
[60] *Id.*, p. 515-16.
[61] Vol. I, pp. 214-215.
[62] Vol. III, p. 873.
[63] Exhibit 5, June 11, 2019 transcript from *Matthews* trial, p. 39.
[64] Vol. I, p. 257; Vol. II, p. 542.
[65] Vol. I, p. 259, 261; Vol. II, p. 379-80.

"keep an eye on" that.[66] The jury was absent when he made that comment.[67]

Judge Morrow's critiques were not one-sided.[68] For example, he warned both sides about focusing on irrelevant issues[69] and asking witnesses to repeat their testimony.[70]

F. The prosecution's unnecessary DNA evidence

On top of these issues, the prosecution unnecessarily introduced a complicated issue involving DNA evidence. It called Kirk DeLeeuw, a forensic biologist with the Michigan State Police, to testify about Wayne County's fifteen-year backlog in processing DNA evidence.[71] Yet there was no need to complicate the prosecution's case with this evidence. The defendant acknowledged that he had sexual intercourse with the victim.[72] He testified, "She was pregnant. She couldn't have sex like we normally do because we didn't want her to abort the baby, which is why she had the miscarriage the other time."[73] During DeLeeuw's testimony, Ciaffone raised the issue of a "rape kit," although there was no allegation of rape in the case.[74]

G. The hung verdict and case reassignment

On June 13, 2019, the jury returned with a hung verdict and the court declared a mistrial.[75] The prosecutor's office soon filed a motion to disqualify Judge Morrow from

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[66] Vol. II, p. 380.
[67] *Id.*, p. 381.
[68] Vol. III, p. 872; Vol. I, pp. 46, 221.
[69] *Id.*, p. 221.
[70] Vol. II, p. 523-24.
[71] Vol. I, pp. 239, 241, 244.
[72] *Id.*, p. 299.
[73] *Id.*, p. 300.
[74] *Id.*, p. 242.
[75] *Id.*, p. 80.

the retrial.[76] The prosecutors didn't serve the motion on Noakes, who was unaware if the court even held a hearing on the motion.[77]

The case was reassigned to Judge Michael Hathaway, a visiting judge.[78] The prosecution was able to re-assign other cases, too, including another case Ciaffone was handling.[79] Attorney Gabi Silver testified that one of her cases was transferred from Judge Morrow to Judge Michael Hathaway without a hearing.[80] She learned of the transfer through an email from Bickerstaff.[81] It appeared that the prosecutor's office was using the allegations about Judge Morrow to re-assign cases from Judge Morrow's docket. In other words, they were "forum shopping."[82] And that forum shopping helped the prosecution: after the transfer in the *Matthews* case, Judge Hathaway granted the prosecution's Rule 404(b) motion in part.[83]

H. Judge Morrow's conversation with Bickerstaff

Ciaffone asked Judge Morrow for feedback early in the trial,[84] as she does in most of her cases.[85] When Ciaffone asked Judge Morrow for feedback, he expressed doubt about her ability to accept feedback.[86] Judge Morrow asked Bickerstaff if she thought

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[76] Vol. I, p. 288.
[77] Vol. III, p. 893.
[78] Vol. I, p. 284-285.
[79] *Id.*, p. 346.
[80] Vol. IV, p. 960, 976.
[81] *Id.*
[82] *Id.*, p. 963.
[83] Vol. I, pp. 289, 350.
[84] *Id.*, p. 35.
[85] *Id.*, p. 36.
[86] Vol. II, p. 470.

Ciaffone could handle criticism, and Bickerstaff said yes.[87] Bickerstaff also asked Judge Morrow for feedback during a recess on June 11, 2019.[88] According to Bickerstaff's June 14, 2019 memo, Ciaffone decided to ask Judge Morrow for advice again after Bickerstaff told Ciaffone that "[Judge Morrow] had given [her] advice twice…"[89]

On the second day of trial, June 11, 2019, Noakes asked for a recess to speak to his client.[90] Ciaffone left the courtroom to use the restroom.[91] Bickerstaff asked Judge Morrow for feedback about her direct examination of the medical examiner.[92] She said something like, "Was that line of questioning any better?"[93] Judge Morrow said Bickerstaff's examination was better, but he had another critique for her.[94] He stood up from the bench and said he would talk to Bickerstaff at counsel's table because giving the critique from the bench might make her blush.[95] Judge Morrow has a deep, booming, easy-to-overhear voice,[96] and he was trying to minimize airing criticism in public.

Judge Morrow sat at counsel's table next to Bickerstaff, who was in the middle of three seats.[97] Lt. Derrick Griffin of the Detroit Police Department sat to Bickerstaff's left and Judge Morrow took the only vacant seat—the one to Bickerstaff's right.[98] Lt. Griffin

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[87] Vol. II, pp. 471-72.
[88] Vol. II, p. 560.
[89] Exhibit 6, Bickerstaff memo.
[90] Vol. I, p. 41-40.
[91] *Id.*, p. 42.
[92] Vol. III, p. 748.
[93] Vol. III, p. 700; Vol. II, p. 383-84.
[94] Vol. II, p. 385.
[95] Vol. III, p. 700.
[96] *Id.*, p. 895.
[97] Vol. II, p. 383.
[98] Vol. I, p. 38.

was the officer in charge of the *Matthews* case.[99] (Lt. Griffin's rank was sergeant at the time of the underlying events.[100])

Prosecutors decide how to position chairs around their table.[101] In this instance, the three chairs were all on one side of the table.[102] And there was little space in the courtroom. As Ciaffone put it, "We were jam-packed."[103] The arms of the chairs were touching because that was the only way for all three chairs to fit behind the table.[104] Judge Morrow sat at an appropriate distance from Bickerstaff and did not touch her.[105]

Judge Morrow then illustrated the problem with Bickerstaff's direct examination by using the development of intimate relationships as an analogy.[106] He said something like, "When a man and a woman start to get close, what does that lead to?"[107] Bickerstaff said she didn't understand.[108] After Judge Morrow repeated his question, Bickerstaff said, "Do you mean sex?"[109] Judge Morrow said that foreplay leads to sex, and asked Bickerstaff, "[W]ould you want foreplay before or after sex?"[110] Bickerstaff didn't say anything in response.[111] When he asked the question again, Bickerstaff answered,

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[99] Vol. III, p. 756.
[100] *Id.*, p. 747.
[101] Vol. III, p. 719.
[102] *Id.*, p. 721; Vol. III, p. 749.
[103] Vol. I, p. 38.
[104] *Id.*
[105] Vol. III, pp. 721, 724.
[106] Vol. II, p. 386.
[107] *Id.*, p. 386.
[108] *Id.*
[109] *Id.*, p. 386.
[110] *Id.*
[111] *Id.*

"Before."[112] (Bickerstaff testified that it was unclear whether the "you" in Judge Morrow's question was Bickerstaff herself or people in general.[113] Judge Morrow meant the question as a general one.[114])

Judge Morrow stated that the climax of the medical examiner's testimony is the cause and manner of death.[115] He didn't use the word "climax" in its sexual sense.[116] He said something like, "You start with all the information from the report, all the testimony crescendos to the cause and manner of death, which is the sex of the testimony."[117] Judge Morrow said a lawyer should "tease the jury with the details of the examination."[118] This conversation lasted a few minutes.[119] Bickerstaff maintained eye contact with Judge Morrow and he did the same with her.[120] Lt. Griffin could easily hear the conversation.[121]

The courtroom staff was present during this conversation.[122] So was Joe Kurily, an attorney with the Wayne County Prosecutor's Office.[123] He watched some of the *Matthews* trial.[124] During Bickerstaff's conversation with Judge Morrow, he was about 10 feet away.[125] Kurily didn't overhear the conversation but he saw nothing unusual in Judge

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[112] Vol. II, p. 386.
[113] *Id.,* 387.
[114] *Answer,* ¶10.
[115] Vol. I, p. 45.
[116] *Answer,* ¶¶12-13.
[117] *Id.,* ¶13.
[118] *Id.,* ¶14.
[119] Vol. III, p. 704.
[120] Vol. II, p. 591-592.
[121] Vol. III, p. 751
[122] *Id.,* p. 707.
[123] *Id.,* p. 698.
[124] *Id.,* p. 698-699.
[125] *Id.,* p. 703.

Morrow or Bickerstaff's conduct.[126] Kurily testified that Judge Morrow would often talk to attorneys at counsel's table.[127]

Bickerstaff related some of the conversation to Ciaffone when she returned and then trial resumed.[128] After trial ended for the day, Bickerstaff shared parts of the conversation with her officemate, Patrina Bergamo.[129] She also told a supervisor, Pat Muscat, on the phone during her drive home.[130]

I. The in-chambers discussion on June 12, 2019.

Judge Morrow often speaks to attorneys about their performance at trial.[131] When the jury was deliberating on June 12, 2019, Judge Morrow invited Ciaffone, Bickerstaff, and Noakes into his chambers.[132] As Noakes testified, they were free to decline Judge Morrow's invitation.[133] The door to Judge Morrow's chambers remained open during the conference.[134] At the time, Noakes had a motion for directed verdict still pending.[135] Judge Morrow believed that Ciaffone had cited the wrong standard when responding to the motion.[136] So when the attorneys walked into his chambers, he had a copy of the Michigan Court Rules for both Ciaffone and Noakes opened to the relevant rule.[137] He

[126] Vol. III, p. 709.
[127] *Id.*, p. 718.
[128] Vol. II, p. 391.
[129] *Id.*, p. 392.
[130] *Id.*, p. 393.
[131] Vol. III, p. 719-720.
[132] Vol. I, p. 50.
[133] Vol. III, p. 882.
[134] *Id.*, p. 884.
[135] Vol. I, p. 52.
[136] *Id.*, p. 52.
[137] *Id.*, pp. 53, 327-28.

explained that Ciaffone had misstated the standard but that he didn't want to embarrass her in court.[138] Ciaffone admitted in these proceedings that she was unfamiliar with the directed-verdict rule.[139]

Judge Morrow asked Ciaffone about admitting evidence that the defendant's DNA was on the deceased victim's vaginal swab.[140] He pointed out that the prosecution had not charged Matthews with criminal sexual conduct, which made the evidence irrelevant.[141] Ciaffone tried to convince him that the DNA evidence was relevant "because it showed that they had close, recent contact near in time to the homicide," but Judge Morrow disagreed.[142] Ciaffone testified that the conversation "went back and forth."[143] According to Ciaffone, Judge Morrow said, "All it shows is that they fucked. Like, that's all it shows, that they fucked."[144] Judge Morrow doesn't recall making this statement but did not contest that he did.[145]

During this discussion, Ciaffone raised the defendant's statement that he had "non-traditional sex" or "not normal sex" with the victim.[146] That led to a conversation about what "non-traditional sex" means.[147] Ciaffone said that "non-traditional sex" means something other than intercourse.[148] This distinction mattered to the legal issues

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[138] Vol. I, p. 53.
[139] *Id.*, p. 54.
[140] *Id.*, p. 55-56.
[141] *Id.*
[142] *Id.* at 56.
[143] *Id.*, pp. 57, 334.
[144] *Id.*, p. 57.
[145] *Answer*, ¶21.
[146] Vol. I, pp. 59, 296-97.
[147] *Id.*
[148] *Id.*

at hand because Ciaffone thought that Matthews's statement was inconsistent with the DNA evidence in the victim's vagina.[149] Judge Morrow felt that Matthews's statement was actually consistent with that evidence because, in his view, Matthews meant that they had what Judge Morrow called "doggy style" intercourse.[150] Judge Morrow stated that Ciaffone's view was the product of her own bias.[151]

Ciaffone stated that Judge Morrow's view was incorrect because Matthews stated that he "couldn't penetrate [the victim] because she could have a miscarriage."[152] According to Ciaffone, Judge Morrow laughed and said, "Oh, so like what—like, he [is] saying that, like, what he's working with … was so big that it would cause a miscarriage[?]"[153] Ciaffone testified that she took "what he's working with" as a reference to the defendant's genitals.[154] She didn't remember Judge Morrow using the word "dick."[155] Bickerstaff is the only person who testified that he said "dick."[156]

During the in-chambers conversation, Judge Morrow criticized Ciaffone's voir dire as being too indirect.[157] He had originally raised the issue during Ciaffone's *voir dire*, asking her, "What is it that you really want to ask?"[158] In chambers, he said something like, "If I want to have sex with someone on the first date, what do I ask them?"[159] When

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[149] Vol. I, pp. 58-59.
[150] *Id.*, p. 60; Vol. III, p. 885.
[151] *Id.*, p. 59-60.
[152] *Id.*, p. 62.
[153] *Id.*, p. 63.
[154] *Id.*, p. 63.
[155] *Id.*, p. 64.
[156] Vol. II, pp. 401-402.
[157] Vol. I, p. 66.
[158] Vol. II, p. 488.
[159] Vol. I, p. 66.

no one responded, Judge Morrow said, "I would ask them, 'Have you ever had sex on a first date?'"[160] Then he asked, "What's the second question I would ask them?"[161] Again, no one answered. Judge Morrow said, "I'd ask, 'Would you have sex with me on a first date?'"[162] He added, "You don't ask questions like, 'Do you want to get married?' or 'Do you want to have kids?' Like, those things would come later. Right? So just ask the question you want to know."[163] The court then dismissed the jury for the day.[164]

J. The post-conference discussion on June 12, 2019

After the June 12, 2019 conversation in chambers, Ciaffone and Bickerstaff walked to counsel's table to pack their things.[165] Ciaffone was standing in front of the prosecutor's table and Bickerstaff was standing behind a chair when Judge Morrow spoke to them.[166] Bickerstaff testified that both attorneys were standing behind the table.[167] Judge Morrow asked Ciaffone how tall she was: "What are you, like, five-one or five-two?"[168] Ciaffone said something like, "No, but I accept that, Judge."[169] Bickerstaff volunteered, "Judge, I'm five-three for context."[170] In response to this invitation to guess again, Judge Morrow then estimated Ciaffone's height as four feet, ten inches. Ciaffone said that she's "four-eleven

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[160] Vol. I, pp. 66-67.
[161] *Id.*, p. 67.
[162] *Id.*, p. 67.
[163] *Id.*
[164] *Id.*, p. 68.
[165] *Id.*, p. 69.
[166] *Id.*, p. 321.
[167] Vol. II, p. 406.
[168] Vol. I, p. 70.
[169] *Id.*, p. 70.
[170] *Id.*

and a half."[171] Judge Morrow then asked if Ciaffone weighed around 105 pounds. Ciaffone said, "Judge, you're not supposed to ask a girl her weight."[172] Then Judge Morrow asked Bickerstaff if she was 117 pounds.[173] Bickerstaff said, "That's very generous but, no, Judge."[174] Judge Morrow responded, "Well, I haven't assessed you for muscle mass yet."[175]

Bickerstaff testified that, during this conversation, Judge Morrow "looked [Ciaffone] down and up once, and then he looked at [Bickerstaff] down and up once."[176] When asked about how Judge Morrow looked at her, Ciaffone testified, "I think that the whole encounter with regards to the height and the weight situation was entirely improper, and you can toss in how he looked with his eyes as part of that whole thing."[177]

K. Bickerstaff and Ciaffone's reports about Judge Morrow

After the conversation on June 12, 2019, Bickerstaff and Ciaffone left the courtroom, and talked about Bickerstaff's conversation with Judge Morrow during the elevator ride to their offices.[178] Ciaffone told Bickerstaff not to tell anyone.[179] In the hallway, however, Bickerstaff and Ciaffone ran into David Champine and Kurily, two other prosecutors, and they discussed their interactions with Judge Morrow.[180] Champine

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[171] Vol. I, p. 70.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] Vol. II, p. 408.
[177] Vol. I, p. 322.
[178] *Id.*, p. 77.
[179] *Id.*
[180] Vol. III, p. 731; Vol. I, p. 77.

told them to report the conversation but Ciaffone resisted.[181]

Bob Donaldson, a senior prosecutor, walked by and heard Bickerstaff and Ciaffone talking about the conversation with Judge Morrow.[182] (Bickerstaff now claims that she got Donaldson's attention, and that he didn't join the conversation because he overheard it.[183]). Donaldson stated that someone needed to report the conversation.[184] Donaldson took Ciaffone and Bickerstaff to see Jason Williams, the head of appeals in the prosecutor's office.[185] Bickerstaff also told Pat Muscat, Ciaffone's boss.[186] Muscat told Athina Siringas, the chief of special prosecution and Muscat's boss.[187]

After the trial, Siringas asked Ciaffone and Bickerstaff to write a memo on their interactions with Judge Morrow during the trial.[188] Both Ciaffone and Bickerstaff wrote memos.[189] Siringas asked Bickerstaff and Ciaffone to draft affidavits.[190] Ciaffone executed an affidavit on June 27, 2019.[191] Bickerstaff executed hers on the same date.[192] She had the affidavit re-notarized on November 27, 2019.[193]

L. Chief Bivens and Detective Kinney's investigation

James Bivens is the chief of investigations at the Wayne County Prosecutor's

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[181] Vol. I, p. 80.
[182] *Id.*, p. 80.
[183] *Id.*, p. 620.
[184] Vol. III, p. 713; Vol. I, p. 70.
[185] Vol. I, p. 70, 412; Vol. II, p. 380.
[186] Vol. I, p. 81-82.
[187] *Id.*, p. 82.
[188] *Id.*, p. 83.
[189] See Exhibit 6, Bickerstaff memo, Exhibit 7, Ciaffone memo.
[190] Vol. II, p. 415.
[191] Vol. I, 86; Exhibit 9.
[192] Vol. II, p. 416-17; Exhibit 8.
[193] Vol. II, p. 417.

Office.[194] He's been in law enforcement for 43 years.[195] At Prosecutor Kym Worthy's direction, Chief Bivens began to investigate the matter.[196] After doing some of his own interviews, Chief Bivens assigned JoAnn Kinney, a retired homicide investigator, to interview witnesses and prepare a report.[197]

Detective Kinney interviewed Ciaffone and Bickerstaff separately.[198] At the conclusion of her investigation, Detective Kinney called Ciaffone and Bickerstaff into her office and asked them to review "Q&A" summaries that she drafted based on their interviews.[199] When Bickerstaff and Ciaffone walked out of Detective Kinney's office, Bickerstaff told Ciaffone "that there was a mistake in hers."[200] Bickerstaff appeared to be concerned.[201] Ciaffone told Bickerstaff to go back and tell Detective Kinney.[202] But Bickerstaff said she was "nervous" and didn't want to go back into Detective Kinney's office.[203] Ciaffone told her, "[Y]ou've got to go back in there[.]"[204] Bickerstaff didn't tell Ciaffone what the mistake was. Bickerstaff did not go back into Detective Kinney's office and did not point out the error. In fact, she never notified her superiors of any error in the statement she signed.[205] Ciaffone felt no obligation to address the error either.[206]

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[194] Vol. I, p. 89.
[195] Vol. V, p. 1171.
[196] *Id.*, p. 1189.
[197] Vol. I, p. 88; Vol. III, p. 829.
[198] Vol. I, p. 304.
[199] Vol. I, p. 90; Vol. III, p. 831.
[200] Vol. I, p. 91.
[201] *Id.*, p. 307.
[202] *Id.*
[203] *Id.*, p. 307.
[204] *Id.*
[205] Vol. II, p. 424.
[206] Vol. I, p. 315.

Detective Kinney testified that, when she asked what Bickerstaff thought Judge Morrow was trying to do, Bickerstaff said, "I know what he was trying to do."[207] Under oath, however, Bickerstaff confessed that she "does not know why Judge Morrow said the things he said to her."[208]

Detective Kinney gave her Q&A statements and her notes to Chief Bivens.[209] Chief Bivens found some handwritten notes from Detective Kinney.[210] Those notes indicate that Bickerstaff said, "I know what he was trying to do."[211] Detective Kinney produced to the Judicial Tenure Commission notes written in part by Det. Kinney and in part by Chief Bivens. Chief Bivens had written, "She felt that he was trying to hit on her in an around about way, felt it was improper for a judge to be discussing sex with her regarding a homicide trial."[212] Detective Kinney's Q&A sheet has never been produced.[213]

M. Bickerstaff's false allegation

Chief Bivens submitted a report about Bickerstaff and Ciaffone's conversations with Judge Morrow to Kym Worthy, the elected prosecutor.[214] Chief Bivens's report repeated Bickerstaff's false statement that she "felt Judge Morrow was trying to hit on her…"[215] Chief Bivens also testified that Bickerstaff told him that she felt Judge Morrow

[207] Vol. III, p. 833.
[208] Vol. IV, p. 945-46; Exhibit L letter; Exhibit M stipulation.
[209] Vol. III, p. 832.
[210] Vol. V, p. 1180.
[211] Exhibit N, Kinney notes.
[212] Vol. V, p. 1184, 1198; Exhibit N.
[213] Vol. V, p. 1179.
[214] Vol. II, p. 421; Exhibit 12.
[215] *Id.,* p. 422.

was trying to hit on her.[216]

Given Chief Bivens's testimony, Bickerstaff lied under oath when she testified that she never told anyone that Judge Morrow hit on her.[217] Bickerstaff also lied to Disciplinary Counsel by stating that she had not seen Chief Bivens's report before—an attempt to excuse her lie about Judge Morrow "hitting on" her.[218] When placed under oath, Bickerstaff admitted that she did, in fact, review Chief Bivens's report.[219] She also testified that she noticed the false statement about Judge Morrow "trying to hit on her."[220] But Bickerstaff never told Chief Bivens that there was an error in his report.[221]

Chief Bivens told Bickerstaff and Ciaffone that he would forward the report to Prosecutor Worthy.[222] Bickerstaff knew that Prosecutor Worthy would rely on the report.[223] Still, she didn't correct the misstatement.[224] In fact, she testified that she gave the matter no more thought.[225]

N. Underlying proceedings

This Commission authorized Disciplinary Counsel to prepare a formal complaint against Judge Morrow and "directed that it be filed."[226] Disciplinary Counsel filed that complaint in August 2020, alleging three counts. Count One alleges "inappropriate use

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[216] Vol. V, p. 1174-75.
[217] Vol. II, pp. 599-600, 607.
[218] Exhibit M, Stipulation, pp. 1-2.
[219] Vol. II, pp. 421-22.
[220] *Id.*
[221] Vol. V, p. 1199.
[222] Vol. II, p. 596.
[223] *Id.*
[224] *Id.*, p. 612.
[225] *Id.*, p. 631.
[226] *Compliant* at 1.

of sexually graphic language"—specifically, Judge Morrow's analogy for a direct examination when talking to Bickerstaff. Count Two alleged more "sexually graphic language," including Judge Morrow's skeptical comment about Matthews's testimony, his comments about asking a date if they would have sex on the first date, and his discussion of Matthews's testimony about "non-traditional sex." In Count Three, the Commission alleged that Judge Morrow committed misconduct by asking Ciaffone and Bickerstaff about their height and weight.

After a five-day evidentiary hearing, the Master concluded that Disciplinary Counsel established misconduct by a preponderance of the evidence. For Count One, the Master concluded that Judge Morrow committed misconduct by sitting next to Bickerstaff and engaging in "unnecessary and inappropriate sexual dialogue."[227] This conduct, according to the Master, violated Michigan Code of Judicial Conduct Canon 2(B), 3(A)(14), and 3(A)(3). For Count Two, the Master found "inappropriate use of sexually graphic language" in Judge Morrow's "analogizing voir dire to asking for sex on a first date," referring to Ciaffone's sexual experience, and his alleged comment about "the size of the defendant's genitalia[.]"[228] The Master also faulted Judge Morrow for using the word "fuck."[229] The Master concluded that this conduct violated the canons listed above. Finally, for Count Three, the Master concluded that Judge Morrow improperly asked about Ciaffone and Bickerstaff's height and weight. This conduct, the

[227] *The Master's Findings of Fact and Conclusions of Law* at 4.
[228] *Id.* at 8.
[229] *Id.* at 9.

Master concluded, violated Canon 3(A)(14) and Canon 3(A)(3).

Standard of Review

This Commission is "vested with the responsibility of determining whether to recommend to [the Michigan Supreme] Court that a judge be disciplined…"[230] Accordingly, it reviews the Master's findings of fact and conclusions of law *de novo*.[231]

To recommend discipline for a judge, this Commission must find that the judge was convicted of a felony, is subject to a physical or mental disability that "prevents performance of judicial duties," or is 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."[232] The Michigan Court Rules provide that "misconduct in office 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.[233]

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[230] *In re Chrzanowski,* 465 Mich 468, 480-481; 636 NW2d 758 (2001).
[231] *Id.*
[232] Const 1963, art 6, § 30.
[233] MCR 9.205.

Disciplinary Counsel must prove that judicial discipline is warranted under these rules by a preponderance of the evidence.[234]

Argument 1: Due Process

One of the most significant legal issues in this case is one that the Commission cannot reach: the Commission's structure is unconstitutional under *Williams*. Only the Michigan Supreme Court can declare its own rules unconstitutional,[235] so Judge Morrow offers these arguments here to preserve them. (The Court previously denied a petition to consider this issue on an interlocutory basis in October 2020.)

1.1 Judge Morrow is entitled to due process.

Under the Fourteenth Amendment of the United States Constitution, no state may "deprive any person of life, liberty, or property, without due process of law[.]"[236] This due-process right protects public employees who are subject to termination only for cause.[237] Michigan's constitution provides that the Michigan Supreme Court can remove a judge only "for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice."[238] Consequently, a Michigan judge is subject to removal only for cause.

It follows that a judge is entitled to due process before suspension or removal.[239]

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[234] *In re Noecker*, 472 Mich 1, 8; 691 NW2d 440 (2005).
[235] *Fieger,* 476 Mich at 254.
[236] US Const Am XIV, §1.
[237] *Gilbert v Homar,* 520 US 924, 928 (1997); *Cleveland Bd of Educ v Loudermill,* 470 US 532, 541 (1985).
[238] Const 1963, Art VI, §302.
[239] *Gilbert,* 520 US at 928.

As the Michigan Supreme Court held in *In re Chrzanowski* (2001), "It is uncontroverted that judges, like all other citizens, have protected due process interests under the … Due Process Clause of the Fourteenth Amendment of the United States Constitution."[240]

The United States Supreme Court has held that an impartial decision-maker is one of the most basic components of due process.[241] Judge Morrow is therefore entitled to impartial decision-makers in this judicial-discipline proceeding.

1.2 A single person cannot be both prosecutor and judge.

In *Williams v Pennsylvania* (2016),[242] the U.S. Supreme Court addressed a case in which the petitioner, Terrance Williams, was originally tried for homicide. At trial, the prosecutor contacted a supervisor for permission to seek the death penalty.[243] This supervisor—then-district attorney Ronald Castille—authorized pursuit of the death penalty with a short note at the bottom of a memo. Fast forward thirty years, and Castille was the Chief Justice of the Pennsylvania Supreme Court.[244] When Williams's post-conviction challenge to the death penalty made its way to that court, Williams asked Castille to recuse himself. Castille refused, and his court reinstated the death penalty.

The United States Supreme Court held that Castille's participation was unconstitutional: "[U]nder the Due Process Clause[,] there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in

[240] *In re Chrzanowski,* 465 Mich 468, 483; 636 NW2d 758 (2001).
[241] *In re Murchison,* 349 US 133, 136 (1955).
[242] *Williams v Pennsylvania,* 136 S Ct 1899, 1910 (2016).
[243] *Williams,* 136 S Ct at 1903.
[244] *Id.* at 1904.

a critical decision regarding the defendant's case."[245] The Court noted that "[d]ue process guarantees 'an absence of actual bias' on the part of a judge."[246] Because it can be hard to tell when a decision-maker is biased, the Court adopted "an objective standard that, in the usual case, avoids having to determine whether actual bias is present."[247] Under this test, the question is "whether, as an objective matter, the average judge in [their] position is likely to be neutral, or whether there is an unconstitutional potential for bias."[248] There is an unconstitutional risk of bias "when the same person serves as both accuser and adjudicator in a case."[249]

This standard precludes a judge from participating in a case when they made a "critical decision" in that case as a prosecutor.[250] There are sound psychological reasons for this rule. When a judge adjudicates a matter in which they participated as prosecutor, there is "a risk that the judge would be so psychologically wedded to [their] previous position as prosecutor that the judge would consciously or unconsciously avoid the appearance of having erred or changed position."[251]

Turning to Castille's involvement in Williams's case, the U.S. Supreme Court held that Castille's role in the "critical choice" to seek the death penalty was enough to make his participation as chief justice unconstitutional.[252] This due-process violation was so

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[245] *Williams,* 136 S Ct at 1905.
[246] *Id.* at 1905, quoting *Murchison,* 349 US at 136.
[247] *Williams,* 136 S Ct at 1905.
[248] *Id.* (cleaned up).
[249] *Id.* at 1905.
[250] *Id.* at 1906.
[251] *Id.* at 1906 (cleaned up).
[252] *Id.* at 1907-8.

serious that it amounted to structural error and precluded harmless-error analysis.[253] Having violated Williams's constitutional rights in his initial hearing, the state was required to rehear the case—without Castille.[254]

1.3 *Withrow* is not applicable because it addresses judges involved in investigation, not judges involved in prosecutorial decision-making.

Williams contrasts with another strand in the U.S. Supreme Court's jurisprudence. *Withrow v Larkin* (1975) is typical of this second strand.[255] There, a Wisconsin board of physicians concluded that the plaintiff, a Michigan doctor, engaged in "proscribed acts" while performing abortions in Wisconsin.[256] The plaintiff had a reciprocal license to practice medicine in Wisconsin. After holding an investigative hearing, the board recommended that the Milwaukee County District Attorney file a complaint to revoke the plaintiff's license and initiate criminal proceedings. The plaintiff argued that this system was unconstitutional because the board was both investigator and adjudicator.[257] The U.S. Supreme Court disagreed, holding than an administrative agency may combine *investigative* and adjudicative functions.[258] The Court saw little risk that investigating the facts would lead a board member to form a particular view of the facts.[259]

Williams and *Withrow* establish a spectrum, as Wright & Miller's treatise on federal practice explains.[260] On one end are cases like *Withrow,* in which a judge previously

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[253] *Williams,* 136 S Ct at 1909.
[254] *Id.* at 1910.
[255] *Withrow v Larkin,* 421 US 35 (1975).
[256] *Id.*
[257] *Id.* at 47.
[258] *Id.* at 52-53.
[259] *Id.* at 47.
[260] See Wright and Miller, Federal Practice and Procedure, §8259 *Separation of Functions* 1st ed.

served in an investigatory role. Under *Withrow,* the Due Process Clause does not prohibit serving as investigator and then serving as judge in the same case.[261] "[A]s investigation veers into something more like prosecution," however, "a combination of functions will grow more problematic."[262] When a judge participated in a key prosecutorial decision, as in *Williams,* the combination of functions is so problematic that it is a structural error.[263]

1.4 Michigan's judicial-discipline system is unconstitutional .

The Michigan Supreme Court created a three-tiered system for review of judicial-discipline matters. First, the Court appoints a master to conduct a hearing and issue a recommendation to the Commission.[264] The Commission hears objections to the master's report.[265] Then the Commission issues its decision.[266] Its decision must include "written findings of fact and conclusions of law, along with its recommendations for action…"[267] Although the Commission may accept the master's conclusions, it is not required to do so.[268] A party who disputes the Commission's findings may submit the matter to the Michigan Supreme Court.[269] The Court reviews the record and then issues its opinion.[270]

Under this scheme, the Commission is one of the key decision-makers in the adjudication of judicial-discipline proceedings. Yet it also decides whether to file a

[261] *Withrow,* 421 US at 54-55.
[262] Wright and Miller, § 8259.
[263] *Williams,* 136 S Ct at 1910.
[264] See MCR 9.231(A).
[265] See MCR 9.241.
[266] See MCR 9.244.
[267] MCR 9.244(B).
[268] See MCR 9.244(B)(1).
[269] MCR 9.251.
[270] MCR 9.252.

complaint in the first place. To begin formal proceedings before a master, *the Commission itself* must file a complaint under the Michigan Court Rules.[271] At that time, the only prosecutor is the Commission itself, as the Michigan Court Rules recognize: "*If the commission issues a complaint,* it shall appoint the executive director or another attorney to act as disciplinary counsel."[272] The charges, as well as the initial assessment of whether those charges warrant discipline, come from the Commission.[273] It is only after the Commission's charging decision that the Commission's executive director or outside counsel takes over as prosecutor.

There can be no doubt about the Commission's significant involvement in the decision to file a complaint against Judge Morro. The complaint itself states that the Commission "authorized this compliant" and "directed that it be filed."[274] With this brief, Judge Morrow must present arguments *to the Commission* about allegations that *the Commission itself* directed Disciplinary Counsel to file. The parties who decide to charge a judge with misconduct later issue findings of fact and conclusions of law about whether disciplinary counsel proved those charges.[275] This combination of functions is unconstitutional under *Williams*.[276]

True, the Michigan Supreme Court previously rejected constitutional challenges to Michigan's judicial-discipline system. But each case upholding Michigan's judicial-

[271] MCR 9.224(A) (emphasis added).
[272] MCR 9.224(B) (emphasis added).
[273] MCR 9.224(A).
[274] Amended Complaint, p. 1.
[275] See MCR 9.224(A); MCR 9.244(B)(1).
[276] *Williams,* 136 S Ct at 1910.

discipline system precedes *Williams* and is out-of-step with current law.[277] Moreover, each case addresses the combination of *investigatory* powers and adjudicatory powers. That combination implicates *Withrow* and does not violate the Due Process Clause. The issue here is the combination of *prosecutorial decision-making* and adjudicatory powers. That combination *does* implicate *Williams* and *does* violate the Due Process Clause.

These earlier opinions also err in concluding that any constitutional error in the Commission's structure is irrelevant because the Michigan Supreme Court ultimately imposes discipline. *Williams* expressly rejects the argument that a judge's conflict is permissible just because a judge is not the deciding vote: "…[T]he Court holds that an unconstitutional failure to recuse constitutes structural error *even if the judge in question did not cast a deciding vote.*"[278] The Commission may not have the deciding vote. But it issues findings of fact and conclusions of law. That is a structural error; the Court's oversight cannot cure it. The only solution is for the Michigan Supreme Court to vacate the entire proceeding, fix the Commission's unconstitutional structure, and start over.

Argument 2: In-Person Hearing

The Commission cannot address the constitutional error in its structure. But it *can* address the Master's failure to hold the in-person hearing required under the Michigan Court Rules.

Courts must apply the plain language of court rules, just as they must apply the

[277] *In re Chrzanowski,* 465 Mich 468; 636 NW2d 758 (2001); *Matter of Del Rio,* 400 Mich 665; 256 NW2d 727 (1977); *Matter of Mikesell,* 396 Mich 517; 243 NW2d 86 (1976).
[278] *Williams,* 136 S Ct at 1909 (emphasis added).

plain language of statutes.[279] In *Ligons v Crittenton Hosp* (2011), the Michigan Supreme Court wrote, "Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text. If the text is unambiguous, we apply the language as written without construction or interpretation."[280]

The relevant court rule here is Michigan Court Rule 9.231(B), which states that "[t]he master *shall* set a time *and a place* for the hearing …."[281] *Shall* means that the rule is mandatory. That conclusion follows from cases like *People v Lockridge* (2015),[282] in which the Michigan Supreme Court held that the word *shall* marks a mandatory directive. And *place* refers to a physical location. When used as a noun, *place* means either "a particular portion of space, whether of definite or indefinite extent" or "space in general."[283] The Supreme Court obviously didn't direct masters to designate "space in general" as a location for judicial-tenure hearings. So there's only one valid reading of Rule 9.231(B): the master must designate a physical location ("a particular portion of space") for the hearing.[284] That eliminated the possibility of a Zoom hearing, since Zoom is a computer program, not a place. A virtual hearing does not satisfy Rule 9.231(B).

The pandemic was no justification for departing from the plain text of this rule. Chapter 9.200 of the Michigan Court Rules includes three principles for interpreting the rules governing judicial discipline. First, the rules "shall be construed to preserve the

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[279] *Ligons v Crittenton Hosp,* 490 Mich 61, 70; 803 NW2d 271 (2011).
[280] *Id.*
[281] MCR 9.231(B) (emphasis added).
[282] *People v Lockridge,* 498 Mich 358, 387; 870 NW2d 502 (2015).
[283] See https://www.dictionary.com/browse/place# (last visited September 25, 2020).
[284] See MCR 9.231(B).

integrity of the judicial system."[285] Preserving the integrity of the judicial system requires applying the governing rules evenly, to everyone, and at all times. Second, the rules must be interpreted "to enhance public confidence in that [judicial] system."[286] The public will certainly lose confidence in the judiciary if tribunals can simply decline to apply a governing rule. Third, the rules must be construed "to protect the public, the courts, *and the rights of the judges who are governed by these rules* in the most expeditious manner that is practicable *and fair*."[287] To preserve Judge Morrow's rights and to hold a fair hearing, the Master should have applied the rules as written—including Rule 9.231(B).

Expedience is no excuse for denying an in-person hearing. Indeed, it was possible under the Department of Health and Human Services' order to hold an in-person hearing on the complaint against Judge Morrow. The Master only had to limit attendance to 20 people per 1,000 square feet and require people to wear facemasks. The Master could have excused people from the facemask requirement when they were testifying, since the Department's order excused people when they were "giving a speech … to an audience, provided that the audience is at least six feet away from the speaker."[288] In fact, before the hearing began, the Michigan Supreme Court endorsed relaxing facemask requirements for witnesses in its.[289] Placing clear plastic shields on the bench and witness

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[285] MCR 9.200.

[286] *Id.*

[287] *Id.* (emphasis added).

[288] *Emergency Order under MCL 333.2253 – Gathering Prohibition and Mask Order,* available at https://bit.ly/34vxWvP (last visited October 7, 2020), at 3-4.

[289] See *Return to Full Capacity: COVID-19 Guidelines for Michigan's Judiciary* https://courts.michigan.gov/News-Events/Documents/ReturntoFullCapacityGuide.pdf (last visited September 29, 2020), at 5).

box would have provided further protection without compromising the Master's ability to assess credibility.

Being deprived of the protections of the Michigan Court Rules is injury enough. But it's important to note that there is a significant difference between a virtual hearing and an in-person hearing when it comes to assessing credibility. Through Zoom, the Court can view witnesses' faces—but nothing else. It cannot see their twitchy feet, nervous hand gestures, or anxious movements in the witness boxes. It cannot see if witness are looking at notes off-screen. It cannot see if witnesses are getting signals from other people. All of those things would be visible at an in-person hearing with clear plastic shields protecting the witness and judge.

A Zoom hearing therefore takes some critical tools away from the factfinder. As a federal court in New York recently explained, "… [A] virtual hearing would present significant challenges in being able to adequately perform the critical credibility assessments that this matter requires …"[290] Of course, wearing masks would inhibit fact-finding—but many Michigan courtrooms are now equipped with clear, plastic shields before the bench and witness box. These measures would have obviated the need to wear a mask while testifying. So it was possible to use the full range of fact-finding tools available in an in-person hearing, while still observing the social-distancing practices that slow the spread of COVID-19.

The Master should have applied the plain language of Michigan Court Rule

[290] *Hassoun v Searls*, __ F Supp 3d __, at 11 (WDNY, April 10, 2020).

9.231(B) and held an in-person hearing. By failing to do so, the Master deprived Judge Morrow of his rights under the Michigan Court Rules.

Argument 3: Hocking

Judge Morrow is entitled to a new hearing because of the Commission's unconstitutional structure and because the Master failed to apply the plain language of MCR 9.231(B). If the Commission declines to order a new hearing, it should address the significant error in the Master's analysis: it fails to apply the Michigan Supreme Court's controlling opinion in *Matter of Hocking* (1996).[291]

Hocking addressed a judge's interactions with two female attorneys and his comments during sentencing in a criminal-sexual-conduct case. Judge Hocking presided over a case in which an attorney was accused of sexually assaulting a client during a 2 a.m. visit to her apartment. While justifying a downward deviation from sentencing guidelines, Judge Hocking made a series of crude and insensitive comments.[292] He found mitigating factors such as the fact that the defendant "helped the victim up off the floor after the occurrence," that the defendant wore the victim down through persistence rather than force, that the "victim asked for it," and that the victim allowed the defendant to visit her home at 2:00 a.m.[293] The judge's boorish and grossly inappropriate comments on the bench included this one:

> This is not a perfect world, but as common sense tells me that when a man calls a woman at 2:00 a.m. and says he wants to come over and talk and he's—that's accepted, a reasonable

[291] *Matter of Hocking,* 451 Mich 1; 546 NW2d 234 (1996).
[292] *Id.* at 10.
[293] *Id.*

> person, whether you want to shake your head or not Ms. Maas [the prosecutor], I haven't been living in a shell. A reasonable person understands that means certain things. They may be wrong.[294]

Judge Hocking lost his temper with the prosecutor after she objected to his downward departure.[295] In another instance, he had a "caustic and abusive exchange" with an attorney who objected to his imposition of sanctions.[296] He was accused of abusing his contempt power, too. (There was also an allegation about his alleged misuse of the attorney-grievance process. The Michigan Supreme Court found nothing improper about Judge Hocking's request for investigation.[297])

The Michigan Supreme Court held that Judge Hocking's inappropriate comments during sentencing were not judicial misconduct. They were "tasteless and undoubtedly offensive to the sensibilities of many citizens."[298] But they were "not explicitly abusive" and did not "evidence persistent misconduct."[299] The Court explained that "every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial discipline."[300] The Court said it was "committed to eradicating sexual stereotypes" but could not "ignore the cost of censoring inept expressions of opinion."[301]

Likewise, the Court concluded that Judge Hocking did not commit misconduct in

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[294] *Hocking*, 451 Mich at 11.
[295] *Id.* at 15.
[296] *Id.* at 22-23.
[297] *Id.* at 20.
[298] *Id.* at 14.
[299] *Id.*
[300] *Id.* at 12.
[301] *Id.*

his interactions with the prosecutor who objected to the downward departure.[302] Although "courtesy was lost and rudeness took over," his conduct was not "clearly prejudicial to the administration of justice."[303] Judge Hocking's interactions with the other attorney crossed a line: Judge Hocking showed "a total lack of self-control and an antagonistic mind-set predisposed to unfavorable disposition."[304] As for the suggestion that Judge Hocking showed gender bias because both attorneys who drew his ire were women, the Michigan Supreme Court held: "The fact that attorneys Mass and Sharp are both women and both happen to have been the object to the respondent's anger does not evidence a discriminatory pattern."[305]

Applying *Hocking* leads to the conclusion that Judge Morrow did not commit misconduct. (Judge Morrow raised *Hocking* below but the Master didn't address it).

3.1 Judge Morrow's analogy for a direction examination

Judge Morrow did compare a direct examination to a romantic relationship that leads to sex when talking with Bickerstaff. He was not "hitting on" her, as Bickerstaff falsely claimed, and there is no evidence that he had any intent other than a pedagogical one. He also used the analogy of asking a date about having sex when talking to Ciaffone, Bickerstaff, and Noakes. So the question is whether these analogies—comparing an examination to a romantic relationship that leads to sex and comparing voir dire questions to inquiries about sex—are judicial misconduct. They are not. Even if the

[302] *Hocking*, 451 Mich at 16.
[303] *Id.*
[304] *Id.* at 23.
[305] *Id.* at 24.

Commission views Judge Morrow's analogy as "distasteful," *Hocking* holds that "every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial discipline."[306]

Moreover, Judge Morrow's comments are hardly out-of-step with other analogies that judges, lawyers, and legal scholars employ. Sex is a common metaphor, even in judicial writing and in bar journals. For example, many judges and legal commentators explain their opposition to footnotes by citing Noel Coward's observation that "[e]ncountering [a footnote] is like going downstairs to answer the doorbell while making love.'"[307] One judge compared medical-malpractice legislation to "a mule—the bastard offspring of intercourse among lawyers, legislators, and lobbyists, having no pride of ancestry and no hope of posterity."[308] Another federal judge compared pretrial procedure to "foreplay."[309] An article in the New York State Bar Journal referred to "contractual foreplay."[310] A continuing-education speaker in Texas "often describes the subject of his speech as 'real sex' while whatever insignificant processes come before are merely 'foreplay.'"[311] Again and again, sex pops up in legal analogies.

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[306] *Hocking*, 451 Mich at 12.

[307] See, e.g., *Ledet v Seasafe, Inc,* 783 So.2d 611 (La. Ct. App. 2011) (Woodward, J., concurring). See also Seth P. Waxman, *Rebuilding Bridge: The Bar, the Bench, and the Academy,* 150 U. Pa. La. Rev. 1905, 1908 (2002); Andrey Spektor and Michael Zuckerman, *Legal Writing as Good Writing: Tips from the Trenches,* 14 J. App. Prac. & Process 303, 312 n 30 (2013); Jack L. Ladau, *Footnote Folly,* 67-Nov Or. St. B. Bull. 19, 22 (2006); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure,* 103 Harv. L. Rev. 926, 940 (1990); Gerald Lebovits, *Do's Don'ts, and Maybes: Usage Controversies – Part II,* 80-Aug NYSTBJ 64 (2008).

[308] *Hayes v Luckey,* 33 F Supp 2d 987 (ND Ala 1997).

[309] *Smith v. J.I. Case Corp.,* 163 F.R.D. 229, 232 (E.D. Pa. 1995).

[310] Peter Siviglia, *Contractual Foreplay: Letters of Intent vs. Term Sheets,* 87-May N.Y. St. B.J. 49 (2015).

[311] Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System,* 10 Wis. Women's L.J. 225, 240–41 (1995).

So, too, in Michigan. In a 2004 law-review article, Michigan Supreme Court Justice Young compared the common law to "a drunken, toothless ancient relative, sprawled prominently and in a state of nature on a settee in the middle of one's genteel garden party."[312] He later asserted that "some jurists like Justice Cardozo actually celebrate Grandpa and his condition and enthusiastically urge all of us to relax, undress, and join Grandpa in his inebriated communion with nature."[313] The image of a naked old man inviting others to disrobe is undeniably lewd—yet Justice Young concluded that it served a pedagogical purpose. The Michigan Supreme Court evidently agreed, since it cited this article in *Henry v Dow Chemical Co* (2005).[314]

Some—like late Michigan Supreme Court Justice Elizabeth Weaver—found the image of a naked old man encouraging others to disrobe to be so inappropriate that she refused to join an opinion that cited the article.[315] This debate at the state's highest court teaches two important lessons. First, sometimes adults—including judges—use somewhat crude analogies to make a point. Second, reasonable minds can disagree about the line between a vivid, albeit off-color, metaphor (a la Noel Coward's oft-repeated statement about footnotes) and an analogy that is truly unfit for adult conversation. Judge Morrow's metaphor—which focused more on a romantic relationship than the act of sexual intercourse—is on the "vivid, albeit off-color" side of that line. Under *Hocking,* it

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[312] Hon. Robert P. Young, *A Judicial Traditionalist Confronts the Common Law,* 8 Tex. Rev. L. & Pol. 299 (2004).
[313] *Id.* at 302.
[314] *Henry v Dow Chemical Co,* 473 Mich 63, 103; 701 NW2d 684 (2005).
[315] *Henry,* 473 Mich at 103 (Weaver, J., concurring).

was not judicial misconduct.

3.2 Judge Morrow's use of the word "fucked" was not misconduct.

Judge Morrow doesn't remember using the word "fucked" during his in-chambers conversation with Ciaffone, Bickerstaff, and Noakes, but he admitted that he probably said something along those lines.[316] Certainly, vulgarity on the bench may be judicial misconduct when it suggests favoritism or prejudgment. In *Matter of Frankel* (1982),[317] the Michigan Supreme Court censured a judge who insulted an attorney in court as follows: "Now, the question is, am I still dispassionate in the case? And I'm not sure that I am, now, Mr. Henry. I'm not sure that I haven't come to a conclusion that whether your client is guilty or innocent, *you're a despicable son-of-a-bitch.*"[318]

Unlike the respondent in *Frankel,* Judge Morrow was not on the bench when he said "fucked." And the Commission should not police a judge's use of curse words in off-the-bench speech. Although this disciplinary matter is not a First Amendment case, the United States Supreme Court's warning in *Cohen v California* (1971), a First Amendment case, applies here, too.[319] *Cohen* concerned a t-shirt that said, "Fuck the Draft."[320] In upholding a constitutional challenge to the law that ostensibly prohibited that t-shirt, the Court explained that eliminating the word *fuck* from public discourse could cause trouble:

> Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to

[316] *Answer*, ¶21.
[317] *Matter of Frankel,* 414 Mich 1109; 323 NW2d 911 (1982).
[318] *Id.* at 1110 (emphasis in original).
[319] See *Cohen v California,* 403 US 15 (1971).
[320] *Id.* at 16.

> affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.[321]

The Court also noted that "must linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well."[322] "In fact," the Court added, "words are often chosen as much for their emotive as their cognitive force."[323]

Again, this isn't a First Amendment case. But *Cohen*'s rationale overlaps with *Hocking*'s rule against treating "distasteful" comments as judicial misconduct, for fear of inhibiting the expression of ideas.[324] And both cases pose a serious challenge to any attempt to discipline a judge based on the use of taboo words. If *fuck* is off-limits for judges, what about other taboo words? Will Michigan taxpayers see their money spent on disciplinary actions involving a judge's use of *hell* or *damn?* If not, what exactly is the difference between these words and *fuck*? And does context matter? Is it okay for a judge to say *fuck* when stubbing their toe, but not when talking to a prosecutor in chambers? Is it okay for a judge to use *damn* when talking about Goethe's *Faust* but not when discussing the Tigers blowing a lead?

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[321] *Cohen*, 403 US at 25.
[322] *Id.* at 26.
[323] *Id.* at 25.
[324] *Hocking*, 451 Mich at 12.

It may be tempting to say that Judge Morrow's use of the word *fuck* was over the line and the Commission need not concern itself with what else may amount to misconduct. When the subject is speech, however, no tribunal has the luxury of limiting itself to the facts of the case before it. Rules that prohibit certain speech can have a chilling effect—and, as *Cohen* makes clear, sweeping taboo words into the dustpan may sweep ideas away, too. Society benefits from more speech, not less.[325]

These principles apply with special force in the context of a criminal trial. Michigan's appellate courts have noted that "defending criminal cases is not for the faint of heart."[326] Criminal proceedings involve some of the most difficult subjects—murder, criminal sexual conduct, and the like—and those proceedings take place in high-stress, high-volume dockets. Lawyers and judges should not have to walk on eggshells when discussing these issues.

In short, democracy requires tolerance for offensive speech, and that tolerance is especially necessary in the context of criminal matters. And, as *Cohen* shows, policing taboo words can do more harm than good. The Commission should therefore conclude that Judge Morrow's use of the word *fuck* was not misconduct.

3.3 Judge Morrow's offhand expression of skepticism at the defendant's statement was not misconduct.

Judge Morrow doesn't remember saying anything like "how big does this guy think he is?" when Ciaffone raised James Matthews's testimony about not having

[325] See *Cohen,* 403 US at 25.
[326] *People v Mitchell,* 454 Mich 145, 170; 560 NW2d 600 (1997).

"normal" sex.[327] But William Noakes credibly testified about this comment, noting that Judge Morrow was just making the point that the defendant was exaggerating.[328] As noted above, Judge Morrow did *not* use the word "dick." (Only Bickerstaff, whose lies are well-documented, attested to that fact.) Again, Noakes provided credible testimony on this point: "I don't remember him using the word 'dick.' And I think the conversation was how big does he think he is, and I think that was the extent of it."[329] When Disciplinary Counsel tried to twist Noakes's testimony into evidence of something more malicious, Noakes was firm and confident that Judge Morrow "was saying that the defendant exaggerated."

Judge Morrow's offhand expression of skepticism at Matthews's testimony was not judicial misconduct. It was related to the case, since the prosecution was making an issue about what exactly Matthews meant by "normal" sex. If Judge Morrow's comment was too blunt, then it was, at worst, the kind of "graceless, distasteful, or bungled" statement that "cannot serve as the basis for judicial discipline" under *Hocking*.[330]

3.4 Judge Morrow's inquiries about height and weight were not misconduct.

Finally, there are Judge Morrow's inquiries to Ciaffone and Bickerstaff about how tall they are and how much they weigh. Judge Morrow admitted from the outset that he asked those questions.[331] Asking someone their height or weight is not judicial

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[327] *Answer*, ¶23.
[328] Vol. III, p. 920.
[329] *Id.*
[330] *Hocking*, 451 Mich at 12.
[331] *Answer*, ¶¶30-32.

misconduct. It may be impolite. But *Hocking* makes it clear that the Code of Judicial Conduct is not about policing good manners: "The comments were tasteless and undoubtedly offensive to the sensibilities of many citizens. They do not display a mindset unable to render a fair judgment."[332]

The attempt to sexualize Judge Morrow's questions—particularly the unfounded allegation about "overtly eyeing"—should be rejected. There was no evidence that Judge Morrow had any sort of illicit motive in asking these questions. Attorney Jeffrey Edison testified that he had never observed Judge Morrow "overtly eyeing" anyone.[333] Attorney Steven Fishman testified that he has never seen Judge Morrow be discourteous or disrespectful to anyone, male or female.[334] This testimony from two of Michigan's most well-respected attorneys should weigh heavily against the attempt to sexualize a conversation that had nothing sexual about it. According to the standard jury instructions, "Evidence of good character alone may sometimes create a reasonable doubt" in a criminal trial.[335] This evidence of Judge Morrow's good character belies Disciplinary Counsel's characterization of Judge Morrow's questions.

Indeed, Judge Morrow's innocuous questions became sexualized only when Bickerstaff began lying about them. Again, the specter of racism rears its head here. America has a long, shameful history of making racist presumptions about Black men

[332] *Hocking,* 451 Mich at 14.
[333] Vol. III, p. 672-673.
[334] Vol. III, p. 800.
[335] M Crim JI 5.8a.

being hypersexual.[336] The absence of evidence to support this "overtly eyeing" narrative—and the significant role that Bickerstaff's lie played in shaping it—proves that bias is indeed present. With this record, the Commission should reject Disciplinary Counsel's allegations and hold that Judge Morrow did not commit misconduct.

Argument 4: *Brown* Factors

If the Commission concludes that Judge Morrow committed misconduct, it must determine the appropriate sanction. To do so, it should employ the non-exclusive list of factors from the Michigan Supreme Court's opinion in *In re Brown* (2000).[337] There, the Court explained that, "all else being equal,

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

b. misconduct on the bench is usually more serious than the same misconduct off the bench;

c. misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;

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

e. misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;

f. 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;

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[336] See Duru, *The Central Park Five,* 25 Cardozo L Rev at 1320

[337] *In re Brown*, 461 Mich 1291; 625 NW2d 744 (2000).

g. misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.[338]

The Michigan Supreme Court and the Commission have continued to apply the *Brown* factors without revision or addition of further guidelines.[339]

In this case, the *Brown* factors militate in favor of lighter discipline—if any discipline is warranted at all:

- There is no pattern or practice of misconduct. The only comparable incidents that Disciplinary Counsel cited were from 2004 and 2005—a decade and a half before the incidents giving rise to this case. With a gap of 15 years between allegations, Disciplinary Counsel did not establish a "pattern or practice."

- All of the alleged misconduct took place off the bench, in private conversations with attorneys (as opposed to *Hocking,* where the offensive comments were on the bench and the Court found no misconduct).

- None of the alleged misconduct caused prejudice to any party. And none impacted the *Matthews* case, since the hung jury resulted in a retrial.

- None of the alleged misconduct implicated "the actual administration of justice."

- All of the comments were spontaneous.

- None of the alleged misconduct "undermine[d] 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 a case."

- None of the alleged misconduct involved discrimination. Although Disciplinary Counsel argued that Judge Morrow's conduct

[338] *Brown,* 461 Mich at 1292-1293.

[339] See, e.g., *In re Halloran*, 486 Mich 1054, 1054; 783 NW2d 709 (2010).

somehow amounted to gender discrimination, the Master correctly declined to make that finding.

All of the *Brown* factors indicate that Judge Morrow's alleged conduct is on the "less severe" end of the spectrum. Consequently, if the Commission decides that any misconduct occurred, it should impose only minimal discipline, such as public censure.

This conclusion finds additional support in discipline imposed in other cases. The Michigan Supreme Court has recognized the fundamental principle "that equivalent misconduct should be treated equivalently."[340] Applying the *Brown* factors, the Court has imposed discipline as follows:

- Removal: *In re Adams* (2013) (perjury);[341] *In re James* (2012) (misuse of public funds, misrepresentations during disciplinary process, violation of anti-nepotism policy);[342] *In re Justin* (2012) ("fixing" tickets, false statements under oath);[343] *In re Noecker* (2005) (false statements after drunk driving accident).[344]

- Suspension for one year: *In re Chrzanowski* (2001) (appointment of attorney with whom judge was having intimate relationship in 56 cases, false statement to detective, failure to disclose intimate relationship).[345]

- Suspension for nine months: *In re Simpson* (2017) (interfering with investigation and prosecution, and making intentional misrepresentation about purpose of text messages).[346]

- Suspension for ninety days: *In re Nebel* (2010) (driving while intoxicated).[347]

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[340] *Brown,* 461 Mich at 1292.
[341] *In re Adams,* 494 Mich 162; 833 NW2d 897 (2013).
[342] *In re James,* 492 Mich 553; 821 NW2d 144 (2012).
[343] *In re Justin*, 490 Mich 394; 809 NW2d 126 (2012).
[344] *In re Noecker,* 472 Mich 1; 691 NW2d 440 (2005).
[345] *In re Chrzanowski*, 465 Mich 468; 636 NW2d 758 (2001)
[346] *In re Simpson,* 500 Mich 533; 902 NW2d 383 (2017).
[347] *In re Nebel,* 485 Mich 1049; 777 NW2d 132 (2010) (driving while intoxicated).

- Suspension for sixty days: *In re Morrow* (2014) (violating various rules and procedures);[348] *In re Hathaway* (2001) (conducting arraignment without prosecutor, threatening to jail defendant if he did not waive jury right, pattern of untimeliness and adjournments).[349]

- Suspension for thirty days: *In re Post* (2013) (refusal to allow invocation of Fifth Amendment and jailing of attorney who counseled client to remain silent).[350]

- Suspension for fourteen days: *In re Halloran* (2010) (dishonesty in managing courtroom and reporting to State Court Administrator's Office).[351]

- Censure*: In re Gorcyca* (2017) ("discourteous and hostile conduct toward children");[352] *In re Servaas* (2009) (moving outside of judicial district and drawing lewd pictures);[353] *In re Haley* (2006) (accepting football tickets in court);[354] *In re Moore* (2005) (eighteen-month delay between arraignment and trial);[355] *In re McCree* (2012) (texting shirtless photo of self);[356] *In re Logan* (2010) (arranging for release on bond for another elected official);[357] *In re Fortinberry* (2006) (sending defamatory letter).[358]

A clear abuse of office—sending an attorney who sought to invoke the federal constitution to jail—resulted in a suspension of only thirty days (*Post*). None of the misconduct alleged against Judge Morrow is even close to that kind of disregard for clear legal rights and abuse of power. Actual dishonesty to a chief judge and the State Court

[348] *In re Morrow,* 496 Mich 291; 854 NW2d 89 (2014).
[349] *In re Hathaway*, 464 Mich 672; 630 NW2d 850 (2001).
[350] *In re Post,* 493 Mich 974; 830 NW2d 365 (2013).
[351] *In re Halloran*, 486 Mich 1054; 783 NW2d 709 (2010).
[352] *In re Gorcyca,* 500 Mich 588; 902 NW2d 828 (2017).
[353] *In re Servaas*, 484 Mich 634; 774 NW2d 46 (2009).
[354] *In re Haley,* 476 Mich 180; 720 NW2d 246 (2006).
[355] *n re Moore,* 472 Mich 1207; 692 NW2d 834 (2005).
[356] *In re McCree*, 493 Mich 873; 821 NW2d 674 (2012).
[357] *In re Logan*, 486 Mich 1050; 783 NW2d 705 (2010).
[358] *In re Fortinberry,* 474 Mich 1203; 708 NW2d 96 (2006).

Administrator's Office resulted in a suspension of only fourteen days (*Halloran*). Again, none of the allegations against Judge Morrow involve dishonesty.

The closest analogue is *In re Gorcyca* (2017),[359] where the respondent was discourteous to children in her courtroom. The respondent in *Gorcyca* received a public censure. Applying the "fundamental premise" that "equivalent misconduct should be treated equivalently," a public censure is the most severe sanction warranted here.

Conclusion

This proceeding is unconstitutional under *Williams* and it violated Judge Morrow's rights under the Michigan Court Rules. Accordingly, Judge Morrow is entitled to a new hearing. If the Commission relies on 2020 hearing, however, it should apply *Hocking* and conclude that Judge Morrow did not commit misconduct. And if it does find misconduct, the only appropriate sanction under the *Brown* factors is public censure.

Respectfully Submitted.

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[359] *In re Gorcyca*, 500 Mich 588; 902 NW2d 828 (2017).

ATTACHMENT A

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Formal Complaint No. 92

Hon. Bruce U. Morrow
3rd Circuit Court
1441 St. Antoine, Courtroom 404
Detroit, Michigan 48226

REPORT OF THE MASTER

PROCEDURAL BACKGROUND

The Michigan Judicial Tenure Commission ("JTC") filed a Complaint and Amended Complaint against the Honorable Bruce U. Morrow ("Respondent"), Judge of the Third Circuit Court, Wayne County, Michigan. This Action was taken pursuant to the authority of the JTC under Article 6, Section 30 of the Michigan Constitution of 1963 and MCR 9.200 et seq., as amended.

Respondent duly filed an Answer to the Complaint and Amended Complaint denying all allegations of judicial misconduct.

Pursuant to the JTC's request for the appointment of a Master, Judge Edward Sosnick (Ret.) was so appointed by Order of the Michigan Supreme Court to hear this matter. The Master thereupon met with all the parties to establish a scheduling order.

On Monday, June 3, 2013, the Master heard arguments and decided all pre-trial motions. The actual hearing was conducted on June 10, 11, 12, 13, 17 with final arguments on June 18, 2013.

Each side was then given time to present proposed findings of facts and conclusions of law.

The Master has carefully reviewed the complete hearing record, including all of the testimony, the volumes of exhibits, final arguments and both sides proposed findings of fact and conclusions of law. This final report is now issued pursuant to MCR 9.214.

LEGAL SETTING

Article VI, Section 30(2) of the Michigan Constitution of 1963 provides....

> (2) On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings.

MCR 9.200 et seq., as amended, was promulgated to implement Article VI, Section 30 and provides the legal framework for this proceeding.

MCR 9.205(B) states as follows:

> **(B) Grounds for Action.** A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice.
>
> * * *
>
> (1) Misconduct in office 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.

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

(3) In deciding whether action with regard to a judge is warranted, the commission shall consider all the circumstances, including the age of the allegations and the possibility of unfair prejudice to the judge because of the staleness of the allegations or unreasonable delay in pursuing the matter.

MCR 9.2013(B) sets our additional factors regarding the legal framework of this case.

9.203(B)

(B) Review as an Appellate Court. The commission may not function as an appellate court to review the decision of a court or to exercise superintending or administrative control of a court, but may examine decisions incident to a complaint of judicial misconduct, disability, or other circumstance that the commission may undertake to investigate under Const 1963, art 6 §30, and MCR 9.207. An erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct. (Emphasis supplied).

MCR 9.211(A) provides that the examiner has the burden of proof and that the standard of proof is a preponderance of the evidence. See In Re: Lupe Ferrada, 458 Mich 350, 360 (1998); In Re: Haley, 476 Mich 180, 189 (2006).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This five day hearing included both sides presenting numerous witnesses and introducing several volumes of exhibits.

The Examiner relied solely on witnesses associated with the Wayne County Prosecutor's Office ("WCPO"). No defense lawyers were called or ever interviewed. In fact, testimony established that it was the WCPO who complained to the JTC about Respondent.

Respondent called several defense lawyers, an assistant Wayne County Prosecutor and related others as witnesses. Respondent chose not to testify.

The Complaint and Formal Complaint identifies the cases, paragraphs (a) through (j) as the basis for its misconduct allegations. The theory of the JTC is that these cases "evidence a pattern in which Respondent simply does what he wants, regardless of the requirements of the law or his obligation to be "impartial". Examiner's proposed findings, p.2.

The facts established that Respondent has served as a judge of the criminal division of the Wayne County Circuit Court (formally the Recorder's Court) since 1992. During his twenty-one year tenure, Respondent has presided over literally hundreds, if not thousands of criminal matters. Witnesses described him as hardworking and punctual. Respondent was also described as fair and as a Judge who runs a user-friendly courtroom. He is described as someone who reaches out to defendants and tries to encourage them to change their ways. He has a reputation for "hands on approach" often shaking hands with jurors,

defendants, defendant's families; he communicates with probationers in a motivational way.

Of the ten charged cases, one took place in 2005, one in 2006, one in 2007, two in 2008, four in 2009 and one in 2010. Given the number of cases that Respondent has dealt with over his twenty one year career, the Examiner will view any claim or "pattern" in that context.

THE CASES IN FC92

A. People v Orlewicz

The Formal Complaint ("FC") alleged that Respondent closed the courtroom for a post-conviction motion on February 27, 2009 in violation of MCR 8.116(D) and excluded the parents of the deceased victim in violation of Article I, Section 24 of the Michigan Constitution. The FC further alleged that Respondent ordered the court reporter not to prepare the transcript of the hearing and refused to allow the prosecutor to join in defendant's motion to produce the transcript or renew his objection to closing the court. The FC alleges that Respondent granted a new trial in the case and was reversed by the Court of Appeals ("COA"). Respondent admitted in his Answer to the Amended Formal Complaint that he did most of the acts alleged in this case although he denied that these acts were either a violation of the law or misconduct.

Jean Paul Orlewicz was tried before Judge Annette Berry of the Wayne County Circuit Court and was convicted of First Degree Murder and Mutilation of a Dead Body. (Caminsky, Tr. v.1, at 67-68; Jacobs Tr., v3, at 684.

Judge Berry sealed a report by psychiatrist Gerald Shiener based on his examination of Mr. Orlewicz. (Jacob Tr., v3, at 688.) Judge Berry was later disqualified from hearing any post-trial motions by action of the Chief Judge. The case, by blind draw, was re-assigned to Respondent.

After the Orlewicz conviction, attorney Elizabeth Jacobs filed a motion for a new trial arguing, in part, that exclusion of testimony from his psychiatrist, Dr. Shiener, violated his constitutional right to a fair trial.

Respondent set hearing on that motion for new trial for February 27, 2009. On or about February 12, 2009, Ms. Jacobs orally requested a conference with Respondent and Wayne County Appellate Prosecutor, Jeff Caminsky. Mr. Caminsky was in charge of all post-trial motions regarding Mr. Orlewicz. Exhibits 3, 4 and 5.

The meeting occurred on February 13, 2009. On that occasion Ms. Jacobs said that she wanted the Respondent to deny a request filed by WXYZ Television to allow cameras at the upcoming hearing T, p. 690-691. She also testified that she requested full closure of the hearing.

On February 18, 2009 Respondent signed an order denying the motion for media coverage.

At the beginning of the February 27, 2009 hearing, Ms. Jacobs stated that the defense asked that the hearing be closed to prevent embarrassment to Mr. Orlewicz and his parents and to protect his right to a fair trial.

Mr. Caminsky did not object to the exclusion of the media but objected to the deceased victim's parents, the Sorensons, being excluded. Ex. 5, p. 5. The

Sorensons were not in the courtroom at the time, but when they entered, Respondent excluded them (Ex. 5, p.6: "The Court: You're not allowed in sir, it's a closed court.").

Mr. Caminsky identified the Sorensons to the Court and stated they had a constitutional right to attend. Respondent replied:

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

The prosecutor filed a complaint for a writ of superintending control (Exhibit 7) and Ms. Jacobs filed a response (Exhibit 8). Ms. Jacobs filed a motion to obtain the transcript. (Exhibit 9).

On April 3, 2009 a hearing was held on Ms. Jacob's motion (Exhibit 11). Respondent did not allow APA Caminsky to renew his objection to closing the court nor allow him to address Ms. Jacob's motion because he had not filed a written response. (Exhibit 11, p 4-7) Respondent denied the motion. (Exhibit 12).

The COA entered an order dated April 14, 2009 (Exhibit 13) remanding the case to the trial court to make appropriate findings regarding closing the court. On April 27, 2009, Respondent made a record of his reason for closing the court without the parties or attorneys present. (Exhibit 14).

On April 29, 2009 the COA entered an order stating that Respondent failed to articulate any valid reason for closing the proceeding, and directing that future proceedings be conducted in open court. (Exhibit 15). The order also ruled the prohibition of the transcript was without basis and directed Respondent

to permit transcription. On December 22, 2009, Respondent granted the defendant's motion for a new trial. (Exhibits 18a and 18b). On June 14, 2011, the COA issued a published opinion reversing Respondent as well as affirming defendant's convictions. (Exhibit 20).

MCR 8.116(D) states:

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

The Examiner argues that Respondent made no attempt to comply with the court rule. Respondent did not identify the specific interest to be protected nor determine that the interest outweighs the right of access as required by paragraph (a), made no attempt to comply with the requirements of paragraph (b), and completely failed to state on the record the specific reasons for the decision to limit access to the proceeding as required by paragraph (c).

Article 1, Section 2 of the Michigan Constitution establishes protected rights of crime victims. "These include: the right to attend trial and all other court proceedings the accused has the right to attend." As their son was deceased, the Sorensons, his parents, possessed that right.

Based upon the totality of the testimony, the Master finds the Examiner has established by a preponderances of evidence that the facts as alleged in the FC are established. The Master will now decide whether those facts constitute judicial misconduct.

The Examiner argues that such misconduct occurred when Respondent did not follow the court rule and the Constitution in closing the courtroom and excluding the Sorensons. Further, that Respondent failed to make a proper record as to the basis for his actions.

The Examiner also faults Respondent for not allowing the assistant prosecutor or defense access to the hearing transcript. Further, that he acted inappropriately when Mr. Caminsky tried to argue against closure.

The Respondent admits most of the acts but asserts that he was not wrong on the law and, even if he ruled incorrectly, he did so in good faith and with due diligence.

Respondent argues case law exists to establish that crime victims' rights to attend a post-conviction hearing is not absolute. Respondent argues that a defendant does not have a due process right to attend post-trial proceedings. Thus, Respondent did not violate the Law or Constitution in excluding the Sorensons.

In making this argument, Respondent relies on *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.

Respondent argues that he was correct that the victim's family's right to attend a post-trial proceeding is not absolute. At the very least, Respondent had a good faith basis for his conclusion. As such, his decision to close the post-trial hearing was not misconduct. See MCR 9.230(B).

The Examiner argues that Respondent did not treat APA Caminsky with "respect and dignity" at the April 3, 2009 hearing when he "cut" [Caminsky] off from speaking because he failed to file a written response ..." (Examiner's Findings of Fact and Conclusion of Law at 11). Respondent claims that there was nothing discourteous about Respondent's statements on April 3, 2009.

On April 14, 2009, the COA held that, "[I]n deciding whether to close proceedings to the public, a court must make finding sufficient to support the closure." It held that Respondent had neither "articulated such findings on the record" nor "entered a written order." Therefore, it remanded the matter and stayed the April 24, 2009 hearing. The panel held that Respondent remained free to "use that date and time to issue its findings to the parties." (Ex. A, *Orlewicz*, Tab 26).

On April 27, 2009, Respondent placed his findings on the record in accordance with the COA's order. (Ex. A, *Orlewicz*, Tab 27). He stated that it was his understanding that the public has more limited rights to access to pretrial proceedings 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,

Respondent concluded that, under the constitution, the defendant's right to a fair trial must prevail. (*Id.*).

Based on the complete hearing record, the Master finds that Respondent, although ruled inadequate by the COA, did articulate the bases for his action on the record on April 27, 2009. In pertinent part, the Respondent stated at pages 6, 7, & 8.

> "When I decided to close the hearing that was scheduled for the 27th of February, I fully understood that there was no affirmative right of public access to pretrial hearings. The United States Court has rejected this contention along with the Sixth Amendment public trial challenge in the context of a suppression hearing where the defense, the prosecution and the trial Judge all agree to closure in the interests of the defendant's right to a fair trial. That was Gannett County v DePasquele, D-E-P-A-S-Q-U-A-L-E, that was at 443 Mich 368, page 391 through 393. It's a 1979 case.
>
> Our advocacy system of justice is premised upon the preposition that the public interest is fully protected by the participants in the litigation. In this particular age, the age we live in of technology, we're all aware of the telecasts, circulations, information sharing, web testing, You Tube, and other internet sites provide a permanent record of events that can never be destroyed. And there is no limit to what sitting and potential jurors can do or will do to obtain information on the world wide web about a pending case.
>
> This Court knows firsthand that even during the middle of a trial some jurors had mentioned that they had Googled the Court's name and came up with facts and knew where the Court lived and paintings and the backgrounds of some of the paintings based on what they were able to find on the internet on Google. It is known who is influenced by all of this information. And it is us, the public, which is targeted as a group.
>
> During the trial, little evidence can be found that telecasting influences a sitting juror because they're watching it as it happens. But pre-trial and post-trial hearings are different because they have the greatest potential to influence prospective jurors evaporating the defendant's right to a fair trial. So, it is his right to a fair trial versus the open access. And in this Court's mind, the right to a fair trial trumps the public interest based on a finding that closure is essential to preserve this higher value and is narrowly tailored to serve that interest. And again, this Court finds that that higher value is the right to a fair trial.

It should be noted that the Court didn't close anything that wasn't in front of it. There was no continuing always be closed, forever be closed."

The testimony of the defendant's physician is expected to touch on some matter that this Court would find highly personal and embarrassing that would not only involve Mr. Orlewicz but also involve family members of Mr. Orlewicz.

It is my belief that if the defendant prevails on these issues raised in his motion for a new trial that evidence will be made public, and if there's a request to record that, then that request will be considered when it's made, but certainly that that evidence will be made public at the trial.

And at the time, it's to be presented, the jurors won't have gotten that information beforehand and so there will be no additional comments from anybody or anybody interpreting it and telling them what it means. It will be free from speculations and from any pontification that generally accompanies the media's analysis of legal matters.

Alternatively, if the defendant does not prevail on the issues raised in the section of his motion for a new trial, but prevails on other issues, the prospective jury also will possibly be tainted.

While the process known as voir dire attempts to weed out those exposed to and affected by pre-trial publicity from sitting on a jury, we all know that that's an imperfect system and falls short many times of the attempt to find a fair and impartial jury.

There is no other way to tailor this request to limit it for those specific purposes other than, I believe, what the Court had done. And it is for those reasons that I closed the hearing on February 27th."

The court reporter did not prepare a transcript of the February 27, 2009 hearing, consistent with Respondent's previous closure order. (Ex. A, *Orlewicz*, Tab 20, "Exhibit C"). On April 3, 2009, Respondent heard Orlewicz's motion to release the transcript. (Ex. A, *Orlewicz*, Tab 24). The prosecution elected not to file a written concurrence to Orlewicz's motion and, therefore, Respondent did not permit oral argument from it. (Ex. A, *Orlewicz*, Tab 25, at 5-6). Respondent

denied Mr. Orlewicz's motion, finding that preparation of a transcript would undermine his order closing the proceeding.

In the quoted pages of the transcript of April 27, 2009, Respondent explained his actions in closing the courtroom. On review, the COA disagreed with his reason. Although wrong on the law, there is no doubt that Respondent did not act without any basis for his actions.

A reading of his thinking process indicates that he was most concerned about insuring a fair trial to Defendant should he prevail, to limit excluded or suppressed information from public exposure, and to minimize tainting a potential jury pool.

Respondent also explained his reasons for denying the transcript. As stated earlier, Judge Berry had suppressed Dr. Sheiner's report. The purpose of closed proceedings was to prevent that information and related testimony out of the public marketplace. Respondent was being extra careful in stopping anyone from leaking that data. Thus, he would not release the transcript.

Respondent's limit on APA Caminsky's right to argue was based on his belief that the APA lost that opportunity by failing to file a written response to Ms. Jacobs Motion. There is legal authority supporting a judge's discretion in not entertaining argument from a party who does not file a written response to a motion. MCR 6.001(D). Subsection (E)(3) of MCR 2.119 provides: "A court may, in its discretion, dispense with or limit oral arguments on motions, and may require the parties to file briefs in support of and in opposition to a motion." MCR

2.119(E)(3). Under the court rule, Respondent had authority to limit APA Caminsky's oral argument and to require that APA Caminsky file a brief.

The Examiner argues that Respondent did not treat Caminsky with "respect and dignity" at the April 3, 2009 hearing when he "cut [Caminsky] off from speaking because he failed to file a written response ..." (Examiner's Findings of Fact and Conclusion of Law at 11).

The Master has carefully reviewed the record of Orlewicz proceedings, mindful that the COA found Respondent's rulings to be erroneous. The Master is bound, however, to follow MCR 9.203(B) which states that "an erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct. Respondent did not treat APA Caminsky inappropriately.

The Master finds that Respondent did not act in bad faith and without due diligence. Each decision was based on his belief that the law required him to rule as he did. He laid out his thinking process on the record and the interests to be protected by those rulings. He explained his actions in closing the courtroom and excluding Defendant's parents and not providing the transcript.

Taking the entire record into consideration, the Examiner finds that Respondent has not committed an act of judicial misconduct. In so holding the Master is not stating that Respondent's rulings were legally correct. The law of the case from the COA established otherwise. The Master finds that the Examiner's allegations of misconduct fall short of the standards set out in MCR 9.203(B).

B. People v Fletcher

The FC alleges that Respondent failed to follow the law when he did not to sentence the defendant to a minimum of 30 days in jail as required by statute.

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

MS. WALSH: As to the 30 days, Your Honor –

THE COURT: What 30 days?

MS. WALSH: 30 days by statute.

THE COURT: No. It says at least 48 hours to be served consecutive. She's served that.

MS. WALSH: No. It says or probation with 30 days to one year in jail, at least 48 hours to be served consecutively –

THE COURT: Right. So she's served that and so The Court—in the next five years, we'll decide when she does her alternative incarceration.

(Exhibit 24, page 13, lines 3 through 15)

Respondent signed an Order of Probation which states "jail sentence to be determined as to start time." (Exhibit 25). Respondent also signed an Order of

Conviction and Sentence which states "jail sentence start time to be determined." (Exhibit 26).

Defendant was again charged with OWI third offense and DWLS in December 2009 in circuit court Case No. 10-1184. (Exhibit 23). Defendant pled guilty as charged. On April 2, 2010 Respondent sentenced defendant to another probation term, including at least 30 days jail (2 days jail in the first six months and 15 additional weekends per Exhibit 23), and discharged her from probation on this case.

Respondent did not give the defendant 30-days on the first case to run concurrent with the sentence on the new case. He instead closed the probation, having never actually imposed the remaining 28 days.

In response, Respondent argues that the statute expressly provides that the 30 days of imprisonment need not be consecutive. Rather, only "not less than 48 hours of "imprisonment" must be consecutive. See MCL 257.625(11(C).

Ms. Fletcher served forty-eight consecutive hours in jail and was in the process of fulfilling her community service and probation requirements when she appeared before Respondent for sentencing. Respondent deferred the question of when she would serve her prison term: "So she's served that and so The Court—in the next five years, we'll decide when she does her alternative incarceration." (Walsh Tr., v.2, at 400). Respondent did not say "if she does her alternative incarceration" but "when she does her alternative incarceration."

Respondent further argued that as the new case sentence of 30 days would be concurrent time with this case, no actual harm occurred.

The Examiner argues this is another example of Respondent willfully not following the law. Respondent contends that there is nothing in the statute, either express or implicit, that requires a judge to imprison a defendant right away or to make an immediate determination about when the sentence will be served. Ms. Fletcher had already served forty eight consecutive hours, and the remaining required twenty eight could be imposed during the term of probation encompassed in the Respondent's Order of Probation.

The Master finds that judicial misconduct has not been established in this case. The Respondent recognizes that Ms. Fletcher had already served the required forty eight consecutive hours and that "jail sentence start time to be determined."

Obviously, the better practice would be to sentence to thirty days, credit of 48 hours, the balance to be served during the term of probation.

Closing the case without imposing the remaining jail sentence was wrong. In fact, however, Respondent imposed a 30 day sentence with the new case which would have run concurrent with the old sentence.

This was not a case of complete disregard of the statutory requirements. The Examiner cannot find bad faith by the Respondent. MCR 9.203(B). Accordingly, the Master finds Respondent did not commit judicial misconduct in this case.

C. People v Slone

The FC alleges that Respondent sentenced the defendant to a prison term 18 months below the sentencing guidelines disregarding the requirements under the law that the reasons for departure be substantial and compelling.

The defendant was charged with Home Invasion 1st Degree (HI 1st); Larceny in a Building (LIB); Stealing or Retaining a Financial Transaction Device without consent (FTD); and habitual offender fourth. (Exhibit 29, ROA and Exhibit 104, the Information). On February 16, 2010 the defendant pled no contest to all counts. (Exhibit 29; Exhibit 30, plea form). The sentencing guideline range for the most serious offense, was 78 to 260 months in prison. (Exhibit 31). On March 4, 2010 Respondent sentenced the defendant on the highest count to 5 to 15 years, or a minimum term of 60 months, 18 months below the sentencing guidelines. (Exhibit 32, sentencing transcript p 10; Exhibit 33, Judgment of Sentence; Exhibit 34, Order of Conviction and Sentence).

APA Brian Surma requested Respondent to state the substantial and compelling reason for the departure. Respondent replied that the departure was because the defendant was on parole, and stated he would put more reasons on the departure form that the defendant was capable of rehabilitating himself, his remorse, his ability to change, that the defendant promised to take the path of Lon Chaney, and he appreciates the history of horror movies. (Exhibit 32, p. 12-13). Respondent wrote "desire to be rehabilitated, remorse for offense, ability/capability to be rehabilitated, age of Mr. Slone, success while on parole" on the departure evaluation form. (Exhibit 35).

The prosecutor's office appealed the sentence. (Exhibit 37, COA docket sheet). On July 23, 2010 the COA issued an order vacating the sentence and remanding for resentencing.

The Examiner argues that misconduct occurred when he deviated from the guidelines.

Although the COA reversed the sentence, Respondent argues that there is no evidence of bad faith or that Respondent did not believe that there was objective substantial and compelling reasons for a departure.

The Examiner finds that the factual record speaks for itself. It does not, however, establish judicial misconduct.

There can be no dispute that judges can depart from guidelines. Judges may depart from sentencing guidelines under certain circumstances and regularly do so. (Surma Tr., v.2, at 303; Fishman Tr., v.5, at 914). As one of the Examiner's witnesses testified, Mr. Slone was "hardly – it's not the only case [the Wayne County Prosecutor] has appealed in terms of sentencing." (Baughman Tr., v.3, at 633). Nor is it unusual that the COA disagreed with Respondent's assessment of whether departure was warranted. It is common for trial judges to find substantial and compelling reasons to depart from sentencing guidelines with which appellate courts disagree. See, e.g., *People v Hayes,* unpublished opinion of the COA, issued May 28, 2009 (Docket No. 284322) (vacating downward departure); *People v Herzberg*, unpublished opinion of the COA, issued June 14, 2005 (Docket No. 255779) (vacating upward departure).

Although legally wrong, Respondent's conduct does not rise to the level of misconduct. MCR 2.203(B).

D. People v McGee

The Examiner contends that, in *People v McGee*, Case No. 05-8641, Respondent committed misconduct by "intentionally violating" MCL 750.520b.

A jury convicted Tyrant McGee of first-degree criminal sexual conduct with a person under age thirteen. (Clark Tr., v2, at 323). The prosecution moved to remand McGee to Wayne County Jail under MCL 770.9b, which provides that a defendant convicted of "sexual assault of a minor" must be detained while awaiting sentencing. Respondent denied this motion. (Clark Tr., v.2, at 326-327).

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

(By Defense Counsel)

MR CLARK: You're not going to remand him? Not going to follow the statute in this case?

MR. JACKSON: January, what date?

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

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

THE COURT: Because we disagree.

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

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

(Exhibit 42 pages 163-164).

On December 20, 2005, the WCPO filed a complaint for superintending control together with motions for immediate consideration and to waive transcripts. (Exhibit 43; Exhibit 44 is the appellate docket sheet). On December 21, 2005 the COA issued an order citing MCL 770.9b (1) and stating:

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

Post-trial proceedings in *McGee* focused on the prosecution's conduct during trial. On May 26, 2006, Respondent granted Mr. McGee's motion for a new trial, finding that APA 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." (Clark Tr., v.2, at 334-334). In fact, APA Clark testified that he later regretted his use of obscene language.

The Defendant filed a motion for a new trial, and a hearing was held on April 28, 2006. (Exhibit 46). The hearing was continued to May 26, 2006. On May 26 Respondent granted the motion for a new trial because of Mr. Clark's use

of the word "fucking" during his rebuttal closing argument. (Exhibit 47; Exhibit 48). The prosecutor appealed the order. (Exhibit 49, COA docket sheet). On August 22, 2006 the COA issued an order reversing Respondent's order granting a new trial. (Exhibit 50).

The Examiner contends that "there is simply no justification for Respondent deliberately violating this statute. Respondent failed to follow the law (MCL 770.9b)."

The statute required that Respondent remand the defendant to custody pending sentence. APA Clark correctly reminded Respondent of the statutory mandate, and Respondent still did not follow the statute and refused to give a reason.

This is a very tough call for the Examiner. No question, bond should have been cancelled. It was a clear error of law not to have done so.

As stated earlier, the Examiner read over every line of the testimony. Drawing reasonable inferences therefrom, I find that Respondent although deeply troubled by the APA's remarks, was probably focused on the fairness of the trial and conviction that had just occurred.

However even viewing this case in the context of Respondent's twenty-one year judicial career there can be no good faith reason for Respondent to completely ignore a mandatory statutory provision.

The Master has consistently given Respondent leeway where there was a good faith explanation of his actions. This is not one of those situations.

According, the Master finds that the Examiner has met his burden that the factual allegations were proved as to the factual allegations and judicial misconduct.

E. People v Wilder

The FC alleges that Respondent pursued a course of action on his own agenda to improperly dismiss a case with prejudice.

1. Facts

The defendant was charged with Possession with intent to Deliver/Manufacture Marijuana (PWID Marijuana) in case 08-7126. (Exhibit 35). The case was set for trial on June 27, 2008. On that day P.O. James Napier and the Officer in Charge (OIC) Sgt. Ronald Murphy did not appear in court. One officer, P.O. Mark Stevelink, appeared. The prosecutor said that the People were not ready. Defense counsel moved to dismiss, and Respondent dismissed the case "for lack of ability to proceed." (Exhibit 56, p. 3-4). Respondent signed an order of dismissal which stated "people not ready to proceed." (Exhibit 55).

The WCPO reissued the warrant and defendant was recharged with the same offense in Case No. 09-3577. (Exhibit 54). A calendar conference was held on February 20, 2009. At that time defense counsel Mr. Mehanna stated that the defendant would like to plead guilty. (Exhibit 58, p. 2). Respondent stated he would take the plea conditionally and hold a hearing on why the officer failed to appear previously. Respondent said he remembered that he said he was going to have the witnesses explain why they weren't there. (Exhibit 58, p 3-4). APA Teana Walsh stated that there should be a show cause hearing beforehand, but Respondent stated he would take the plea and get a

presentence report so he would not have to backtrack. (Exhibit 58, p 4). Respondent proceeded with the plea procedure. (Exhibit 58, p.5-10). APA Walsh stated that she never heard of such a thing, and Respondent stated he just took a conditional plea. (Exhibit 58, p 10). After further discussion (Exhibit 58, p 11-13) the matter was continued to April 24, 2009. The matter was continued again until May 29, 2009 because the transcript of the June 27, 2008 dismissal was not obtained. (Exhibit 59).

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

The officers appeared at the hearing on June 19. (Exhibit 61). P.O. Napier informed the court that he did not receive a subpoena because he had broken his hand and was separated from the police department. (Exhibit 61, p 4 lines 4-6). Sgt. Murphy told the court he received a subpoena but was in another courtroom. When he appeared in Respondent's courtroom the case had already been dismissed. (p 5, lines 20-22). He also told the court that the subpoenas for the officers were not sent to him, but were sent to the Western District where the officers were assigned. (p 6) Respondent ordered the prosecutor to obtain the Western District subpoena book. The matter was continued to July 10. On that

date, Respondent examined the subpoena book and determined that neither P.O. Napier nor P.O. Stevelink signed for their subpoena. (Exhibit 62, p 5) Respondent dismissed the case, and stated:

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

Respondent signed an order dismissing the case with prejudice. (Exhibit 63).

APA Walsh was not present when the first case was dismissed. The Respondent and the Defendant recalled that there was an understanding that the case would not be re-written until Respondent looked into the police officer's failure to appear.

The Examiner argues that the record shows that Respondent, on his own accord, pursued a course of conduct to dismiss the case, failing to remain an impartial jurist and was advocating for the defendant. A reading of the transcripts shows that Respondent intended from the start to dismiss the new case because the officers did not appear at the trial. Respondent stated:

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

The record made when the original case was dismissed (both the transcript Exhibit 56 and the dismissal order Exhibit 55) did not reference a

"conditional dismissal." Respondent, however, relied on his memory of something he may have said off the record when the case was dismissed that he was going to have the witnesses explain their failure to appear. (February 20 transcript Exhibit 58, p 3-4). Mr. Mehanna told the court that the defendant remembered "something of that sort." as well.

APA Walsh and defense attorney Mehanna had agreed on a plea and did not ask for a dismissal based on the result in the earlier case. Examiner argues that Respondent went far beyond his role as a neutral jurist and became an advocate for the defendant. His failure to remain neutral and failure to follow the law violated the misconduct allegations of paragraph (a) through (i) above as well as MCR 6.302(C)(2).

Respondent explains that Respondent's decision was based on his concern that the prosecution's witnesses willfully violated subpoenas. Further, courts have discretion to dismiss criminal charges in certain cases. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998) ("This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion."). Courts may use this discretion to dismiss cases when parties fail to comply with clear court orders. *Haddad v Michigan Nat Corp*, unpublished opinion per curiam of the COA, issued March 4, 1997 (Docket No. 189812). A subpoena is a court order and Respondent had ample cause to see that it was enforce.

On July 10, 2009, Respondent 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 on June 27, 2008 and Officer Murphy was present but in another courtroom. (Walsh Tr., v.2, at 424). Therefore, Respondent found that the prosecution was not able to present a valid reason for the officers' absence and dismissed the case. (Walsh Tr., v.2, at 425). The prosecution did not appeal this decision. (Walsh Tr., v.2, at 427).

The Master finds that the original case should not have be dismissed with prejudice. That in so doing, Respondent legally erred.

The Examiner contends that this action was part of his pattern to disregard the law and advocate for the defendant. Respondent argues for a different interpretation, that there was a legal basis for his actions.

Respondent argues that Michigan law provides support for the proposition that a judge can dismiss charges before jeopardy attaches. In *People v Owens*, 74 Mich App 191, 194; 253 NW2d 706 (1977), the COA affirmed a trial court's decision to dismiss criminal charges based on the prosecution's failure to comply with discovery obligations. Further, that Respondent was not advocating for the benefit of defendant but to protect the integrity of the justice system.

Respondent expressed concern that police officers were not showing up for trial to the detriment of defendant's rights. He became concerned that this first case might be an example of that activity.

Respondent insisted on having a hearing to allow the officers to explain their non-appearance. At the conclusion of that hearing, he ruled that the officers had no valid basis for their non-appearance and dismissed with prejudice the earlier case.

The Examiner finds that Respondent was not motivated to favor the defendant but to protect the integrity of the justice system. Police officers, like any subpoenaed witness, had an obligation to attend court proceedings. As the officers had no valid excuse for their non-appearance, he ruled as he did.

Under these circumstances, the Master concludes that Respondent, although legally incorrect, did not act in bad faith. Accordingly, the Master does not find misconduct in this matter. MCL 9.203(B).

F. People v Jones

The FC alleges that Respondent abused his discretion, failed to remain neutral, and advocated for the defendant resulting in the dismissal of the case.

1. Facts

The defendant was charged with Possession with Intent to Deliver Cocaine 50 grams, Possession of a Firearm by a Felon, Felony Firearm, and Maintaining a Drug House. (Exhibit 65). The charges were a result of the execution of a search warrant that was predicated on a controlled buy by source of information (SOI) #2117. Defense counsel filed a Motion for a Franks Hearing (Exhibit 66) arguing that the Officer In Charge ("OIC"), Officer Castro, had provided inaccurate information in support of his request for a search warrant.

A hearing on defendant's motion was held on Friday November 14, 2008. (Exhibit 67). P.O. Castro, the affiant for the search warrant, testified regarding the controlled buy by SOI #2117. (Exhibit 67, p 3-16). The wife of the defendant, testified that she was at the location the day of the controlled buy and that no one came to the house that day and there was no one at the location that fit the

description of the seller that the SOI gave Officer Castro. (p 17-24). After arguments, Respondent denied defendant's motion. (p 39).

On Monday November 17, 2008, with no prompting or request by the defense, Respondent issued an order for production of the search warrants and returns where P.O. Castro used SOI 2117. (Exhibit 68). On Friday, November 21, Respondent issued an order for all DPD search warrants where SOI #2117 was used. (Exhibit 69).

On Monday November 24, APA Teana Walsh appeared before Respondent regarding the court's orders (defense counsel was not present). (Exhibit 70). The record shows that the court received 22 search warrants and that APA Walsh stated the WCPO would not comply with the second order. (Exhibit 70, p 3). On Tuesday, November 25 Respondent issued a subpoena to the WCPO to "produce all search warrants & returns where SOI #2117 were used." (Exhibit 71). Respondent also issued an order the same day requiring the production of the documents by December 2, 2008. (Exhibit 72). APA Walsh filed a motion to quash the subpoena and for a protective order (Exhibit 73) and a motion to rescue Respondent. (Exhibit 75).

Both counsel appeared before Respondent on December 4, 2008. (Exhibit 76). Respondent suppressed the evidence and granted the defendant's motion to dismiss. (Exhibit 76), p 9-10). Respondent signed an order dated December 4,2008 dismissing the case with prejudice. (Exhibit 77).

The WCPO filed an appeal. (Exhibit 78, the appellate docket sheet). On April 15, 2009 the COA issued an unpublished opinion reversing the dismissal

and remanding the case to a different judge for trial. (Exhibit 79). The COA remanded the case to a different judge, stating:

> We have reviewed the transcripts and conclude that n irreconcilable conflict has developed between the trail judge and the prosecutor in this case. After the judge, with no prompting from the defendant, ordered the search-warrant records, repeated arguments took place between the judge and the prosecutor, with the judge essentially becoming an advocate for defendant. Under these circumstances, we conclude that remand to a different judge is necessary. (Opinion p 6).

The Examiner claims that Respondent's actions constituted judicial misconduct by engaging in a course of conduct on behalf of the defendant that was not requested by the defendant, abused his discretion with his burdensome order, suppressed the evidence for an invalid reason of his own making, and acted as defendant's advocate, requiring the COA to remand to a different judge.

Respondent argues that he was not being an advocate for defendant but acting out of genuine concern that Officer Castro was not truthful in his search warrant affidavit. Further, Respondent had a right to order the Detroit Police Department to produce all search warrants in which the affiant police officer used the information at issue. (Walsh Tr., v.2 at 432). Although Officer Castro testified that the Confidential Informant (SOI #2117) had been used on more than fifty occasions, the Detroit Police Department produced only twenty-two warrants. (Walsh Tr., v.2, at 434). Respondent repeated his request because, given Officer Castro's representation that the information had been used in over fifty cases, there were still twenty-eight subpoenas remaining after the initial production of twenty-two subpoenas.

After reviewing the affidavits produced, Respondent concluded that when Officer Castro had provided information about his informant to the magistrate, he had omitted twenty-two cases. (Ex. B, Jones, Tab 25, at 7). In addition, the informant was successful in only half of those twenty-two cases. (*Id.* at 7-8). By omitting this information, Officer Castro "intentionally skewed the numbers and interfered with the magistrate's ability to make a fully informed decision. (Id. at 8).

Consequently, Respondent reconsidered his previous ruling and granted the defendant's motion, (Walsh Tr., v.2, at 441). With evidence of the cocaine suppressed, Respondent was required to dismiss the charges against Jones. (Id.).

Respondent argues that as a procedural matter he cannot be faulted. Reconsideration of his initial decision to allow the evidence was permitted by MCR 6.435(B), which provides that, "After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous." MCR 6.435(B). There was no final judgment at the time Respondent reconsidered his decision. Given the defendant's motion to suppress evidence Respondent had a good faith basis to inquire into the veracity of the informing officer. Although the COA found that officer to be more credible than Respondent did, this difference of judicial opinion is not—and cannot be—the basis of finding of misconduct.

In deciding the question of judicial misconduct, the Master finds that MCR 6.435(B) is applicable. The Order Denying Defendant's Motion to Suppress was not a final order. The case was still pending. It appears that Respondent had a legal basis for his prior ruling.

The Master is mindful that the COA transferred the case to another judge finding that Respondent had, in essence, overstepped his judicial rule and became an advocate for the Defendant.

After careful analysis of the hearing record, however, the Master believes that the record establishes that Respondent was deeply concerned with the credibility of Officer Castro. The actions of the Judge were not to favor or benefit the Defendant, but rather to make sure justice was done. The whole case depended on credibility. If Officer Castro was not credible, the evidence was tainted and should be excluded. In essence, Defendant would be convicted with that tainted evidence.

Without question, his methods were unorthodox. Most Judges would not have been so proactive. And, clearly, the COA found fault with his conduct. However, that finding does not necessarily establish misconduct. The Master finds, that Respondent acted in the good faith belief that judicial action was needed to prevent a miscarriage of justice – that he had made a mistake denying the prior motion to suppress. Although the Master finds Examiner has established a factual basis for this case, the Master holds the remedy is appellate review; not judicial misconduct. MCR 9.203(B).

G. People v Boismier

The FC alleges that Respondent engaged in improper actions during the trial and after a COA order.

1. Facts

The defendant was charged with two counts of Criminal Sexual Conduct (CSC) Third Degree-person thirteen to fifteen and furnishing alcohol to a minor. (Exhibit 81). APA Angela Povilaitis testified that at the beginning of the trial prior to jury selection, she interviewed a witness named Starr Gasidlo who had previously refused to speak to the police or prosecutor or give a statement. (T, p 541). APA Povilaitis testified that Ms. Gasidlo said that her father David Gasidlo told her that the defendant (their next door neighbor) told him that there was no rape but that it was consensual sex. (T, p 542). Ms. Povilaitis testified that she immediately informed defense counsel, Mr. Mateo, there was the possibility of a new witness and asked the Officer in Charge to locate and interview the father. (T, p 542-543). There was an exchange on the record prior to jury selection on February 4, 2009 regarding the potential new witness. Lt. LaPointe, the OIC stated that he had attempted without success to contact the father. (Exhibit 82A, p 3; T, p 544-545).

The matter was next addressed at the end of jury selection after the jury was removed from the courtroom. Mr. Mateo stated that he understood that the father had been interviewed and told the police that there was no admission by the defendant, and that the father would not be called by either party. Ms.

Povilaitis stated that she was withdrawing her motion to amend the witness list to include him. (Exhibit 82A, p 147).

The prosecution presented its witnesses on February 5 and rested. Nothing regarding any statement by the defendant to Mr. Gasidlo was asked of any of the witnesses, including Starr Gasidlo. (Exhibit 82B, transcript of February 5; T p 575).

The trial continued on February 9 with the defense case. The defendant and his wife testified. (Exhibit 82C, transcript of morning session February 9). During her cross-examination of the defendant, Ms. Povilaitis asked: "Isn't it true that you told Mr. Gasidlo that you had consensual sex with Corrin?" The defendant answered: "No". Ms. Povilaitis then asked: "Did you tell anybody that you had consensual sex with Corrin?" The defendant again answered "No." Mr. Mateo asked to approach the bench, and the attorneys and Respondent had a side-bar discussion.

Ms. Povilaitis resumed her questioning asking the defendant: "Do you know what the word "consent" means?" Defendant answered "Yes." Ms. Povilaitis asked: "Did you tell anyone that you had consensual sex with Corrin Vonseeno?" The defendant answered: "No." and the cross-examination terminated. (Exhibit 82C, p 102; Exhibit 83 is the transcript excerpt from pages 101 to 104). Mr. Mateo continued with a short re-direct examination and the court broke for lunch. (Exhibit 82C, p 103-104).

At the start of the afternoon session Mr. Mateo addressed the court regarding Ms. Povilaitis questions to the defendant. Mr. Mateo asked the court

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

Mr. Mateo filed a motion for a judgment of acquittal or in the alternative a new trial, and a hearing on the motions was held on February 26, 2009. (Exhibit 85). Ms. Povilaitis stated that she did file a written response because she received the motion the day before, and Respondent adjourned the matter until April 3. (Exhibit 85, p 29). On April 3 Respondent stated:

> I think that there, as a result of a direct disobeying of a Court order, not order as such, but a conference that was had between all the lawyers and the Court instructing the lawyers on how to proceed with the questioning of the defendant as it related to accusations and information, I think that this rises to prosecutorial misconduct.
>
> I think that in this particular case there was a strict direction that as given to the prosecution on how to approach cross-examination. It was, in my mind, intentionally violated. And, as such, I think tainted the entire trial.
>
> (Exhibit 86, p 9-10).

Respondent granted the motion for a new trial and denied the prosecutor's request for a stay. (Exhibit 86, p 10). Respondent signed an order granting the new trial (Exhibit 87) and an order denying the stay. (Exhibit 88).

The prosecutor appealed the order granting a new trial. (Exhibit 80, the COA docket sheet). On July 31, 2009 the COA issued an order vacating the new trial order and remanding the case back to the trial court to resolve whether the prosecution had a good-faith basis for asking the questions, and if not, whether the defendant was prejudiced and denied a fair trial as a result of the prosecutor's questions (Exhibit 90). On October 20, 2009 Respondent made a record without the parties or attorneys present. (Exhibit 91).

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

Based on the above-enumerated factual recitation, the Examiner alleges several acts of judicial misconduct as follows:

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

> Respondent ignored the request and engaged Mr. Mateo in a pointless discussion as to whether he must report Ms. Povilaitis to the AGC.

To the contrary, Respondent argued that the facts, as presented, though true, do not constitute judicial misconduct.

Respondent argues that he did instruct APA Povilaitis during a bench conference to refrain from further suggesting that Mr. McGee confessed to the crime. In fact, both Respondent and Defense attorney Mateo understood that APA Povilaitis had been so instructed. APA Povilaitis then proceeded to violate that order by asking another question suggesting that the defendant confessed to the crime in a private conversation.

The COA ruling also faults Respondent for failing to conduct a hearing on whether the prosecution had a good faith basis for her questions. Respondent made a record without the attorneys being present. Respondent stated the basis for his ruling on that record.

There is no question that Respondent committed several errors of law in this case. The COA decision constitutes the law of the case.

As fact finder, it is the Master's obligation to decide if those reasons are also misconduct. In so doing, the existence of a pattern of improper conduct would help in that endeavor. In fact, the Examiner bases his allegations, in part, on the existence of Respondent's pattern of abusing his judicial power for his own inappropriate ends.

This is a most difficult case for the Master. A reading of the FC, without more, makes Examiner's theory plausible.

A FC, however, is just a compilation of allegations.. A hearing with witnesses and supporting evidence is still necessary. The Master writes this report after presiding over such a hearing. It affords the Master to view the case, not just from the viewpoint of the WCPO, but from involved defense attorneys and others who know Respondent as a judge with a twenty-one year judicial tenure.

The Master finds that there is a pattern in the these cases, but not necessarily as described by the Examiner. Respondent's "pattern" of judging is to proactively prevent legally wrongful results. Though his methods are sometimes unorthodox, "his heart is in the right place" ensuring in his mind, that justice prevails in the criminal justice system.

The Master has carefully examined the record made in this case. It establishes that both Respondent and the Defense Attorney agree that the APA, in essence, acted unfairly and contrary to a side-bar instruction not to question Defendant about his alleged prior admissions. Both state that Ms. Povilaitis was out of line in her questions. Mr. Mehenna testified that he was taken by surprise and was actually upset and angry with Ms. Povilaitis.

The Examiner believes that this is a case of alleged misconduct based on errors of law. The split decision of the COA confirms this opinion.

There is no evidence that Respondent acted in bad faith. He was judged to be simply wrong on the law by a non-unanimous decision of the COA.

The Master finds that the Examiner has not proved judicial misconduct by a preponderance of evidence. MCR 2.203(B).

H. People v Redding

The FC alleges that at the beginning of a trial over which he was to preside, Respondent in open court left the bench, shook the defendant's hand, and gave a package of documents to the defense counsel.

1. Facts

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

The trial in the 2007 case was commenced on April 11, 2007. APA Povilaitis testified that at the beginning of the trial she observed Respondent leave the bench, come down and shake hands with the defendant, who was in custody at the time. She then observed Respondent hand papers to the defendant. This occurred in open court. (T, p 529). Respondent made no record of his actions or what the documents were until she questioned him. (T, p 530; Exhibit 98). The questioning occurred after jury selection was completed and the jury excused. (Exhibit 98a, excerpt of the April 11 transcript). Ms. Povilaitis testified she had looked at the documents very briefly and that they

were high school records of the Defendant's son, who was also the complainant. (T, p 531-532).

Respondent acknowledged on the record that he shook the defendant's hand (Exhibit 98a, p 111) and acknowledged that he gave the documents to defense counsel. (p 112). Respondent stated that the document were given by the defendant to the court's deputy and given to Respondent a couple of months before the case began. (p 113-114). Respondent denied reading the documents (p 111) and denied there was ex parte communication with the defendant. (p 109).

Respondent points out that it was not unusual for Respondent to shake hands with people in his courtroom. (Povilaitis Tr., v.3, at 590). The prosecuting attorney at the Redding trial has seen him shake hands with jurors, counsel, defendants, and defendants' families before. (Id.).

Respondent explained that the records had been given to his courtroom deputy for the court to hold before Redding was bound over. (Povilaitis Tr., v.3, at 535-536). He also explained that he had never read them. (Povilaitis Tr., v.3, at 537).

After APA Povilaitis severely questioned Respondent on the record about the documents, Mr. Redding's counsel stated that she did not intend to introduce them at trial. (Povilaitis Tr., v.3, at 601).

As for shaking Mr. Redding's hand, Respondent explained: "And just so that the record can be straight, I probably have shaked [sic] Redding's hand ten time over the course of our relationship as Judge and accused and prisoner."

(Povilaitis Tr., v.3, at 536). The prosecutor did not return to the subject or offer any argument as to why it would be improper for Respondent to extend a common greeting to an individual in his courtroom.

The Examiner argues that the facts as set forth establishes judicial misconduct. He shook hands with the defendant in open court at the beginning of a trial over which he was to preside. Respondent handed documents to either the defendant or his counsel. These actions alone would raise questions to anyone in the courtroom as to whether the judge knows the defendant or whether the judge is impartial. Rather than sua sponte raising the issue and making a record as to the documents, Respondent left the bench and delivered them to the defense. Respondent made no record until the prosecutor raised the matter at a later time. Examiner argues that these are not actions of a neutral and impartial jurist. Respondent's actions in this case are improper and at a minimum create the appearance of impropriety in violations on the canons.

Respondent argues that these actions occurred out of the presence of the jury, as shown by APA Povilaitis's testimony that she did not have an opportunity to address her concerns about Respondent's actions before the jury was brought into the courtroom. (Povilaitis Tr., v.3, at 595-596). He explains his actions on the record to Ms. Povilaitis and all sides had an opportunity to read the documents. Neither the prosecutor or defense sought the introduction in evidence on mentioning that again.

The Master finds that the facts as alleged in the FC have been established. Respondent admits this.

The Master holds, however that this is an isolated incident, though unusual, and does not constitute judicial misconduct.

The jury was not present when Respondent handed defense counsel the school records of one of defendant's sons. The APA and defense attorney apparently, did not need them for the trial. As stated, no further mention of this incident was made during the trial.

Respondent is known as a "hand-shaker" as part of his approach to being a judge. In the context of the case, hindsight indicates it would have been better if Respondent did not return Respondent's papers in the manner which he returned them.

The record does not establish, however, that this type of conduct ever occurred before or after this case. The Examiner finds that this is a case of poor judgment rather than judicial misconduct.

I. People v Moore

The FC alleges that prior to trial Respondent obtained the defendant's medical records without knowledge or consent of the parties.

1. Facts

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

indicated that they were satisfied with the factual basis for the plea, Respondent stated:

> THE COURT: Okay. I took the liberty of getting his medical records because I believe that the prosecution should look at what occurred to Mr. Moore. I know that the transcript boasts of one of the witnesses saying, yes, she kicked "the shit out of him," or something of that nature, because they drug him back in the store and all of them abused him. You can't abuse somebody that commits a crime.
>
> MS. DAWSON: Yes, sir.
>
> THE COURT: I don't know if you know if I got the medical records showing the abuse that was done to him by this group of vigilantes after he was disarmed in the parking lot, but it was shameful.
>
> MS. DAWSON: Yes, sir.
>
> THE COURT: You didn't know I got those records either, did you?
>
> DEFENDANT MOORE: No, sir.
>
> THE COURT: I sure did.
>
> (Exhibit 102, p 8).

The records revealed that Defendant was severely beaten by store security personal during his apprehension. In fact, he was hospitalized as a result of that beating.

Examiner argues that it was improper for Respondent to obtain the medical records through subpoena without knowledge or consent of defendant or other attorneys. Respondent was going to preside over the trial whether it was a jury trial or a bench trial. When Respondent ordered the defendant's medical records, he was the presiding judge in the case whatever kind of trial eventually occurred. It is clear from the remarks that Respondent made on the record that

he had formed a negative opinion as to the conduct of some of the witnesses in the case. Whether Respondent would be the fact-finder or not, he had been influenced enough to do his own investigation and form his own opinions regarding the facts and the witnesses before any testimony was presented at trial.

Further, Respondent did not reveal that he had obtained the records until the plea was taken. Respondent had a responsibility to inform the parties of his actions and his opinions before presiding over the case. Respondent also had the responsibility to raise the issue so either party could consider whether they would ask Respondent to recuse himself before handling the case.

Respondent argues that there was no evidence presented suggesting that Respondent lacked the authority to subpoena these medical records. The Examiner did not pursue that issue at the hearing.

The Master again finds that the Examiner has established the facts as, alleged in the FC. The Master disagrees as to a finding of judicial misconduct. Looking at the total record, there is no evidence that Respondent held "deep-seated favoritism or antagonism." To the contrary, he accepted the plea agreement between Mr. Moore and the prosecution.

The Master finds that Respondent was concerned about the treatment of defendant during his apprehension. The brutal treatment of defendant, while not excusing his crime, was totally improper.

At sentencing, Respondent made it clear to the Defendant that he was responsible for his criminal behavior, that his being beaten did not excuse his

criminal actions. This does not establish any bias or prejudice in favor of defendant.

The Examiner finds that the Examiner has not met it's burden of proof in establishing judicial misconduct in this case. MCR 2.203(B).

J. People v Hill

The FC alleges that Respondent removed a prisoner from the court's lockup, sentenced him to prison, and returned him to the lockup with no security in the courtroom.

Brandon Hill was charged with armed robbery, carjacking, and felony firearm. (Dawson Tr., v.1, at 221). He pleaded guilty to all counts and the court scheduled sentencing for March 8, 2010 at 8:30 a.m. (*Id.* at 221-222).

Mr. Hill's attorney advised the court that he had another matter and was hoping to complete Mr. Hill's sentencing as early as possible. (Harper Tr., v.3, at 736).

No deputies were present in the courtroom at 8:30 a.m. and there were no other attorneys. (*Id* at 736-737). The court waited for the deputies to return but they did not arrive. (*Id.* at 7373).

Finally, Respondent took the lockup keys from the deputy's desk and went into the prisoners' lockup area. (Dawson Tr., v.1, at 224). Defense counsel went with him to lockup. (Harper Tr., v.3, at 738). Respondent brought Mr. Hill into the courtroom. (*Id.*). He was not handcuffed.

Mr. Hill was sentenced with a brief hearing that lasted five to ten minutes. (Harper Tr., v.3, at 739). Respondent then returned Mr. Hill to lockup and replaced the keys on the deputy's desk. (*Id.*).

The prosecutor never expressed concerns on the record about sentencing Mr. Hill without the deputy present. (Dawson Tr., v.1, at 228; Harper Tr., v.3, at 740). But testified at hearing that Respondent's actions frightened and upset her.

In fact, on cross-examination, APA Dawson explains the impact of Respondent's actions:

BY MR. CAMPBELL:

Q. Ms. Dawson, my name is Don Campbell. You were just asked, Why did you leave? And you said because there was no security. Do you remember that:

A. What I meant to say was that as soon as the sentencing was over I gathered my belongings, and I wanted to get out of the courtroom and off the floor as quickly as possible. There was no - - there was no security in the courtroom.

Q. I understand that. There was never any security in the courtroom?

A. No sir.

Q. So there was nobody stopping you from leaving when the defendant walked out; right?

A. No.

Q. So you stayed then. So it wasn't the fact that there was no security that you left. You left for a different reason. We can agree on that; right?

A. No.

Q. We can't agree.

A. No.

Q. Okay. In fact, you left because you were afraid; right?

A. I was – yeah, I was angry. I was afraid. I was angry.

Q. What did you say to the judge.

A. Nothing.

Q. - - to let him know that you were afraid?

A. I didn't want to draw attention to the fact that there was no security in the courtroom. I couldn't believe that - - that this was happening. I kept expecting the deputies to walk in. I kept thinking surely he is not going to do this without the deputies here. We're not really going to do this. It's - - it - -

Q. Again, you thought that, but you didn't share that; correct?

A. No. You're correct. I did not.

Q. You described it as frightening.

A. Yes.

Q. Was Capers Harper frightened?

A. I don't know.

The Examiner argues that Respondent's conduct endangered the public and is another example of "doing what he wants" regardless of its impact on others.

The Respondent argues that no real safety risk was created.

Mr. Hill's defense attorney testified that Mr. Hill knew that his sentence would be before the hearing began, and was satisfied with it. (Harper Tr. v3, at 740). The sentencing hearing was a formality to put the parties' agreement on the record.

The Master finds that there is little, if any, dispute of fact as to this matter.

However, there is no good faith or other explanation for Respondent's conduct. Being in a hurry is no excuse for placing the public or anyone in potential danger. Defendant Hill was to receive a lengthy prison sentence for armed robbery, carjacking and felony firearm. He was in custody under the control of the Wayne County Sheriff Department. There is no evidence that Respondent made any effort to locate the deputies assigned to his courtroom.

Respondent created a potential risk to public safety. Accordingly, the Master holds that the Examiner has met its burden of proof as to the facts and judicial misconduct.

Dated: August 8, 2013

Edward Sosnick

Honorable Edward Sosnick (Ret.)