

STATE OF MICHIGAN
IN THE SUPREME COURT

Complaint Against:

HON. BRUCE U. MORROW
3rd Circuit Court
Detroit, Michigan

Case No. 161839
Formal Complaint No. 102

Hon. Bruce Morrow's Motion for Rehearing

Judge Bruce Morrow¹ states as follows for his Motion for Rehearing:

1. On January 13, 2022, the Court issued its opinion in this matter. *In re Morrow*, __ Mich __; __ NW2d __; 2022 WL 128125 (2022). This motion asks the Court to reconsider its constitutional analysis and, in particular, its application of *Williams v Pennsylvania*, 579 US 1 (2016).

2. The Judicial Tenure Commission issues a complaint (MCR 9.224) and then adjudicates its own complaint (MCR 9.244). Judge Morrow argued that this combination of *prosecutorial* and adjudicative functions violated his right to due process under *Williams*. The Court disagreed. It held that the Commission's structure is constitutional under *Withrow v Larkin*, 421 US 35 (1975) (which considered the combination of investigative – not prosecutorial – and adjudicative functions).

¹ Bruce Morrow is a Black man and by the time of this filing a retired Circuit Court Judge, first elected to the City of Detroit's Recorder's Court and then to Wayne County Circuit Court Criminal Division. He served his city, his county, and his state for nearly 30 years.

3. The Court's analysis was faulty in four ways. First, it misstated the legal issue, erroneously focusing on the combination of *investigatory* and adjudicative functions instead what was really at issue: the combination of *prosecutorial* and adjudicative functions. Second, the Court overlooked the structural-error rule, erroneously concluding that this Court's oversight could cure any due-process violation at the Commission. Third, the Court seemed to require Judge Morrow to name individual commissioners even though no case or rule requires that and the Court Rules themselves speak of the Commission acting as a whole. Fourth, the Court erroneously failed to properly consider and address the objective *risk* of bias that's actually at issue under governing caselaw.

4. Correcting the Court's errors leads to the conclusion that the Commission's dual role did, in fact, violate Judge Morrow's constitutional rights.

The Court's opinion misstates the legal issue: it's the Commission's prosecutorial role, not its investigatory role, which creates a risk of bias.

5. First, the Court erred in relying on *Withrow* instead of *Williams*. The Court found that *Withrow's* facts are closer to the facts of this case, stating that both cases involve the combination of "*investigative* and adjudicatory roles." *Morrow*, slip op at 6 (emphasis added). That statement is false.

6. *Withrow* involves the combination of investigative and adjudicatory roles. Judge Morrow never argued that the combination of *investigative* and adjudicatory roles violates due process. The Court's statement is factually incorrect. His argument, rather, is that the combination of *prosecutorial* and adjudicatory roles creates an unconstitutional risk of bias. That's *Williams*, not *Withrow*. The Commission *issues a complaint* (MCR 9.224)

and then rules on its *own complaint* (MCR 9.244). It's required to opine on whether its own position is correct. The risk of bias here is too high under *Williams*.

7. Because the Commission plays a prosecutorial role (by issuing a complaint), the Court should have looked to a case that involves the combination of prosecutorial decision-making (and not mere investigation) with an adjudicatory role. That's *Williams*, not *Withrow*. See *Withrow*, 421 US at 47 (addressing the "combination of investigative and adjudicative functions"); *Williams*, 579 US at 16 ("Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level.").

8. Here's why the distinction between mere investigation and prosecution is important: investigation doesn't require an investigator to form an opinion about the object of the investigation. Acting in a prosecutorial role *does* require taking sides. That's why the Supreme Court held that there is "an unconstitutional potential for bias ... when the same person serves as both accuser and adjudicator in a case." *Williams*, 579 US at 8 (quoting *Murchinson*, 349 US 133, 136 (1955)).

9. The Commission acts as *accuser*—not just investigator—and then adjudicator. That's *Williams*, not *Withrow*. And that's unconstitutional.

The Court overlooked the structural-error rule.

10. The second error is that the Court failed to apply *Williams*'s structural-error rule. *Williams* made it very clear that the combination of prosecutorial and adjudicative roles is a structural error—an error that cannot be cured even if "the judge in question did not cast a deciding vote." *Williams*, 579 US at 14. Yet the Court treated the

Commission's violation of the due-process clause as an error that is cured through this Court's oversight. That is false.

11. This Court has recognized the distinction between structural errors and other errors. In *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000), for example, the Court explained, "Structural errors . . . are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal." *Id.* at 52.

12. The United States Supreme Court plainly stated that combining prosecutorial and adjudicatory functions is a structural error. *Williams*, 579 US at 14 ("... [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.").

13. It can't be said that this rule applies only to criminal matters. *Williams* was a post-conviction and therefore civil matter. *Pennsylvania v Finley*, 481 U.S. 551, 556; 107 S Ct 1990 (1987) (holding that a post-conviction proceeding "is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature").

14. The Commission issues a complaint and then rules on its own complaint. MCR 9.224; MCR 9.244. That implicates *Williams* and its structural-error rule. Yet the Court found that its oversight of the Commission cures any constitutional infirmity: "We reiterate that it is not the JTC that provides a final adjudication and sanctions judges; that responsibility belongs only to our Court. ... Therefore, we do not believe that respondent's general allegations about the JTC's dual roles are enough to overcome a

presumption of honesty and integrity in those serving as adjudicators.” *Morrow*, slip op at 6.

15. The Court’s analysis is invalid under *Williams*. The Court’s “responsibility” for issuing a final decision does not change the fact that the Commission first issues an opinion on the validity of its own complaint, in violation of the due-process clause of the United States Constitution. *Williams*, 579 US at 14. So the Court’s analysis of this issue is incorrect.

Judge Morrow always focused on the Commission as a whole because that’s what the Michigan Court Rules require.

16. Third, the Court faulted Judge Morrow for not specifically stating which individuals on the Commission violated his due-process rights. It concluded that Judge Morrow “does not raise a similar contention regarding the personal involvement of any particular member of the JTC in his case. He only generally asserts that the entire JTC cannot play a hybrid role in the judicial disciplinary process.” *Morrow*, slip op at 6.

17. There is no statute, court rule, or case that required Judge Morrow to name individual members of the Commission. The Michigan Court Rules state, however, that the *entire Commission* issues a complaint (MCR 9.224) and the *entire Commission* issues an opinion (MCR 9.244). Accordingly, Judge Morrow has relied on the Michigan Court Rules and argued throughout these proceedings that the entire Commission is disqualified.

18. Judge Morrow should be able to rely on the plain language of the Michigan Court Rules, which identify the Commission as the complaint’s author and the Commission as the complaint’s adjudicator. If the Court is going to create a new rule, it

should apply only prospectively – to those who have notice. There should be no penalty when a party relies on the text of the Michigan Court Rules.

This due-process challenge was about the impermissible risk of bias.

19. The Court concludes with a finding that Judge Morrow did not overcome “a presumption of honesty and integrity in those serving as” Commission members. *Morrow*, slip op at 6. Again, the Court is applying the wrong legal standard. The question is whether there’s an unconstitutional *risk* of bias, not whether there’s evidence of *actual* bias. *Williams*, 579 US at 8 (discussing “objective standard” that measures “impermissible risk” of bias).

20. The Court applied the wrong legal standard. It analyzed this issue as if the question was actual bias. In fact, the issue is whether there’s an unconstitutional risk of bias. *Williams*, 579 US at 8 (citing standard for finding “impermissible *risk* of actual bias”) (emphasis added).

21. Merely investigating does not require the investigator to form an opinion. That’s why *Withrow* allows the combination of investigation and adjudication. *Withrow*, 421 US at 47 (addressing the “combination of investigative and adjudicative functions”). Prosecution, however, requires an opinion. That’s why there *is* an unconstitutional risk of bias when the Commission rules on the merits of its own complaint. *Williams*, 579 US at 16 (“Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant’s case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level.”).

22. The Commission acts as prosecutor (MCR 9.224) and then adjudicator (MCR 9.244). It is the judge in its own case. Although this Court has the final word, that fact is legally irrelevant. *Williams*, 579 US at 14.

Conclusion

23. Like every respondent in a judicial-discipline matter, Judge Morrow is entitled to a process consistent with his rights under the United States Constitution. The Michigan Court Rules, which allow the Commission to both issue a complaint and then rule on that complaint, violate his due-process rights. Accordingly, Judge Morrow respectfully asks this Court to grant rehearing and to apply *Williams* to declare Subchapter 9 of the Michigan Court Rules unconstitutional.

Respectfully Submitted,

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STATE OF MICHIGAN

MI Supreme Court

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