

## **ATTACHMENT A**

**STATE OF MICHIGAN  
BEFORE THE JUDICIAL TENURE COMMISSION**

**COMPLAINT AGAINST:**

**Formal Complaint No. 92**

**Hon. Bruce U. Morrow  
3<sup>rd</sup> Circuit Court  
1441 St. Antoine, Courtroom 404  
Detroit, Michigan 48226**

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**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 out 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 preponderance 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 Sorensens. 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 Sorensens.

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 27<sup>th</sup> 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 27<sup>th</sup>."

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 1<sup>st</sup> Degree (HI 1<sup>st</sup>); 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 1<sup>st</sup> 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 13<sup>th</sup>. See you January 13<sup>th</sup>.

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 an irreconcilable conflict has developed between the trial 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 3<sup>rd</sup> 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 1<sup>st</sup> Degree (CA 1<sup>st</sup>), 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 shaken [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 its 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

  
Honorable Edward Sosnick (Ret.)