STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Hon. Theresa M. Brennan
53rd District Court
Brighton, MI 48116

Formal Complaint No. 99
Master: Hon. William J. Giovan

MOTION TO DISQUALIFY THE TENURE COMMISSION AND TO ADMINISTRATIVELY CLOSE THIS CASE

NOW COMES the Hon. Theresa M. Brennan, respondent herein, by and through her attorneys, the law firm of Dickinson Wright PLLC, and prays that all the members of the Judicial Tenure Commission, save the Hon. Pablo Cortes who has already done so for another reason, recuse themselves from any further involvement in this matter other than to administratively close the matter until the Commission has been reconstituted with all new members. In support of this motion, Judge Brennan represents unto this Court as follows:

A. Motion to Recuse

MCR 9.204(A) disqualifies the judge members of the Commission from participating in any proceedings before it when required "for any reason set forth in MCR 2.003[C],"[1] and the Commission's IOP 9.204(A)-4 extends the requirement of and bases for disqualification to its non-judge members, as well. MCR 2.003(C)(a) and IOP 9.204(A)-4(d) require disqualification for "bias[] or prejudice[]" concerning a respondent, and an expression pre-de novo review of a belief

[1] MCR 9.204(A) actually cross-references MCR 2.003(B), but grounds for disqualification are itemized in subrule (C). They were originally listed in subrule (B), but some years ago MCR 2.003 was reorganized. To date, however, the cross-reference in MCR 9.204(B) has not been changed to recognize that reorganization.

that a respondent is guilty of serious misconduct "amount[s] to a prejudgment" which is a bias "requir[ing] disqualification." *People v Gibson* (on rem), 90 Mich App 792, 796-797; 282 NW2d 483 (1979), *lv den* 401 Mich 868 (1980). "There is perhaps no more basic precept [embedded in our law] pertaining to the judiciary [of which the Commission is an adjunct] than… that judges be ... free from predisposition in their decision-making," Geyh, *Judicial Conduct and Ethics* (5th ed), § 4.01, which is why an expression of prejudgment always requires disqualification. *Gibson*. Each member of the Commission other than Judge Cortes has, for the following reasons, very publically expressed before under-taking the de novo review required of them the opinion that Judge Brennan is guilty of serious misconduct, requiring their recusal.

First, the indisputable facts:

1. On Wednesday, November 21, 2018, two days after the conclusion of the formal hearing in this matter, the Examiners appointed by the Commission filed a motion with it asking for permission to petition the Supreme Court for the immediate suspension of Judge Brennan without pay. Citing to and, sometimes, quoting from portions of the transcript of the formal hearing -- there had been a month's hiatus in the hearing before it concluded on November 21, giving the court reporter time to prepare a transcript -- the Examiners contended that those portions proved that Judge Brennan had tampered with evidence and had perjured herself, conduct which required her removal from the bench without waiting for de novo review, first, by this Commission and, then, by the Supreme Court.

2. Judge Brennan responded on November 27, 2018, strongly taking issue with the Examiners' claims of criminal behavior. She pointed out, first, that the Examiners acknowledged that she had "copied" data from one phone to another, which is, by definition, not the deletion or destruction of data as claimed by them, and that, when placed in context, the statements by her

quoted by the Examiners were not even incorrect, let alone perjury. Judge Brennan also contended that the Commission petitioning for her interim suspension "will be telling the Master [who would not issue his report for nearly another month] ... that it considers Judge Brennan guilty of tampering with evidence and of lying, removing the Master's independence from the process" and thereby undermining the constitutionality of our unified system of judicial discipline. The Examiners replied that Judge Brennan had admitted at the formal hearing, which she had not, having tampered with evidence and lying under oath, so her punishment should not be delayed by waiting for a report from the Master and for its de novo review.

3. On December 11, 2018, the Commission denied the Examiners' motion. The effectuating order did not explain why, but a subsequent order did. The Commission had agreed with Judge Brennan that granting the Examiners' request would risk it being understood by him and others as telling the Master, who had yet to issue a report, to rule against Judge Brennan or to have his report rejected on review if he did not.

4. On December 20, 2018, the Master issued his report. On December 27, 2018, the Commission set January 31, 2019, as the deadline for Judge Brennan to file objections, which it anticipated she would, to the Master's report. The Examiners' response would be due 14 days thereafter. MCR 9.215. Also on December 27, 2018, the Commission scheduled for March 4, 2019, a hearing on any objections filed by Judge Brennan.

5. At its meeting on January 7, 2019, the Commission sua sponte, i.e., without a request by the Examiners and without any notice to or input from the parties, reconsidered its denial on December 11, 2018, of the Examiners' motion for permission to seek Judge Brennan's immediate suspension and, on reconsideration, granted that motion. An effectuating order was issued on January 9, 2019. Very perceptively, the Commission declined to itself file the petition,

or have a petition filed on its behalf, and to express any opinion, indeed, it "express[ed] no opinion[,] regarding the Master's report or the substance and/or merits of the Examiner's Motion for Interim Suspension." The Commission viewed doing either as incompatible with its upcoming role "as an adjudicative body that will hear argument on the Master's report."

6. A petition was filed with the Supreme Court on January 15, 2019, by the Commission's Deputy Executive Director. In large part, that petition tracked what the Examiners' motion to the Commission had asserted about Judge Brennan's supposed tampering with evidence and perjury. The petition also added claims that the evidence at the formal hearing proved a pattern of lies, misrepresentations and concealment by her regarding her relationship with MSP Dt. Sgt. Sean Furlong during the of *People v Kowalski*, 44th Circuit Court Case No. 08-017643. (An email to the Commission by its Deputy Executive Director appears to acknowledge that those latter assertions were added without advance notice to the Commission.)

7. The petition was denied by the Supreme Court on January 25, 2019. Its jurisdiction had not been properly invoked, ruled the Court. Specifically, the Court ruled that it '"may take certain disciplinary actions against a judge only '[o]n recommendation of the [J]udicial [T]enure [C]ommission'" and that MCR 9.217(A)(1) provides that only "[the [C]ommission may petition for an order suspending a judge until final adjudication of [a Formal] [C]omplaint]." A petition filed "by" the Commission's Deputy Executive Director, even though with its permission, is not filed by the Commission, and a petition which eschews expressing any opinion on its substance and/or merits is not the required recommendation, also ruled the Court.

8. On February 4, 2019, another petition was filed, really refiled, with only two significant changes. It was filed as a request by the Commission itself, and it was signed by the Chairperson of the Commission, as well as by its counsel. Earlier in the day, the Commission, sans

Judge Cortes, had "unanimously resolve[d]" to file the petition, a copy of which petition was "attached" to its resolution, so it necessarily follows that all the other Commissioners had read and concurred with the petition. Although renumbered, the petition's substantive assertions are identical to those in the prior petition.

9. While courtesy drafts of Judge Brennan's objections to the Master's report and her brief supporting those objections were served, to afford them enough time to digest and respond to both, on the Examiners on February 3 and 4, 2019, respectively, neither was filed with the Commission until February 8, 2019. Judge Brennan does not know if they were immediately forwarded to the Commissioners, will be sent to the Commissioners along with Examiners' response when it is filed, or will be sent together with the Examiners' response to the Commissioners closer to March 4. 2019.

Now, the applicable law:

The above-delineated timing of the Commission's filing with the Supreme Court of its petition for Judge Brennan's immediate suspension, more precisely, the sequence of events leading up to that filing, plus the contents of that filing, require the conclusion that, just as did the trial judge in *Gibson*, all the Commissioners have expressed in advance of the hearing mandated by MCR 9.216 a pre-judgment of Judge Brennan's guilt of misconduct indistinguishable from the pre-judgment expressed in *Gibson* of the yet-to-be-tried defendant's guilt of armed robbery. Necessarily, therefore, the Commissioners' disqualification is likewise required.

Gibson was one of two cases brought against the alleged perpetrators of an armed robbery. The cases were pursued separately because the other defendant had confessed. Stricter severance requirements applied back then. That defendant was tried first and was convicted after a bench trial. Explaining his verdict -- the defendant had opted for a bench trial -- the judge stated, "There

is no question in the Court's mind that this was done by Mr. Peete and Mr. Gibson, his companion ..." 90 Mich App at 795. Mr. Gibson was then tried and convicted by the same judge. He, too, had opted for a bench trial. Neither Mr. Gibson nor his attorney were aware of what the judge had said about him at the co-defendant's trial. That statement "amounted to a prejudgment" of Mr. Gibson's case, ruled the Court of Appeals, which required that judge to have sua sponte disqualified himself, requiring a reversal because he did not.

This matter is indistinguishable from *Gibson*.[2] The Commission's petition to the Supreme Court begins with a declaration that it "rests on just a fraction of the misconduct established at the [F]ormal [H]earing (p 2). Then, after detailing some, but far from all, of the pertinent evidence presented at that hearing, the Commission's petition asserts, multiple times, that that evidence "establishes" and "established" tampering with evidence and perjury (¶¶ 26, 29, 32, and 33). Those words reflect findings which can be made only after de novo review. Using them before de novo review "amount[s] to a [*Gibson*-style]] prejudgment" of a case yet to be heard. Because the Commission unanimously resolved to file, not just a petition for interim suspension which it left to its counsel to compose, but a petition which it had already read, and approved, the words of prejudgment are the Commission's. Perhaps, the Supreme Court would have accepted as invoking its jurisdiction a less explicit petition, say, one asserting only that the evidence at the formal hearing suggested significant misconduct, but, perhaps, not. Whichever needs not be resolved, however. The Commission cannot walk back its unambiguous declaration that "misconduct [was] established" at the formal hearing, which plainly is a prejudgment.

[2] *Gibson* is, relatively speaking, a somewhat dated opinion. But longevity does not undermine an opinion's precedential value. To the contrary. *Marbury* v *Madison*, 5 US 137 (1803), and a legion of other opinions are ancient but still viable. An opinion loses precedential value only if overruled, which *Gibson* has never been, even inferentially, nor has it even been questioned or criticized. To the contrary, it has been cited multiple times, meaning that it is far from dead, let alone interred. Westlaw identifies 22 opinions, most from Michigan, a few from elsewhere, which cite *Gibson*.

Two things about this matter are unique and appear to distinguish it from *Gibson*. Both are just apparent, however, not real, so neither is a significant distinction. First, the Supreme Court ordered the Commission, if it wished to proceed, not only to itself refile its petition, but to alter the petition to express an opinion on the petition's merits, what it had not done originally. The Supreme Court did not, however, require the Commission to prejudge the claims of misconduct by Judge Brennan. To refile, the Commission had to express an opinion regarding "the substance and/or the merits" of any petition, but it was not required to file another petition. The Commission chose to file again, so it chose to prejudge what it would have to later adjudicate.

Granted, the Supreme Court put the Commission in a difficult spot. It could decline, to avoid opening itself up to a motion like this one, pursuing an interim suspension, which it thought warranted, or it could act as it did, risking this motions. If it did the latter, in the manner prescribed by the Supreme Court, which was the only effective way to proceed, resulted a prejudgment which was "necessitated by the exigencies of the circumstances." That sounds like a defense, but is not, *Gibson* held. The disqualifying remarks in that case were necessitated by having to resolve the prosecution of Mr. Gibson's compatriot. Nonetheless, a recusal was necessary. So is, therefore, recusal of the Commission, -- because there remains a remedy.

Second, replacing the Commission will be more cumbersome than would have been replacing the trial judge in *Gibson*. Reassigning that case to a fellow judge from the same Circuit or to a visiting judge assigned by SCAO would have been disruptive, but not very. Requiring the Commissioners to resign and be replaced by would be cumbersome, but manageable since specifically authorized by MCR 9.202(C)(2). Therefore, the Rule of Necessity does not apply. That rule allows a tribunal to hear a matter from which it would otherwise be disqualified when, but only when, "the machinery of the law furnishes no other means or tribunal to hear and

determine the matter." That necessity "must be imperative, in the determination of which the greatest care should be exercised." *Higer v Hansen*, 170 P2d 411, 413 (Idaho 1946). See also *United States v Will*, 449 US 200, 213-215; 101 S Ct 471; 66 LE Ed 2d 392 (1980). There is no imperative necessity in this case because MCR 9.202(c)(2) furnishes a way to have it heard.

Nor, finally, does MCR 9.219's authorizing the Commission to petition the Supreme Court for interim suspensions mean that doing so cannot ever be a disqualifying prejudgment because every such petition entails a pre-de-novo-review assessment of the evidence. That is essentially what the Examiners argued back in December 2018 in reply to Judge Brennan's response to their motion for permission to file a petition for her interim suspension. In other words, Judge Brennan expects the Examiners to argue that MCR 9.219 works, albeit without saying so, an exception to MCR 2.003(C)(1)(e) for petitions for interim suspension. Judge Brennan respectfully disagrees. The argument ignores this case's unique circumstance.

As best counsel can determine, petitions for interim suspension are filed and interim suspensions are ordered at the beginning of judicial discipline cases, well before the presentation of proofs at a formal hearing, not afterwards. Filing a petition then cannot be deemed a pre-judgment of de novo review by the Commission because there is not yet anything to review. In that situation, it cannot be contended in support of a petition, that "misconduct [has been] established." At most, misconduct is only alleged, which is much different. In that situation, therefore, it is realistic, not just a legal fiction, to believe that, after development at a formal hearing, the Commission might comfortably conclude that things developed differently than anticipated very early on, so that what was thought might be serious misconduct did not happen or, if it happened, was less serious. In other words, it is realistic to believe that a petition for interim misconduct was not a pre-judgment, but a preliminary call, not unlike a preliminary

injunction which does not pan out on further development, so it is not made permanent after trial. Such an outcome does not appear realistic when an interim suspension is sought after all the proofs and just weeks before de novo review by the Commission.

B. Motion to Administratively Close this Matter.

Ordinarily, disqualifications play out quite simply. The affected judge or tribunal ceases all activity in the matter, other than memorializing the disqualification, steps aside, and a replacement judge or tribunal is assigned. Then, the matter continues apace. As noted earlier, things cannot proceed so simply in this matter. The entire Commission, save Judge Cortes, must resign. Otherwise, the case will go into hibernation. The case cannot be reviewed, the Commission cannot make a recommendation to the Supreme Court, and, without a recommendation, that Court cannot take any action. It is only "[o]n recommendation of the [J]udicial [T]enure [C]ommission," that the Supreme Court may discipline a judge. Const 1965, Art 6, § 30(2). This case can be restarted if, but only if, all Commissioners resign and are replaced per MCR 9.202(C). Accomplishing all that will take some time, however, so administratively closing the case until then seems the most prudent.

Respectfully submitted,

By:*/s/ Dennis C. Kolenda*

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