STATE OF MICHIGAN

IN THE SUPREME COURT

Complaint Against:

HON. BRUCE U. MORROW 3rd Circuit Court Detroit, Michigan	Case No. 161839 Formal Complaint No. 102

Hon. Bruce Morrow's Petition to Reject or Modify Commission's Recommendation

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Filed under AO 2019-6

Oral Argument Requested

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Table of Contents

Index of Authorities

Cases

Other Authorities

Rules

Constitutional Provisions

Statement of Jurisdiction

On the Judicial Tenure Commission's recommendation, this Court may censure, suspend, retire, or remove a judge for misconduct in office and "conduct that is clearly prejudicial to the administration of justice." Const. 1963, art VI § 30. A respondent may ask this Court to review the Commission's recommendation by filing a petition within 28 days after entry of the Commission's order. MCR 9.122(A)(1).

Respondent Hon. Bruce E. Morrow filed this petition within 28 days of the Commission's June 17, 2021 *Decision and Recommendation for Discipline.*

Questions Presented

I

Under the due-process clause, an individual cannot serve as accuser and judge in the same case. The members of the Commission issue a complaint. Then the same members decide whether the evidence supports their own charges. Under *Williams v Pennsylvania*—an opinion this Court has not yet considered—is this due-process violation is a structural error that invalidates this proceeding?

Judge Morrow answers: Yes.

The Commission answers: No.

This Court should answer: Yes.

II.

MCR 9.231(B) required the Master to designate a "place" for a hearing. A "place" is a physical location. The Master did not follow this rule, and none of the Court's pandemic-era orders can justify failing to apply the plain text of controlling rules. Are the underlying proceedings therefore invalid?

Judge Morrow answers: Yes.

The Commission answers: No.

This Court should answer: Yes.

III.

Hocking held that a judge's inappropriate comments on the bench were not misconduct. The Commission tries to avoid *Hocking* by arguing that Judge Hocking's remarks were on the bench, while Judge Morrow's were off the bench. Under Michigan law, however, that makes Judge Morrow's comments *less* serious, not more. Because Judge Hocking's comments were not misconduct, should the Court hold that Judge Morrow's comments were not misconduct either?

Judge Morrow answers:	Yes.
The Commission answers:	No.
This Court should answer:	Yes.

IV.

In *Gorcya,* a judge—while on the bench—made abusive comments like threatening a nine-year old that she'd have to "go to the bathroom in public" if she didn't comply with her orders. This judge received public censure. Judge Morrow is accused of referring sex and using curse words in private conversations with adults. If the Court finds misconduct, is public censure the maximum sanction?

Judge Morrow answers:	Yes.
The Commission answers:	No.
This Court should answer:	Yes.

Introduction

The Judicial Tenure Commission's "decision and recommendation" in this case is fraught with error. Its most glaring problem is a constitutional error—one that invalidates this entire proceeding. In *Williams v Pennsylvania*, 136 S Ct 1899 (2016), the United States Supreme Court held that "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Id.* at 1905. *Williams* applied this rule to a judge who, before taking the bench, did nothing more than authorize another prosecutor to seek the death penalty.

The Commission is both accuser and adjudicator. It authorized a complaint under MCR 9.224(A); that's an accusatory role. Then the Commission issued a "decision and recommendation" under MCR 9.244(A); that's a judicial role. This dual role violated respondent Hon. Bruce Morrow's due-process rights.

The Commission will argue that the Court already rejected Judge Morrow's constitutional argument. But that's not true. This Court's last foray into the constitutionality of subchapter 9.200 was in 2001—a decade and a half before *Williams*'s clarification of the governing law. See *In re Chrzanowski*, 465 Mich 468; 636 NW2d 758 (2001). It was also before the Supreme Court adopted an objective standard of judicial bias in *Caperton v AT Massey Coal Co, Inc*, 556 US 868 (2009).

The Commission will also tell the Court that the due-process violations in its structure are irrelevant because it only makes a recommendation. That's not true as a factual matter because the Commission must make a "decision" and issue "written findings of fact and conclusions of law." MCR 9.244. And it's not true as a legal matter because combining accusatory and adjudicative functions is so serious a violation of the due-process clause that *Williams* treats it as a structural error. It doesn't matter whether the conflicted individual cast a deciding vote; their participation irredeemably taints the entire process.

The problems with this proceeding go beyond this violation of constitutional law. Michigan Court Rule 9.231(B) required the Master to set a "place" for Judge Morrow's hearing. A "place" is a physical location. Instead

of following the court rules, the Master held a virtual hearing. That was an error. The Michigan Court Rules are not optional, and nothing in this Court's pandemic-era orders excused the Master from following that rule.

The Board also misapplied *Matter of Hocking*, 451 Mich 1; 546 NW2d 234 (1996), which held that a judge's crude and insensitive comments on the bench were not misconduct. *Hocking*'s rule undercuts all of the Commission's claims here. So the Commission tries to distinguish *Hocking* by citing the fact that Judge Hocking made his comments on the bench. But misconduct on the bench is *more* serious than misconduct off the bench. If offensive comments *on* the bench are not misconduct, then offensive comments *off* the bench are not misconduct either. The Commission's conclusion to the contrary does violence to the usual rules that apply in disciplinary matters.

In addition, the Commission's "decision and recommendation" advocates a sanction that is grossly out of step with this Court's precedent. This Court publicly censured a judge who made abusive comments to *children* while *on the bench*. *In re Gorcyca*, 500 Mich 588; 902 NW2d 828 (2017). This judge asked a child if she wanted to go to the bathroom "in public," weaponizing the most intimate and vulnerable position that most children can imagine. In this case, the Commission is recommending a 12-month suspension for Judge Morrow's allegedly inappropriate comments to two adults off the bench. If these comments to children while on the bench warrant only public censure, there can be no justification for a 12-month suspension based on analogous comments to adults while off the bench.

The Court should follow *Williams* and vacate the Commission's "decision and recommendation." It should then revise subchapter 9.200 of the Michigan Court Rules to comply with *Williams*. Then, and only then, the Commission should begin this process anew—affording to Judge Morrow his right to an in-person hearing under the Michigan Court Rules, applying *Hocking*, and evaluating any discipline in light of *Gorcyca*.

Relevant Facts

A. Background on Judge Morrow

Judge Morrow has been a judge at the Wayne County Circuit Court since his election in 1998. *Answer*, ¶1. Before that, he served as a judge at the Recorder's Court.

Since taking the bench, Judge Morrow has tried to humanize the judicial process, to treat all participants with empathy and respect, and to model humility. Vol. III, pp. 669-670, 794-795; Vol. IV, p. 969. Part of those efforts is helping jurors confront their own biases. Vol. III, p. 795. He also mentors inmates. *Id.*, p. 688. As attorney Jeffrey Edison testified, Judge Morrow "encourage[s] those who have been caged for many years, sometimes caged for life, and tr[ies] to uplift their spirits and enhance their quality of life." *Id.*

People across the country recently discovered these qualities in Judge Morrow when news outlets like the Washington Post and the ABA Journal covered the story of Edward Martell.[1] Martell appeared before Judge Morrow 16 years ago as a defendant for selling crack cocaine. Martell told CNN that Judge Morrow issued a challenge that changed his life:

> I will never forget what he told me. He said, "Mr. Martell, you don't have to be out here selling drugs. You have greatness within you. I challenge you, be the CEO of a Fortune 500 company."

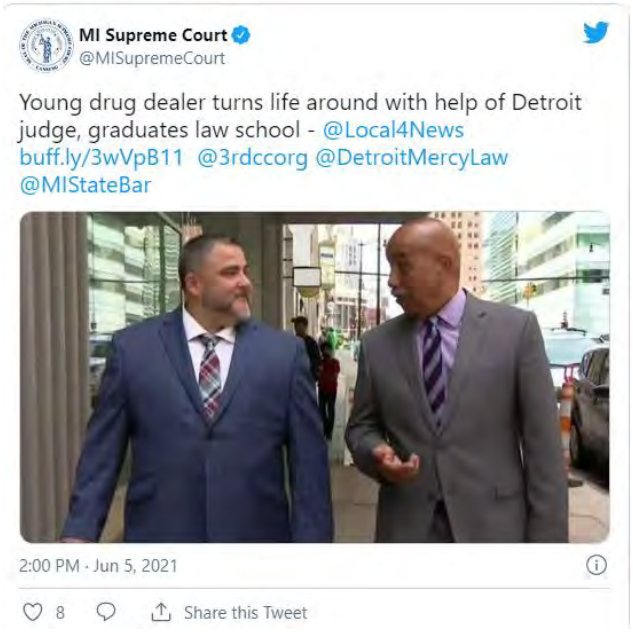
Alaa Elassar, *A judge swore in a lawyer who was once a drug dealer in his courtroom 16 years ago*, CNN (May 31, 2021). That recognition of his humanity changed Martell's life. He attended college and then law school. In May 2021, Judge Morrow swore in Martell as a member of the Michigan bar. In Martell's

[1] See, e.g., Kim Bellware, *A judge gave a drug dealer a second chance. Sixteen years later, he swore him in as a lawyer*, Washington Post (May 25, 2021); Debra Cassens Weiss, *Years after challenging drug dealer to change, judge swears him in as a lawyer*, ABA Journal (May 27, 2021).

words, "Morrow cracked that door open for me and pointed me in the right direction but he never left me." *Id.*

This episode is quintessential Judge Morrow. By simply recognizing Martell's inherent value as a human being, he was the catalyst for life-altering change. He's played a similar role in the lives of countless defendants and jurors, as demonstrated by the attached sample of the hundreds of similar letters that Judge Morrow has received.

This Court has concluded that Judge Morrow's methods can be too unorthodox at times. *In re Morrow,* 496 Mich 291; 854 NW2d 89 (2014). But it has also publicly lauded Judge Morrow:



B. The Matthews case

This case concerns Judge Morrow's attempts to educate two prosecutors who were struggling with basic trial mechanics. These issues arose during the 2019 trial of James Matthews for the 2003 murder of Camille Robinson.[2] William Noakes was the defense attorney, and Ashley Ciaffone and Anna Bickerstaff were the prosecutors Vol. I, pp. 31-32; Vol. II, p. 376.

[2] *People v Matthews,* Wayne County Circuit Court Case No. 18-7023-01-FC.

Although the prosecution didn't charge Matthews with crimes relating to sexual activity, Matthews told police that he had a sexual encounter with the victim before her death. Vol. I, p. 31. The prosecution stressed this sexual element during trial, leading to some of the discussions at issue here.

Matthews was a difficult case for the prosecution. The homicide occurred 16 years before trial, one of the key witnesses had a checkered background, and the press was critical of the prosecution's handling of the case. Vol. II, pp. 462-463. One issue involved "other acts" evidence under MRE 404(b). The prosecution wanted to introduce evidence that Matthews committed a 1999 homicide. Vol. III, p. 757. Judge Morrow excluded that evidence under MRE 404(b) at a pretrial hearing. Vol. I, pp. 190-91. The Court of Appeals issued an interlocutory ruling that allowed the prosecution to renew its attempt to admit this evidence at the close of the prosecutor's case or sooner. Vol. III, p. 757. Ciaffone and Bickerstaff never renewed their Rule 404(b) motion during their case-in-chief. Vol. I, p. 279. They couldn't do so through rebuttal witnesses because there was no testimony about those homicides to rebut. *Id.*, pp. 283-284. Ciaffone renewed the Rule 404(b) motion on the last day of trial and Judge Morrow denied it. *Id.*, p. 279.

Another issue concerned alleged statements from the defendant's siblings. Emory Matthews, the defendant's brother, supposedly told a police officer in 2005 that the defendant confessed to multiple homicides. Vol. I, p. 190; Vol. II, pp. 498-99. By the time of trial, he refused to confirm that statement. Vol. III, p. 760. He made the officer in charge, Lt. Derrick Griffin, aware of that fact before trial. *Id.* The defendant's sister also notified Lt. Griffin that she wouldn't testify in a manner consistent with statements attributed to her in police reports. *Id.*, p. 761-762. Lt. Griffin told Ciaffone or Bickerstaff that the defendant's siblings wouldn't provide favorable testimony. *Id.*, p. 763. Nevertheless, Ciaffone told the jury in her opening statement that Emory Matthews would testify that James Matthews admitted to *two* homicides. Vol. I, p. 190; Vol. II, p. 498-99.

Throughout the trial, the prosecution needed reminders from Judge Morrow about how to form proper arguments and questions. During her opening statement, for example, Ciaffone warned the jury against "red

herrings." Vol. I, pp. 176-177. Judge Morrow had to stop Ciaffone and remind her not to include improper arguments. *Id.,* p. 178.

The prosecution ran into trouble again when Ciaffone examined the defendant's neighbor. This witness—who was supposed to identify the defendant—only identified the defendant by saying, "I think that's him." Vol. I, p. 184. Ciaffone "confront[ed]" the neighbor with a transcript of his previous testimony, even though the neighbor never said that he was unable to recall his previous testimony. *Id.,* pp. 200-201. Judge Morrow had to explain that Ciaffone was not refreshing the witness's recollection properly. *Id.,* pp. 202-203.

Ciaffone had repeated problems with leading questions, even after Judge Morrow corrected her. *Id.,* pp. 515-16. Bickerstaff had difficulties during the trial, too, particularly with beginning most of her questions with the word *and*. Vol. I, pp. 257, 259; Vol. II, pp. 379-380.

On top of these issues, the prosecution unnecessarily introduced a complicated issue involving DNA evidence. They called a forensic biologist to testify about Wayne County's fifteen-year backlog in processing DNA evidence. Vol. I, pp. 239, 241, 244. Yet the defendant acknowledged that he had sexual intercourse with the victim. *Id.,* p. 299. He testified, "She couldn't have sex like we normally do because we didn't want her to abort the baby, which is why she had the miscarriage the other time." *Id.,* p. 300.

On June 13, 2019, the jury returned with a hung verdict and the court declared a mistrial. Vol. I, p. 80. The prosecutor's office soon filed a motion to disqualify Judge Morrow from the retrial. Vol. I, p. 288. After the transfer in the *Matthews* case, Judge Hathaway granted the prosecution's Rule 404(b) motion in part. Vol. I, pp. 289, 350.

C. Judge Morrow's conversation with Bickerstaff

On the second day of trial, Noakes asked for a recess. Vol. I, pp. 41-42. Ciaffone left the courtroom. *Id.,* p. 42. Bickerstaff asked Judge Morrow for feedback, saying something like, "Was that line of questioning any better?" Vol. II, p. 383-84. Judge Morrow said Bickerstaff's examination was better, but he had another critique for her. Vol. II, p. 385. He stood up from the bench

and said he would talk to Bickerstaff at counsel's table because giving the critique from the bench might make her blush. Vol. III, p. 700. Judge Morrow has a voice that's easy to overhear, and he was trying to minimize airing criticism in public. *Id.*, p. 895.

Judge Morrow sat at counsel's table next to Bickerstaff, who was in the middle of three seats. Vol. II, p. 383. Lt. Derrick Griffin of the Detroit Police Department sat to Bickerstaff's left and Judge Morrow took the only vacant seat on Bickerstaff's right.[3] Vol. I, p. 38.

Prosecutors decide how to position chairs around their table. Vol. III, p. 719. In this instance, the three chairs were all on one side of the table. *Id.*, p. 721; Vol. III, p. 749. And the courtroom was "jam-packed." Vol. I, p. 38. The arms of the chairs were touching because that was the only way for all three chairs to fit behind the table. *Id.* Judge Morrow sat at an appropriate distance from Bickerstaff and did not touch her. Vol. III, pp. 721, 724-725.

Judge Morrow then illustrated the problem with Bickerstaff's examination by using the development of intimate relationships as an analogy. Vol. II, p. 386. He said something like, "When a man and a woman start to get close, what does that lead to?" *Id.* Bickerstaff said she didn't understand. *Id.* After Judge Morrow repeated his question, Bickerstaff said, "Do you mean sex?" *Id.* Judge Morrow said that foreplay leads to sex, and asked Bickerstaff, "[W]ould you want foreplay before or after sex?" *Id.* Bickerstaff didn't say anything in response. *Id.* When he asked the question again, Bickerstaff answered, "Before." *Id.*

Bickerstaff testified that it was unclear whether the "you" in Judge Morrow's question was Bickerstaff herself or people in general. Vol. I., p. 387. Judge Morrow meant the question as a general one. *Answer*, ¶10.

Judge Morrow stated that the climax of the medical examiner's testimony is the cause and manner of death. Vol. I, p. 45. He didn't use the word "climax" in its sexual sense. *Answer*, ¶¶12-13. He said something like, "You start with all the information from the report, all the testimony

[3] At the time, Lt. Griffin's rank was sergeant. Vol. III, p. 747.

crescendos to the cause and manner of death, which is the sex of the testimony." *Id.*, ¶13. Judge Morrow said a lawyer should "tease the jury with the details of the examination." *Id.*, ¶14.

This conversation lasted a few minutes. Vol. III, p. 704. Lt. Griffin overheard it all. Vol. III, p. 751. The courtroom staff was present during this conversation. *Id.*, p. 707. So was Joe Kurily, an attorney with the Wayne County Prosecutor's Office. *Id.*, p. 698. During Bickerstaff's conversation with Judge Morrow, he was about 10 feet away. *Id.*, p. 703. Kurily didn't overhear the conversation but he saw nothing unusual in Judge Morrow's or Bickerstaff's conduct. Vol. III, p. 709.

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

Judge Morrow often speaks to attorneys about their performance at trial. See, e.g., Vol. III, p. 719-720. When the jury was deliberating on June 12, 2019, Judge Morrow invited Ciaffone, Bickerstaff, and Noakes into his chambers. Vol. I, p. 50. They were free to decline Judge Morrow's invitation. Vol. III, p. 882. The door to Judge Morrow's chambers remained open during the conference. *Id.*, p. 884.

At the time, Noakes had a motion for directed verdict still pending. Vol. I, pp. 52-53. Judge Morrow believed that Ciaffone cited the wrong standard when responding to the motion. *Id.* When the attorneys walked into his chambers, he had a copy of the Michigan Court Rules for both Ciaffone and Noakes opened to the relevant rule. *Id.*, pp. 5. He explained that Ciaffone had misstated the standard but that he didn't want to embarrass her in court. Vol. I, pp. 53-54.

Judge Morrow asked Ciaffone about admitting evidence that the defendant's DNA was on the victim's vaginal swab. *Id.*, pp. 55-56. He pointed out that the prosecution didn't charge Matthews with criminal sexual conduct, so the evidence was irrelevant. *Id.* Ciaffone tried to convince him that the DNA evidence was relevant "because it showed that they had close, recent contact near in time to the homicide," but Judge Morrow disagreed. *Id.*, p. 56. According to Ciaffone, Judge Morrow said, "All it shows is that they fucked. Like, that's all it shows, that they fucked." *Id.*, p. 57.

During this discussion, Ciaffone raised the defendant's statement that he had "non-traditional sex" or "not normal sex" with the victim. Vol. I, pp. 59, 296-97. That led to a conversation about what "non-traditional sex" means. *Id.* Ciaffone said that "non-traditional sex" means something other than intercourse. *Id.* This distinction mattered because Ciaffone thought that Matthews's statement was inconsistent with the DNA evidence. Vol. I, pp. 58-59. Judge Morrow felt that statement was consistent with that evidence because, in his view, Matthews meant that they had what Judge Morrow called "doggy style" intercourse. *Id.,* p. 60. He stated that Ciaffone's view was the product of her own bias and inexperience. Vol. I, p. 59.

Ciaffone argued that Judge Morrow was incorrect because Matthews stated that he "couldn't penetrate [the victim] because she could have a miscarriage." Vol. I, p. 62. According to Ciaffone, Judge Morrow laughed and said, "Oh, so like what—like, he [is] saying that, like, what he's working with … was so big that it would cause a miscarriage[?]" *Id.*, p. 63. Ciaffone testified that she took "what he's working with" as a reference to the defendant's genitals. *Id.* She didn't remember Judge Morrow using the word "dick." *Id.*, p. 64. Bickerstaff is the only person who testified that he said "dick." Vol. II, pp. 401-402.

Judge Morrow also criticized Ciaffone's voir dire as too indirect. Vol. I, p. 66. He originally raised the issue during Ciaffone's voir dire, asking, "What is it that you really want to ask?" Vol. II, p. 488. In chambers, he said something like, "If I want to have sex with someone on the first date, what do I ask them?" Vol. I, p. 66. When no one responded, Judge Morrow said, "I would ask them, 'Have you ever had sex on a first date?'" Vol. I, pp. 66-67. Then he asked, "What's the second question I would ask them?" *Id.* Again, no one answered. Judge Morrow said, "I'd ask, 'Would you have sex with me on a first date?'" *Id.* He added, "You don't ask questions like, 'Do you want to get married?' or 'Do you want to have kids?' Like, those things would come later. Right? So just ask the question you want to know." *Id.*

E. The post-conference discussion

After the conversation in chambers, Ciaffone and Bickerstaff walked to counsel's table. Vol. I, p. 69. Ciaffone was standing in front of the

prosecutor's table and Bickerstaff was standing behind a chair when Judge Morrow spoke to them. *Id.*, p. 321. Judge Morrow asked Ciaffone how tall she was: "What are you, like, five-one or five-two?" Vol. I, p. 70. Ciaffone said something like, "No, but I accept that, Judge." *Id.* Bickerstaff volunteered, "Judge, I'm five-three for context." *Id.*

Judge Morrow then estimated Ciaffone's height as four feet, ten inches. Ciaffone said that she's "four-eleven and a half." Vol. I, p. 70. Judge Morrow asked if Ciaffone weighed around 105 pounds. Ciaffone said, "Judge, you're not supposed to ask a girl her weight." *Id.* Then Judge Morrow asked Bickerstaff if she was 117 pounds. *Id.* Bickerstaff said, "That's very generous but, no, Judge." *Id.* Judge Morrow responded, "Well, I haven't assessed you for muscle mass yet." *Id.*

Bickerstaff testified that Judge Morrow "looked [Ciaffone] down and up once, and then he looked at [Bickerstaff] down and up once." Vol. II, p. 408. When asked about how Judge Morrow looked at her, Ciaffone testified, "I think that the whole encounter with regards to the height and the weight situation was entirely improper, and you can toss in how he looked with his eyes as part of that whole thing." Vol. I, p. 322.

F. Chief Bivens and Detective Kinney's investigation

After learning about the conversations with Judge Morrow, Athina Siringas (chief of special prosecution) asked Ciaffone and Bickerstaff to write a memo on their interactions with Judge Morrow. Vol. I, p. 83. Later, she asked for affidavits. Vol. II, p. 415.

James Bivens is the chief of investigations at the Wayne County Prosecutor's Office. Vol. I, p. 89. At Prosecutor Kym Worthy's direction, Chief Bivens began to investigate the matter. Vol. V, p. 1189. He assigned JoAnn Kinney, a retired homicide investigator, to interview witnesses and prepare a report. Vol. I, p. 88.

Detective Kinney interviewed Ciaffone and Bickerstaff separately. Vol. I, p. 304. At the conclusion of her investigation, Detective Kinney called Ciaffone and Bickerstaff into her office and asked them to review "Q&A" summaries that she drafted based on their interviews. Vol. I, p. 90. When

Bickerstaff and Ciaffone walked out of Detective Kinney's office, Bickerstaff told Ciaffone "that there was a mistake in hers." Vol. I, p. 91. According to Ciaffone, she appeared concerned. *Id.*, p. 307. Ciaffone told Bickerstaff to tell Detective Kinney. *Id.* When Bickerstaff said she was too nervous to do so, Ciaffone told her, "[Y]ou've got to go back in there[.]" *Id.*, p. 307. But Bickerstaff never corrected the error. Vol. II, p. 424.

Detective Kinney gave her Q&A statements and notes to Chief Bivens. Vol. III, p. 832. Those notes indicate that Bickerstaff said, "I know what he was trying to do." *Hearing Exhibit N* (Kinney/Bivens notes). Detective Kinney also testified that Bickerstaff said, "I know what he was trying to do." Vol. III, p. 833. In these proceedings, however, Bickerstaff stated that she "does not know why Judge Morrow said the things he said to her." Vol. IV, p. 945-46. See also *Hearing Exhibit L* (letter); *Hearing Exhibit M* (stipulation).

G. Bickerstaff's false allegation

Chief Bivens submitted a report about Bickerstaff's and Ciaffone's conversations with Judge Morrow to Prosecutor Worthy. Vol. II, p. 421. It summarized Bickerstaff's comments this way: "She felt that he was trying to hit on her in an around about way, felt it was improper for a judge to be discussing sex with her regarding a homicide trial." Vol. V, pp. 1184, 1198; *Hearing Exhibit N*. Chief Bivens also testified that Bickerstaff told him that Judge Morrow was trying to "hit on" her. Vol. V, p. 1174-75.

When interviewed by Disciplinary Counsel, Bickerstaff said she had never seen Chief Bivens's report before. *Hearing Exhibit M* (stipulation). Under oath, Bickerstaff admitted that she *did* review Chief Bivens's report. Vol. II, pp. 421-22. She also testified that she noticed the false statement about Judge Morrow "trying to hit on her." *Id.* But Bickerstaff never told Chief Bivens about this significant error in his report. Vol. V, p. 1199.

H. Proceedings before the Master and Judicial Tenure Commission

This Commission authorized Disciplinary Counsel to prepare a formal complaint against Judge Morrow and "directed that it be filed." *Complaint*, p. 1. Count One alleges "inappropriate use of sexually graphic language"—

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

After a five-day evidentiary hearing, the Master concluded that Disciplinary Counsel established misconduct. For Count One, the Master concluded that Judge Morrow committed misconduct by sitting next to Bickerstaff and engaging in "unnecessary and inappropriate sexual dialogue." *The Master's Findings of Fact and Conclusions of Law* at 4. This conduct, according to the Master, violated Michigan Code of Judicial Conduct Canon 2(B), 3(A)(14), and 3(A)(3). For Count Two, the Master found "inappropriate use of sexually graphic language" in Judge Morrow's "analogizing voir dire to asking for sex on a first date," referring to Ciaffone's sexual experience, and his alleged comment about "the size of the defendant's genitalia[.]" *Id.* at 8. The Master also faulted Judge Morrow for using the word *fuck*. *Id.* at 9. For Count Three, the Master concluded that Judge Morrow improperly asked about Ciaffone's and Bickerstaff's height and weight in violation of Canon 3(A)(14) and Canon 3(A)(3).

The Commission adopted all of the Master's findings and conclusions. Unlike the Master, the Commission also concluded that Judge Morrow engaged in gender discrimination.

Standard of Review

This Court reviews the Commission's recommendations and findings of fact de novo. *In re Chrzanowski*, 465 Mich. 468, 478; 636 NW2d 758 (2001). Disciplinary Counsel must prove misconduct by a preponderance of the evidence. See *In re Noecker*, 472 Mich 1, 8; 691 NW2d 440 (2005).

Argument 1: Due Process

Under the due-process clause, an individual cannot serve as accuser and judge in the same case. The members of the Commission issue a complaint. Then the same members of the same Commission decide whether the evidence supports their own charges. Under *Williams v Pennsylvania*—an opinion this Court has not yet considered—this due-process violation is a structural error that invalidates this proceeding.

No state may "deprive any person of life, liberty, or property, without due process of law[.]" US Const Am XIV, §1. This due-process right protects public employees who are subject to termination only for cause. See *Gilbert*, 520 US at 928. A Michigan judge can be removed only for cause. See Const 1963, Art VI, §30(2). Judge Morrow is therefore entitled to due process before suspension or removal. *Gilbert*, 520 US at 928. See also *In re Chrzanowski*, 465 Mich 468, 483; 636 NW2d 758 (2001).

Due-process requirements are flexible. *Gilbert*, 520 US at 929. But there can be no reasonable dispute that the due-process clause entitles Judge Morrow to an unbiased decision-maker. This right is a "basic requirement of due process." *In re Murchison*, 349 US 133, 136 (1955).[4]

Under *Williams v Pennsylvania*, 136 S Ct 1899 (2016), the Judicial Tenure Commission is objectively biased because it acts as both accuser and judge. This bias irredeemably taints this entire proceeding and, per *Williams*, is not subject to harmless-error analysis. In other words, *Williams* requires that the Court vacate the Commission's decisions, revisit the structure of Michigan's judicial-discipline system, and begin this process anew once subchapter 9.200 complies with the due-process clause.

[4] Other state supreme courts have reached that conclusion as well. See *In re Conduct of Pendleton*, 870 NW2d 367, 381 (Minn 2015); *In re Commission on Judicial Tenure and Discipline*, 916 A2d 746 (RI 2007); *Mosley v Nevada Comm'n on Judicial Discipline*, 22 P.3d 655, 659 (Nev 2001).

1.1 Under *Williams*, an individual cannot be accuser and judge in the same case.

Williams was a post-conviction case—and, therefore, a civil action. See *Pennsylvania v Finley*, 481 U.S. 551, 556; 107 S Ct 1990 (1987) (holding that a post-conviction proceeding "is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature"). A jury had convicted Terrance Williams of homicide. During the underlying trial, the prosecutor contacted a supervisor for permission to seek the death penalty. *Williams*, 136 S Ct at 1903. This supervisor—Ronald Castille—authorized pursuit of the death penalty with a short note on a memo. *Id.*

Thirty years later, Castille was the Chief Justice of the Pennsylvania Supreme Court. *Williams*, 136 S Ct at 1904. When Williams's post-conviction challenge to the death penalty made its way to that court, Williams asked Castille to recuse himself. *Id.* Castille refused, and his court reinstated Williams's death penalty. *Id.*

The U.S. Supreme Court held that Castille's participation in this civil proceeding was unconstitutional: "… [U]nder the Due Process Clause[,] there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams*, 136 S Ct at 1905. The Court explained that "[d]ue process guarantees 'an absence of actual bias' on the part of a judge." *Id.*, quoting *Murchison*, 349 US at 136. It adopted "an objective standard that, in the usual case, avoids having to determine whether actual bias is present." *Id*. Under that test, the question is not whether an adjudicator is actually biased but "whether, as an objective matter, the average judge in [their] position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Id.* (cleaned up).

There is an unconstitutional risk of bias "when the same person serves as both accuser and adjudicator in a case." *Williams*, 136 S Ct at 1905.[5] Neither the passage of time nor the judge's minimal role as accuser can avoid these

[5] The Court's choice of words is important: this rule applies to "accusers," not just prosecutors. The Commission is an accuser. MCR 9.224(A).

due-process concerns. *Id.* at 1907. This rule precludes a judge from participating in a case when they made a "critical decision" in that case as a prosecutor. *Id.* at 1906. The Court noted sound psychological reasons for this rule. When a judge adjudicates a matter in which they participated as prosecutor, there is "a risk that the judge would be so psychologically wedded to [their] previous position as prosecutor that the judge would consciously or unconsciously avoid the appearance of having erred or changed position." *Id.* at 1906 (cleaned up). A judge may even place greater weight on their prior impressions than on the parties' arguments. *Id.*

As for Williams, the U.S. Supreme Court held that Castille's role in the "critical choice" to seek the death penalty was enough to make his participation as chief justice unconstitutional. *Williams,* 136 S Ct at 1907-8. Despite his minimal involvement, this due-process violation was so serious that it amounted to structural error. *Id.* at 1909. Harmless-error analysis did not apply. *Id.* The state had to hold another hearing—without Castille. *Id.* at 1910.

Williams relies on *In re Murchison,* 349 US 133, 136 (1955), and *Caperton v A T Massey Coal Co,* 556 US 868 (2009). In *Murchison,* the Court held that a Michigan judge violated the petitioners' rights by charging them with criminal contempt, investigating their alleged contempt, and then convicting and sentencing them for contempt. *Murchison,* 349 US at 135. The Court explained, "It would be very strange if our system of law permitted a judge to act as grand jury and then try the very persons accused as a result of his investigations." *Id.* at 137. Once an attorney participates in a case as accuser, they cannot serve as judge, too. *Id. Williams* expanded *Murchison*'s rule to a judge who had only a brief, supervisory role as prosecutor.

Caperton contributed another important piece. It rejects the idea that judicial bias is a subjective phenomenon and, instead, adopted objective standards for recusal. *Caperton,* 556 US at 872. The case arose when a lawyer named Brent Benjamin received substantial contributions to his campaign for the state supreme court from A.T. Massey Coal Co.'s president. *Id.* at 873. A.T. Massey's president knew that the state supreme court would review a $50 million verdict against his company. Benjamin won the election, thanks in part to Blankenship's contributions, and then declined to recuse himself when

A.T. Massey Coal's case came before the court. The Court found the risk of bias was too high to be constitutionally tolerable. *Id.* at 881, 884.

Bias is an objective matter (*Caperton*) and due process prohibits combining the roles of prosecutor and judge (*Murchison*). *Williams* combined these principles to hold that participating in both key accusatory decisions and adjudication creates an objective risk of bias. That risk is so great that it's a structural error. *Williams,* 136 S Ct at 1910.

1.2 *Withrow* is inapplicable because it addresses judges involved in investigation, not accusation.

Before applying *Williams* to the Michigan Court Rules, it's helpful to consider a line of cases that this Court relied on when rejecting previous challenges to the Commission's structure.

That line begins with *Withrow v Larkin*, 421 US 35 (1975). A Wisconsin board of physicians concluded that the plaintiff, a Michigan doctor, engaged in "proscribed acts" while performing abortions in Wisconsin. *Id.* at 39. After an investigative hearing, the board recommended that the district attorney file a complaint to revoke the plaintiff's license and initiate criminal proceedings. *Id.* at 42. The plaintiff argued that this system was unconstitutional because the board was both investigator and adjudicator. *Id.* at 47. The U.S. Supreme Court disagreed, holding than an administrative agency may combine investigative and adjudicative functions. *Id.* at 52-53. It saw little risk that investigating the facts would lead a board member to form a particular view of the facts. *Id.* at 47. It also noted that many administrative agencies combine investigative and adjudicative functions, and that courts have rejected due-process challenges to this combination. *Id.* at 52.

The Court distinguished *Withrow* from *Murchison* based on the limited nature of the board's investigation: "When the Board instituted its investigative procedures, it stated only that it would investigate whether proscribed conduct had occurred. Later in noticing the adversary hearing, it asserted only that it would determine if violations had been committed which would warrant suspension of appellee's license." *Withrow,* 421 US at 54-55. The board knew its investigation would lead to an adjudication but had no

stake in the outcome. *Id.* at 54. The Court wrote, "The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing." *Id.* at 55. Board members would not be "so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position." *Id.* at 57-58.

Both *Williams* and *Withrow* remain good law.[6] So these cases establish a spectrum. See Wright and Miller, *Federal Practice and Procedure*, §8259 *Separation of Functions* (1st ed). On one end are cases like *Withrow,* in which a judge previously served in an investigatory role. The due-process clause does not prohibit serving as investigator and then serving as judge in the same case. *Withrow,* 421 US at 54-55. But "as investigation veers into something more like prosecution, a combination of functions will grow more problematic." Wright and Miller, § 8259. When a judge participates in a key accusatory decision, the combination of functions is so problematic that it amounts to structural error. *Williams,* 136 S Ct at 1910.

This distinction makes sense. Gathering evidence doesn't require the formation of an opinion, so investigation is unlikely to create the confirmation bias that *Williams* cited. Issuing a complaint based on that evidence, however, requires a hypothesis. Forming that hypothesis leads to confirmation bias. And when an adjudicator previously expressed an opinion on the case as an accuser, this dual role creates an objective appearance of bias.

The key question for this Court, therefore, is whether the Commission acts in an investigatory role as in *Withrow* or whether it participated in a key accusatory decision as in *Williams*. The answer, detailed below, is that the Commission participates in *the* key accusatory decision: whether to prosecute at all. Then it adjudicates those very claims. This structure is unconstitutional.

1.3 Michigan's judicial-tenure system is unconstitutional.

Article VI of Michigan's Constitution created the Judicial Tenure Commission. See Const 1963, Art VI, § 30. Section 30 directs this Court to

[6] See *Rippo v Baker,* 137 S Ct 905 (2017) (per curiam), (citing both *Williams* and *Withrow* as the standard governing judicial disqualification).

make rules governing the Commission. *Id.*, §30(2). To that end, this Court enacted subchapter 9.200 of the Michigan Court Rules, which directs the Commission to issue complaints and then decide whether its own allegations have merit.

The Commission can hire a staff, and any commission employee or outside counsel involved in investigating a judge may not participate in deliberations about whether to charge a judge.[7] See MCR 9.210(H)(2). But the Commission itself decides whether to issue a complaint:

> (A) Upon determining that there is sufficient evidence to believe that the respondent under investigation has engaged in misconduct, *the commission may issue a complaint* against that respondent.
>
> ***
>
> (C) *Upon issuing a complaint, the commission* shall petition the Court for the appointment of a master.

MCR 9.224 (emphasis added). These rules leave no room for doubt: it is the Commission itself that decides to pursue a disciplinary complaint. The Commission makes *the* key accusatory decision.

Once the Commission issues a complaint, a master conducts a hearing and issues a recommendation to the Commission. See MCR 9.231(A); MCR 9.236. The Commission then hears objections to the master's report, switching from accuser to judge. See MCR 9.241; MCR 9.244.

The Michigan Court Rules expressly require the Commission to make a decision about its own charges. Rule 9.244 is entitled "Commission

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[7] This separation of *investigatory* and adjudicative functions is unnecessary as a constitutional matter. *Withrow*, 421 US at 54-55. So the current court rules prohibit what is allowed (combining investigative and adjudicative functions) and allow what is prohibited (combining accusatory and adjudicative functions).

Decision." This rule directs the commission to issue "written findings of fact and conclusions of law, along with its recommendations for action…" MCR 9.244(B). So the Commission makes a "decision" on both factual and legal matters. It acts as a judge. Although the Commission may accept the master's conclusions, it's not required to do so. See MCR 9.244(B)(1).

The Commission claims that its role is limited to making a recommendation and nothing more. That's not true. The Commission "*must make written findings of fact and conclusions of law* along with its recommendations for action with respect to the issues of fact and law in the proceedings." MCR 9.244(B)(1) (emphasis added). Indeed, the very document in which the Commission claims that it makes no decisions at all is called "*Decision and* Recommendation for Discipline."

This blending of roles isn't just unconstitutional. It's also unsound as a practical matter. Confirmation bias (or "motivated reasoning") shapes how humans view evidence. People tend to view evidence through the lens of their pre-existing beliefs. See Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N C L Rev 1951, 1981 (2013). People also reject or misinterpret information that disproves their hypotheses. *Id.* at 1980. That's why *Williams* cites the "risk that the judge would be so psychologically wedded to [their] previous position as prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'" *Williams*, 136 S Ct at 1906.

Subchapter 9.200 guarantees confirmation bias because it makes the Commission level accusations and then issue "findings of fact and conclusions of law" on its own allegations. This built-in recipe for bias casts a shadow over every judicial-discipline case in Michigan.

This appearance of bias is especially concerning when the Commission reaffirms its original allegations after a master hears evidence in person and then rejects those allegations. And that happens often:

- In *In re Konschuh,* ___ Mich ___; ___ NW2d ____ (June 11, 2021), the master rejected most of the Commission's allegations—then the Commission re-affirmed almost all of its original allegations and

recommended removal.

- In *In re Morrow*, 496 Mich 291, 297; 854 NW2d 89 (2014), the master found misconduct under two of ten counts—then the Commission re-affirmed its original allegations for six more counts.

- In *In re Adams*, 494 Mich 162, 167-68; 833 NW2d 897 (2013), the master rejected the Commission's allegation that the respondent intended to defraud—then the Commission re-affirmed its original allegations, adding that no one could "possibly" view the matter differently. *Id.* at 168.

- In *In re Hultgren*, 482 Mich 358 (2008), the master found no misconduct—then the Commission re-affirmed all of its original allegations and recommended a 60-day suspension.

- In *Chrzanowski*, 465 Mich at 474-475, the master rejected most of the Commission's allegations and concluded that no discipline was warranted—then the Commission re-affirmed its original allegations and recommended a 12-month suspension. *Id.* at 475.

- In *In re Haley*, 476 Mich 180, 185-86; 720 NW2d 246 (2006), the master rejected the Commission's allegations—then the Commission re-affirmed its original allegations and recommended public censure.

Again and again, the Commission makes allegations, a neutral factfinder rejects them based on evidence and testimony, and then Commission simply sticks with its original position. The appearance of bias is overwhelming.

There's no doubt that members of the Judicial Tenure Commission are honest, faithful public servants. But judges are often unaware of their own

biases, just like any other person. That's why judicial bias is an objective issue. *Caperton,* 556 US at 872. That's also why *Williams* prohibits anyone who had a significant role in accusatory decision-making from serving as a judge. *Williams,* 136 S Ct at 1910.

The Court should apply that clear rule here and declare subchapter 9.200 unconstitutional.

1.4 Cases upholding Michigan's judicial-discipline system are outdated and contrary to *Williams*.

The Commission didn't have authority to rule on these constitutional arguments. But it rejected them anyway, stating that this Court "has already considered and rejected [the] argument in holding Michigan's judicial discipline system is constitutional, including in ways that differentiate the system from the problems found in *Williams*." See *Decision and Recommendation* at 17. It cites *In re Chrzanowski,* 465 Mich 468; 636 NW2d 758 (2001), *Matter of Del Rio,* 400 Mich 665; 256 NW2d 727 (1977), *Matter of Mikesell,* 396 Mich 517; 243 NW2d 86 (1976), and this Court's order denying superintending control in this case. *Id.*

The Commission's assertion is simply not true. The order denying Judge Morrow's complaint for superintending control doesn't analyze *Williams;* it only states that the Court "is not persuaded that it should grant the requested relief," which was superintending control. *Morrow v Judicial Tenure Commission,* 506 Mich 954; 958 NW2d 849 (2020). All of the other cases preceded *Williams* by over a decade and a half. They don't apply the structural-error rule articulated in *Williams* or *Caperton's* objective standard of bias, which are critical to *Williams's* holding. Nor do they recognize the distinction between investigation (*Withrow*) and accusation (*Williams*). The Commission's nothing-to-see-here approach is contrary to the facts.

More importantly, *Chrzanowski, Del Rio,* and *Mikesell* are wrong under current law. To understand these opinions and their significant constitutional errors, it's necessary to begin with one of the opinions driving their analyses: *Matter of Baun,* 395 Mich 28; 232 NW2d 621 (1975).

Baun concerned the Attorney Grievance Commission rather than the Judicial Tenure Commission. This Court held that Michigan's attorney-discipline process did not offend due process because the entity that files a complaint is not the same entity that adjudicates the complaint: "… [T]he State Bar Grievance Administrator found probable cause, prepared, filed and prosecuted the complaint. A hearing panel initially adjudicated the matter and then the State Bar Grievance Board reviewed it. *The functions are separate. The people [are] different in each instance*." *Id.* at 34 (emphasis added). The Court therefore applied *Withrow* to hold that the attorney-discipline scheme did not violate the due-process clause. *Id.* at 35.[8]

This Court misapplied *Baun* when it first considered a due-process challenge to the Judicial Tenure Commission in *Matter of Mikesell*, 396 Mich 517 (1976). The respondent argued "that the combined investigatory and disciplinary role of the Commission violates the constitutional rights to due process." *Id.* at 528. The Court rejected that argument. *Id.* at 91-92, citing *Baun*, 395 Mich at 35, and *In re Hanson*, 532 P.2d 303 (Alaska 1975). It quoted *Hanson* for the proposition that "due process does not forbid the combination with judging of such functions as prosecuting, investigating, and accusing …" *Mikesell*, 396 Mich at 531, quoting *Hanson*, 532 P.2d at 306. (That statement may have been debatable when the Court decided *Miskell*. It's now objectively wrong in light of *Williams*, 136 S Ct at 1910.)

The Court followed *Mikesell* one year later in *Matter of Del Rio*, 400 Mich 665; 256 NW2d 727 (1977). A judge challenged the Commission's "combined investigative, adjudicative, and disciplinary roles." *Id.* at 689. This Court held that the Commission has no disciplinary role at all because it only makes a recommendation. *Id.* It reasoned that discipline comes from this Court, not the Commission. *Id.* The Court also listed a number of cases approving the combination of "*investigative* and adjudicative roles in a single agency[,]" including *Withrow*. *Id.* at 690 (emphasis added). Ultimately, the Court held that the respondent failed to establish even a risk of prejudice: "…[T]his Court, like the United States Supreme Court in *Withrow* … does not believe

[8] *Baun* proves that the Commission's structure *is* unconstitutional. Its accusatory and adjudicative functions are *not* separate and the people are *not* different in each instance. *Cf. Baun*, 395 Mich at 35.

that the combination of the *investigative* and adjudicate roles in the Judicial Tenure Commission creates even a risk that due process guarantees could be violated." *Id.* at 738 (emphasis added).

The Court last considered the constitutionality of the Commission's double role in *Chrzanowski,* 465 Mich at 468. Another respondent in a judicial-discipline proceeding argued that the Commission's "'simultaneous' role as a prosecutorial, investigatory, and adjudicatory body [violated] her due process rights." *Id.* at 483. The Court rejected that argument again, relying on *Withrow, Del Rio,* and *Mikesell.* Adopting the *Withrow* standard, the Court held that, although due process doesn't prohibit combining investigative and adjudicative functions, "special facts and circumstances" might create an "intolerably high" risk of bias. *Id.* at 768. It found no "special facts and circumstances" in *Chrzanowski.* The Court observed that the Commission makes a recommendation, and the Court reviews the matter *de novo. Id.* at 486-87. It also stressed that the Commission is a separate entity from the examiner (now called disciplinary counsel). *Id.* With no evidence of actual bias, the court concluded that the Commission's "investigative and adjudicative functions" were "adequately separated[.]" *Id.*

These cases are outdated and inapposite. The most important distinction is that these opinions address the combination of *investigatory* powers and adjudicatory powers. That combination implicates *Withrow,* and does not violate the due-process clause. The issue here is the combination of *accusatory* and judicial powers. That combination implicates *Williams* and *does* violate the due-process clause.

The Court also decided these cases before the U.S. Supreme Court changed judicial-conflict law in *Caperton.* The days of relying on judges to police their own conflicts are gone. *Caperton,* 556 US at 872. Conflicts are an objective issue. *Id.* In *Chrzanowski,* however, the Court looked for *actual* bias, not the objective appearance of bias. *Chrzanowski,* 465 Mich at 487. And *Williams* accurately holds that the combination of accusatory and adjudicative roles creates a conflict that violates the due-process clause.

Moreover, the Court built these cases on a shaky foundation. *Mikesell* relied on *Baun* without noticing the difference between the Commission's

structure and the attorney-discipline system. Unlike attorney-discipline proceedings, judicial-discipline proceedings use the same individuals to issue a complaint and then adjudicate that complaint. By overlooking that distinction, *Del Rio* erroneously relied on *Mikesell, Chrzanowski* erroneously relied on *Mikesell* and *Del Rio,* and the Court's error accumulated at compound interest.

The Court also erred in concluding that any constitutional error in the Commission's structure is irrelevant because this Court ultimately imposes discipline. *Chrzanowski,* 465 Mich at 486-87. The U.S. Supreme Court rejected the argument that a judge's conflict is permissible just because a judge is not the deciding vote: "…[T]he Court holds that an unconstitutional failure to recuse constitutes structural error *even if the judge in question did not cast a deciding vote.*" *Williams,* 136 S Ct at 1909 (emphasis added). So an objectively conflicted member of the Commission invalidates this entire proceeding. The due-process violation at issue here is a *structural* error. *Id.* This Court's oversight cannot cure it. The appropriate remedy here is the same remedy ordered in *Williams*: starting over.

1.5 The Commission's attempt to distinguish *Williams* is wrong both factually and legally.

Aside from falsely claiming that this Court somehow rejected Judge Morrow's argument about *Williams* years before the U.S. Supreme Court actually issued *Williams*, the Commission asserts that "*Williams* is patently distinguishable, as it involved a prosecutor turned state supreme court justice presiding over a death penalty case he was previously involved with as a prosecutor." *Decision and Recommendation* at 17. The implication here (which Disciplinary Counsel made explicit when Judge Morrow sought superintending control) is that *Williams* is limited to criminal proceedings.

That implication is false, and there's an easy way to tell: *Williams* was not a criminal proceeding. The conflicted judge participated in a *post-conviction* proceeding. *Williams,* 136 S Ct at 1903. As Justice Thomas observed in his *Williams* dissent, post-conviction proceedings are "civil in nature." *Williams,* 136 S Ct at 1916-17 (Thomas, J., dissenting). And he's right. See

Finley, 481 U.S. at 556. So the distinction that the Commission tries to draw here is invalid.

There's another easy way to tell: the Supreme Court followed *Murchinson* in holding that the due-process clause prohibits a person from being "*accuser* and adjudicator in a case." *Williams*, 136 S Ct at 1905, citing *Murchinson*, 349 US at 136-137 (emphasis added). It didn't limit this objective-bias rule to former prosecutors.

Moreover, *Williams* is about objective bias, and there can be no dispute that a respondent in a judicial-discipline proceeding is entitled to an unbiased decision-maker.[9] This Court expressly said so. *Chrzanowski*, 465 Mich at 483. And it's well-established that the right to an impartial decision-maker applies in disciplinary proceedings. See, e.g., *Friedman v Rogers*, 440 US 1, 18; 99 S Ct 887 (1979) (holding that an optometrist had "a constitutional right to a fair and impartial hearing in any disciplinary proceeding conducted against him by the [Texas Optometry] Board"). Judge Morrow indisputably has a right to an impartial decision-maker. And the Commission is objectively biased.

The Court now has an opportunity to correct a serious injustice—and to prevent future injustice. It should vacate the Commission's opinion and table future judicial-discipline proceedings until subchapter 9.200 complies with the due-process clause.

[9] Indeed, justices of this Court recuse themselves when they participated in the prosecution of an underlying disciplinary proceeding. See, e.g., *Grievance Administrator v Beck*, 505 Mich 948; 936 NW2d 472 (2020) (noting that Justice Cavanagh "did not participate due to her prior services as a member of the Attorney Grievance Commission.").

Argument 2: In-Person Hearing

MCR 9.231(B) required the Master to designate a "place" for a hearing. A "place" is a physical location. The Master did not follow this rule, and none of the Court's pandemic-era orders can justify failing to apply the plain text of controlling rules. Accordingly, the underlying proceedings are invalid.

Courts must apply the plain language of court rules, just as they must apply the plain language of statutes. *Ligons v Crittenton Hosp,* 490 Mich 61, 70; 803 NW2d 271 (2011). That means giving "effect to the plain meaning of the text" and applying its "language as written without construction or interpretation." *Id.*

The relevant court rule here is Michigan Court Rule 9.231(B), which states that "[t]he master *shall* set a time *and a place* for the hearing …." MCR 9.231(B) (emphasis added). *Shall* means that the rule is mandatory. *People v Lockridge,* 498 Mich 358, 387; 870 NW2d 502 (2015). And *place* refers to a physical location. When used as a noun, *place* means either "a particular portion of space, whether of definite or indefinite extent" or "space in general." See https://www.dictionary.com/browse/place# (last visited July 10, 2021). This Court obviously didn't direct masters to designate "space in general" as a location for judicial-tenure hearings. So there's only one valid reading of Rule 9.231(B): a master must designate a physical location ("a particular portion of space") for the hearing. See MCR 9.231(B).

The plain text of this rule eliminated the possibility of a Zoom hearing. Zoom is a computer program, not a place. A virtual hearing does not satisfy Rule 9.231(B).

Chapter 9.200 of the Michigan Court Rules includes three principles for interpreting the rules governing judicial discipline, and each supports the conclusion that Judge Morrow was entitled to an in-person hearing. First, the rules "shall be construed to preserve the integrity of the judicial system." Preserving the integrity of the judicial system requires applying the governing rules evenly, to everyone, and at all times.

Second, the rules must be interpreted "to enhance public confidence in that [judicial] system." MCR 9.200. If disciplinary authorities can refuse to follow governing rules, the public will lose confidence in the judicial system.

Third, the rules must be construed "to protect the public, the courts, *and the rights of the judges who are governed by these rules* in the most expeditious manner that is practicable *and fair*." MCR 9.200 (emphasis added). To preserve Judge Morrow's rights and to hold a fair hearing, the Master should have applied the rules as written—including Rule 9.231(B).

The pandemic was no excuse for denying an in-person hearing. It was possible under the Department of Health and Human Services' order to hold an in-person hearing on the complaint against Judge Morrow. The Master only had to limit attendance to 20 people per 1,000 square feet and require people to wear facemasks. The Master could have excused people from the facemask requirement when they were testifying, since the Department's order excused people when they were "giving a speech … to an audience, provided that the audience is at least six feet away from the speaker."[10] In fact, before the hearing began, this Court endorsed relaxing facemask requirements for witnesses in its COVID guidelines.[11] Placing clear plastic shields on the bench and witness box would have provided further protection without compromising the Master's ability to assess credibility.

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

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[10] *Emergency Order under MCL 333.2253—Gathering Prohibition and Mask Order*, available at https://bit.ly/34vxWvP (last visited July 7, 2021), at 3-4.

[11] *Return to Full Capacity: COVID-19 Guidelines for Michigan's Judiciary* at 5.

A Zoom hearing therefore takes critical tools away from the factfinder. See *Hassoun v Searls*, __ F Supp 3d __, at 11 (WDNY, April 10, 2020) ("… [A] virtual hearing would present significant challenges in being able to adequately perform the critical credibility assessments that this matter requires …"). Of course, wearing masks would inhibit fact-finding—but many Michigan courtrooms were equipped with clear, plastic shields before the bench and witness box. These measures would have obviated the need to wear a mask while testifying.

In short, it was possible to use the full range of fact-finding tools available in an in-person hearing, while still observing the social-distancing practices that slow the spread of COVID-19. The Master chose not to folow the rules. Now, the Commission tries to justify that decision by claiming that "[n]othing in the [MCR 9.231(B)] requires that the hearing be held in person." *Decision and Recommendation* at 18. But that's precisely what the rule requires. There's no way to read the word "place" as referring to anything other than a physical location—which means the rule requires an in-person hearing.

The Master should have applied the plain language of Michigan Court Rule 9.231(B) and held an in-person hearing. By failing to do so, the Master deprived Judge Morrow of his rights under the Michigan Court Rules and inhibited his ability to conduct cross-examination. The Court should vacate the proceedings below because of their structural constitutional error and ensure that any subsequent proceedings comply with the governing court rules—including the requirement of designating a "place" for the hearing.

Argument 3: *Hocking*

> ***Hocking* held that a judge's inappropriate comments on the bench were not misconduct. The Commission tries to avoid *Hocking* by arguing that Judge Hocking's remarks were on the bench, while Judge Morrow's were off the bench. Under Michigan law, however, that makes Judge Morrow's comments *less* serious, not more. If Judge Hocking's comments were not misconduct, then Judge Morrow's comments were not misconduct.**

Judge Morrow is entitled to a new hearing because of the Commission's unconstitutional structure and because the Master failed to apply the plain language of MCR 9.231(B). If the Court reaches the substance of the Commission's claims, it should apply *Matter of Hocking*, 451 Mich 1; 546 NW2d 234 (1996), and hold that Judge Morrow's comments were not misconduct.

3.1 *Hocking* holds that a judge's "tasteless" and "offensive" comments on the bench were not misconduct.

Hocking addressed a judge's interactions with two female attorneys and his comments during sentencing in a criminal-sexual-conduct case. Judge Hocking presided over a case in which an attorney was accused of sexually assaulting a client during a 2 a.m. visit to her apartment. While justifying a downward deviation from sentencing guidelines, Judge Hocking made a series of crude and insensitive comments. *Hocking*, 451 Mich at 10. He found mitigating factors such as the fact that the defendant "helped the victim up off the floor after the occurrence," that the defendant wore the victim down through persistence rather than force, that the "victim asked for it," and that the victim allowed the defendant to visit her home at 2:00 a.m. *Id.* The judge's inappropriate comments on the bench included this one:

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

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

Hocking, 451 Mich at 11.

Judge Hocking lost his temper with the prosecutor after she objected to his downward departure. *Id.* at 15. In another instance, he had a "caustic and abusive exchange" with an attorney who objected to his imposition of sanctions. *Id.* at 22-23. He was accused of abusing his contempt power, too.[12]

The Court held that Judge Hocking's comments during sentencing were not judicial misconduct. They were "tasteless and undoubtedly offensive to the sensibilities of many citizens." *Id.* at 14. But they were "not explicitly abusive" and did not "evidence persistent misconduct." *Id.* The Court explained that "every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial discipline." *Id.* at 12. Although the Court was "committed to eradicating sexual stereotypes," it could not "ignore the cost of censoring inept expressions of opinion." *Id.*

Likewise, the Court concluded that Judge Hocking did not commit misconduct in his interactions with the prosecutor who objected to the downward departure. *Hocking*, 451 Mich at 16. Although "courtesy was lost and rudeness took over," his conduct was not "clearly prejudicial to the administration of justice." *Id.* Judge Hocking's interactions with the other attorney crossed a line: Judge Hocking showed "a total lack of self-control and an antagonistic mind-set predisposed to unfavorable disposition." *Id.* at 23. As for the suggestion that Judge Hocking showed gender bias because both attorneys who drew his ire were women, the Court held: "The fact that attorneys Mass and Sharp are both women and both happen to have been the

[12] There was also an allegation about his alleged misuse of the attorney-grievance process, but this Court found nothing improper about Judge Hocking's request for investigation. *Id.* at 20.

object to the respondent's anger does not evidence a discriminatory pattern." *Id.* at 24.

The Commission tries to duck *Hocking* by arguing that "Respondent was not in Judge Hocking's situation. He was not explaining his decision from the bench on the record." *Decision and Recommendation* at 37. That's true. But that means Judge Morrow's statements were *less* serious than Judge Hocking's comments, not more. *In re Brown*, 461 Mich 1291, 1292; 625 NW2d 744 (2000) (stating that "misconduct on the bench is usually more serious than the same misconduct off the bench"). The Commission turns the usual rules upside down, asking the Court to hold that offensive comments off the bench are somehow worse than offensive comments off the bench. That's a legal error—and more proof of the need to separate accusatory functions from judicial functions in subchapter 9.200.

The Commission also makes a serious factual error in its attempt to avoid *Hocking.* It says that Judge Hocking's actions were different because "Judge Hocking was not alleged to have sexually harassed anyone." *Decision and Recommendation* at 36. That's true, too. But neither was Judge Morrow.

The Commission's complaint never asserts that Judge Morrow's conduct amounts to "sexual harassment." Instead, the complaint focuses on Judge Morrow's *language.* Count One is titled "inappropriate use of sexually graphic language." Count Two is titled "inappropriate use of sexually graphic language." Count Three is titled "Violations of Canons 2(A), 2(B), 3(A)(3) & 3(A)(14) by questioning female attorneys who appeared before him about their physical appearance." Every count focuses on Judge Morrow's choice of words. Consequently, the governing opinion is *Hocking.* Its application means that Judge Morrow did not commit misconduct.

The Commission downplays Judge Hocking's comments as "engag[ing] in dated stereotypes about women inviting sexual abuse." *Decision and Recommendation* at 36. Giving a defendant a break because he helped the woman he raped off the floor is not "engaging in dated stereotypes." Stating that a "reasonable person" would assume he was entitled to sex simply because a woman allowed him to stop by at night is not a "engaging in dated stereotypes." And the Commission's characterization

overlooks that Judge Hockings also had a "caustic and abusive exchange" with an attorney who objected to his imposition of sanctions. *Hocking*, 451 Mich at 22-23.

Moreover, it's important to recall who was in the audience for these comments: the victim. This judge—while on the bench—told the victim that she was responsible for her own sexual assault—that *she invited it*. That is worse by far than anything Judge Morrow is accused of saying. It beggars belief that the Commission would try to excuse these comments as just old-fashioned views about gender roles.

Hocking holds that a judge does not commit misconduct when, while on the bench, he blames a victim for her own sexual assault. That is the yardstick by which the Court should measure the Commission's allegations.

3.2 Judge Morrow's analogy for a direction examination

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

They are not. Even if the Court views Judge Morrow's analogy as "distasteful," *Hocking* holds that "every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial discipline." *Hocking*, 451 Mich at 12. If that's the rule on the bench, where misconduct is more serious, it must be the rule off the bench as well.

Moreover, the Commission's analysis fails to acknowledge that sex is a common metaphor, even in judicial writing and in bar journals. For example, many judges and legal commentators explain their opposition to footnotes by citing Noel Coward's observation that "[e]ncountering [a footnote] is like going downstairs to answer the doorbell while making

love.'"[13] One judge compared medical-malpractice legislation to "a mule—the bastard offspring of intercourse among lawyers, legislators, and lobbyists, having no pride of ancestry and no hope of posterity." *Hayes v Luckey*, 33 F Supp 2d 987 (ND Ala 1997). Another federal judge compared pretrial procedure to "foreplay." *Smith v. J.I. Case Corp.*, 163 F.R.D. 229, 232 (E.D. Pa. 1995). An article in the New York State Bar Journal referred to "contractual foreplay." Peter Siviglia, *Contractual Foreplay: Letters of Intent vs. Term Sheets*, 87-May N.Y. St. B.J. 49 (2015). A continuing-education speaker in Texas "often describes the subject of his speech as 'real sex' while whatever insignificant processes come before are merely 'foreplay.'" Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 Wis. Women's L.J. 225, 240–41 (1995).

So, too, in Michigan. In 2004, Justice Robert Young wrote an article comparing the common law to "a drunken, toothless ancient relative, sprawled prominently and in a state of nature on a settee in the middle of one's genteel garden party." Hon. Robert P. Young, *A Judicial Traditionalist Confronts the Common Law*, 8 Tex. Rev. L. & Pol. 299 (2004). He asserted that "some jurists like Justice Cardozo actually celebrate Grandpa and his condition and enthusiastically urge all of us to relax, undress, and join Grandpa in his inebriated communion with nature." *Id.* at 302. The image of a naked old man inviting others to disrobe is undeniably lewd—yet Justice Young concluded that it served a pedagogical purpose because it was a vivid image. This Court cited Justice Young's article in *Henry v Dow Chemical Co*, 473 Mich 63, 103; 701 NW2d 684 (2005), even though some—like late Justice Elizabeth Weaver—found the image of a naked old man encouraging others

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

to disrobe so inappropriate that she refused to join an opinion that cited the article. *Henry,* 473 Mich at 103 (Weaver, J., concurring).

This debate teaches two important lessons. First, adults—including judges— sometimes use crude analogies to make a point. Second, reasonable minds can disagree about the line between a vivid, albeit off-color, metaphor and an analogy that is truly unfit for adult conversation. Judge Morrow's metaphor is on the "vivid, albeit off-color" side of that line.

3.3 Judge Morrow's use of the word *fucked* was not misconduct.

Judge Morrow acknowledged that he probably used the word *fucked*. *Answer*, ¶21. Certainly, vulgarity on the bench may be judicial misconduct when it suggests favoritism or prejudgment. In *Matter of Frankel,* 414 Mich 1109; 323 NW2d 911 (1982), this Court censured a judge who insulted an attorney in court as follows: "Now, the question is, am I still dispassionate in the case? And I'm not sure that I am, now, Mr. Henry. I'm not sure that I haven't come to a conclusion that whether your client is guilty or innocent, you're a despicable son-of-a-bitch." *Id.* at 1110

Unlike *Frankel,* Judge Morrow was not on the bench when he said "fucked." And the Court should not police a judge's use of curse words in off-the-bench speech. Although this disciplinary matter is not a First Amendment case, the United States Supreme Court's warning in *Cohen v California* (1971), a First Amendment case, applies here, too. See *Cohen v California,* 403 US 15 (1971). *Cohen* concerned a t-shirt that said, "Fuck the Draft." *Id.* at 16. In upholding a constitutional challenge to the law that ostensibly prohibited that t-shirt, the Court explained that eliminating the word *fuck* from public discourse could cause trouble: "…[W]hile the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen,* 403 US at 25. The Court also noted that "most linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well." *Id.* at 26.

Again, this isn't a First Amendment case.[14] But *Cohen*'s rationale overlaps with *Hocking*'s rule against treating "distasteful" comments as judicial misconduct, for fear of inhibiting the expression of ideas. *Hocking*, 451 Mich at 12. And both cases pose a serious challenge to any attempt to discipline a judge based on the use of taboo words. If *fuck* is off-limits for judges, what about other taboo words? Will Michigan taxpayers see their money spent on disciplinary actions involving a judge's use of *hell* or *shit?* If not, what exactly is the difference between those words and *fuck*? And does context matter? Is it okay for a judge to say *fuck* when stubbing their toe, but not when talking to a prosecutor in chambers?

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

These principles apply with special force in the context of a criminal trial. As this Court has stated, "defending criminal cases is not for the faint of heart." *People v Mitchell*, 454 Mich 145, 170; 560 NW2d 600 (1997). Criminal proceedings involve some of the most difficult subjects—murder, criminal sexual conduct, and the like—and those proceedings take place in high-stress, high-volume dockets. Lawyers and judges should not have to walk on eggshells when discussing these issues.

The Court should therefore conclude that Judge Morrow's use of the word *fuck* was not misconduct.

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[14] The Commission asserts that Judge Morrow argued that he had a "First Amendment constitutional right to use profane language toward the APAs" and that he made that argument "without citation to authority." *Decision and Recommendation*, p. 17. Neither statement is true. Judge Morrow expressly stated that he was *not* making a First Amendment argument, but that the concerns at issue in *Cohen* apply here as well—as *Hocking* demonstrates. See *Hocking*, 451 Mich at 12 ("…[W]e cannot ignore the cost of censoring inept expressions of opinion.").

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

Judge Morrow doesn't remember saying anything like "how big does this guy think he is?" when Ciaffone raised Matthews's testimony about not having "normal" sex. *Answer,* ¶23. But William Noakes testified about this comment, noting that Judge Morrow was just making the point that the defendant was exaggerating. Vol. III, p. 920. Again, Noakes provided credible testimony on this point: "I don't remember him using the word 'dick.' And I think the conversation was how big does he think he is, and I think that was the extent of it." *Id.* When Disciplinary Counsel tried to twist Noakes's testimony into evidence of something more malicious, Noakes was firm and confident that Judge Morrow "was saying that the defendant exaggerated."

Judge Morrow's offhand expression of skepticism at Matthews's testimony was not judicial misconduct. It was related to the case, since the prosecution was making an issue about what exactly Matthews meant by "normal" sex. If Judge Morrow's comment was too blunt, then it was, at worst, the kind of "graceless, distasteful, or bungled" statement that "cannot serve as the basis for judicial discipline" under *Hocking*, 451 Mich at 12.[15]

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

Finally, there are Judge Morrow's inquiries to Ciaffone and Bickerstaff about how tall they are and how much they weigh. Judge Morrow admitted from the outset that he asked those questions. *Answer,* ¶¶30-32. Asking someone their height or weight is not judicial misconduct. It may be impolite. But *Hocking* makes it clear that the Code of Judicial Conduct is not about policing good manners: "The comments were tasteless and undoubtedly

[15] The same applies to his use of the word "doggy style." The Commission says that Judge Morrow "could have said it in a more professional, less crass way, but he chose not to." *Decision and Recommendation,* p. 11. Notably, the Commission doesn't share what the "less crass" version of this phrase might be. Judge Morrow and Ciaffone were talking about precisely how Matthews had sex with the victim because that was relevant to the case. That subject necessarily gets into sensitive territory.

offensive to the sensibilities of many citizens. They do not display a mindset unable to render a fair judgment." *Hocking,* 451 Mich at 14.

The Commission's attempt to sexualize Judge Morrow's questions—particularly the unfounded allegation about "overtly eyeing"—should be rejected. There was no evidence that Judge Morrow had any sort of illicit motive in asking these questions.

Jeffrey Edison testified that he had never observed Judge Morrow "overtly eyeing" anyone. Vol. III, p. 672-673. Steven Fishman testified that he has never seen Judge Morrow be discourteous or disrespectful to anyone, male or female. Vol. III, p. 800. This testimony from two of Michigan's most well-respected attorneys should weigh heavily against the attempt to sexualize a conversation that had nothing sexual about it. According to the standard jury instructions, "Evidence of good character alone may sometimes create a reasonable doubt" in a criminal trial. M Crim JI 5.8a. In the same way, this evidence of Judge Morrow's good character belies the Commission's characterization of Judge Morrow's questions.

3.6 Neither *Iddings* nor *Servaas* is comparable to this case.

The Commission asserts that Judge Morrow's conduct is comparable to the respondents in *In re Iddings,* 500 Mich 1026 (2017), and *In re Servaas,* 484 Mich 634; 774 NW2d 46 (2009). Neither case is comparable.

Iddings involved a judge's sexual harassment of his secretary over the course of three years. *Iddings,* 500 Mich at 170. Unlike Judge Morrow, that judge had no pedagogical intent. He made it clear that he wanted a sexual relationship and he persisted—over his secretary's objections—to press that issue over several years. *Id.* He sent personal text messages, he offered to buy expensive gifts, he invited his secretary to share a hotel room, he shared a sexually suggestive video, he called his secretary "sexy," he touched his secretary and he looked down her blouse. *Id.*

The comments at issue here—which were made over days, not years—are not at all like *Iddings.* Judge Morrow never attempted to have a sexual relationship with any of the prosecutors. He never touched the prosecutors. He never looked down their blouses. The Commission's assertion that Judge

Morrow's actions are "worse" than *Iddings* simply defies credulity. See *Decision and Recommendation* at 37.

Nor is this case like *Servaas*. There, a judge "drew female breasts on a note that was attached to a court file." *Servaas,* 484 Mich 634. He drew a penis on another note in a court file. *Id.* At a court-sponsored retirement party, he stated that "a woman had 'an awfully small chest' for the college indicated on [her] sweatshirt, and 'should have gone to a smaller school like Alma,' which would have fit her 'small chest better.'" *Id.*

Again, the Commission insists that Judge Morrow's conduct was worse than Judge Servaas's conduct. That argument is not credible. Judge Morrow never drew any lewd pictures. He mentioned height and weight—which have nothing to do with sex—rather than a sexual characteristic like breasts. Judge Morrow did mention the manner in which the *Matthews* defendant had sex with the victim—but only because that issue was *relevant to the case*. It was no more improper than Justice Kennedy's reference to "anal sex" in *Lawrence v Texas,* 539 US 558, 563; 123 S Ct 2472 (2003).

Both *Iddings* and *Servaas* involve overt sexual harassment. That is not what the Commission charged in this case. It charged Judge Morrow with using improper language. So the Court should look to the cases that actually fit the Commission's charges. That's *Hocking.* As detailed above, *Hocking* compels the conclusion that Judge Morrow did not commit misconduct.

Argument 4: *Brown* Factors

A judge—while on the bench—made abusive comments like threatening a nine-year old that she'd have to "go to the bathroom in public" if she didn't comply with her orders. This judge received public censure. Judge Morrow is accused of referring sex and using curse words in private conversations with adults. If the Court finds misconduct, he should receive no more than public censure.

If the Court concludes that Judge Morrow committed misconduct, it must determine the appropriate sanction. To do so, it should employ the list of factors from *In re Brown*, 461 Mich 1291; 625 NW2d 744 (2000). According to those factors, public censure is the maximum appropriate sanction.

4.1 Application of *Brown* factors

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

- There is no pattern or practice of misconduct. The only comparable incidents that the Commission cites were from 2004, 2005, and 2018. With a gap of 13 years between allegations, the Commission cannot establish a "pattern or practice." (In addition, it's improper to consider uncharged allegations. More on that below).

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

- None of the alleged misconduct prejudiced a party and none impacted the *Matthews* case.

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

- All of the comments were spontaneous.

- None of the alleged misconduct "undermine[d] the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in a case."

- None of the alleged misconduct involved discrimination. Although Disciplinary Counsel argued that Judge Morrow's conduct somehow amounted to gender discrimination, the Master correctly declined to make that finding, as explained below.

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

This conclusion finds additional support in discipline imposed in other cases. This Court has recognized the fundamental principle "that equivalent misconduct should be treated equivalently." *Brown,* 461 Mich at 1292. The closest analogue here is *In re Gorcyca,* 500 Mich 588; 902 NW2d 828 (2017). There, this Court imposed public censure for a judge's abusive language toward with *children* while she was *on the bench*. She called a child stupid. *Id.* at 603 ("You're supposed to have a high IQ, which I'm doubting now …"). She compared a child to a mass murderer. *Id.* She threatened to send him to a group home, pointing out that he would have to go "to the bathroom in public…" *Id.* She called a child "mentally messed up." *Id.* She asked a nine year-old if she'd like to go to "jail." *Id.* And she asked a child if she "like[d] going to the bathroom in front of people." *Id.* Judge Gorcyca said all of these things to children while on the bench. She received public censure.

In this case, the Commission accuses Judge Morrow of discourteous and hostile conduct in private conversation with *adults* while *off the bench.* Because Judge Gorcyca received a public censure for discourtesy on the bench to children—including threatening them with having to go "to the bathroom

in front of people"— there is no reasonable justification for the Commission's recommendation of a 12-month suspension.[16]

The Commission's underlying assumption seems to be that a comment mentioning sex is necessarily worse than a comment mentioning any other subject. But Judge Gorcyca's comments to a nine-year old about "going to the bathroom in public" are no different than mentioning sex. They invoked an vulnerable, private moment—the most private moment that a nine-year old can imagine, one hopes—and they weaponized that vulnerability. They were far more abusive than anything Judge Morrow is accused of saying. They were made on the bench to children. And they received public censure.

The maximum discipline here is public censure.

4.2 The Commission did not establish gender discrimination.

The Commission concludes that Judge Morrow's comments to Bickerstaff and Ciaffone were "unequal treatment on the basis of gender" because he used sexual analogies with women but not men. *Decision and Recommendation* at 25. Assuming that the premise of that argument is true (it's not), that analysis is contrary to governing Michigan law. In *Hocking,* this Court held: "The fact that attorneys Maas and Sharp are both women and both happen to have been the object of respondent's anger *does not evidence a discriminatory pattern*." *Hocking*, 451 Mich at 13 (emphasis added). So the fact that Bickerstaff and Ciaffone are both women doesn't mean that Judge Morrow's comments had anything to do with their gender.

In any event, the premise of the Commission's argument is false. Judge Morrow made some of the comments at issue in this very case in a

[16] That's also evident from cases imposing lesser sanctions for much more serious misconduct than alleged here. *In re Simpson,* 500 Mich 533; 902 NW2d 383 (2017) (suspending judge for nine months for interfering with investigation and prosecution, and making intentional misrepresentation about purpose of text messages); *In re Servaas*, 484 Mich 634; 774 NW2d 46 (2009) (public censure for moving outside of judicial district and drawing lewd pictures); *In re McCree*, 493 Mich 873; 821 NW2d 674 (2012) (public censure for texting shirtless photo of himself).

conversation with Ashley Ciaffone *and William Noakes.* Vol. III, pp. 919-920. And he made the "armpit hair" comment in a conversation with a female prosecutor *and Joe Kurily*. Vol. IV, pp. 1056-1057. The Commission's claim that Judge Morrow only used these analogies with women is false.

4.3 Judge Morrow's objections to Anna Bickerstaff's false accusations are not a valid basis for increasing discipline.

The Commission rejected Judge Morrow's assertion that Anna Bickerstaff made false representations about him. But the Commission never addresses the evidence supporting that claim. Worse, the Commission tries to turn Judge Morrow's objections about being the subject of false accusations into a reason to *increase* discipline. *Decision and Recommendation,* p. 37. Its handling of this issue shows how grave a need there is to separate the Commission's accusatory functions from its judicial functions.

The record proves that Anna Bickerstaff falsely accused Judge Morrow of hitting on her. Ashely Ciaffone testified that, when she walked out of Detective Kinney's office, Bickerstaff acknowledged that "that there was a mistake in" her statement. Vol. I, p. 91. Bickerstaff said, "I'm worried. Some of the stuff that JoAnn put in here wasn't correct." *Id.,* p. 307. According to Ciaffone, she appeared to be "concerned." *Id.* Ciaffone told her to go back in and fix it. *Id.,* p. 92. But Bickerstaff never did a thing about it. Vol. II, pp. 423-424. (The Commission doesn't acknowledge this evidence.)

Bickerstaff's testimony explains what was false about her report: it accused Judge Morrow of "hitting on" her. Vol. II, p. 598. And she spread that false allegation. Chief James Bivens—whose credibility is unimpeachable—testified that Bickerstaff *told him* that Judge Morrow was trying to "hit on" her. Vol. V, pp. 1174-1175. Indeed, that's what he wrote in his report. *Id.,* p. 1174. Bickerstaff testified that she knew this report would go to Prosecutor Kym Worthy. Vol. II, p. 596. She knew, in other words, that her false allegation about Judge Morrow "hitting on" her would become the official narrative. (The Commission doesn't acknowledge this evidence either.)

But that claim was false. There can be no dispute that it was false because Bickerstaff herself disowned that claim when placed under oath. Vol.

II, pp. 599-600. She testified, "He did not hit on—I do not believe that he was hitting on me, and I did not tell anyone that I believed he was hitting on me." *Id.*, p. 607. (Again, the Commission doesn't acknowledge this evidence.)

Based on this testimony, it's clear that Bickerstaff falsely accused Judge Morrow of hitting on her. Whether she affirmatively said that to Chief Bivens (as Chief Bivens testified) or whether she let this falsehood go uncorrected is irrelevant. For lawyer, there's no difference. See, e.g., MRPC 3.3(a)(1) ("A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal *or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer*.") (emphasis added). Bickerstaff never alerted the Judicial Tenure Commission—or anyone besides Ciaffone, for that matter—that her statement was false.

This wasn't just any falsehood. It was the kind of falsehood that has prompted devastating violence against Black men from Emmett Till to the Central Park Five. See N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo Rev 1315 (2004). See also Megan Armstrong, *From Lynching to Central Park Karen: How White Women Weaponize White Womanhood,* 32 Hastings Women's L.J. 27, 37 (2021) (citing thousands of lynchings prompted by "supposed assaults upon white women by Black men," as documented in the research of journalist Ida B. Wells).

In the wake of the 2011 shootings in Tucson, former President Barack Obama exhorted the nation to "expand our moral imaginations, to listen to each other more carefully, to sharpen our instincts for empathy …."[17] Legal scholars have noted that these skills are critical in the legal arena. Susan A. Bandes, *Moral Imagination in Judging,* 51 Washburn L J 1 (2011); Nicole E. Negowetti, *Judicial Decisionmkaing, Empathy, and the Limits of Perception,* 47 Akron L Rev 693 (2014). So it's important to imagine how this falsehood looked from Judge Morrow's perspective.

[17] See Remarks by the President at a Memorial Service for the Victims of the Shooting in Tucson, Arizona (January 12, 2011), available at https://bit.ly/3qZf2rW (last visited July 9, 2021), cited in Bandes, *supra.*

Judge Morrow knew he wasn't hitting on Bickerstaff. *Bickerstaff* knew he wasn't hitting on her. But that became part of the official narrative—either because Bickerstaff made a misrepresentation (as demonstrated by Chief Bivens's testimony and Bickerstaff's denial) or because she purposely let this falsehood fester. Judge Morrow—a husband and a father—found himself falsely accused of "hitting on" young, white woman. As a Black man in America, having lived all his life with racist acts large and small, he was facing the kind of false allegation that has prompted unspeakable violence.

There's another important element here. Americans have historically tried to silence Black voices by dismissing accomplished Black men and women as "uppity." Jennifer Lisa Vest, *What Doesn't Kill You: Existential Luck, Postracial Racism, and the Subtle and Not So Subtle Ways the Academy Keeps Women of Color Out*, 12 Seattle J. for Soc. Justice. 471, 510 (2013). Judge Morrow presented favorable testimony from a Black attorney with a resume that would put most lawyers to shame. Disciplinary Counsel asked the Master to reject this witness's testimony because, as Disciplinary Counsel put, he was "pompous." Vol. V, p. 1305 ("…"[Y]ou saw his testimony. You saw his pompous attitude."). One might be inclined to dismiss that statement as an unfortunate choice of words when there was little time for reflection. But Disciplinary Counsel repeated that claim in writing—*after* Judge Morrow stressed its racist implications. *Disciplinary Counsel's Response to Respondent's Objections to the Master's Report*, pp. 28-29 ("The video-recording of Mr. Noakes's testimony shows that he was, in fact, 'pompous,' without regard to his race."). This rhetoric was no accident. It was a deliberate invocation of a racist trope.

The Commission doesn't just refuse to address this evidence. *Decision and Recommendation*, p. 15 n. 2. It actually argues that the Court should *increase* Judge Morrow's discipline because he objected to Bickerstaff's falsehood and this racist rhetoric. If the Court decides that Bickerstaff's false statement is acceptable or that Disciplinary Counsel's rhetoric wasn't as racist as it seems to Judge Morrow, that's one thing. But the Commission's request to increase discipline based on Judge Morrow's objections to conduct that the Commission refused to acknowledge is quite another. It is deeply unjust.

4.4 The Commission's other arguments for a severe sanction lack merit.

The Commission offers a few more arguments in its attempt to increase discipline. It copies a section of Disciplinary Counsel's brief asserting that "[Judge Morrow's] conduct has garnered a lot of negative publicity" and that a number of websites have "articles about his inappropriate comments to" Ciaffone and Bickerstaff. *Decision and Recommendation* at 28.

This argument fudges an important fact. Those articles aren't about Judge Morrow's comments to Ciaffone and Bickerstaff, as the Commission claims. They're about the Commission's allegations and these proceedings. Increasing Judge Morrow's discipline based on press coverage *of these disciplinary proceedings* is wholly inappropriate.

4.5 The Commission erred in relying on allegations that do not appear in its complaint.

The Commission believes that it established a "pattern of saying sexually inappropriate things to women." *Decision and Recommendation,* p. 19. This "pattern," according to the Commission, is established by a letter from the SCAO in 2004, and letter from the Commission in 2005, and a few comments in 2018 and 2019. *Decision and Recommendation,* pp. 19-20. So, in the Commission's view, there is a "pattern" based on unproved conduct in 2004 and 2005 and then—after a thirteen-year gap—again in 2018 and 2019.

This reliance on unpleaded allegations of misconduct is inappropriate. See *In re Simpson,* 500 Mich 533; 902 NW2d 383 (2017). In *Simpson,* this Court held that it would not consider "allegations of misconduct that were not found and recommended to us by the JTC." *Id.* at 565. Doing so, the Court held, would violate both the Michigan Constitution and the Michigan Court Rules. *Id.* The Court's opinion makes it clear that the Commission cannot consider unpleaded allegations either:

> Another compelling reason to limit our review in JTC proceedings to allegations of misconduct found and recommended to us by the JTC is that a respondent judge is entitled to notice of the

> charges and a reasonable opportunity to respond to them. Without such notice, it is not clear to us how a respondent judge would know which charges are at issue and, therefore, which ones he or she should substantively address when a case proceeds to our Court. … *Should a respondent and his or her attorney be put in the untenable position of having to argue against possible findings of misconduct that were not charged in the complaint* or made by either the master or the JTC but might be discerned by a member of this Court? Whatever could be said about such a regime, we would no longer say that it "provides a full panoply of procedural guarantees for adjudicating allegations of judicial misconduct.

Simpson, 500 Mich at 569 (emphasis added). The Court can't treat these uncharged instances as part of a "pattern" without presuming that the unpleaded allegations are true. And that has never been established, aside from the allegations in *Morrow,* 496 Mich at 291.

Under *Simpson,* imposing discipline based on theories outside the four corners of the Commission's complaint is another violation of Judge Morrow's right to due process. The Court should reject the Commission's arguments.

Conclusion

These proceedings are unconstitutional under *Williams.* Because this error is structural, the Court should vacate the Commission's *Decision and Recommendation,* and allow a new proceeding only once subchapter 9.200 of the Michigan Court Rules complies with the United States Constitution.

If the Court doesn't apply *Williams,* it should apply the Michigan Court Rules to hold that Judge Morrow was entitled to an in-person hearing. It should also apply *Hocking* to hold that Judge Morrow's actions were not misconduct.

Finally, if the Court decides to impose discipline, it should follow *Gorcyca.* A judge—while on the bench—made abusive comments like threatening a nine-year old that he'd have to "go to the bathroom in public" if he didn't comply with her orders. She received public censure. There can be no justification for imposing a greater sanction on a judge who referred to sex and used curse words in private conversations with adults.

Respectfully Submitted,

Collins Einhorn Farrell PC

/s/ Trent B. Collier
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Dated: July 14, 2021

Verification

I, Hon. Bruce U. Morrow, certify that the information contained in this petition is correct to the best of my knowledge, information, and belief.

Hon. Bruce U. Morrow

Certificate of Compliance

I certify that the Brief of Plaintiff Honorable Bruce Morrow complies with the type-volume limitation set forth in MCR 7.212(B). I am relying on the word count of the word-processing system used to produce this brief. This brief uses a 12-point proportional font (Palantino Linotype), and the word count for this brief is 15,502.

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Attachment A

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

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

Formal Complaint No. 102
Volume I

P R O C E E D I N G S

-- Including Separate Records --

held before the Special Master Hon. Betty R. Widgeon (P32596) via Zoom in Michigan, on Friday, November 13, 2020, commencing at or about 9:00 a.m.

APPEARANCES:

For the MJTC: JUDICIAL TENURE COMMISSION
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248.355.4141
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615 Griswold, Suite 1120
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BY: MS. ELIZABETH JACOBS (P24245)

REPORTER: Ms. Elsa J. Jorgensen, CSR-6600

ALSO PRESENT: Hon. Bruce Morrow
and others

A. Yes.
Q. What is the name of the case you were trying in front of Judge Morrow in June of 2019?
A. *People v. James Matthews*.
Q. And was that a homicide?
A. Yes.
Q. Can you tell the judge very briefly what the case was about?
A. It was a cold case from 2003, in which the allegations were that the defendant had murdered a woman that was a known prostitute, drug user. There was evidence that the body had been drug from a house associated with the defendant, down the porch, and left at the front lawn of that residence, essentially.
Q. Did the case involve any sort of sexual activity?
A. There -- not in charges itself, but the circumstances surrounding her death. There was a rape kit done, and there was some evidence of DNA with regards to possible sexual encounter.
Q. Did you have a co-counsel?
A. Yes. Anna Bickerstaff was second-chairing at the time.
Q. And was she a more junior prosecutor than you?
A. Yes, very much so.
Q. Did you have an officer in charge?
A. We did.

Q. What was his name?
A. Sergeant Derrick Griffin. Excuse me.
Q. And do you know from what department he was?
A. Detroit Police Homicide.
Q. Did you have motions prior to the start of the trial?
A. Yes.
Q. And did you argue some of those motions?
A. Yes.
Q. Who was the defense attorney?
A. Mr. William Noakes at the state trial stage. Prior to that, at the exam stage, it was Mr. Wyatt Harris. And then after the exam, but I think prior to possibly the arraignment on the information, I believe that Mr. Noakes came in to the case.
Q. Okay. Was this trial held in the Frank Murphy Hall of Justice?
A. Yes.
Q. And was it held before Judge Morrow as the presiding judge?
A. Yes.
Q. Do you know what date the trial started?
A. On June the 10th of 2019.
Q. And do you know when the trial ended?
A. The verdict came in on June the 13th of 2019.
Q. Now, was there a court reporter present in the

of Stinson?

A. Deborah Stinson. That would have been Anna Bickerstaff.

Q. Can you describe for us the courtroom? Describe the prosecutor's table and who was sitting where.

A. So we had myself, Ms. Bickerstaff, and then our officer in charge of the case. So, typically, if you have a case where you have three people, you know, you kind of have to creatively set up where everyone is going to sit because the defense and the defendants sit on the opposite table.

And so the way that we were seated on this occasion was -- so if the podium is in the center, then the prosecutor's table, if I'm looking at the judge, would be to the right-hand side. And the first seat next to the podium would have been our officer in charge, Sergeant Griffin. Then the middle seat would have been Ms. Bickerstaff, and then I was on the seat at the end closest to where the jury box would have been.

Q. Did that leave much room for anything else at the table?

A. No. We were jam-packed. Some courtrooms allow -- most courtrooms would allow the officer in charge to sit sometimes on, like, the other end of the table, but the judge wanted us kind of all in a row.

Q. Do you know if the arms of the chairs were touching?

A. They were. They had to to fit inside the table area.

A. It did. It moved very fast. There was also a point in time where the jury was present, and I asked for five minutes to go out in the hall and see -- or in the witness room to see who I had present. And the judge had kind of posed the question to the jury like: Do you all think we should give her five minutes? What do you think? You know, she's going to keep you here waiting. You know, what do you want to do?

Q. Have you ever seen another judge ask the jury whether or not a prosecutor could have five minutes?

A. No.

Q. Did the jury respond to him?

A. I don't remember. I don't -- I don't believe so.

Q. All right. After the medical examiner testified, did you call other witnesses, if you recall, or did you rest your case?

A. No. We called other witnesses. We put in -- I want to say we put up 12 witnesses on the 11th, which is a lot of witnesses.

Q. So you moved fast?

A. We moved very fast, yes.

Q. Did there come a time when there was a break because Mr. Noakes wanted to talk to his client about whether to testify?

A. That would have been very -- towards the very tail end

on the 12th, yes.

Q. Okay. So on the 11th, did you take a break in the afternoon and did you leave the courtroom to use the restroom?

A. Yes.

Q. Do you know what time of day that happened?

A. I don't.

Q. When you left the courtroom, where was Ms. Bickerstaff?

A. She was either standing or seated. She had just finished questioning the medical examiner.

Q. And where was now Lieutenant formerly Sergeant Griffin?

A. He was seated at the prosecutor table in his same seat closest to the podium.

Q. Do you know where Mr. Noakes was?

A. I don't. I don't know if Mr. Noakes also went to the bathroom when I went. I'm not -- I can't say.

Q. Do you know how long the break was?

A. Not long.

Q. Can you estimate how long?

A. Five or ten minutes maybe.

Q. When you returned --

A. Close to five or ten minutes. I'm sorry to cut you off. It was supposed to be a five -- a five-minute break, and I don't know if it went over the -- it definitely went over five minutes. It may have been ten minutes or so.

MR. CAMPBELL: I'm going to object to the leading questions. There's been several in a row here, Judge.

THE MASTER: Objection is sustained.

BY MS. WEINGARDEN:

Q. Can you describe what you were thinking when you came into the courtroom and saw what you saw?

A. At that point I truthfully was thinking, you know, we're rushing through this. So my thought was what's going on? You know, we're trying to move this trial along, and they're kind of just chatting or talking about I didn't know what at the time.

Q. Did you overhear anything that you could make out?

A. Yes. I heard Judge Morrow say that the cause and manner of death are like the climax.

Q. At that time did you have any idea what he meant by that?

A. No, I had no idea.

Q. How did their conversation end?

A. I don't know if there was anything said after that. I couldn't specifically hear. There were a lot of people in the courtroom in general at that point in time, and just at some point the judge got up and walked back up to the bench. And Ms. Bickerstaff stood up, and I asked her like, "What was that all about?"

reported it to a supervisor that day, but I don't know. Once her and I got off the elevators, she got off at the 11th floor and went to her office. I took the elevator up to 12. I went to my office, and that -- that was that.

Q. Okay. Did you then go home for the night?

A. Yes.

Q. Did you return to court on June 12th?

A. Yes.

Q. And did the jury eventually start deliberating on June 12th?

A. Yes.

Q. During the deliberations is it typical for prosecutors to stay in the courtroom or go to their offices and wait for the verdict?

A. It depends. A lot of times people will go back to their offices just because it can be a very lengthy process.

Q. Did you and Ms. Bickerstaff stay in Judge Morrow's courtroom during deliberations?

A. When we could, yes.

Q. And was there a time when Judge Morrow invited you all into chambers?

A. Yes.

Q. Do you know what time of the day that was?

A. It would have been -- I don't. It would have been the

Q. What was Mr. Noakes doing?
A. Not much of anything either.
Q. What were you and the judge talking about?
A. It started as he wanted to show me a court rule or show Mr. Noakes and I, he had indicated, a court rule. And then, in my opinion, it turned into a critique of how we put on the case, me being the prosecution.
Q. So let me go back. During the trial did Mr. Noakes make a motion for directed verdict?
A. He did.
Q. Tell the judge what a motion for directed verdict is.
A. So a motion for a directed verdict is typically made by a defense attorney at the close of the People's proofs during a trial. They get up and argue that the evidence submitted or presented by the prosecutor up to that point is insufficient at this point for it to be given to a jury to even consider. So they ask the judge at this point, based on the insufficiency of the evidence, to dismiss the case.
Q. Which prosecutor responded to that motion?
A. I did.
Q. And did you cite the proper standard?
A. I thought that I did. I cited the standard that I had always cited, that I had always heard cited, which is that the court is to view the evidence in a light most

favorable to the non-moving party, which in that case would be the prosecution, would be the non-moving party, and that was the standard. And then I had gone on to, you know, argue what evidence was sufficient that day.

Q. Did Judge Morrow rule on the defense motion?

A. He did not. He said he was holding his ruling in abeyance.

Q. When you went into chambers and you said he was talking about the law, did he present to you a different rule?

A. Yes. He said to me when we got into chambers that he called us back there because he didn't want to dog me in front of other people because he thought I would be embarrassed that I had misstated the rule.

Q. What does it mean to dog someone?

A. To criticize or critique or --

Q. All right. Now, before that had he criticized or critiqued you or dogged you in the courtroom?

A. Yes.

Q. But on this occasion he said he didn't want to embarrass you?

A. Yes.

Q. Did he show you a rule of law or a court rule?

A. Yes. When we walked in there, he, being Judge Morrow, had two books open. He handed one to Mr. Noakes, and he handed one to me. And both of the books were opened to

the same court rule, which was a Michigan Court Rule, regarding directed verdicts of acquittal.

Q. Do you know the court rule number?

A. I want to say it's 6.419, I think.

Q. And what does that rule say?

A. Essentially it says that the judge has discretion to hold a directed verdict motion in abeyance and to issue his ruling at any time even after the jury had rendered its verdict in --

Q. At that time how did you feel about the fact that he pointed that law out to you?

A. I -- at that point I had never seen that. So when I had read it, I didn't, at that point, have a response because I had never seen that rule cited. I was not familiar with it. And so then the judge had asked like, "Do you know what that means?"

And I was kind of looking at him. He goes, "That means I can dismiss your case at any time."

Q. How did that make you feel?

A. Concerned.

Q. Why were you concerned?

A. I was -- I felt as though -- based on what occurred later on in the conversation, I felt as though I had to still convince him of our case.

Q. Okay. How serious a case was this?

A. It was a first-degree murder. There were -- it was a cold case, so it had been one of the shelved rape kits. So in the rape kit project where all of those kits were found in the storage, that had been untested. So it was an old case.

And the defendant was alleged to have not only committed this homicide but to be linked to somewhere in the range of ten other potential either murder/rapes or murder/strangulation, CSC, or just criminal sexual conduct cases. So he was implicated in several very serious crimes.

Q. So this was very serious to you?

A. Yes. All of my cases are very serious to me because they're all homicides.

Q. Okay. So tell us about the conversation you and Judge Morrow had beyond the discussion about the motion for directed verdict.

A. After the motion for a directed verdict, the judge then brought up the issue of the DNA. He had -- so for most of the, like, two hours that were in the chambers, the conversation was directed towards me and it was between Judge Morrow and I.

So initially the conversation started with the DNA. The judge had said to me that he did not think that I should have put in the DNA, that the defendant

wasn't charged with criminal sexual conduct and so that it wasn't relevant, and that not only did I struggle my way through the testimony of the lab experts, but that it wasn't -- it wasn't helpful.

And so then at that point there was an exchange between he and I. I had responded back to try and, I guess you could say, maybe convince him that the DNA was significant. And I had said to him at that point that, you know, he had said why -- why did you put in that DNA, DNA evidence? It didn't matter.

And I -- my response back was I thought that it was significant that there was DNA in the victim's oral swab and that vaginal swab that was identified as the defendant's because it showed that they had close, recent contact near in time to the homicide. So I thought that it was very significant evidence, despite the fact that there hadn't been a charge of criminal sexual conduct.

Q. Did Judge Morrow disagree with you?

A. Yes, absolutely. It went back and forth. The judge would say kind of why he thought that it was not significant or important or a mistake to have put it in my case. And then I tried to, you know, respond back and try to convince him, I guess, and say, "Well, judge what about this?" or, you know, "Judge, this?"

And it kind of went back and forth, and I could tell as the conversation continued on, he was getting more and more frustrated with me.

Q. Did he raise his voice?

A. Yes, as the conversation went on.

Q. Did he use any profanity?

A. After the -- after we had kind of gone back and forth about the issue of DNA, he was -- he -- it seemed as though he wanted me to -- in my opinion, it seemed as though he wanted me to agree with what his position was. And when I wasn't, he was getting more frustrated and so it kind of -- at a point he said all -- do you want me to say what it was like really --

Q. Yes. Yes, you're allowed to say the word. Yes.

A. Okay. So he had said like, "All it shows is that they fucked. Like, that's all it shows, that they fucked."

Q. Did he say the word "fucked" twice?

A. Yes.

Q. Had you ever had a judge say that word in front of you before?

A. Not unless they were repeating testimony or -- no, not in that context. No.

Q. Did you think it was an appropriate for a judge to say to an assistant prosecutor?

A. It surprised me or shocked me when he said it at that

points was that the defendant denied that the two had intercourse and that, even when he had testified, he had -- "he" being the defendant -- had said that there -- what I thought, when he and I were in chambers, I said that I thought the defendant had used the words "non-traditional sex," which I since have read the transcript and those were not the words the defendant used. He said "not normal," I think was what the defendant said, not normal sex, during his testimony.

When we were in chambers, though, I think that it may have -- I may have supplied the word. I'm not certain. Brought up that he claimed it was non-traditional sex, but that the DNA was in very traditional areas for someone that claimed to not have had intercourse with the victim.

Q. Did you and Judge Morrow then have a discussion about what non-traditional sex was?

A. Yes.

Q. Tell us how that transpired.

A. So the judge had asked me what my definition of non-traditional sex was, and I said not intercourse. And the judge had said that my interpretation of non-traditional sex was shaped or formed by my own bias and inexperience.

And he had said that what the defendant, in

his mind, had meant by non-traditional sex was just not missionary, not in the typical, like, way. And then he went on to kind of say he meant like, you know, doggy style, and then he, like, named some other stuff.

Q. Did Judge Morrow use the words "doggy style"?

A. Yes.

Q. Did you feel that that was an appropriate conversation in light of what you were -- the subject matter you were talking about?

A. It just felt like everything kept -- no. At that point, I don't know that I -- at the point in time that this was happening, I hadn't thought about whether it was appropriate or not, truthfully. I -- at that point my focus was, like, just trying to convince him that the DNA was significant.

Q. With hindsight now that you've had time to think about it, do you think it was appropriate for him to say things like that to you?

A. No.

MR. CAMPBELL: I'm going to object. I don't know the relevancy of her hindsight here, and, really, I mean, it's nothing more than giving the opinion of others who have since given her an opinion on what they think.

THE MASTER: Is there a response?

Q. With hindsight, do you think that his conduct -- I mean his words were appropriate and respectful and courteous to you?
A. No.
Q. Explain to us why you feel that way.
A. Because it felt like, not just at that point in time specifically, but during the course of what felt like a very long time in his chambers, what turned out to be around two hours, it felt like every example that he gave always kept going back to sex or the way someone looked. It felt like they all kept -- every example or teaching moment he maybe tried to have about anything always went back to a sexual explanation.
Q. Okay. Did he talk to you about your voir dire?
A. Yes. So there was a point in time -- well, also -- sorry. To go back, kind of the conversation that, with regards to the positions and the non-traditional sex, there was also at the end of that, the judge had kind of said -- I had responded back to what he had said about, like, the positions and whatnot, and I said, "Well, Judge, actually, the defendant says in his statement that he couldn't penetrate her because she could have a miscarriage."

And so then the judge at that point kind of like laughed and said, oh, so like what -- like, he

saying that, like, what he's working with, or something along those lines, was so big that it would cause a miscarriage.

And I said like, I don't know.

Q. What was he referring to when he said what he was working with?

A. The defendant's penis.

Q. Did Judge Morrow refer to his penis as any other word besides a penis?

A. I'm not certain, but it was the sentiment, yes.

Q. Did he ever use the word "dick"?

A. He may have.

MR. CAMPBELL: Your Honor, that's leading.

THE MASTER: Objection is sustained.

BY MS. WEINGARDEN:

Q. Do you have in front of you an affidavit that you wrote as well as a memorandum of law that you wrote?

A. Yes.

Q. Could you review it and tell us whether or not you wrote that Judge Morrow referred to it as a dick?

MR. CAMPBELL: I'm going object. There's no basis for that.

MS. WEINGARDEN: Your Honor, it's to refresh her recollection. She said she doesn't remember.

MR. CAMPBELL: She said that she couldn't

remember.

MS. WEINGARDEN: So she can use her notes and her affidavit to refresh her memory.

MR. CAMPBELL: Again, she can refresh her memory when she says she can't remember. She hasn't testified to that.

THE MASTER: Ms. Weingarden, do you have an additional question before -- would you rephrase your question, please.

MS. WEINGARDEN: Okay.

BY MS. WEINGARDEN:

Q. Ms. Ciaffone, do you remember whether or not Judge Morrow used the word "dick" referring to Mr. Matthews' penis?

A. I don't remember.

Q. Do you know whether or not you wrote anything about that in your affidavit or in your memorandum?

A. I did.

Q. Would it help if you refreshed your memory by reading those documents?

A. Yes.

MS. WEINGARDEN: Okay. Judge, could she have a moment to look at those?

THE MASTER: Certainly.

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A. He was laughing.
Q. Did you also discuss or did you and he discuss your voir dire?
A. Yes.
Q. What did he say about your voir dire?
A. So Judge Morrow had said that he was not above learning from attorneys, that he still -- he still had things to learn and that he doesn't normally allow prosecutors or defense attorneys to do voir dire because it can be pretty useless, he had said, but that he let us do it on this occasion.

And he said, "And you know what, Ms. Ciaffone?"

And I said, "What?"

He goes, "I didn't learn anything from your voir dire at all."

And I said, "Okay."

And he said, you know, "If you want to be direct with a juror, just be direct with them. Just ask them something directly." And he said, you know, "For example" -- and then he gave an example.

He goes, "If I want to have sex with someone on a first date, what do I ask them?"

And no one in the room responded. And he said, "I would ask them, 'Have you ever had sex on a

first date?'"

And he said, "What's the second question I would ask them?"

And he didn't -- no one said anything. He said, "I'd ask, 'Would you have sex with me on a first date?'"

No one responded. He goes, "You don't ask questions like, 'Do you want to get married' or 'Do you want to have kids?' Like, those things would come later. Right?" He's like, "So just ask the question you want to know."

Q. Okay. Was there anything else that occurred in chambers that you believe may have been inappropriate?

A. Can I take a minute to look at my report -- or my memo?

Q. Yes, if that would refresh your memory. Yes.

MR. CAMPBELL: I would object to the open-ended question of "Is there anything else you can remember?" That's not really a point of refreshment. You're not refreshing her recollection. You're trying to create testimony.

THE MASTER: Response?

MS. WEINGARDEN: I don't have a response.

THE MASTER: Objection is sustained.

Continue.

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prosecutor table.
Q. Where was the jury at this time?
A. They were still in the witness room -- or in the jury room. I'm sorry.
Q. Had there been any discussion about releasing them for the day?
A. There wasn't, like, a discussion, but I knew -- we all knew that that was what was happening based on I think someone that had come to say it's 4:00, or something along those lines. Like, we've got to let them go.
Q. So when Judge Morrow had another conversation with you, was it in the courtroom?
A. Yes.
Q. Where were you standing?
A. I was standing next to Ms. Bickerstaff. We were both standing near the prosecutor table.
Q. And what were doing?
A. We were just getting packed up for the day.
Q. Was Judge Morrow -- where was he?
A. Judge Morrow was walking through -- so when you come from the back, you can either go right up to the bench if you're the judge, or to get out to where we were, you to have to go through a little area next to the witness seat and then down past the court reporter area to, like, the main floor. And Judge Morrow had walked

Q. Now, the next day did you go back to the courtroom?
A. Yes.
Q. Was that the day the jury rendered its verdict?
A. Yes.
Q. What was the verdict?
A. A hung jury.
Q. Was a mistrial declared?
A. Yes.
Q. And was the case set for a new trial date?
A. Yes.
Q. Now, after that did you ever talk to supervisors about what had transpired with Judge Morrow during that trial?
A. Even before that, we had, but yes.
Q. Explain what you mean when you say "even before that."
A. So that night that -- of the 12th when we went upstairs and we had ran into David and he told us to tell someone, and I said, no, absolutely not, we're not telling anyone.

Bob Donaldson, who is a prosecutor, a senior prosecutor at my office, walked by. And Anna said, "Well, there's a supervisor. We can tell him."

And I said, "No, don't tell him."

He was my office mate at the time's dad, so I was close to him and I was embarrassed. I didn't want him to know. And so Anna told him what had happened,

through to where we were onto, like, the main floor.

Q. Do you know whether or not he was wearing his robe?

A. I don't recall.

Q. Did you have a conversation or did he have a conversation with you at that point?

A. Yes. He walked up to kind of where we both were, and he asked how tall I was. And I think he offered, "What are you, like, five-one or five-two?"

Q. Did you respond to him?

A. I said something along the lines of -- like I may have said something like -- I'm not entirely certain on the words I used. Can I look at my statement?

Q. Yes, if that would refresh your memory.

A. Yes. So the judge had said -- Judge Morrow had said that -- like, "What are you, about five-one, five-two?"

And I said, like, "No, but I accept that, Judge."

And Ms. Bickerstaff responded and said, "Well, Judge, I'm five-three for context."

And so then the judge looked back over at me and said, "So four-ten."

And I said, "Well, four-eleven and a half."

And he said, "And what do you weigh, like 105 pounds?"

And I said, "Judge, you're not supposed to ask

a girl her weight."

And she looked at -- and he looked at Ms. Bickerstaff, and he said, "What are you, like 117?"

And she said, "That's very generous, but, no, Judge."

And he goes, "Well, I haven't assessed you for muscle mass yet."

Q. When he did that, how far was he standing from the two of you?

A. A couple of feet.

Q. Was he doing anything with his eyes?

A. Like kind of looking up and down to, I think, assess.

Q. Up and down where?

A. Like, us.

Q. Can you imitate for us with your own eyes what you saw him do?

A. Just like -- kind of, like, looking at her and then, like, kind of looking at me, kind of. I don't know if I -- it's hard to see my own eyes in the Zoom and do it, but --

Q. Was he looking at your faces or something else?

A. No, just our bodies, I would say, like ourselves.

MS. WEINGARDEN: For the record, the witness moved her eyes up and down for the record.

THE MASTER: Thank you.

Q. And eventually did he concede and let you go into the courtroom the next day?
A. I don't even know if he conceded. I, at the time, was, like, insubordinate I guess you could say, and I said I was going in no matter what, that they couldn't keep me out of the courtroom tomorrow.
Q. And what was it -- why were you so insistent on going to the courtroom the next day?
A. Because this is, like, one of the highest, most important things you can do, when you have a jury trial of this magnitude, is to see it out, see it through, and go back in and -- I'm sorry -- go back in and finish it out and take the verdict, regardless.
Q. And did you, in fact, do that the next day?
A. Yes.
Q. Now, after it was all over with, did anybody ask you to put into writing what occurred?
A. Yes.
Q. Who asked you that?
A. Athina Siringas.
Q. And she is, you said, the big boss of the special prosecutions unit?
A. Yes.
Q. So what did you put into writing?
A. A summary of what had occurred and what my knowledge of

A. Yes.
Q. How do you know that?
A. Because I was interviewed by Investigator JoAnn Kinney.
Q. Who is she?
A. She is one of the -- actually, I don't know if it's investigator or detective. I always get it wrong. I think it's detective. There are -- the Wayne County Prosecutor's Office employs investigators, oftentimes retired police officers from different places, as investigators in our office. So Ms. JoAnn Kinney is one of those. I believe she's a retired Detroit Police Homicide investigator employed by the Wayne County Prosecutor's Offices.
Q. Do you know when she interviewed you?
A. I can't recall.
Q. Do you know if it was before or after you wrote your affidavit?
A. I think it was after.
Q. Do you know if it was a short time after or a long time after?
A. I'd say a short time after. Not -- maybe a few days or weeks after.
Q. When she interviewed you, where did the interview take place?
A. In her office on the 12th floor, the prosecutor's

office.

Q. Was anyone else present, besides you and Detective Kinney?

A. I'm not sure if Chief Bivens was present.

Q. Who is he?

A. So the chief of the investigators at our office is Chief James Bivens. He's oftentimes called JB. I'm not sure if JB was present in the room with JoAnn at the time that I was interviewed. I don't recall.

Q. Do you know if JB, or James Bivens, is JoAnn Kinney's supervisor?

A. He is.

Q. When Ms. Kinney interviewed you, did she do it on video?

A. No.

Q. Did she record it in any way?

A. Not that I was made aware of.

Q. Was she taking notes?

A. I'm not certain.

Q. Did she take a witness statement like you -- like they used to do before video?

A. Like a question-and-answer format?

Q. Yes.

A. No.

Q. At any time were you allowed to review whatever she wrote or had about your interview with her?

A. So I want to say that it was at the conclusion of her investigation or the investigation from our office, being the prosecutor's office. I want to say maybe at the conclusion of that she called into her office Anna and I, and indicated that she had finished the investigation, that she had drafted a summary of our interviews, and she wanted us to check the accuracy of them.

Q. What format was your -- was what you reviewed?

A. It was -- it appeared to be like a narrative paragraph authored from her point of view.

Q. Was it typewritten?

A. Yes.

Q. And did you review that?

A. Yes.

Q. Did Ms. Kinney get it right?

A. For the most part, yes.

Q. Was there anything incorrect that Ms. Kinney wrote down?

A. Can I review it once more just to be certain?

Q. So for the record, that's Exhibit No. 12; right?

A. Yes.

Q. Okay. And if it would refresh your memory, please do review the paragraph relating to you.

A. Thank you. I would say that that's accurate, yes.

Q. Who provided you with a copy of that paragraph?

A. JoAnn Kinney showed it to me. I don't think she ever provided it to me, like gave me a copy. But you provided this to me.
Q. Now, do you have the entire exhibit, which is, for the record, nine pages long?
A. No. I have, like, a paragraph that's a couple inches thick.
Q. How many lines are written on the copy of the summary of your interview with Ms. Kinney?
A. Ten lines in the one paragraph and three lines in the smaller paragraph below.
Q. Okay. Would you say it is significantly shorter than your memorandum and your affidavit?
A. Yes. It's just -- that's the length, very small, very short.
Q. Have you been privy to reading the rest of the investigation done by the Wayne County Prosecutor's Office?
A. No.
Q. Did you read the paragraph relating to Ms. Bickerstaff's interview with JoAnn Kinney?
A. I didn't read it, but I don't remember if JoAnn Kinney read them out loud. All I know is that when we walked out, Anna said that there was a mistake in hers.
Q. Did you give her any advice about what to do about the

mistake?

A. I said she needed to go back and she needed to tell JoAnn.

Q. Do you know whether or not Ms. Kinney -- Ms. Bickerstaff went back and talked to Ms. Kinney?

A. I don't know. She said she was nervous. She didn't want to go back in there and tell her. And I said you've got to go back in there, but then at the same time, you know, at this point, I mean, I knew that we -- I couldn't get involved in the sense that I was potentially a witness as well.

Q. So --

A. I'm not sure if she did or not.

Q. Did anyone, to your knowledge, report this situation to the Judicial Tenure Commission?

A. Yes.

Q. Who reported it?

A. So I don't -- what do you mean by reporting it, I guess?

Q. Okay. Well, so let's go back. Were you asked to fill out a form called a Request for Investigation relating to this incident?

A. So, yes, but that was in the works, so Anna handed it to me, the document.

Q. Had Anna written on the document when she handed it to you?

THE WITNESS: Thank you, Ms. Jorgensen.

I don't know. To my knowledge, no.

BY MR. CAMPBELL:

Q. You had been in Judge Morrow's courtroom for the May 2009 argument on the 404(b) motion that was filed by the People pretrial; correct?

A. Yes.

Q. You had also been there for other pretrials related to the *Matthews* case, or no?

A. Yes.

Q. How many times in 2019 had you been to Judge Morrow's courtroom?

A. I would say less than five, counting any pretrials or motion hearings that may have occurred in another case that I had pending before him at the same time.

Q. Did you familiarize yourself with the courtroom?

A. In what sense?

Q. Well, did you make any trips special just to check out the courtroom itself to understand where everything was, whether it be tables, chairs, where you anticipated the defendant to be, things like that?

A. I had been in there before, so I was familiar.

Q. Fair to say the courtrooms in the Wayne County Criminal Division are not cookie-cutter?

A. They actually mostly are. It just depends on where the

THE MASTER: Continue, Mr. Campbell.

BY MR. CAMPBELL:

Q. When you finished your list of three, what you did is you began to address issues that you wanted the jury to be aware of that the defense would raise. Do you remember that?

A. No.

Q. At page 177, lines 4 through 7. Could you read that, please, Ms. Ciaffone?

A. Yes. "As you listen to the evidence in this case, beware of what they call red herrings. A red herring is something that's meant to distract you, to distract you from where the evidence is --"

Q. First of all, do you know what a red herring means in terms of what it's an allusion to?

MS. WEINGARDEN: Objection. Relevance.

THE MASTER: Mr. Campbell, response?

MR. CAMPBELL: There was no objection to her reading this, and she used the term "red herring." I'm asking her what she meant when she said it.

THE MASTER: Further objection, if any, from disciplinary counsel?

MS. WEINGARDEN: It's not relevant.

THE MASTER: All right. The objection did not come earlier. I'm going to allow the question. Go

ahead.

BY MR. CAMPBELL:

Q. Do you remember the question, Ms. Ciaffone?

A. No. What was the question?

Q. I'm going to have the court reporter read it back just to make sure we get it accurately.

A. Oh, I remember. What my definition of "red herring" is.

Q. Let's wait for Ms. Jorgensen to be ready and then we can proceed.

(The question was read back as follows:

"QUESTION: Do you know what a red herring means in terms of what it's an allusion to?")

THE WITNESS: And my response is the same as what I had described in my opening, just that it's something meant to distract, to keep an eye out for something that's meant to distract them.

BY MR. CAMPBELL:

Q. It's actually a fraudulent act. It's an act of dragging a fish across a fox's path so that the dogs are led in a different direction on purpose. Did you know that that's where that came from?

A. No.

Q. Were you accusing the defense of being fraudulent? Was that your intention?

MS. WEINGARDEN: Objection. Relevance.

MR. CAMPBELL: Oh, I'm going --

THE MASTER: I'm going to allow the answer. Go ahead and answer.

THE WITNESS: No.

BY MR. CAMPBELL:

Q. Do you remember what happened after you made the statement that we just had up on the screen about the red herring? Do you remember what happened?

A. The judge stopped me and said that I could not do that.

Q. Have you made that same statement, or one similar to it, in an opening statement previously?

A. I'm not certain.

Q. Have other judges let you make that statement without it being noted or objected to or corrected?

A. Well, I don't even remember if I've made it before, so I don't remember if the judge had stopped me.

Q. And you were the mentor for Ms. Bickerstaff; correct?

A. I saw her as someone that I was mentoring. I don't know how she saw me.

Q. Let's go to page 177 in Exhibit 5, lines 8 through 11. And I believe this is Judge Morrow and I'll read it here. It says he's interposing.

"Excuse me. I love you for that. But as to what the evidence will show, not anticipating what might

Q. So you would agree, though, it would be overly sensitive to make a point out of this "love you for that" lead-in to an instructive moment in terms of telling you that you had gone too far in your opening statement?
A. I don't know that it would be sensitive when you are evaluating the rest of what occurred during this trial. I would say that it was on par with a lot of the inappropriate comments that were to follow.
Q. Would you have filed a Judicial Tenure complaint based on that remark?
A. I would not.
Q. Mr. Masterson testified. Do you remember that?
A. He did, yes.
Q. Do you remember leading Mr. Masterson through most of the direct examination?
A. I'm not sure.
Q. Do you remember where Mr. Masterson did ID Mr. Matthews?
A. I do know he did identify him, yes.
Q. Do you remember that when he did so he was a little bit on the weak side? He said, "Yeah, I think that's him"?
A. I think -- yes, I do remember that. I wouldn't -- I wouldn't characterize it as on the weak side. I think that you would have had to see the witness, Mr. Masterson, and his demeanor to understand that he was a very nervous, very -- he -- he was a different

THE MASTER: Thank you. Mr. Campbell, continue.

MR. CAMPBELL: Thank you.

BY MR. CAMPBELL:

Q. Do you remember that Mr. Mattheson did not --

A. Masterson?

Q. Masterson. I do appreciate those corrections. Thank you.

Do you recall that Mr. Masterson could not recall the date of January 9th, 2003, when you asked him about that?

A. Yes.

Q. Do you remember that you followed up nicely with questions about did you recall a time where there was a body on the front lawn?

A. Yes.

Q. I've got to ask. In that opening statement that we read about before where you talked about several admissions and two killings, do you remember that in the opening?

A. Yes.

Q. Why did you mention two killings in a case about one killing?

A. It was based off of a statement made by the brother.

Q. Was the other killing one of those that had been suppressed under the 404(b) motion?

A. My position would be yes, but I believe the testimony of Mr. Emory Matthews was something that was fleshed out in advance of trial, if I recall.

Q. You think there is an order somewhere that allows you to talk about two killings through Mr. Emory Matthews?

A. Not an order, no.

MS. WEINGARDEN: Objection, Your Honor. This has nothing to do with the disciplinary proceeding.

MR. CAMPBELL: It has everything to do with the issue of being a mentor and the comment by the judge that was elicited, and it's not -- it's not in any affidavit, Judge. It's not in any report, no memo. It's not in the prosecutor's big report that they did. It's not in the request for investigations that my client was served with. It's not in the answers that we've done. It's not in the formal complaint. They came in here. They talked about this issue of whether or not she was a good mentor, whether or not --

THE MASTER: Thank you.

MR. CAMPBELL: -- she should follow.

THE MASTER: Thank you, Mr. Campbell. The objection is sustained. We'll go to the separate record. Please read back the last question.

- - -

using.

Go ahead, Mr. Campbell.

MR. CAMPBELL: I want to stay on the main one. I'm going to withdraw my question that was objected to, and I would like to proceed, if I may, with questioning the witness.

THE MASTER: You may continue.

MR. CAMPBELL: Thank you.

BY MR. CAMPBELL:

Q. So there is a time where Mr. Masterson was asked about whether or not he saw Mr. Matthews. Do you remember that?

A. Yes.

Q. Do you remember that he told you originally that he did not remember seeing Mr. Matthews?

A. I think that was his initial response. Correct.

Q. And it was not "can't remember," but it was a "no." Do you remember that?

A. Yes.

Q. And what you did in response to Mr. Masterson was to pick up a prior transcript of a statement under oath that he had provided during the investigation, and you had him read it and agree with it. Is that a fair statement?

A. I do know that I confronted him with his statement, yes.

I don't know if I confronted him with it for that question, because my understanding is that I had asked him so you never -- I think I continued on the questioning at that point. I don't know that I showed him a transcript then.

Q. Do you remember -- well, let me ask you this.

You would agree with me if a witness answers "no" to a question that it's not proper to refresh recollection at that point?

A. I would need more background. I need more context. In what way?

Q. You asked the question to a witness, "Did you see Mr. Matthews on January 9, 2003?" And the witness says, "No."

A. It would have been more proper to impeach him.

Q. But you would agree that it's not refreshing recollection?

A. If he does not say that he didn't remember, correct.

Q. Thank you. Do you recall leading Mr. Masterson for two and a half pages of his testimony from the point where he said "no" and you handed him the transcript and said, "Well, read this, read this, read this"? Do you remember that?

A. I do remember going over some things with him in the transcript. I don't remember if I lead him for X amount

of pages or not, but --

Q. I appreciate that. If we could go to page 190 of the first volume of Exhibit 5, lines 16 to 24.

Do you remember why you stopped leading him?

A. Well, you just put a transcript up on the screen, and it looks as though the judge stopped me, from what you put up on the screen.

Q. That is correct. I wondered if you remember him stopping you?

A. No.

Q. Thank you. I'm going to read it, and then there is a line for you at the end. It's line 24 when we get there, because that's you. Are you ready?

A. Yeah.

Q. Interposing -- and you know what "interposing" means; right?

A. Sorry. What did you say?

Q. Ms. Ciaffone, you know what the word "interposing" means on a transcript; correct?

A. Yes.

Q. That means he's interrupting you. Is that a fair statement?

A. I agree.

Q. "If I might, please, you're not refreshing his memory because you haven't asked him a question about what did

he tell the police. You're just reading stuff right now. You can ask him questions about what he remembered the police" -- there's an S-I-C there in brackets. "You can refresh his memory with that."

As an aside here, maybe Mr. Allen is likewise an east sider like me. Now back into reading.

"If you'd like, but you just can't read it. That's not the proper way to have that information introduced."

Do you see that?

A. I do.

Q. And what was your response at line 24?

A. "Thank you."

Q. Does this refresh your memory of what the conversation was between you and Judge Morrow at that point?

A. I remember the conversation. I just didn't know if it came right after that point in time.

Q. How about the way that he interposed or interrupted where he said -- what was the phrase? -- "Please."

MR. CAMPBELL: Can you put that back up?

BY MR. CAMPBELL:

Q. I'm sorry.

A. Are you asking if I remember that?

Q. I'm asking if you do remember him saying, "If I might, please" as his introduction.

"At this time we're supposed to have an evidence technician present in the witness room, and she is not here. We have a little bit of a slowdown with our witnesses right now. Would the Court just allow maybe five minutes for us to maybe make some phone calls?"

Q. There is then a back-and-forth on pages 58 and 59. I believe it's with the jury present. Do you remember that?

A. There were present, yes. Because he posed -- "he" being the judge. Judge Morrow posed questions to them about whether or not I should be allowed to have some more time.

Q. You know that jurors these days -- let me ask you.

You started ten years ago trying cases; correct?

A. Correct.

Q. You know that the rules have changed about how involved jurors can be with a number of things; correct?

A. Yes.

Q. Compared to ten years ago. You know even still that Judge Morrow's jurors are told that they have considerably greater autonomy than most jurors? I think that's a safe way to ask that question.

A. Yes.

Q. Okay. You were there when he told the jury, "Hey, if you need to get up and go to the bathroom, go ahead and get up and go to the bathroom."

A. Yes.

Q. "The judge doesn't have to tell you where he's going, so you don't have to tell us where you're going. And we'll wait for you if that's what it takes." Correct?

A. Correct.

Q. That's just an example, and there's probably a lot of them in terms of what they could do.

By the way, do you remember in voir dire there was a discussion about menstruation?

A. I don't know if it was a discussion. I think it was a comment by a juror or something.

Q. Correct. There was a comment by a juror, and the judge then followed it with a discussion about that; right?

A. He may have, yes.

Q. Okay.

A. I don't remember.

Q. Safe to say, the voir dire was different from any voir dire circumstance you had ever had, it had no similarity to anything else that you had done as a prosecutor?

A. Certainly.

Q. Doesn't make it wrong, but it was different; correct?

A. Certainly different, yes.
Q. So I'm sorry. Can you read -- in fact, I've kept you without food and water. I'm going to read it for you, and you tell me if I get wrong.

Ms. Ciaffone at line 5: "At this time we're supposed to have an evidence tech" -- I think you already read that.

A. I read that, yeah.
Q. That must be my stickerless approach now. Sorry. Let's go forward.

Kirk DeLeeuw?

A. Yes.
Q. Am I saying that name correct?
A. You are.
Q. He is with the Michigan State Police, forensic biologist?
A. Yes.
Q. And he was, it turns out, the next witness; correct?
A. Yes.
Q. I think there was some confusion about calling somebody, and then they decided it worked out best that Kirk DeLeeuw was available and he came in and he testified; correct?
A. Yes.
Q. Can we get Volume 2, page 72, lines 9 and 11?

Q. But once a bell has rung, it can't be un-rung?

MR. CAMPBELL: I'm going to withdraw that question. I apologize.

BY MR. CAMPBELL:

Q. You had a discussion with Kirk DeLeeuw about the rape kit project after he acknowledged that he knew what it was, and you described a fifteen-year backlog; correct?

A. He does or I do. Correct.

Q. I believe it came from you. You asked him if he was aware of the fifteen-year backlog.

A. Correct. He explained what I think that meant and what that was.

Q. In the end when you're in chambers with Judge Morrow, he's critical of your admission of any of the DNA evidence when you have your discussion with him; correct?

A. Correct.

Q. Was he critical, among other things, that you were using the fifteen-year backlog to hide the fact that between the police and the prosecutors, they had simply dropped this case and it got lost between 2003 and 2018?

A. That was nothing he ever said, no.

Q. You recall the meeting in the judge's chambers -- I'm sorry. Yeah, judge's chambers -- to be about two hours long, maybe a little more, maybe a little less. Is that

adjustments to the affidavit? Right?

A. I may have added some things to the affidavit that weren't included in the memo.

Q. This would be an example of something you eliminated or took out of -- you took out from the memo when you made the affidavit the word "little." It went from "little bit" to "a bit"; right?

A. Yes.

Q. I want to go through I think the rest of the trial, and then we'll return to matters in the chambers. Give me a moment.

Am I correct that you never moved to admit the 404(b) evidence in your case in chief?

A. I believe we renewed our motion at the end of the trial.

Q. Now, Ms. Ciaffone, you know, the words I just used, and you know the words you just used. Are you saying that you raised the 404(b) motion in the case in chief that you had?

A. Not in the case in chief. I believe that the -- it may have come up at the -- I don't know at what point it was raised. But, no, we didn't renew it during our case in chief.

Q. Okay. So you know that the 404(b) motion would have to be raised in your case in chief; right?

A. Not -- I don't know. I'm not sure.

BY MR. CAMPBELL:

Q. Rebuttal testimony has to rebut something; right?

A. Yes.

Q. So the only witness called by the defense was the defendant; correct?

A. Correct.

Q. So in order to present rebuttal testimony on 404(b), you would have to present testimony that rebuts something the defendant said; correct?

A. Correct or -- correct, evidence that came out, not necessarily during -- correct.

Q. And the defendant was never asked about any homicide other than the homicide that was the subject of the trial when he testified; correct?

A. I'm not aware. I can't recall, but I don't believe so.

Q. In other words, you believe that he was not asked about any homicide other than the homicide that was the subject of the case; correct?

A. I believe so.

Q. So if he did not say anything about other murders, there is no rebuttal that could be brought in on the issue of other murders in your case in June of 2019; correct?

A. Correct.

Q. You did move for admission of the 404(b) evidence on the last day of the trial; correct?

A. Correct.
Q. Yeah. And that -- the judge allowed you to raise that issue; correct?
A. I don't know if he allowed me. I raised the issue, and he ruled on it.
Q. And he denied it; correct?
A. Correct.
Q. He asked you -- do you remember if he asked you about whether you were asking for reconsideration of his prior order?
A. I do.
Q. And do you remember saying initially yes?
A. Yes, and then I changed my -- I changed that, but, yes, initially, yes.
Q. And why did you change that?
A. Because we were going off of the Court of Appeals order. I must have misspoken inadvertently.
Q. You know that the judge who currently has the case is Judge Michael Hathaway; correct? This is the James Matthews prosecution that you handled in June that ended in a hung jury has now been assigned to Judge Michael Hathaway in the Wayne County Circuit Court Criminal Division; correct?
A. Correct.
Q. You know that Michael Hathaway is a visiting judge in

Q. So you did not move to disqualify Judge Morrow from the *Matthews* case?

A. I don't recall. It may have been by my supervisor, Athina Siringas, is my recollection.

Q. You have never seen an affidavit from her; correct?

A. No.

Q. We have the motion, the front page of the motion. If you could find that and let me know when you do.

How long is the motion that you saw for disqualification?

A. I'm not sure. I can't remember.

Q. When did you last see it?

A. I don't know.

Q. I've seen a motion to permit a motion to be filed under seal. Have you seen that motion?

A. At some point I'm sure, yes.

Q. Did you see a subsequent motion filed under seal?

A. If it's not the motion that we've been talking about with regards to disqualification, then I don't know.

Q. So you don't know -- I'm going to put up the front page of the document, which is my exhibit --

MR. CAMPBELL: Give me a moment. I'm trying to figure out which exhibit it is. It's from the court record. I think it's B. Yes. It's my Exhibit B. Is there a stipulation for the admission of --

MS. WEINGARDEN: Yes. Yes. It's part of the court file, which is Exhibit B.

MR. CAMPBELL: Thank you.

BY MR. CAMPBELL:

Q. Do you see there People's Motion to Disqualify Judge Bruce Morrow?

A. Yeah.

Q. And you see the names of the folks representing the prosecutor's office?

A. My three bosses, yes.

Q. Your name does not appear; correct?

A. Correct.

Q. Do you have the full motion? I have the front page there for you. But do you have the full motion?

A. No.

Q. I'm going to go back into the trial -- by the way, so Judge Hathaway granted, in part, your motion for the 404(b) evidence; correct?

A. Correct.

Q. Was it the same or was it different evidence than you had presented to Judge Morrow?

A. It was -- some was the same, and I believe there was some additional information that we -- some new -- not new in the sense of being new as in age, but new as in had not been raised in the last motion with

BY MR. CAMPBELL:

Q. And I'll try and lead you through this as quickly as I can, but as correctly as I can.

James Matthews at some point told somebody he did not have sex with the decedent. That was your understanding; correct?

A. That he didn't know her.

Q. Well, that was -- in 2003 you claim that's what he said, and then in two thousand -- some time later than that there may have been a statement that he didn't know her, but I want to focus on the time he said he did know her but he didn't have sex with her because she was pregnant.

A. I don't know that -- I don't know if I know what you're talking about, where you're talking about.

Q. Do you remember, when you cross-examined James Matthews while he was testifying about a statement that he had given, where he said that he didn't have sex with her because she was pregnant?

A. I think I asked him about a statement he had made where he said that there was -- he had not penetrated her or something along those lines, yes.

Q. Well, do you recall actually cross-examining him on the statement that he did not have sex with her, and his answer was: "I never said that. I said I did not have

normal sex with her"?

A. Okay.

Q. Does that sound familiar to how the case went?

A. I'm not certain, but it's something along -- whatever the scenario was, he ultimately denied -- denied that.

Q. You never asked him what normal sex was; right?

A. I don't recall. I don't think so, no.

Q. Okay. And you never called a police officer to perfect, either for impeachment or for substantive purposes, that testimony? Nobody came in as a police officer and said Mr. Matthews told me that he did not have sex with the victim?

A. We had Investigator Special Agent Barbara Simon that came in, and she read the statements that he made previously, back closer to the time of the homicide.

Q. She read a statement from 2003; correct?

A. Honestly, I don't remember the dates offhand, but for some time closer to the homicide she read the statements she was present for.

Q. Exactly. She was not present for the statement about whether or not he had sex; correct?

A. I don't know. That would have been in 2003, so I would say, yes, I thought she had.

Q. If she was there, then is it that you failed to get that testimony from her in her testimony on rebuttal, or is

A. I was not surprised because he got up there and gave a very confusing story that was moderately consistent with a mixture of his statements that he had made throughout the years. So I expected whatever he got up there to say to not make much sense.

MR. CAMPBELL: Do we have Volume 2, page 196, 19 to 22?

BY MR. CAMPBELL:

Q. Do you remember asking this question at lines 19 through 21?

"Okay. Now, Mr. Matthews, did you and Ms. Robinson have sexual intercourse on January the 9th or January the 10th?"

A. Yes, I remember that.

Q. And he responded: "Yes. We did"?

A. I remember that, yes.

Q. The next one, the following lines 23 and 25 on the same page.

A. I remember this line of questioning with him.

Q. Thank you. Can you read that question that you asked him?

A. "QUESTION: Okay. Do you remember telling the police when you were interviewed on the 14th that Ms. Robinson wasn't able to have sex because she was pregnant?"

Q. So this is a time where you're asking him about

statements to the police concerning not having sex; correct?

A. Yes.

Q. And what is his response?

MR. CAMPBELL: If you can put that up, please.

BY MR. CAMPBELL:

Q. This is page 197 of Volume 2, 1 through 3. Go ahead.

A. Do you want me to read it?

Q. I'll read it, actually. It's his answer.

"She was pregnant. She couldn't have sex like we normally do because we didn't want her to abort the baby, which is why she had the miscarriage the other time."

And so you were using the prior statement, one, to impeach his statement that he had previously said, it was a prior inconsistent statement to say that he had not had sex with her and was now testifying that he had sex with her; right?

A. Yes.

Q. And you also, because he was a defendant and because, as an admission, it would be admissible against him substantively, you wanted to use that, the information in the police report, against him; correct?

A. The written interview statement. Correct.

Q. Correct. In order to perfect that to use it as

told him what happened with the case. That's the only information we got on the 12th out, or the 11th, whichever day that was, the 12th. The only information we got out, he asked how it went. Anna told him what had happened.

Q. You have mentioned in your direct that there was a time when you were interviewed by the Commander Detective Kinney; right?

A. Yes.

Q. When she interviewed you, am I correct from what you said on direct that both you and Ms. Bickerstaff were in the same room being interviewed?

A. Incorrect.

Q. Am I correct that you described, on direct, talking to Ms. Bickerstaff after the interview? That's --

A. No, because we were interviewed -- no, we weren't together. The time that I think you're referring to is when JoAnn Kinney called us back there to let us know she finished the investigation and then let us each read our paragraphs that she had drafted.

Q. Were you --

A. We were never interviewed by her together ever.

Q. Thank you. Were you in the same room when you read your separate paragraphs together?

A. Yes. They weren't read out loud, to my knowledge,

was?
A. I don't.
Q. When you leave Detective Kinney's office, it's you and Ms. Bickerstaff together; correct?
A. Correct.
Q. And what is Ms. Bickerstaff's comportment or demeanor at that moment?
A. She was concerned.
Q. Could you tell she was concerned while in the office?
A. No.
Q. What led you to believe -- what did you see or what did you perceive that led you to believe she was concerned?
A. It was only things that I heard. I could repeat the statements, but it's only things that I heard her say that made me know that she was worried or nervous.
Q. That made you believe --
A. I could say the statements.
Q. I'm sorry. What did she say that made you believe that she was concerned?
A. She said, "I'm worried. Some of the stuff that JoAnn put in here wasn't correct."
Q. Did she tell you what stuff that was put in that wasn't correct?
A. She may have at the time, but I don't remember. I don't think she did. I'm not sure.

Ms. Bickerstaff does. Do you remember that difference between the two memos?

A. I've never seen her memo, so I couldn't tell you.

Q. At the time that you are in the courtroom where Judge Morrow originally states what he thinks your height is, do you remember that?

A. Yes.

Q. Where are you standing?

A. Near the prosecution table.

Q. On which side of the prosecution table?

A. Closer to the jury box towards like the front of the prosecutor table.

Q. And where is Ms. Bickerstaff?

A. I want to say that she was either at the seat where she had been sitting throughout the trial but standing behind the chair, or at the seat where I had been sitting but standing behind the chair. She was packing stuff up, so we were right in that area.

Q. And where was Judge Morrow?

A. He was, I believe, kind of on the -- like near where, like, the witness stand would be but, like, out front on the floor, the main floor, near where we were.

Q. You're aware of the charges in this case being that Judge Morrow overtly eyed you and Ms. Bickerstaff. That's the phrase that is used by the prosecution:

Overtly eyed. Have you read that before in their complaint?

A. I'm not sure. I've read the complaint, but I don't know if I remember that language. I know that's not -- I don't know that that's -- that's not language I've used.

Q. Do you think that's an accurate description?

A. Overtly in the sense of purposefully, do you mean, or how so?

Q. Improperly.

A. I think that the whole encounter with regards to the height and the weight situation was entirely improper, and you can toss in how he looked with his eyes as part of that whole thing.

Q. But you've never said to anybody "he overtly eyed me"; correct?

A. No, I've never used the word "overtly eyed" or the phrase "overtly eyed."

Q. Have you ever -- you've met Lora Weingarden?

A. Yes.

Q. In fact, she used to work at the Wayne County Prosecutor's Office; correct?

A. Yes, correct.

Q. And she's now the prosecutor, the disciplinary counsel here; correct?

A. Correct.

A. Yes.
Q. Okay. Where Judge Michael Hathaway allowed the 404(b) evidence as to the New York City -- denied it. I'm sorry -- denied the 404(b) evidence as to the New York City CSC case?
A. Yes.
MS. WEINGARDEN: Mr. Campbell, will you stipulate to that?
MR. CAMPBELL: I'll stipulate to that.
BY MS. WEINGARDEN:
Q. And is there another order dated September 23rd, 2019, where Judge Michael Hathaway granted as to two homicide cases, one in Michigan and one in New York City?
A. Yes.
MR. CAMPBELL: I'll stipulate to that too.
MS. WEINGARDEN: Okay.
BY MS. WEINGARDEN:
Q. Have I ever talked with you about whether or not Judge Morrow looked your bodies up and down as he was discussing your height and weight?
A. Yes.
Q. And you said earlier you didn't use the words "overtly eyeing." What words did you use?
A. I don't remember, but I can tell you that the sentiment was overtly eyeing.

Attachment B

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

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

Formal Complaint No. 102
Volume 2

P R O C E E D I N G S

held before the Special Master Hon. Betty R. Widgeon (P32596) via Zoom in Michigan, on Monday, November 23, 2020, commencing at or about 8:43 a.m.

APPEARANCES:

For the MJTC: JUDICIAL TENURE COMMISSION
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REPORTER: Ms. Elsa J. Jorgensen, CSR-6600

ALSO PRESENT: Hon. Bruce Morrow;
Ms. Laurie Hagen, Collins Einhorn.

Q. Were you assigned to any sort of special unit in June of 2019?
A. Yes.
Q. What unit?
A. The Violent Crime Unit.
Q. Did that involve homicides?
A. No. No.
Q. Do you know a young prosecutor by the name of Ashley Ciaffone?
A. Yes.
Q. And did you and she co-try the case of *People vs. James Matthews*?
A. Yes.
Q. How did you get involved in trying that case?
A. I believe she either told me or a supervisor that it was a very voluminous case and had asked for help, and then I went to a supervisor and confirmed or asked for permission to help on the case and they said it was fine. So I, from that point on, was like a second chair for her.
Q. Was that the first time that you and Ms. Ciaffone co-tried a case together?
A. No.
Q. Did you do one before June 10th of 2019 or after, or both?

as possible.
Q. Was that in the transcript?
A. No.
Q. Besides those two examples, I'm not going to ask you what else was not in the transcript, but were there other things that did not make the transcript?
A. I believe so.
Q. Now, the trial started on June 10th of 2019; right?
A. Yes.
Q. Who conducted the voir dire for the prosecution?
A. Ashley Ciaffone.
Q. Who conducted the opening statement for the prosecution?
A. Ashley Ciaffone.
Q. Did you do the direct exam of any witnesses on June 11th?
A. I did a police officer who was an evidence technician, and I believe I did the victim's sister, who identified her, and I believe I did the medical examiner.
Q. Have you had an opportunity to review the direct exam that you conducted for those three witness?
A. Yes.
Q. I'm going to direct your attention first to the police officer who was the evidence technician. Did you notice in the transcript that you started many sentences with the words "and" or "okay"?

A. Yes.
Q. Did you do the same with Dr. Galita, the medical examiner's testimony?
A. Yes.
Q. Now, did anyone point out to you that you start the sentences that way?
A. Yes.
Q. Who did?
A. On this occasion during this trial, Judge Morrow had let me know after -- after the evidence tech, he told me that that is something I should keep an eye on because I was starting a lot of my sentences with "and."
Q. Before that, did you ask Judge Morrow for any feedback?
A. No.
Q. When he gave you that feedback, did he do it on the record?
A. I'm not sure.
Q. Was it in open court?
A. Yes.
Q. Were there people in the courtroom when he said that?
A. Yes.
Q. Who would have been in the courtroom?
A. Everyone. We were between witnesses at that point. I believe Ashley was maybe going to get another witness, and he just said from the bench that I should watch

sitting in the middle chair, and then the OIC was sitting to my left and then Ashley during the normal trial was sitting in the seat to my right.

Q. You said the chairs had rollers on the bottom?

A. Yes.

Q. And was the podium to your right or to your left?

A. To my left.

Q. How crowded was it behind the prosecution table?

A. It was very crowded. It's, you know, like a normal folding table, but when there's three chairs it gets -- the armrests are, like, right up against each other. It gets kind of hard to move.

Q. So you said you were seated in the middle chair?

A. Yes.

Q. And Ms. Bickerstaff you said left the courtroom. Who was seated to your left?

A. Ms. Ciaffone left the courtroom.

Q. I'm sorry. Ms. Ciaffone, correct. Who was seated to your left?

A. The OIC, Sergeant Griffin.

Q. During the break did he stay in the chair or did he leave?

A. He stayed in his chair.

Q. During the break do you know what Mr. Noakes did?

A. I don't recall what Mr. Noakes did.

Q. During the break where did the jury go?
A. Into the jury room.
Q. And what about the people who were sitting in the audience?
A. They were all -- they stayed where they were.
Q. Did anything unusual happen during that break?
A. When we were on that break I had addressed the Court, Judge Morrow, and I had asked -- or I don't remember exactly how I phrased it, but I said, you know, I was trying to keep in mind the tip you gave me. I tried to, like, you know, heed your advice. Did you think I did better?
Q. And what were you referring to?
A. When he told me I was starting every sentence with "and," I tried to do -- I tried to keep in mind not starting every sentence with "and" during the medical examiner.
Q. So you were asking him if you did better in that regard?
A. Yes.
Q. Where were you when you asked the question?
A. I believe I was seated at the prosecution table or, you know, headed to sit down at the prosecution -- or, yeah, back in my seat at the prosecution table.
Q. Where was Judge Morrow when you asked the question?
A. He was up sitting on the bench.

was seated in the seat, he was right next to me.
Q. When he was seated in the seat, were the arms of the chair touching?
A. I believe so.
Q. And at that point did you have any idea what the conversation was going to be about?
A. No.
Q. How did he start the conversation?
A. He said when a man and a woman start to get close, what does that lead to? And I said I don't understand, Judge. And he repeated it again. He said when a man and a woman get close, what does that lead to? And I said do you mean sex? And he said, yes, it leads to sex. He said you start with holding hands, rubbing elbows, kissing, foreplay, and then that leads to sex. And then he said would you want foreplay before or after sex? And I didn't say anything. I -- sorry.
Q. Okay. So I don't want to interrupt you.

So did he make these statements one after the other after the other, or did he have you answer whatever he was asking you?
A. The first, when he said what does that lead to, I responded and I said I didn't understand. He said it again, and I responded and then he -- when he asked about foreplay, he -- I didn't respond, but he just kept

looking at me until he -- so he said would you want foreplay before or after sex? I didn't say anything. And then he repeated himself so I responded.

Q. And what did you say?

A. I said before.

Q. Now, was he asking about you personally, or was he asking about people in general?

A. I'm not sure. He just said you --

Q. Go ahead. Go ahead.

A. No, he just said would you want foreplay before or after sex? It wasn't clear.

Q. Tell us how his body was positioned when he talked to you like that.

A. He was like kind of turned towards me and like leaning forward a little bit. Like, directing, like, his body towards me, not like -- it wasn't -- it wasn't addressing the whole courtroom.

Q. I'm sorry. Can you estimate how close your heads were together?

A. Probably like a foot, foot and a half. The chairs were very close together.

Q. What were his eyes doing?

A. He was looking directly at me, you know, wasn't breaking eye contact, wasn't looking around, just constant eye contact during the conversation.

Q. Do you recall what he said as his example?
A. Yes. He said, you know, if I want to sleep with a woman on a first date, I wouldn't say: Do you want a family? I would say: Would you sleep with me on first date? Have you ever slept with anyone before on a first date?
Q. Did the case involve sex? Was it a charged sex crime?
A. No. We only -- no.
Q. Okay. Do you recall -- let me go back.
Did you think it was appropriate or inappropriate for him to give you that example?
A. I thought it was very inappropriate.
Q. And did he say anything else in chambers, besides using the F word and that, that you thought was inappropriate?
A. He, like, made comments about the defendant's body parts.
Q. What specific body part?
A. His penis.
Q. Did he refer to the defendant's penis as anything other than a penis?
A. He did not use the word "penis." He said dick.
Q. What was he saying about the defendant's dick?
A. He was saying, oh, that guy must think he feels so good about himself, or something like that, that his dick was big enough to, like, hurt her or hurt the baby. Like, he must feel so good about himself that he has such a

big dick, like, yeah, right, my guy, or something like that.

Q. So did the defendant testify in your trial?

A. Yes.

Q. Did he testify that -- anything involving the victim being pregnant?

A. The defendant testified, yes, that the victim was pregnant, but she wasn't.

Q. And did he talk about, in his testimony, how they had sex in terms of body positioning?

A. The defendant just said it was non-traditional sex.

Q. Did anyone on the record at that trial clarify what he meant by that?

A. I don't believe so.

Q. During the in-chambers discussion, did Judge Morrow discuss with you both and Mr. Noakes anything about the words "non-traditional sex"?

A. Yes. It came up that that was how the defendant testified, and Ashley had said that she -- she believed non-traditional sex to mean anal sex or oral sex. And the judge jumped in and said: Well, you know, that's your bias. Your bias led you to the wrong conclusion in this case and your personal bias led you to misconstrue because obviously he meant not missionary style sex, he meant doggy style sex as non-traditional so it wouldn't

A. He, like, looked at us and he kind of, like, looked up and -- like, looked down once and then looked back up.

MS. WEINGARDEN: For the record, the witness has shifted her eyes down and up a few times.

MR. CAMPBELL: Well, I'm going to object. The testimony was once. So whether she did it a few times in your questioning, that's different. But to suggest that she had done it a few times and that's her testimony, that's wrong.

MS. WEINGARDEN: Let me rephrase the question.

MR. CAMPBELL: No. I'm going to object to asked and answered, because the answer was he did it once.

MS. WEINGARDEN: Judge, I want to clarify whether it was once for each woman or once total.

THE MASTER: I will allow the clarification. Continue.

BY MS. WEINGARDEN:

Q. Ms. Bickerstaff, did he look your body up and down and Ms. Ciaffone's body up and down?

A. He looked Ashley down and up once, and then he looked at me down and up once.

Q. Okay. Now, did he respond when Ashley said to him it's not nice or whatever, not polite to ask a woman her weight?

A. Yes.
Q. Is everything that you wrote in it the truth?
A. Yes.
Q. And is everything you wrote in it accurate?
A. There were -- so if I could -- on page 1 where I wrote "Would you want foreplay before or after sex?" He said that twice.

And I answered, "Before."

And I believe that's it in the affidavit, but it's not in the memo.
Q. Okay. Now, did you and Ashley work on your memo together?
A. No.
Q. Do you know whether or not she wrote a memo?
A. I'm not sure. Probably.
Q. Did anyone tell you what to write in your memo?
A. Just what happened.
Q. Did anyone read it and critique it and tell you to make any changes?
A. No.
Q. Did you eventually have to write an affidavit?
A. Yes.
Q. Who told you you had to write an affidavit?
A. I believe Athina Siringas is the one who told us we should write an affidavit.

any way?
A. I -- I don't know if she did.
Q. Do you recall whether or not she took notes or did a question and answer on paper?
A. She -- I didn't write anything down. I don't know if she was taking notes.
Q. At any point did she have you sign anything?
A. I don't believe so.
Q. At any point did she have you review what she had written?
A. No.
Q. In your interview with her, did you ever tell her that you thought Judge Morrow was hitting on you?
A. I did not say that.
Q. If that appears in her report, do you have any idea how it got there?
A. She must have written that. I don't know.
Q. Did there ever come a time when you were asked to review a report that judge -- that Mr. Bivens submitted to Kym Worthy, the elected prosecutor?
A. Yes.
Q. Do you know when that was?
A. No.
Q. Would that have been before or after you wrote your affidavit?

A. After, I believe.
Q. Who asked you to review the report?
A. James Bivens.
Q. At that point was it a handwritten or typewritten report?
A. Typed.
Q. Do you know how many pages long it was?
A. No.
Q. Was it only your portion of what you say happened, or did it include other people's interviews?
A. Other people's interviews also.
Q. Do you know the reason you were asked to review that report?
A. No.
Q. When you reviewed that report, did you review the paragraph relating to your interview with JoAnn Kinney?
A. Yes.
Q. Did you see any errors in what she had written?
A. Yes, that part, that sentence.
Q. What sentence?
A. It says, "She added that she felt Judge Morrow was trying to hit on her because of what he stated regarding sex and foreplay." I didn't think he was hitting on me. I didn't say I thought he was hitting on me.
Q. Did you tell anyone that that appears in the report but

did you tell anybody else?
A. No.
Q. Did Ms. Ciaffone give you any advice about what to do about the error?
A. I don't recall. I don't recall -- sorry.
Q. Okay. Did you do anything to make sure the memo was corrected?
A. No.
Q. Is there a reason you didn't do anything to make sure the memo was corrected?
A. I just didn't -- I didn't know what to do. I didn't know how to handle the situation, so I just -- I didn't say anything.
Q. When was it that you revealed to someone that there was an error in the report?
A. I told Ashley like right as we stepped out of the office. I told her I didn't say that.
Q. After that, who was the next person you told about an error?
A. Probably you. No one else. I haven't spoken about this with anyone else, so you're probably the next person I spoke to about that.
Q. Okay. Now, do you know whether -- let me strike that.
Did you report the situation to the Judicial Tenure Commission?

Q. The accused in the case was James Matthews; correct?
A. Correct.
Q. You knew the details of the case and the facts that would be relied upon to convict Mr. Matthews; correct?
A. Correct.
Q. You knew the strengths of the case?
A. Correct.
Q. And you knew there were some parts that were not strong at all; correct?
A. I thought it was a strong case. I mean, I guess -- I guess some of the weaknesses were the witnesses, but yes.
Q. I'm going to go through a list and see if we can agree that these are the toughest parts of the case. One was the age. It had been more than 16 years since the homicide; correct?
A. Yes.
Q. And that was the tough issue to deal with; correct?
A. Yes. Not one of the toughest, but it was an issue that we had, yes.
Q. The background of Ms. Leak, one of the witnesses, was also a tough issue; correct?
A. Yes.
Q. There was DNA evidence, but there was also a problem in the past with the DNA lab; correct?

A. I don't believe so. I believe the lab technician from DPD testified that there was an issue with the DPD firearms lab and that's why they were shut down, but there was no issue with the DNA lab, but they were both shut down just because they were -- I think shared a building or something and they were connected. But there was no issue with the DNA lab.

Q. There had been press about this case; correct?

A. Yes.

Q. And that press was bad for both the Wayne County Prosecutor's Office and the Detroit Police Department; correct?

A. That's fair.

Q. There was fighting between your office and the police department as to whose responsibility it was for this case to have lingered without having been filed earlier; correct?

A. I'm not certain of that. I just read about it in that news article.

Q. And that's what the news article was about. It was about the shifting of blame between your office and the Detroit Police Department. Correct?

A. Correct.

Q. Thank you. You were aware that you had Mr. Matthews at the scene of the murder on the day that it occurred;

that advice to her?

A. Sure.

Q. Do you agree with me that the demeanor he had before the jury when he made this piece of advice available for Ms. Ciaffone is the demeanor he was consistent in keeping before the jury at other times where he gave her advice when the jury was present?

A. Sure.

Q. Thank you. Back when you get into chambers you agree with me that it's this theme that becomes the subject of discussion about the voir dire, "What is it that you really want to ask?" Correct?

A. Sure.

Q. Do you know what it is that Ms. Ciaffone really wanted to ask?

A. Yes. We worked on this example a lot together kind of. We had gotten the example from another prosecutor and tried to, like, workshop it and make it fit our case a little bit better. I don't know that the execution -- I mean, the jurors didn't, you know, answer in a way that allowed the example to unravel as we would have wished, but I knew her purpose going in for this example.

Q. Do you remember Ms. Ciaffone's response to Judge Morrow when he posed the advice, "What is it that you really want to ask or know"?

A. Do I remember her -- I don't remember her response.
Q. Do you remember that she did ask more questions?
A. Yes. I believe she asked more general questions not related to our example.
Q. Did she ask the question, "Does anybody here know of any reason why they would be biased and unable to give a fair verdict rendering on the evidence in this case?"

Do you remember that being the question?

A. Not specifically, but I -- if that's what was said, I don't contest it.
Q. And do you remember she actually got a juror to raise their hand and then have a conversation with her that lasted about a page and a half? Do you remember that?
A. Not specifically, but I don't contest that it happened.
Q. Let's go to Volume 1, page 120, lines 8 to 13, is the next.

Based on my review of the transcript this is the question that follows Judge Morrow's last statement of advice, "What one thing do you really want to know?"

And Ms. Ciaffone says -- if you could read that if you're able to, Ms. Bickerstaff?

A. Yes. You want me to read it out loud?
Q. Yes, please.
A. Oh, okay.

"MS. CIAFFONE: Does anyone here

James Matthews admitted to a killing in 2002 and 2003. Two killings. She called it several admissions, and I would have to check my conjunction, whether it's an "and" or an "or." She might have said "or," and I apologize for this. She said "or." So we put that up on the screen to have that statement.

Ms. Bickerstaff, is it your memory that Ms. Ciaffone described Emory Matthews as coming in to testify about several admissions?

A. Can you repeat the question?

Q. So you see her opening statement here; correct --

A. Yes.

Q. -- on the screen? And she says, "And he's going to tell you that he had heard several admissions from his brother."

So I read that --

A. Yes, I see that.

Q. I want to make sure.

A. I see that. Sorry.

Q. For all the stuff that going on in the courtroom that you testified on direct exam, to your recollection, that's accurate, that's what she argued -- or I'm sorry. That's what she stated in opening statement; correct?

A. That is what she stated. Correct.

Q. And then she goes on to say, "He's going to tell you

that his brother admitted to killing two different women."

Do you remember that?

A. Do I remember Ashley saying that?

Q. Yes.

A. Yes.

Q. How many murders were the subject of this case?

A. Just one, but the brother's admission mentioned two bodies. I'm sorry. The brother's statement, I guess.

Q. So did you believe after the 404(b) evidence had been suppressed that you could talk about another body? And this isn't about another body. This is about another killing. But you thought that that would be okay?

A. I believe Ashley had asked the Court about these statements even after he denied the 404(b), and I believe the judge didn't have any issue with the statements.

I do believe she did separately address, you know, Judge, we're seeking to admit this statement, and I don't believe there was any issue with it. Or like redacting -- you know, redacting at the part where it said two bodies or there was no issue like that.

Q. She gives her opening statement on the first day of the trial on June 10th. Emory Matthews will testify on the second day of the trial. Was Emory Matthews there for

A. She said, "Did you tell the police back on January about having seen the defendant on January 9th?"
Q. You would agree that's a leading question?
A. Possibly.
Q. Possibly leading? I mean, it's --
A. She's asking, What did you tell the police on this date?
Q. She's leading. Again, "Do you remember telling the police that?" So this is lines 3 and 4 of page 191.
A. Oh, you're up here. Okay.
Q. Do you agree with me that she begins that question before the judge interposes again, that is a leading question?
A. Yes.
Q. So, again, he was legally correct to interpose; correct?
A. I believe so.
Q. And he did so in a manner that was appropriate. You would agree with that?
A. Yes.
Q. Ms. Ciaffone does go on, as you noted, reading below, to ask a non-leading question; correct?
A. Yes.
Q. Mr. Masterson represents the end of the testimony and the only testimony presented on day one of the trial; correct?
A. Yes.

A. I learned it should be the last thing.
Q. Was the advice you received concerning how to take the testimony of the medical examiner, from Judge Morrow, criticism, in your opinion?
A. I guess it could be called a criticism. He was saying I did it wrong. I did it in the middle, and it should have been at the end.
Q. And I may have misstated this earlier, so I want to ask it now.

Did you tell Patrina Bergamo that Judge Morrow was extremely mean -- this is a quote -- "extremely mean to APA Ciaffone"?
A. I don't recall.
Q. Did you ever tell anyone that Judge Morrow was hitting on you during that conversation?
A. No.
Q. At any time did you ever allege to anybody that Judge Morrow was hitting on you?
A. Never.
Q. You do know what that means when I use the word "hitting"; correct?
A. Yes, I understand.
Q. What is your understanding?
A. Like flirting or coming on to someone.
Q. And that did not happen; correct?

next to you; correct?
A. Correct.
Q. You told her exactly what was incorrect about it; correct?
A. Correct.
Q. You told Ashley Ciaffone that the report improperly contained information that Judge Morrow had hit upon you while at the prosecutor table during this conversation that we've been talking about; right?
A. I told her that I did not say that, yes.
Q. It was your testimony on direct examination that Ms. Ciaffone had no advice for you in response. Is that accurate?
A. I don't remember what she said to me in response, if anything.
Q. Other than Ms. Ciaffone, who did you tell that the information in the report was false?
A. Ms. Weingarden.
Q. And it's fair to say that more than a year elapses between the conversation with Ms. Ciaffone and the conversation with Ms. Weingarden?
A. Yes.
Q. How often did you think about the fact that there was this false statement accusing Judge Morrow of something very serious in that report and you had failed to

correct it?

A. How often did I think about it?

Q. Yes.

A. I don't think I thought about it until Lora -- I'm sorry -- Ms. Weingarden brought it up and I corrected it.

Q. If a lawyer knows of a material false statement, is the lawyer allowed to simply turn a blind eye to it and do nothing?

A. I don't believe so, no.

Q. There are ethics rules, including 8.4(B), that would require a lawyer to act proactively when they learn of a false statement or an omission that creates a materially false statement. You know that; right?

A. I'm not familiar at this time with the contents of that rule offhand.

Q. When is the last time you reviewed the Michigan Rules of Professional Conduct?

A. Probably before I took the MPRE.

Q. That would be 2017 or before; correct?

A. 2017, I believe.

Q. This false statement was not just wrong, but it attributed the wrong statement to you; right?

A. It attributed a statement that I never said, to me.

Q. It was a statement that accused Judge Morrow of hitting

A. Correct.
Q. In fact, that interview takes place on June 17th with Detective Kinney; right?
A. Correct.
Q. And Detective Kinney takes down information while she's talking to you; correct?
A. I don't recall if she wrote anything down.
Q. Do you have a memory of her not writing anything down, or is it that you don't have a memory one way or the other?
A. I don't have a memory one way or the other.
Q. Do you have a memory of whether you told her that Judge Morrow was hitting on you?
A. I did not tell her that.
Q. So that information is false; correct?
A. He did not hit on -- I do not believe that he was hitting on me, and I did not tell anyone that I believed he was hitting on me.
Q. When you met with Detective Kinney, were you with Ashley Ciaffone or were you alone with Detective Kinney?
A. I was alone.
Q. There came a time where Detective Kinney showed you a paragraph and a statement that she had prepared as part of her investigation. Do you remember that?
A. She did not show me anything.

Attachment C

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

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

Formal Complaint No. 102
Volume 3

P R O C E E D I N G S

held before the Special Master Hon. Betty R. Widgeon (P32596) via Zoom in Michigan, on Tuesday, November 24, 2020, commencing at or about 8:51 a.m.

APPEARANCES:

For the MJTC: JUDICIAL TENURE COMMISSION
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BY: MS. ELIZABETH JACOBS (P24245)

REPORTER: Ms. Elsa J. Jorgensen, CSR-6600

ALSO PRESENT: Hon. Bruce Morrow;
Ms. Laurie Hagen, Collins Einhorn.

A. Yes.

Q. In regard to defense counsel and prosecutors, can you describe what you observed in terms of his conduct with them?

A. Well, I think that just overall, across the board, I think one of his objectives and goals, from my perception, was to demystify the courtroom process, to communicate with the potential jurors and the jurors in a way that they have an understanding of their responsibilities as triers of the fact, their responsibilities of, if you will, using their own experiences to evaluate and assess what is being presented, that the law was not some authoritarian, mystical concepts, but very practical and basic.

I think he appreciated good advocacy and demanded preparedness when you came into his courtroom, across the board of both defense counsel and prosecutors. I think he exemplified a degree of humility from the bench and was not someone who was, if you will, stuck on himself by virtue of being a lawyer -- being a judge and having a robe.

He wanted to allow and create an atmosphere where the prosecutor and the defense had the opportunity to present their respective positions and interests without imposing his own or injecting his own perhaps

perceptions of the case.

He -- as long as counsel was complying with the dictates of the law in terms of decorum, in terms of presentation of evidence, in terms of oral advocacy, then he would sit back and let the prosecutor do what he or she was supposed to do and allow the defense, he or she, to advocate its position.

Q. I'm concluding from that that he treated both sides fairly; is that correct?

A. Unquestionably.

Q. Have you observed his interaction with female defense attorneys and female prosecutors?

A. Yes.

Q. And can you tell me, was there any difference in how he treated women from men, male attorneys and female attorneys?

A. Oh, I think equally. I mean, equally. He allowed each gender to -- or each person, regardless of gender, to advocate their professional position.

Q. Did he ever use sexually graphic language in an inappropriate manner either from the bench or to attorneys?

A. Not that I'm aware of.

Q. Is there anything in his interaction with counsel for both sides, male and female, that would erode public

relationship, the history that I shared with him.

Q. All right. So maybe I'll rephrase the question. Have you socialized with him in the last two years?

A. Are you talking about, like, partying or hanging out or anything like that?

Q. Going out to dinner, inviting each other to your homes?

A. No. No, no, no, no, no, no, no. We haven't done that.

Q. Do you know his wife and children?

A. We had a 50-year high school reunion, and he was there and I was there. That probably was the first time of, like, being out in public that we've shared in -- I can't -- that might have been the only -- I mean, the real time, you know, that was it.

Now, I would say this also, that Judge Morrow, over the years, has made presentations in the department -- Michigan Department of Corrections mentoring the inmates in the corrections system on several programs, and I've been on programs with him inside the prisons where we both were in there demystifying the system, encouraging those who have been caged for many years, sometimes caged for life, and trying to uplift their spirits and enhance their quality of life.

So I have socialized with him in the prison system. That was a time that I've been outside the

been some, you know, communication like -- but, anyway, Judge Morrow got off the bench and sat at the prosecutor's table in the middle of -- there's three chairs set up at, like, the prosecutor's table on one side of it.

Normally when I would sit there, there would be two chairs because it's really meant for two sides -- two chairs on each side. But there was three chairs on each side, and he sat in the middle chair. And then I heard him -- I didn't hear him. I saw him speaking to Anna. I don't know. I didn't hear what was said.

Q. So your recollection is is that he sat in the middle chair?

A. That's my recollection. Correct.

Q. And which chair did Ms. Bickerstaff sit in?

A. I believe the chair closest to the podium.

Q. Did they have an officer in charge of the case?

A. Yes.

Q. Where was he during this?

A. I'm not sure. I mean, my memory is fuzzy, for what it's worth. But from what I remember, there were, you know, three people at the table. So it was Anna, Judge Morrow, then I guess either the OIC or Ashley, but I'm not -- I'm not certain who it was. But from my recollection, there was three people at the table --

Q. So during --
A. -- on the one side.
Q. Okay. Sorry.
During your testimony today, if you don't have a good memory, say so.
A. Okay.
Q. And don't guess. Just tell us you don't know. Okay?
A. All right. I apologize.
Q. No, you're doing fine. We just need to know that you think it's fuzzy.
MR. CAMPBELL: I object to the apology. I don't think it's necessary.
BY MS. WEINGARDEN:
Q. So did there come a time when you saw Judge Morrow and Ms. Bickerstaff at the prosecutor's table talking?
A. Yes.
Q. Could you describe where their bodies were positioned?
A. Well, Judge Morrow was in the seat and Ashley was in the seat closest to the podium, and they were -- I mean, they were close, but, I mean, there was three chairs, you know, on one side --
Q. So were the -- go ahead.
A. Yes. They were positioned close. All of the chairs were touching armchairs or close to touching, from what I recall and -- but yes.

of Justice.

Q. What is that knowledge?

A. Well, just as the question implied that perhaps most prosecutors have issues with Judge Morrow, I think it's been a longstanding controversy to perhaps understate it.

I don't quite understand the source of it, other than that Judge Morrow exemplifying a high degree of fairness and will hold the prosecutor to task in terms of their responsibilities and when, as a judge, the prosecutor has not met its burden or advocated their -- their position sufficiently, and Judge Morrow does not hesitate to rule accordingly by way of dismissal or suppressing evidence or rendering verdicts of not guilty.

Q. If you know, does this animosity extend to the administration in the office?

A. I do not personally know, but that certainly is what is the tone in the --

MS. WEINGARDEN: Objection to the hearsay and speculation.

MS. JACOBS: I'll withdraw the question. Thank you. I have no further questions.

THE MASTER: Anything further, Ms. Weingarden?

MS. WEINGARDEN: No.

somewhat vague recollection of the specific events and days.

Q. All right. Do you recall seeing Anna Bickerstaff do the direct examination of a police officer where she started most of her questions using the word "and"?

A. No, I do not recall that.

Q. Do you recall hearing Judge Morrow instruct Anna Bickerstaff about how she needs to fix that problem?

A. No, I do not recall that.

Q. Did you hear Judge Morrow say anything to Anna Bickerstaff from the bench?

A. Yes.

Q. Tell the judge what you recall him saying.

A. Well, there was a moment -- I believe you're referencing a moment where, from my recollection, it was about lunchtime so I was finishing up some of my cases before they resumed the trial of James Matthews.

Anna Bickerstaff and I believe the OIC and Ashley Ciaffone were all in the courtroom. Anna Bickerstaff said to Judge Morrow something along the lines of "Was that line of questioning any better?"

Judge Morrow said something along the line of, "Yes, it was, but I have something to say that could make you blush," something along those lines.

And then Judge Morrow got -- there might have

Q. And how close were Judge Morrow and Ms. Bickerstaff's heads to each other?
A. I don't recall.
Q. Were you able to hear what Judge Morrow was saying?
A. No.
Q. Where were you when this conversation took place?
A. I believe I was -- I would sit off to the left in the pit, but maybe like 20 or 30 feet away from the prosecutor's table. So it would be, you know, if you're facing the bench, I would be on the left side of the courtroom.
Q. Near the defense side of the courtroom?
A. Right, but kind of in a corner. So I'd probably be like, you know, 10 feet off -- 10 feet off the defense table to the left of it.
Q. All right. Now, by June of 2019 how long had you been assigned to Judge Morrow's courtroom?
A. It would have been a little less than a year.
Q. During that less than a year, did Judge Morrow ever say to you, "I'm going to tell you something that may make you blush"?
A. No.
Q. Did you ever hear him saying it to any other defense attorney or prosecutor?
A. No.

Q. Were you watching the two of them have their conversation?
A. Yes.
Q. Could you describe for us what they were both looking at?
A. Each other.
Q. Were you able to read anything into Anna's body language?
A. No.
Q. Were you able to read anything into Judge Morrow's body language?
A. No.
Q. For how long were they seated looking into each other's eyes and talking?
A. Well, they were talking for maybe a few minutes. I don't know if they were -- yeah, they were talking for a few minutes.
Q. How did -- what happened when the conversation ended?
A. I believe Judge Morrow got back on the bench and the trial started back up, and I probably went to my --
Q. During this conversation, were there spectators --
THE COURT REPORTER: I'm sorry. I didn't hear the end of the answer. "And I probably went to my --."
THE WITNESS: I said that after this conversation took place, Judge Morrow got back on the

Q. So hold on. You broke up for a minute.
A. I'm sorry. Did you not hear me?
Q. So you're breaking up. You were saying it's your courtroom and then we missed the rest of that.
A. Okay. I was basically saying that it is sort of my courtroom, and I would position the chairs how I would like them. I would position the chairs so they were kind of far apart from each other, and there'd be two on one side of the table and two on the other.
Q. So when Judge Morrow would come down to your side of the table to talk to you, were the chairs close together or not close together?
A. Not close together, generally speaking.
Q. And were your heads close together or not close together?
A. Not close together.
Q. Were there people in the audience while the discussion between Judge Morrow and Ms. Bickerstaff went on?
A. Yes.
Q. And was the court staff present?
A. Yes.
Q. Do you know a man by the name of William Noakes?
A. I do.
Q. Who is he?
A. He was the defense attorney on that case, and he

THE WITNESS: Thank you.

Okay. This should be better.

THE MASTER: And, Mr. Kurily, I will ask you. Are you alone in the room where you are now?

THE WITNESS: I am. Nobody is in this home at all.

THE MASTER: All right. Thank you. Continue, Ms. Weingarden.

BY MS. WEINGARDEN:

Q. So you were telling us there were members of the audience in the courtroom when this conversation between the judge and Ms. Bickerstaff occurred?

A. Yes.

Q. And were the court staff members present?

A. Yes.

Q. Did you have any thoughts about the way the conversation looked to you? Did you think it was unusual, or did you have any thoughts about that?

A. Not -- no. I was interested in what he -- what he was saying, but -- to be honest, but I didn't really have too many thoughts.

Q. Did you ever ask Ms. Bickerstaff what was said?

A. I may have.

Q. Do you -- okay.

Do you know for sure or you're not sure?

remember saying 20 times, but, I mean, it could have been 20 times, I suppose.

Q. Okay. And, in fact, it's fair to say you were not surprised to see him come down from the bench into the well and even go to the prosecutor's table on this occasion during the *James Matthews* trial; correct?

A. That didn't surprise me.

Q. As you mentioned, there are various ways to design the setup of chairs at the prosecution table in a courtroom; correct?

A. Correct.

Q. It is the prosecutors who elect how to set up the table at any given time for any given case. Fair statement?

A. Fair statement.

Q. Judge Morrow empowers the attorneys, whether they're at the defense table or the prosecutor table, to set up how they want to have their courtroom; correct?

A. I mean, he never told me I couldn't set it up. I've never seen him say to anybody change your setup, no.

Q. Is it a fair statement that in the time that you served as Judge Morrow's prosecutor, you never saw him purposely try to embarrass anybody?

A. That's fair to say.

Q. Is it fair to say that there were times where he would talk to you in chambers about things that had happened

on the record that, had he addressed them on the record, it would have been embarrassing for you?

A. That's fair to say.

MS. WEINGARDEN: Objection. Relevance.

THE WITNESS: I'm sorry.

THE MASTER: What is the objection?

MS. WEINGARDEN: Relevance.

THE MASTER: Objection is overruled.

Continue.

MR. CAMPBELL: Thank you.

I'm going to ask the court reporter, Mr. Kurily, whether she received that response, and, if so, I'll move on to the next question.

THE COURT REPORTER: I did, Mr. Campbell. I got the response "That's fair to say."

MR. CAMPBELL: I'll proceed.

BY MR. CAMPBELL:

Q. It's fair to say, Mr. Kurily, that you were enabled and able to speak frankly with Judge Morrow in chambers?

A. That's fair to say.

Q. Fair to say that Judge Morrow would critique you in a direct manner in chambers?

A. Yes.

Q. Were you in the courtroom during the trial of James Matthews when Ms. Ciaffone asked for a critique at the

A. I don't understand that question.
Q. You were asked how close Judge Morrow was to Ms. Bickerstaff. I'm asking you, isn't it true Ms. Bickerstaff was as close to Judge Morrow as Judge Morrow was to her? Right?
A. I mean --
Q. Let's put it this way. I'm going to withdraw the question and ask another.

These two people were equally distant from each other; right?
A. Right. I mean, they were --
Q. Judge Morrow was no closer to Ms. Bickerstaff than Ms. Bickerstaff was to Judge Morrow; right?
A. Right.
Q. Ms. Bickerstaff was in an appropriate distance from Judge Morrow for the conversation they were having; correct?
A. I -- yes. Yes.
Q. Ms. Bickerstaff was in an appropriate professional distance from Judge Morrow in the conversation that they were having; right?
A. Yes.
Q. Judge Morrow was an appropriate judicial distance from Ms. Bickerstaff in the conversation they were having; correct?

A. I'll say that nothing about how they were sitting was particularly, you know, strange to me, if that's what you're asking.

Q. I wasn't, but let me ask you this.

Was there anything particularly strange about the way that they were sitting?

A. No.

Q. I have to ask this just in light of putting in context your direct examination.

Did you stare at them the whole time?

A. No.

Q. I figured you didn't, but I needed to ask.

Were you aware of the 404(b) issue in the *James Matthews* case?

A. No.

Q. So you were not aware of the Court of Appeals ruling that came out just before trial?

A. Actually, I actually was aware of that, yes.

Q. And how did you become aware? Was it through conversation? Through something you read? Let me ask you that first before we get into the details.

A. How did I become aware?

Q. Yes.

A. Well, actually, I remember on that day there were different trials scheduled. I had a trial scheduled,

end of the case, to be given at the end of case, so it was during the trial?

A. I can't recall.

Q. Is it fair to say that Judge Morrow has an open-door policy for his chambers?

A. That's fair to say.

Q. Is it fair to say that the door is always open when folks are in his chambers?

A. I wouldn't say always. Most of the time.

Q. Is it fair to say that Judge Morrow calls folks young ladies, young women, young man, young gentleman, those terms, regularly?

A. That's fair to say.

Q. Fair to say that Judge Morrow in jury trials often uses colorful analogies as he is addressing both voir dire and the instructions for the jurors that are selected?

A. Yes.

Q. Is it fair to say that, although you don't have a photographic memory of what happened and circumstances, it is your recollection that the chairs were touching but the people were not who were sitting at the table?

A. Correct.

Q. Is it fair to say that, not just for prosecutors but for any lawyer, to be critiqued in the courtroom could be an embarrassing situation?

Q. All right. Do you know how close their heads were together when they were talking?
A. I can't say that I -- I can't say that I remember that.
Q. Were you able to overhear any of the conversation?
A. Yes.
Q. Was it easy for you to hear, or was it kept quiet?
A. It was fairly easy.
Q. What did you overhear Judge Morrow say?
A. I remember him saying something with regard to a man and a woman, you know, getting together and then I remember hearing the word "crescendo."
Q. Did you have a feeling or an idea about whether that conduct or those words were appropriate?
A. I didn't feel that they were appropriate at the time.
Q. Why not?
A. Because it was my impression that the analogy he was making was in reference to some sexual relations.
Q. Did you feel that was professional of the judge?
A. No.
Q. Did you feel that would be embarrassing to the prosecutor?

MR. CAMPBELL: Objection. Objection to the last question. I don't think that's relevant.

THE MASTER: Is there a response, Ms. Weingarden?

upcoming trial?
A. I don't think I was.
Q. Were you aware of the ruling by Judge Morrow to exclude those events or incidents that the prosecution was trying to bring into the case?
A. Yes.
Q. Were you aware of the prosecutor's office decision to appeal Judge Morrow prior to trial, what's called an interlocutory appeal? Were you aware of that?
A. Yes.
Q. Were you aware of the result of that appeal being that the Court of Appeals said that at the time that the evidence is placed in, the prosecution could again request an opportunity to bring in the 404(b) evidence that had been denied at the original hearing? Do you remember that?
A. Yes.
Q. Do you remember that the 404(b) evidence sought on appeal was only the 1999 prior homicide, so actually that's the only item that could have been brought in then at trial based on the Court of Appeals order; correct? Did you remember that?
A. Yeah, I was thinking we went to trial on the 2003.
Q. Yes.
A. So your reference to 1999, the 1999 case.

not confirm. Do you understand what I'm saying, or do I need to rephrase that?

A. That's correct. His testimony was inconsistent with the written statement.

Q. Not only was his testimony inconsistent, but he had told people before he testified, "I am not going to say that my brother made the admissions." Do you remember that?

A. Yes.

Q. And he had said that the police report that credited Emory Matthews with having made the prior statements was wrong. Do you remember that?

A. Yes.

Q. I think he may have even used the word "fake" or "fraud" or something like that. Do you remember him being that adamant about how wrong the prior statement was?

A. Yes, I do recall that.

Q. When -- if you can remember, when did you learn that Emory Matthews was not going to testify consistent with the 2005 police report?

A. I can't say that I recall the exact date and time.

Q. Let me try and see what we can do to get somewhat of a date here. It would have been prior to trial; correct?

A. Yes.

Q. It would have been close to or before the time when the subpoena was issued for Mr. Matthews, Emory Matthews;

correct?
A. Again, I can't give you the exact date and time, but it was -- it was my impression that he wasn't going to cooperate in the prosecution of his brother.
Q. Did you have that impression as early as when the 404(b) motion was filed, so that would have been sometime in May or April of that year, a month or two before the trial?
A. Yes, I may have -- I may have formulated that impression, yes.
Q. And Mr. Matthews, Emory Matthews -- I guess both Emory and James Matthews had a sister. Do you remember that?
A. Yes.
Q. Do you remember the sister originally was considered or maybe even endorsed as a potential witness to also testify about the admissions that had been made by James Matthews as to one or more murders; correct?
A. Yes.
Q. The sister, just like James -- maybe not just like, but in some manner on her own, the sister had decided that she would not testify consistent with her prior statements to the police or at least that were in the police report. Is that a fair statement?
A. That's fair, yes.
Q. You knew that, like Emory, the sister was not going to

testify at trial to the confessions; correct?
A. Correct.
Q. You knew that prior to trial; correct?
A. Correct.
Q. Am I correct that you knew that even before or at the time of the 404(b) motions being filed? Again, I've identified that as May or April, about a month to two months before the trial.
A. I would have known it -- again, I don't know the exact date, but I would have known it prior, prior to trial.
Q. Thank you. And you work for the Detroit Police Department. Is that a fair statement?
A. That's correct.
Q. You do not work for the Wayne County Prosecutor's Office; correct?
A. Correct.
Q. But there is a connection or a cohesion between the prosecutor's office and the police department, especially on cases that are being tried like this, that you do interact with members of the Wayne County Prosecutor's Office; right?
A. That's correct.
Q. Your responsibility, as the officer in charge, is to keep prosecutors abreast of the developments that you become aware of relative to witnesses in a case. Is

that a fair statement?
A. That's fair.
Q. Moreover, your responsibility, as you understand it, is to alert the prosecutor when there is a change of circumstances with a particular witness, for example, like Emory Matthews or Emory Matthews's sister. Is that a fair statement?
A. Yes.
Q. Am I correct that you did alert the Wayne County Prosecutor's Office to the difficulties that were arising or had arisen relative to the testimony anticipated by Emory Matthews?
A. Yes, I'm sure I -- I'm sure I had made them aware.
Q. Who at the Wayne County Prosecutor's Office would you have made aware?
A. APA Ciaffone and -- and/or APA Bickerstaff.
Q. Thank you. You agree with me that the alert you would have given -- let me back up.

You agree with me the alert you did give was prior to trial, concerning Emory Matthews and his not testifying consistent with the police report?
A. Yes. It would have occurred, because it would have been during my attempts to serve them subpoenas for trial, so, yes, it would have been prior to the trial.
Q. You were there in the courtroom when Emory Matthews

A. I would say that the atmosphere in his courtroom is very friendly. I think that Recorder's Court in general is a lot more informal than most of the courts I've been in. Not every single judge, but many.

And I think -- I know anybody that you ask about the experience in his courtroom, the first thing they're going to say, particularly if you're a defense lawyer, is he gets started every day at 8:30, which defense lawyers really, really appreciate, because we spend way too much time standing around, doing absolutely nothing waiting for judges to get there at 9:45, 10:15, or who knows when.

Q. Can you tell us -- can you describe Judge Morrow's voir dire practice?

A. Judge Morrow, as I say, is informal and he believes in making people comfortable. All of us who've been trying cases for a long time know that jurors who come to court, in general, are not very comfortable. It's a strange place for them. A judge comes out. He or she has got a robe on. People always tell them stand up, sit, go here, go there.

And I think that Bruce's thing always has been to try to make people, A, comfortable, and he does a very good job of that. He comes off the bench. He stands there in front of them. He introduces himself as

Bruce. He doesn't talk about I'm judge. Everybody knows he's judge. He's got a robe on, but he doesn't -- he makes them as comfortable as he can. So that's the first thing that you notice in voir dire.

The second thing is I think Judge Morrow, like anybody that's tried a lot of cases, recognizes that in voir dire what you're trying to find out about people is whether they have bias. And bias doesn't necessarily mean I hate somebody or that they are a member of the Ku Klux Klan. Bias can be conscious and bias can be unconscious.

And Judge Morrow makes a very fine attempt to get from the jurors the -- or to explain to jurors what bias is and then to ask them questions that cause them to show one way or the other, or even to acknowledge to themselves, that maybe they are a little bit biased about this. Maybe they don't like left-handed guys. Maybe they like tall people better than short people.

I think he learned a lot of that from Judge George Crocket III, who did the exact same thing and was a fantastic voir dire person. I would say in my career, a couple hundred major trials, at least, I'd say the two judges I thought did the best voir dire that I have been in front of were George Crocket III and Bruce Morrow.

Q. And, again, that is Chief Bivens; correct?
A. That's correct.
Q. And you're aware that Chief Bivens made a memo to Prosecutor Worthy from, among other things, the materials that you provided, including the statement of Anna Bickerstaff; correct?
A. I was not aware of any report that he made.
Q. You said you were not aware. When did you become aware?
A. I became aware when I talked to you and Ms. Weingarden about the report.
Q. In the -- do you remember what Anna Bickerstaff said to you in that interview?
A. Yes. She told me what happened, and she informed me that she asked Judge Morrow for some pointers. He came off the bench and --

MS. WEINGARDEN: Objection to the hearsay. Objection, Your Honor. It's hearsay.

MR. CAMPBELL: It's not offered for the truth of the matter asserted. It's offered for impeachment of Anna Bickerstaff's testimony in this proceeding.

MS. WEINGARDEN: Then I think he has to ask her the question that is impeachment, not a general overview of what Ms. Bickerstaff told her.

THE MASTER: Mr. Campbell?

MR. CAMPBELL: If you would like, I didn't

want to cut off the witness.

THE MASTER: Yes, if you would, Mr. Campbell, just ask the questions individually.

MR. CAMPBELL: Thank you.

BY MR. CAMPBELL:

Q. Did Anna Bickerstaff tell you -- give me a moment here.

Did Anna Bickerstaff tell you that she felt Judge Morrow was trying to hit on her, because of what he stated regarding sex and foreplay?

A. I don't remember that.

Q. You do not remember that being part of a statement that you took?

A. I don't. Only thing I remember, when I asked Anna: What did you think he was trying to do? And her answer was: I know what he was trying to do.

But as far as him hitting on her, I'm not sure about that.

Q. I'd like to show you Chief Bivens's memo to see if that refreshes your memory when you say you're not sure about that. So I'd like to do that. You're a room away from me. I have a copy of what's been marked as Exhibit 12 to these proceedings.

A. Okay.

Q. With the master's permission, I would show that to you.

MS. WEINGARDEN: Judge, I object. I don't

differently that are counsel in front of him?
A. No.
Q. Did there come a time that you were directed to go into the chambers with the judge?
A. Well, I don't think we were directed. I do remember the judge asking us if we'd come to his chambers.
Q. Did you think that you could say no?
A. Of course.
Q. Okay. You weren't forced to go back there?
A. No. Actually, you know, given the fact that we're getting close to wrapping up the trial, I was interested in hearing what the judge had to say.
Q. Were you interested in hearing what the judge had to say in terms of your performance?
A. I was interested in hearing him -- what he might have to say about what he thought how the case went in, what he thought about, you know, the jury, and whether the jury was going to be able to return a verdict or not. And, of course, I'm always interested in how I perform because my clients' lives are at stake based on how I perform.
Q. Did Judge Morrow offer a criticism of your cross-examination of the DNA expert?
A. He most certainly did.
Q. Can you tell us what that was?

A. Yeah. Basically, he pointed out something that, from my perspective, I was probably too close to it and I was responding to what the prosecutors were doing, as opposed to looking at it from the perspective of if this man had strangled this woman, as the prosecution was saying, then what would have happened is, is he would have left -- there would have been epithelials on her neck and there would have been DNA evidence on her neck.

Now, of course, given that this case arose in part as the result of a rape kit that had been rediscovered, the rape kit did not go to the matter of DNA on the neck. It only went to DNA in the vagina, in her anus, and in her mouth.

And so he said, you know, instead of playing on their field, I could have simply pointed out that there was no DNA evidence indicating that he strangled her.

Q. And was strangulation the manner of death?

A. Yes.

Q. Did you think that you might use this if you had to retry this case?

A. Oh, heck, yes.

Q. Was this a tip from the judge?

A. I don't know that it was a tip. I just think it was one of those things that, you know, he pointed out, and I

thought it was clear that, yeah, I should have thought of that.

Q. You didn't resent him for saying this?

A. No.

Q. You didn't -- he didn't treat you with -- you didn't feel that you were being treated with disrespect or discourteously?

A. No. Trust me, I've been treated with disrespect and discourteously in courtrooms in Mississippi and Alabama and Georgia, and Bad Axe, believe it or not. But this is -- this was not one of those situations.

Q. Just for the record, is Bad Axe in Michigan?

A. It is indeed.

Q. It's not in the South?

A. No.

Q. Thank you. Did you go, during this -- we've already gotten into the conference in back, and I apologize. You went back with Ashley Ciaffone and Anna Bickerstaff and the judge, is that correct, back to chambers?

A. That's correct.

Q. Do you recall whether the door was open or closed?

A. The door was open.

Q. How long do you recall this chambers conference lasting?

A. Maybe 15 minutes.

Q. Do you recall -- besides DNA evidence, do you recall

A. Yes.
Q. Could you be wrong on that?
A. I might be, but the fact of the matter is, is I wasn't asked to be there and I wasn't there. And, apparently, the motion was granted without me knowing about it, and, most certainly, without my client knowing about it.
Q. When you read the transcript, did you think there was anything missing from it? And this is the trial transcript.
A. No.
Q. This is my last question, Mr. Noakes.

Could you describe Judge Morrow's voice for us?
A. He has a fairly booming voice. I mean, he's a large man. I mean, I'm six-foot-one, 200 pounds. He's probably about six-foot-three or six-foot-four, maybe more. And he has a booming baritone voice.
Q. Was there an example in which he had to project his voice because a microphone was not working?
A. Yes.
Q. Can you tell us about that? Tell us about that.
A. Basically at a point, the microphone wasn't working and so he --
Q. Where were you?
A. I was at counsel table.

you this question. At the trial, had the defendant testified that he and the deceased victim engaged in, quote, non-traditional sex? Do you recall the defendant testifying to that at trial?

A. Yes.

Q. Do you recall in chambers Judge Morrow confronting APA Ciaffone about her personal bias and inexperience with what non-traditional sex was?

A. I remember the judge commenting on inherent bias, basically making the point that we all have biases that we often are not aware of, and he pointed that out to Ms. Ciaffone.

Q. And when he did that, did he talk about her personal bias and inexperience about what non-traditional sex was?

A. I believe he -- I believe he commented on what she may or may not know, and I don't know if it was specifically about sex, but he certainly did talk about inherent bias that she may have.

Q. Did he tell Ms. Ciaffone that most people do not interpret non-traditional sex the way she does?

A. Yes, I remember that.

Q. What did he say about that?

A. Well, I think that's the sum and substance, what you just put in the question.

Q. And you can't remember more information that Judge Morrow said about that topic?
A. No.
Q. Okay. While in chambers, did Judge Morrow laugh at the defendant's testimony that he did not have traditional sex with the victim because she was pregnant and he did not want to hurt the baby?
A. Yeah, I think he may have laughed at that. And that gets to the point of Mr. Matthews exaggerating.
Q. Did Judge Morrow say words to the effect of, How big does this guy think he is, referring to his penis? Do you recall that?
A. I think he did.
Q. Do you recall Judge Morrow saying: Does he think his dick is so big that he would hurt the baby?
A. I don't recall that part, but I do recall basically the conversation that this guy is exaggerating.
Q. Do you recall Judge Morrow saying: This guy must feel real good about himself to think his dick is that big?
A. I don't remember him using the word "dick." And I think the conversation was how big does he think he is, and I think that was the extent of it.
Q. And the reason he even mentioned that was because he was making fun of the defendant's testimony. Is that true?
A. Well, he was saying that the defendant exaggerated.

Attachment D

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

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

Formal Complaint No. 102
Volume 4

P R O C E E D I N G S

held before the Special Master Hon. Betty R. Widgeon (P32596) via Zoom in Michigan, on Monday, December 7, 2020, commencing at or about 8:35 a.m.

APPEARANCES:

For the MJTC: JUDICIAL TENURE COMMISSION
3034 West Grand Boulevard, Suite 8-450
Detroit, Michigan 48202
313.875.5110
Disciplinary counsel:
BY: MS. LORA WEINGARDEN (P37970)
MR. LYNN HELLAND (P32192)

For the Respondent: COLLINS EINHORN FARRELL PC
4000 Town Center, Suite 909
Southfield, Michigan 48075
248.355.4141
BY: MR. DONALD D. CAMPBELL (P43088)

For the Respondent: LAW OFFICES OF ELIZABETH JACOBS
615 Griswold, Suite 1120
Detroit, Michigan 48226
248.891.9844
BY: MS. ELIZABETH JACOBS (P24245)

REPORTER: Ms. Elsa J. Jorgensen, CSR-6600

ALSO PRESENT: Hon. Bruce Morrow;
Ms. Laurie Hagen, Ms. Sherrie Marinkovich, Collins Einhorn.

involves the admission of two exhibits, one of which is the stipulation, and the other is a document upon which the stipulation is, in part, based. Because of this stipulation, we're able to proceed without having to call Lora Weingarden as a witness in this matter. I appreciate the disciplinary counsel, plural, working with us on this matter so that we could present the stipulation and proceed with the matter.

So stipulation involves two exhibits that were not originally provided in this matter that I will have e-mailed to you, Your Honor, so that you have them. That e-mail will go also to disciplinary counsel and to the court reporter so she has them. But they have been marked now separately as Exhibit L, Respondent's Exhibit L, and Respondent's Exhibit M.

Respondent's Exhibit L is a document that I'll now describe, and then it is referenced within Exhibit M and the stipulation. It's a one-paragraph memo that was made by Lora Weingarden, and it was sent to Don Campbell. It is dated October 1, 2020, and it has a "re" line that says: "Testimony of grievant, Anna Bickerstaff," and it reads as follows. Again, it is one paragraph, about six lines.

"On September 29, 2020,

Ms. Bickerstaff reviewed the memo

written by Detective JoAnn Kinney about Detective Kinney's interview of Ms. Bickerstaff on June 17, 2019. Ms. Bickerstaff had not previously seen this memo. She informed me that the memo contained an error. She said she had not informed Detective Kinney that Judge Morrow was trying to hit on her. Ms. Bickerstaff informed me that she does not know why Judge Morrow said the things he said to her."

That completes the reading of the memo that is Exhibit L.

Now I have Exhibit M, which is longer. It's about a page and a half, but it's larger type so it won't take long to read. I do want to point out something here.

Exhibit L contains a reference to Detective Kinney's memo, and you'll see, as part of the stipulation, we agree that it's actually the memo that was prepared by Chief Bivens referring to Detective Kinney's memo and not the actual memo of Detective Kinney. So with that understanding, again, that's expressly clarified here, I'll proceed.

This is Respondent's Exhibit M. It's entitled

Q. Did you think there was anything wrong with his demeanor? Or can you tell us about his demeanor, please?

A. The thing I think that I respected most about Judge Morrow was his fairness to all parties, his respect for everybody who came in the courtroom, whether you were the defendant or a lawyer. He treated my clients with respect like they were real people, as he did their families, as he did families of the victims.

He tried to make them feel comfortable in the courtroom, in spite of what was going on, you know, I mean, a lot of times very serious charges. You know, it's hard -- I don't know. I don't see that kind of respect towards my clients, particularly, in other courtrooms, towards my clients, litigants, family members on both sides.

It was something that always stood out to me, as opposed to some of the other courtrooms where, you know, clients, family members, victims aren't usually or aren't treated quite so well.

Q. Have you observed his interaction with defense counsel and prosecutors?

A. Yes.

Q. Does he treat them differently? That is --

A. Not that I saw. No, not that I saw. But I can tell you

hour. It's time to eat. I don't think I'm doing that.

BY MS. WEINGARDEN:

Q. Mr. Kurily, did you hear Judge Morrow say something to a female prosecutor about her armpit hair?

A. Yes.

Q. Approximately when did that discussion take place?

A. I want to say summer of 2019.

Q. Defense counsel and I have agreed to not name the female prosecutor, and I would ask you also not name her. We're going to just refer to her as the female prosecutor. Okay?

Tell us the circumstances of where you were and what was the setting of when you heard the statement from Judge Morrow.

A. We were in Judge Morrow's courtroom. I was seated at the prosecutor's table. The female prosecutor was seated next to me. I believe it was pretty early in the morning before court had began, and somehow a discussion of armpit hair started and -- and -- yeah.

Q. Where were you when the conversation took place? You said at the prosecutor's table. Did you stay there?

A. Yes.

Q. Were you seated the entire time?

A. I was.

Q. What about the female prosecutor? Where was she?

A. She was seated next to me the entire time.
Q. And where was Judge Morrow when the conversation took place?
A. He was standing in front of the prosecutor's table.
Q. How far from the table?
A. Five or -- five feet maybe, just right in front of the table.
Q. Did you start the conversation about armpit hair?
A. No.
Q. Did the female prosecutor start the conversation about armpit hair?
A. No.
Q. Who did?
A. Judge Morrow.
Q. Did he share with you whether or not he shaves his own armpit hair?
A. Yes.
Q. What did he say about that?
A. He said he shaves his armpit hair.
Q. Did you share with him whether or not you shave your armpit hair?
A. No.
Q. Did the female prosecutor share with him whether or not she shaves her armpit hair?
A. No.

Attachment E

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

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

Formal Complaint No. 102
Volume 5

P R O C E E D I N G S

held before the Special Master Hon. Betty R. Widgeon (P32596) via Zoom in Michigan, on Tuesday, December 15, 2020, commencing at or about 8:47 a.m.

APPEARANCES:

For the MJTC: JUDICIAL TENURE COMMISSION
3034 West Grand Boulevard, Suite 8-450
Detroit, Michigan 48202
313.875.5110
Disciplinary counsel:
BY: MS. LORA WEINGARDEN (P37970)
MR. LYNN HELLAND (P32192)

For the Respondent: COLLINS EINHORN FARRELL PC
4000 Town Center, Suite 909
Southfield, Michigan 48075
248.355.4141
BY: MR. DONALD D. CAMPBELL (P43088)

For the Respondent: Law Offices of Elizabeth Jacobs
615 Griswold, Suite 1120
Detroit, Michigan 48226
248.891.9844
BY: MS. ELIZABETH JACOBS (P24245)

REPORTER: Elsa J. Jorgensen, CSR-6600

ALSO PRESENT: Hon. Bruce Morrow:
Ms. Laurie Hagen, Collins Einhorn

was just her and I.

Q. Thank you.

MR. CAMPBELL: I'd like to now have page 93 put on the screen.

BY MR. CAMPBELL:

Q. So appearing in front of your screen, Chief, should be the third page of your memo.

A. Page 3?

Q. Correct. It's my Screen 93.

A. Oh, okay.

Q. And you can see I've pulled out from that the first paragraph. This paragraph was placed by you into the report; correct?

A. That is correct.

Q. You see in the middle -- actually, I guess it's the second full sentence --

A. Yes.

Q. -- on the page reads: "She added that she felt Judge Morrow was trying to hit on her because of what she stated" -- sorry -- "because of what he stated regarding sex and foreplay."

Do you see that?

A. Yes, I do.

Q. Those are words that you added to this report; correct?

A. That is correct.

Q. And the "she" that you're referring to is Anna Bickerstaff; correct?
A. That is correct.
Q. It's true that Anna Bickerstaff did tell you that she felt Judge Morrow was trying to hit on her because of what he stated regarding sex and foreplay; correct?
A. That is correct.
Q. I want to go to page 96 of my screen. I think it's page 6 of your report. And, Chief, so the record is clear, I did ask you to have a copy of your report available and you do have that in front of you; correct?
A. That is correct.
Q. This is a paragraph that refers to an interview of an assistant prosecuting attorney supervisor at Wayne County Prosecutor's Office named Robert, he goes by Bob Donaldson; correct?
A. Correct.
Q. You interviewed Bob Donaldson; correct?
A. That is correct.
Q. And so we're clear, while Detective Kinney interviewed Ms. Bickerstaff originally, you separately did meet and speak with Ms. Bickerstaff; correct?
A. That is correct.
Q. So it says, as part of this paragraph -- you can read it. It's in the middle. It says: "Upon hearing what

A. That's correct.
Q. Give me a moment. You wrote, quote -- first of all, this is "Re: Hi from Lora." Do you see that?
A. Yes.
Q. Am I correct that this is part of a longer string of e-mails between you and Ms. Weingarden?
A. I believe it is.
Q. In this e-mail you write: "Lora, JoAnn found her notes, on which I wrote the following: 'She felt that he was trying to hit on her in an around about way, felt it was improper.' This occurred after JoAnn had taken her statement, which is properly why it was not in her written statement. After looking at the notes, I do recall her saying that. Again, if it wasn't said, you would have not seen it in my report."

I've read that accurately; correct?

A. You did.

MR. CAMPBELL: I'd like to put up Screenshot 100.

BY MR. CAMPBELL:

Q. Chief, this is a screenshot of a portion of the page, because it was a single page that Detective Kinney gave you, correct, with handwriting on it?
A. That's correct.
Q. So this is a screenshot of the bottom -- not full

faking emotion?

A. Yes. Yes, indeed.

Q. Based on her experience over the years?

A. Based on experience and the time I spent with her in homicide, she's a pretty good judge of what's going on from a particular person that she talks to, yes.

Q. When you typed your memo, which has been shown to you and which you have, did you expect that memo ever to be turned over to the Judicial Tenure Commission?

A. No. That's not up to me. I give that to my boss, Ms. Worthy, and then they make that decision. I do not.

Q. Did you ever tell Ms. Bickerstaff or Ms. Ciaffone that that memo would be turned over to the Judicial Tenure Commission?

A. I don't recall telling them that, no.

Q. So how did this -- I want to go through the steps of how this investigation took place within your office.

How did you get assigned to investigate the situation?

A. It was assigned to me by the prosecutor.

Q. Kym Worthy?

A. Yes.

Q. And then what did you do to get the investigation moving?

A. I just began to interview people. Then I --

THE MASTER: All right. Thank you. Continue, please.

BY MS. WEINGARDEN:

Q. Chief, after you finished typing your memo, what did you do with it?

A. I took it to Ms. Worthy, the prosecutor.

Q. Do you know what was done with it after that?

A. No.

Q. Is there a reason after JoAnn Kinney interviewed the two women that you went back and interviewed Ms. Bickerstaff yourself and added that one light-colored line in your document?

A. I'm sure there was. I just don't recall what it was.

Q. Normally do you trust JoAnn Kinney to do a good, thorough interview of witnesses?

A. Indeed, yes.

Q. Can you read to the judge the totality of the statements you wrote on that document in the lighter ink?

A. On the note?

Q. Yes.

A. She felt that he was trying to hit on her in an around about way, felt like it was improper for a judge to be discussing sex with her regarding a homicide trial.

Q. Who made that statement to you?

A. Anna Bickerstaff.

Q. Thank you.

MS. WEINGARDEN: Nothing further.

THE MASTER: Mr. Campbell?

MR. CAMPBELL: Judge, today I'm going to get the date right, and I'm sure of it this time.

R E D I R E C T E X A M I N A T I O N

BY MR. CAMPBELL:

Q. December 15th, 2020, Anna Bickerstaff has never come to you and indicated that she made a false statement to you when she gave you that information; correct?

A. That's correct.

Q. Thank you.

MR. CAMPBELL: I have no further questions for this witness. He can be excused.

THE MASTER: Thank you. Ms. Weingarden, anything further?

MS. WEINGARDEN: Yes.

R E C R O S S - E X A M I N A T I O N

BY MS. WEINGARDEN:

Q. But you don't even remember if Ms. Bickerstaff ever reviewed your memo; is that correct?

A. I don't.

Q. I'm sorry. What was your answer?

A. I do not.

Q. Thank you.

Judge Morrow's courtroom for 18 months. He got criticized and critiqued by Judge Morrow at least 15 times, if not more.

During these discussions of critique, he never sat arm to arm in a chair with Judge Morrow. Judge Morrow never looked into his eyes and locked eyes and did not look away. Their heads were never a foot or a foot and a half apart. Judge Morrow never made sexual analogies, and he never used the words tease, foreplay, climax, crescendo to make his point.

So it is not appropriate to use sex as a teaching tool. It's not something Judge Morrow did with male prosecutor or male attorneys, and it was completely inappropriate to do it with these young women.

Then Mr. Campbell says, well, the disciplinary counsel did not call Mr. Noakes as a witness and he's a res gestae witness. And, of course, that's true, we did not call him in our case in chief. You heard from his testimony that he and I had an interview together in early 2020, and you saw his testimony. You saw his pompous attitude. You saw that he tried to protect Judge Morrow.

What he didn't realize is that during this hearing many of his answers didn't protect Judge Morrow, but, in fact, corroborated the testimony of

Attachment F

Office DEPOT

July 24, 2019

Anna 11th floor

[redacted]

Definitions

Sexual Harassment

William Noakes

Noakes

Black Man - Defense Attorney

Ashley Ciatone

Felt intimidated -

Scared

Feel like I was

Hung jury -

DNA evidence was already in

Ashley

June 17, 2019

Felt her career was affected

Walk in on the tail in

Ashley felt really bad - she felt as though she was sexual harass while in

Anna Bickerstoff She felt that he was trying to hit on her [illegible] what [illegible]

✓ felt sexually harassment

felt intimadated - felt uncomfortable

how a judge to be dismissive and cold for [illegible] awarding a [illegible] trail

No don't think that the words or what he was telling her was good advise

She knew what he was

6-14-19, by ... Kyon | Date of occ. June 11, 2019 Tuesday (1) | Homicide Trial

Loc of occ. Judge Bruce Morrow's Ct Room # 404 3rd Circuit, FMHJ, | Second Killer. People v James Matthews Trial

6-17-18 | Interviews re: B.M. Case

2:50 P.M. | T/T Kurt Koenig [redacted] - heard about it from Joe. {In Toronto" {cell - [redacted]} Was in and out of court room, did not see or hear anything relative to this case. {left message for Joe on cell.

2:00 PM | T/T Mike Tinsey - 48788 - was not in court at time of incident. Heard nothing re: Judge Morrow saying anything re: foreplay, or sex.

2:05 P.M. | T/T Pat Muscat - came off the bench, made inappropriate comments. Everyone angry about some of legal moves and rulings. Ashley pretty fired up about it. Cannot dislike go into detail, but while he explained to her about direct examination of M.E's office, he used sexual; got really close to her - using sex as an analogy. Felt she was reserved, and didn't tell him everything. It clearly bothered her b/c one of the toughest people he knows.

2:10 | T/T Barbara Canning - was in Cats 1/2 after and T/T Pat heard same as described by Pat. Seemed in disbelief that it happened.

Homicide Trial

(2)

Interview Cont'd re: B.M. Case

3:00 pm — TT - Sgt Derrick Griffin - [redacted] - §0
Judge came off the bench - sat next to Anna Barker Staff - wasn't listening - but could hear that it was of a sexual nature - said something ~~about~~ about a man and a woman being together, and it building to a "crescendo". Sat next to Anna about 5-min or so. Used that as an analogy - thought he was unprofessional; pertaining to the pros.

3:15 pm — TT Paton Bergamo - To Anna - analogy of direct examination of medical exam - using sex as the analogy. Why do you want foreplay after sex, cause of and manner of death is like that of [illegible] sex - you don't want foreplay after sex. Heard he was extremely mean to Ashley. "only thing you gonna prove is that they fucked. Kept saying the word fucked. Defendants taken back, disbelief. Now she very upset about it. Concerned ~~about how this will come out. Her word~~ against his word.

Homi Ind

(3)

Inter Cont'd Re: B.M. Case

3 40 T/T Bradly Cobb - Heard Anna T/T other, Dave Chapin and other - [Ashley S], heard B.M. was in her face, using the "F" word. What was the next thing after foreplay. Knew it was of a sexual nature; this was so serious, and demeaning. And asked her to respond to his sexual questions.

3 50 T/T Johnathan Mycak - heard this from Anna Horrified by what he heard - Heard that comments were made; offered feedback to Anna "what I have to tell you will make you sick" this was after Ashley left court room - equated M.E. [illegible] to that of sex; foreplay to climax - cause; manner of death - talked about sexes heights, ~~[illegible]~~ weights, physical appearance At first, [illegible] Anna; got the sense she was shocked, and could never [illegible] expected this from a sitting Judge.

Interview Cont'd B.M. Case

4:00 P.M. — TT Jason Walton - Bob Donaldson brought her to Jason - Anna didn't want to tell him; Anna had been called up and TT him about her direct on M.E. He used the analogy of sex, using foreplay before sex. Clearly very embarrassed. [illegible] [illegible], [illegible] else. Clearly uncomfortable with it all. Seemed worried that it may affect her ability to practice there, because she was getting a Judge in trouble.

(margin note: [illegible] asked her to do same.)

6-18-19 10:15 AM — TT Robert Donaldson

Was walking down the hall, and heard someone say something about sex. It was a group of them re: a serial killer. He took them to Jason to see if there were any legal avenues that can be had. Anna told him the story of what happen. Talked about (Judge) sex in how she should examine the M.E. about the act reaching a ~~"crescendo". Relate~~ what Anna told him.

(5)

Interviews

6-18

10:30 Jared Chapin - 224-8742

Anna; Ashley Hall, and come up from court - one in hall - told them jury charge; some of the things Judge was saying - comparing foreplay, ready up to sex; was appalled by it. Got bits; pieces of what one said to Anna; Ashley. Told Anna; Ashley that they should go a supervisor.

6-19-18

12:50 P.M. It dys Sh Son With It, work Mason doesn't recall The Judge for a min other than an argument & jury deliberately longer. Potty about sex; Judge is always bang the bench walking around. doesn't recall Judge Sitting next to DDA.

It dys ~~Hatch~~ Nathaniel McMurran - was upon court room - doesn't recall Judge bang the bench and sitting next to DDA Potty about ~~sex~~ sex - Potty mouth stood out to him.

6-24-19
9:50 Am

Joe Kuriky (6) [redacted]

Was (Tuesday, 6-11-19) in Court Room 204 Judge Morrow. From what he remembers that it was around the end of closing arguments Brian Steff got Judge Morrow did she do better. Morrow responded something along the lines was yes, but I have to explain something & you that's going to make you blush. Judge Morrow left the bench and went up to Brickenstaff, He was pretty close, their chairs were touching. Their faces were close and he was talking to her, but couldn't hear what he was saying. A couple of hours later, she told me that Morrow said my questions were better, but asking questions was like foreplay and it before the sex. Told him a lot more, but don't remember details.

6-27-19

(7)

12:50pm Ct room - 404 - Judge Monroe
Clk - Mark Ulatowski { 224-0415
Doesn't recall seeing or saying anything -
Def attorney - Willie Noakes - Public Def
(P-42796) [redacted] - TX No Answ
cell ~~800-0835~~ [redacted] TX no Ans - left msg
Court Rept - {Jean Allen} [redacted]
Ct Rept ← {224-2086}

9/30 12:30pm.
T/c att Willie Noakes (313-[redacted]
Daly ~~at~~ interacted was in Judges
Chambers where he and the APAs other d/t
re: presently a better case; Talked the
DNA on neck. Did not see Judge
Monroe say nor react to either one of them.
Didn't see anything unusual that occurred
between the Judge or with of the APAs.

Attachment G

Respondent Exhibit L

To: Don Campbell
From: Lora Weingarden
Date: October 1, 2020
Re: Testimony of grievant, Anna Bickerstaff

On September 29, 2020, Ms. Bickerstaff reviewed the memo written by Detective JoAnn Kinney about Detective Kinney's interview of Ms. Bickerstaff on June 17, 2019. Ms. Bickerstaff had not previously seen this memo. She informed me that the memo contained an error. She said she had not informed Detective Kinney that Judge Morrow was trying to hit on her. Ms. Bickerstaff informed me that she does not know why Judge Morrow said the things he said to her.

Attachment H

Respondent Exhibit M

Stipulation

The parties stipulate that if Lora Weingarden were called as a witness, she would testify that she interviewed Anna Bickerstaff on September 29, 2020. During the interview Ms. Bickerstaff informed Ms. Weingarden that there was an error in the paragraph of J. Bivens's report, page 3 of Exhibit 12, which purports to be Ms. Bickerstaff's statement.

Contrary to a sentence in that paragraph, Ms. Bickerstaff told Ms. Weingarden she had never told Detective Kinney that she believed Judge Morrow was hitting on her. Ms. Bickerstaff also told Ms. Weingarden that she did not believe Judge Morrow had been hitting on her. She informed Ms. Weingarden that she does not know why Judge Morrow told her the things he did when he came to counsel table during the Matthews trial. Ms. Weingarden has a present recollection of this conversation.

Ms. Weingarden made a note of Ms. Bickerstaff's statement contemporaneously with the statement. On October 1, 2020, Ms. Weingarden prepared a memo of her conversation with Ms. Bickerstaff for the purpose of informing counsel for Judge Morrow of it. Marked as Exhibit L to FC 102. The phrase in Ms. Weingarden's October 1, 2020 memo written as "the memo written by Detective JoAnn Kinney" is, in fact, a reference to the section of page 3 of Exhibit 12 to JTC FC 102 that was sent to Ms. Bickerstaff. Ms Weingarden's October 1, 2020 memo was provided to Judge Morrow's counsel in the discovery exchange on October 7, 2020.

Ms. Weingarden's October 1, 2020 memo records that Ms. Bickerstaff told Ms. Weingarden that she had never read J. Biven's

report or the paragraph she was provided from that report by Ms. Weingarden. Ms. Weingarden would testify that she does not have a current recollection of Ms. Bickerstaff making that statement. Ms. Weingarden's practice is to attempt accurately to record what a witness says to her. Because Ms. Weingarden has no current recollection of Ms. Bickerstaff making that statement, she cannot provide the circumstances of the statement, such as the question she asked or Ms. Bickerstaff's exact words to her. For that reason, while Ms. Weingarden believes her memo accurately describes what she understood Ms. Bickerstaff to say, she is unable to ensure that Ms. Bickerstaff accurately understood her question and she accurately understood Ms. Bickerstaff's answer.

The October 1, 2020 memo is a recorded recollection of the information Ms. Weingarden received from Anna Bickerstaff.

The parties stipulate to admit the October 1, 2020 memo as Judge Morrow's Exhibit L.

Attachment I

STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Hon. Bruce Morrow

Third Circuit Court

Detroit, Michigan

Formal Complaint No. 102

Hon. Betty R. Widgeon, Ret'd

_____/

THE MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION ALLEGATIONS

Judge Morrow ("Respondent") has been a judge at the Wayne County Circuit Court since his election in 1998. Before that, he served as a judge at the Recorder's Court. Respondent is subject to all the duties and responsibilities imposed on judges by the Michigan Supreme Court and is subject to the Michigan Code of Judicial Conduct.

II. PROCEDURAL HISTORY

The Judicial Tenure Commission ("the Commission") authorized Formal Complaint 102 as to Respondent and petitioned the Michigan Supreme Court for the appointment of a Master on August 11, 2020. Respondent filed an Answer to the Complaint on August 25, 2020. The Michigan Supreme Court appointed Hon. Betty R. Widgeon, retired (14A District Court), as the Master in Formal Complaint No. 102 against Hon. Bruce U. Morrow on September 17, 2020.

The Master issued a Scheduling Order on September 28, 2020, for the hearing to be held via the ZOOM virtual platform with live streaming on YouTube on November 13, November 23, November 24, December 7, and December 15. Disciplinary Counsel ("the Examiner") filed an Amended Complaint on October 21, 2020.

The parties gave closing arguments at the close of proofs on December 15, 2020. On December 22, 2020, the Commission issued an Order Granting the Master's Request for an Extension to file her report on or before February 9, 2021. The parties filed Proposed Findings of Fact and Conclusions of Law and responses by January 15, 2021.

III. STANDARD OF PROOF

The standard of proof in a Judicial Tenure Commission hearing is by a preponderance of the evidence. *In re Haley*, 476 Mich 180, 189; 720 NW2d 246 (2006).

IV. BACKGROUND

Respondent presided over the June 2019 homicide trial of James Edward Matthews ("the defendant"). The case, *People v. Matthews,* lasted from June 10, 2019, to June 13, 2019. The defendant was accused of the 2003 murder of Camille Robinson. He was not charged with any crimes relating to sexual activity, but he acknowledged to the police in 2003 that he had a sexual encounter with the victim before her death. The Assistant Prosecuting Attorneys ("APAs") in the Matthews case were Ashley Ciaffone ("Ciafonne") and Anna Bickerstaff ("Bickerstaff"). Ciaffone had tried a case before Respondent as an intern and had one other case pending before him. Bickerstaff had never met Respondent until her involvement in the Matthews case.

During *voir dire*, Respondent used the example of his height to illustrate bias for the jury. He said, "I'm gonna say: The man was tall. I can almost guarantee everybody has a different height for tall. Because mine is 6'7". And why is it 6'7"? Because I'm 6'4". And our definitions

are always personal. Nobody knows. But if I say that man was 6'7", now you have the information. Now you can make your own conclusion."

As a part of his effort to enhance the quality of advocacy in his courtroom, Respondent often offers advice and criticism to attorneys. Near the end of Ciaffone's *voir dire*, Respondent encouraged her to be more direct in her questions, asking, "What one thing do you really want to know?" Ciaffone asked a more direct question as a response to Respondent's feedback.

Ciaffone asked Respondent for feedback early in the trial, to which he responded by expressing doubt about her ability to accept feedback. At one point, Respondent intervened to explain that Ciaffone was not refreshing the witness's recollection properly. Ciaffone had repeated problems with leading questions, even after Respondent corrected her. Bickerstaff began many of her questions with the word "and"; Respondent told her that she should "keep an eye on" that. The events that form the basis for the Complaint occurred during the remainder of the trial.

V. COUNT 1: INAPPROPRIATE USE OF SEXUALLY GRAPHIC LANGUAGE

Findings of Fact

The Master finds by a preponderance of the evidence that Respondent did inappropriately use graphic sexual language in his June 11, 2019, conversation with Bickerstaff based upon the following evidence:

A. At one point on June 11, 2019, during a break, Bickerstaff asked Respondent for feedback about her direct examination of the medical examiner. She said words to the effect of "was that line of questioning any better?" Respondent said Bickerstaff's examination was better, but he had another critique for her. He left the bench saying that he would talk to Bickerstaff at the Counsel's table because giving the critique from the bench might make her blush.

B. Respondent sat next to Bickerstaff who sat in the middle of the three chairs at the Prosecutor's table. The seats were close together, and the arms of the chairs were touching. Respondent then illustrated the problem with Bickerstaff's direct examination by using the development of an intimate relationship as an analogy. He said words to the effect of "when a man and a woman start to get close, what does that lead to?"

C. Bickerstaff said she didn't understand. After Respondent repeated his question, Bickerstaff said, "Do you mean sex?" Respondent said that foreplay leads to sex and asked Bickerstaff, "Would you want foreplay before or after sex?" Bickerstaff did not respond.

D. When Respondent asked the question again, Bickerstaff answered, "Before." Respondent stated that the climax of the medical examiner's testimony is stating the cause and manner of death.

E. Respondent said words to the effect that "you start with all the information from the report, all the testimony crescendos to the cause and manner of death, which is the sex of the testimony." Respondent stated that a lawyer should "tease the jury with the details of the examination."

Discussion of Findings

The record paints a picture of a Judge who initially freely offered correction and criticism of Bickerstaff and Ciaffone's techniques from the bench but then decided to approach and sit next to Bickerstaff and engage her in unnecessary and inappropriate sexual dialogue. The fact that sex might otherwise have been mentioned in a courtroom or in Bickerstaff's presence does not make a Judge asking her about her own sexual experiences and desires appropriate – even if it is asked as a hypothetical. This exchange happened in the courtroom, during a trial, while Bickerstaff was working. Her reaction or response to the conversation is not the standard by

which the appropriateness of the exchange is evaluated. Nevertheless, the Master notes that it would be unreasonable to expect that, under such circumstances, Bickerstaff was, or would have considered herself to be, free to disengage from the conversation or complain about the inappropriate nature of the conversation.

Nothing about Bickerstaff's question regarding her examination technique – or Respondent's general impression that she had much to learn in multiple areas – serves to create an environment in which sitting directly next to her and asking about her sexual preferences was appropriate. The fact that Respondent followed up these questions with a metaphor for eliciting witness testimony does not make his use of sexual language in the above cited dialogue and context necessary or appropriate. Respondent's Answer to Count I paragraph 6 of the Complaint– that he went to sit next to Bickerstaff because he did not want to cause her to blush in embarrassment over being corrected– is undermined by the fact that Respondent had already repeatedly corrected Bickerstaff from the bench throughout the trial. Instead, his comments about making Bickerstaff blush suggest an acknowledgment that the personal and intimate nature of what he intended to say was what would embarrass her, not the underlying suggestion that her litigation technique needed improvement.

Respondent takes the position that Bickerstaff is "a liar" and that, therefore, her testimony should be discounted accordingly. This assertion is based on the facts that (1) Chief James Bivens's report of her interview to Detective JoAnn Kinney states that Bickerstaff believed that Respondent was hitting on her, (2) Bickerstaff testified that she did not believe that Respondent was hitting on her, (3) Bickerstaff told some of her coworkers about the incorrect statement, and (4) Bickerstaff did not tell Chief Bivens about the incorrect statement. While the Master agrees that the appropriate course of action would have been for Bickerstaff to have told

Chief Bivens of the error, she does not find that Bickerstaff's failure to do so automatically destroys the credibility she otherwise had, especially given her candor in admitting to her failure to correct that mistake.

Conclusions of Law

Based upon these factual findings, the Master concludes that the Examiner has met its burden of proving the allegations contained in Count 1, and Respondent is responsible for the following as a matter of law:

A. Conduct in violation of the Michigan Code of Judicial Conduct Canon 2(B), which contains the following requirements:

> A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected characteristic, a judge should treat every person with respect;

B. Conduct in violation of the Michigan Code of Judicial Conduct Canon 3(A)(14), which contains the following requirements:

> Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect. To the extent possible, a judge should require staff, court officials, and others who are subject to the judge's discretion and control to provide such fair, courteous, and respectful treatments to persons who have contact with the court; and

C. Conduct in violation of the Michigan Code of Judicial Conduct Canon 3(A)(3), which includes the following requirements:

> A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and other staff, court officials, and others subject to the judge's direction and control.

VII. COUNT 2: INAPPROPRIATE USE OF SEXUALLY GRAPHIC LANGUAGE

Findings of Fact

The Master finds by a preponderance of the evidence that Respondent did inappropriately use graphic sexual language in his June 12, 2019, conversation with Ciaffone based upon the following evidence:

A. When the jury was deliberating on June 12, 2019, Respondent invited counsel – Ciaffone, Bickerstaff, and Defense Attorney Noakes ("Noakes") – into his chambers. By that time, Noakes had made a motion for directed verdict, and that motion remained pending during the conversation that followed. Respondent believed that Ciaffone had cited the wrong standard when responding to Noaks's motion.

B. Respondent asked Ciaffone about her decision during the trial to seek admission of evidence showing the defendant's DNA was on the victim's vaginal swab. Ciaffone responded that she felt the evidence was relevant "because it showed that they had close, recent contact near in time to the homicide." Respondent disagreed and said words to the effect of "all that shows is that they fucked. Like that's all it shows, that they fucked."

C. During this discussion, Ciaffone said the defendant had stated that he had had "non-traditional sex" or "not normal sex" with the victim. That led to a conversation about what non-traditional sex" meant. Ciaffone said that "non-traiditional sex" meant something other than intercourse. Ciaffone thought that defendant's statement was inconsistent with the DNA evidence; however, in Respondent's view, defendant meant that the two had engaged in what Respondent called "doggy style" intercourse. Respondent stated that Ciaffone's view was the product of her own bias and inexperience.

D. Ciaffone stated that Respondent's view was incorrect because defendant had claimed that he "couldn't penetrate [the victim] because she could have a miscarriage."

Respondent laughed and stated words to the effect of "oh, so like what — like he [is] saying that, like, what he's working with … was so big that it would cause a miscarriage[?]"

E. During the in-chambers conversation, Respondent again criticized Ciaffone's voir dire as being too indirect and said words to the effect of, "If I want to have sex with someone on the first date, what do I ask them?"

F. When no one responded, Respondent said, "I would ask them, 'Have you ever had sex on a first date?' What's the next question I would ask them?" Again, no one answered.

G. Respondent said words to the effect of, "I'd ask, 'Would you have sex with me on a first date?' You don't ask questions like, 'Do you want to get married?' or 'Do you want to have kids?' Like, those things would come later. Right? So just ask the question you want to know."

H. Respondent was also critical of Noakes during this conference, but he did not use sexual examples in his comments to Noakes.

Discussion of Findings

The totality of the evidence supports a finding that the conversation that took place between Respondent and Ciaffone in chambers on June 12, 2019 constituted an inappropriate use of sexually graphic language. The fact that the topic of sex was broached does not, in and of itself, constitute inappropriate conversation *per se*. In this case, Ciaffone made the question of the defendant's sexual contact with the victim an issue. She did not, however, make her own sexual experience or the size of the defendant's genitalia topics of discussion in the case or in chambers. Respondent unnecessarily and improperly introduced both subjects as well as analogizing vior dire to asking for sex on a first date. Respondant does not deny that he used some variation of the word "fuck" in regards to the defendant's sexual interactions with the

victim. Respondent's counsel argues that the word "fuck" is not inapprorpate if it is used to describe sexaul intercourse and that, because Respondent used it in this context, it could not have been inappropriate.

The Master is persuaded otherwise. The inappropriate nature of the progression of this conversation is thrown into relief by the fact that Respondent commented early in the conversation about what he presumed to be Ciaffone's lack of sexual experience. To deduce that she was sexually inexperienced and then follow up that observation with coarse sexual joking and unnecessary sexual analogies demonstrates an unprofessional discourtesy toward Ciaffone. Arguably, the conversation would have been inappropriate under any circumstances, but if Respondent thought that Ciaffone was, in fact, sexually inexperienced, he could not have reasonably imagined that the conversational path he was pursuing would have made her feel anything less than uncomfortable. Furthermore, Respondent offered critiques to Noakes without making use of sexual examples or assessments, thus undercutting the argument that sex was the best or only teaching tool at his disposal for offering criticism and critique.

Conclusions of Law

Based upon these factual findings, the Master concludes that the Examiner has met its burden of proving the allegations contained in Count 1, and Respondent is responsible for the following as a matter of law:

A. Conduct in violation of the Michigan Code of Judicial Conduct Canon 2(B), which contains the following requirements:

   A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected characteristic, a judge should treat every person with respect;

B. Conduct in violation of the Michigan Code of Judicial Conduct Canon 3(A)(14), which contains the following requirements:

Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect. To the extent possible, a judge should require staff, court officials, and others who are subject to the judge's discretion and control to provide such fair, courteous, and respectful treatments to persons who have contact with the court; and

C. Conduct in violation of the Michigan Code of Judicial Conduct Canon 3(A)(3), which includes the following requirements:

A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and other staff, court officials, and others subject to the judge's direction and control.

VII. COUNT 3: VIOLATION OF CANONS 2(A), 2(B), 3(A)(3), 3(A)(14)

Findings of Fact

The Master finds by a preponderance of the evidence that Respondent did violate Canons 3(A)(3) and 3(A)(14) based upon the following evidence:

A. After the June 12, 2019, conversation in chambers, Ciaffone and Bickerstaff walked to Counsel's table to pack their things. While they were there, Respondent spoke to them. He asked Ciaffone how tall she was: "What are you, like five-one or five-two?" Ciaffone said words to the effect of, "No, but I accept that, Judge." Bickerstaff volunteered, "Judge, I'm five-three for context." Respondent then estimated Ciaffone's height as four feet, ten inches. Ciaffone said that she is "four-eleven and a half."

B. Respondent then asked if Ciaffone weighed around 105 pounds. Ciaffone said words to the effect of "Judge, you're not supposed to ask a girl her weight." Then Respondent asked Bickerstaff if she was 117 pounds. Bickerstaff said, "That's very generous, but no, Judge."

C. Respondent responded, "Well, I haven't assessed you for muscle mass yet." During this conversation, Respondent looked Ciaffone up and down once and then looked Bickerstaff up and down once.

Discussion of Findings

Respondent's Counsel attempts to explain the personal questions by stating that Respondent was interested in knowing Ciafonne and Bickerstaff's heights because he used height-related illustrations to demonstrate bias to the jury. However, Respondent did not claim that was his reason for asking the questions at the time that he asked them. Furthermore, there was no professional reason offered – at the time or after – for Respondent to inquire as to Ciaffone and Bickerstaff's weights. The comment about not having "yet" assessed Bickerstaff's muscle mass further moves the interaction to a place well outside the bounds of professional, respectful, and dignified conversation.

Conclusions of Law

Based upon these factual findings, the Master concludes that the Examiner has met its burden of proving the allegations contained in Count 1, and Respondent is responsible for the following as a matter of law:

A. Conduct in violation of the Michigan Code of Judicial Conduct Canon 3(A)(14), which contains the following requirements:

> Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect. To the extent possible, a judge should require staff, court officials, and others who are subject to the judge's discretion and control to provide such fair, courteous, and respectful treatments to persons who have contact with the court; and

B. Conduct in violation of the Michigan Code of Judicial Conduct Canon 3(A)(3), which includes the following requirements:

> A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and other staff, court officials, and others subject to the judge's direction and control.

VII. CONCLUSION

The Master concludes that the Examiner has demonstrated by a preponderance of the evidence that Respondent violated the Michigan Code of Judicial Conduct as set forth in Counts 1, 2, and 3 of the Examiner's Amended Complaint. Respondent asserts that the behavior underlying the first two counts was simply a well-intentioned attempt on his part to help Ciaffone and Bickerstaff improve their litigation skills by use of sexual analogies. However, while the APAs might have sought and received professional assistance from Respondent during the trial, his pointed, direct, sexual commentary and analogies exceeded the bounds of appropriate professional interactions and crossed into inappropriate, undignified, discourteous, and disrespectful communication. When judges treat officers of the court without courtesy or civility, it subverts the public's confidence in the integrity of and respect for the judiciary.

With regard Count 3, the personal, intrusive, and unprofessional comments were attached to no explanation that would render them appropriate or respectful. Unwelcome questions and guesses about a female's weight and references to "assessing" her muscle mass while looking her up and down is similarly beyond the scope of respectful and courteous conduct as required by the applicable canons.

Betty R. Widgeon

Hon. Betty R. Widgeon, Ret'd, P32596, Master

February 9, 2021

February 9, 2021

Attachment J

STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

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

Docket No. 161839
Formal Complaint No. 102

DECISION AND RECOMMENDATION FOR DISCIPLINE

At a session of the Michigan Judicial Tenure Commission, Detroit, Michigan, on June 14, 2021,

PRESENT[1]:

Hon. Karen Fort Hood, Chairperson
Hon. Jon H. Hulsing, Vice-Chairperson
Mr. James W. Burdick, Esq, Secretary
Hon. Monte J. Burmeister
Hon. Pablo Cortes
Ms. Siham Awada Jaafar
Mr. Thomas J. Ryan, Esq.
Hon. Brian R. Sullivan

I. Introduction

The Judicial Tenure Commission of the State of Michigan ("Commission") files this recommendation for discipline against Hon. Bruce U. Morrow ("Respondent"), who at all material times was a judge of the 3rd Circuit Court in the City of Detroit, County of Wayne, State of Michigan. This action is taken pursuant to the authority of the Commission under Article 6, § 30 of the Michigan Constitution of 1963, as amended, and MCR 9.202.

On September 17, 2020, the Supreme Court appointed Hon. Betty R. Widgeon as the master ("Master"). A five-day public hearing commenced on November 13, 2020 and concluded on

[1] Commissioner Ms. Danielle Chaney was not present for the June 14, 2021 session, but she agrees with this decision and recommendation for discipline and has signed it.

December 15, 2020 (the "Hearing"), which was conducted virtually at the decision of the Master. Having reviewed the transcript of the Hearing, the exhibits, the Master's report, disciplinary counsel's brief in support of the Master's findings, Respondent's objections to the Master's report, Respondent's response to disciplinary counsel's brief in support of the Master's findings, and disciplinary counsel's response to Respondent's objections to the Master's report, and having considered the oral arguments of counsel, the Commission unanimously concludes that the Examiner has established by a preponderance of the evidence that Respondent committed misconduct. Respondent took the position in this proceeding that he committed no misconduct and that one of the victims was lying, which the Commission rejects. Respondent also contends that these proceedings are unconstitutional and that he was entitled to an in-person hearing, which the Commission also rejects. Respondent's misconduct included using inappropriate sexually graphic language to female assistant prosecutors on multiple occasions, questioning these female attorneys about their physical appearance, and mistreating them in these regards due to their gender.

For the reasons set forth herein, the Commission unanimously recommends the Supreme Court publicly censure and suspend Respondent without pay from the office of judge of the 3rd Circuit Court for a period of twelve months on the basis of his misconduct.

II. Jurisdiction

Respondent has been a judge at the Wayne County Circuit Court since his election in 1998. Before that, he served as a judge at the Recorder's Court. As a judge, Respondent is subject to all the duties and responsibilities imposed on him by the Michigan Supreme Court, the canons of the Michigan Code of Judicial Conduct ("MCJC" and the "Canons"), and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.202. Pursuant to Article 6, § 30 of the Michigan Constitution of 1963, as amended, and MCR 9.202 and MCR 9.211, the Judicial Tenure Commission has jurisdiction over Respondent's conduct.

III. Procedural Background

On August 11, 2020, the Judicial Tenure Commission filed Formal Complaint (FC) 102. It charged Respondent with three counts of misconduct based on violations of the MCJC and the Canons. The complaint alleged Respondent committed these violations during his tenure as a Wayne County Circuit Court judge.

As to the specific counts of the complaint, Count I charged that Respondent used inappropriate sexually graphic language toward a female assistant prosecutor during a brief break in a homicide jury trial on June 11, 2019. Count II charged that Respondent used inappropriate sexually graphic language toward another female assistant prosecutor in Respondent's chambers on June 12, 2019 while the jury deliberated in the same homicide jury trial. Count III charged that Respondent committed misconduct by questioning these female attorneys about their physical characteristics.

On August 25, 2020, Respondent filed his answer to the complaint together with his affirmative defenses (Respondent's "Answer," cited as "R's Ans."). On September 17, 2020, the Supreme Court appointed the Master. Disciplinary counsel filed an amended complaint on October 21, 2020 to correct certain dates alleged. The five-day virtual Hearing commenced on November 13, 2020 and concluded on December 15, 2020. The parties filed Proposed Findings of Fact and Conclusions of Law and responses by January 15, 2021.

IV. Master's Findings of Fact and Conclusions of Law

On February 9, 2021, the Master issued a report containing her findings of fact and conclusions of law (the "Master's Report"). The Master concluded the Examiner established by a preponderance of the evidence that Respondent committed misconduct in office under Counts I, II and III. As to Counts I and II, the Master concluded Respondent violated Canons 2(B), 3(A)(3), and 3(A)(14). As to Count III, the Master concluded Respondent violated Canons 3(A)(3) and 3(A)(14). Disciplinary counsel filed a brief in support of the Master's findings and disciplinary analysis on

March 9, 2021. Respondent timely filed his objections to the Master's Report on March 9, 2021, and Respondent filed his response to disciplinary counsel's brief in support of the Master's findings and disciplinary analysis on March 30, 2021. Disciplinary counsel filed a response to Respondent's objections to the Master's Report on March 30, 2021.

On May 10, 2021, the Commission held a public hearing on Respondent's objections to the Master's Report pursuant to MCR 9.241, which was conducted via Zoom video based upon various executive orders by the Governor and administrative orders of the Michigan Supreme Court relating to the ongoing COVID-19 pandemic.

V. Standard of Proof

Judicial discipline is a civil proceeding, the purpose of which is not to punish but to maintain the integrity of the judicial process. *Matter of Mikesell*, 396 Mich 517, 527; 243 NW2d 86 (1976); *In re Seitz*, 441 Mich 590, 624; 495 NW2d 559 (1993); *In re Haley*, 476 Mich 180, 195; 720 NW2d 246 (2006). The standard of proof applicable in judicial disciplinary matters is the preponderance of the evidence standard. *In re Ferrara*, 458 Mich 350, 360; 582 NW2d 817 (1998) (cite omitted). The disciplinary counsel bears the burden of proving the allegations by a preponderance of the evidence. MCR 9.233(A). The Commission reviews the master's findings of fact and conclusions of law de novo, and the Commission may, but need not, defer to the master's findings of fact. *In re Chrzanowski*, 465 Mich 468, 482; 636 NW2d 758 (2001). In *Ferrara*, *supra*, 458 Mich at 362, the Michigan Supreme Court, citing *In re Tschirhart*, 422 Mich 1207, 1209-1210; 371 NW2d 850(1985), recognized:

> "*[t]he proper administration of justice requires that the Commission view the Respondent's actions in an objective light*. The focus is necessarily on the impact his statements might reasonably have upon knowledgeable observers. Although the Respondent's subjective intent as to the meaning of his comments, his newly exhibited remorsefulness and belated contrition all properly receive consideration, any such *individual interests are here necessarily outweighed by the need to protect the public's perception of the integrity of the judiciary*."

(emphasis added). It is the Commission's, not the master's conclusions and recommendations that are ultimately subject to review by the Michigan Supreme Court. *Chrzanowski*, 465 Mich at 481.

VI. Commission's Findings of Fact and Conclusions of Law

The Commission unanimously accepts and adopts the Master's findings of fact and conclusions of law that Respondent committed the misconduct alleged in Counts I, II, and III of the amended complaint. The Commission unanimously accepts and adopts the Master's conclusions of law that Respondent's misconduct in Counts I and II violated Canons 2(B), 3(A)(3), and 3(A)(14). The Commission unanimously accepts and adopts the Master's conclusions of law that Respondent's misconduct in Count III violated Canons 3(A)(3) and 3(A)(14). In addition, the Commission finds that Respondent's misconduct in Count III also violated Canon 2(B), and Respondent's misconduct in all three counts also constituted a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c), and Respondent's unfair and discourteous treatment in all three counts was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

A. Count I: Inappropriate Use of Sexually Graphic Language.

Count I charged that Respondent used inappropriate sexually graphic language toward a female assistant prosecutor during a brief break in a homicide jury trial on June 11, 2019. The Master concluded the misconduct charged in Count I constitutes: (a) failure to respect and observe the law, failure to act in a manner that promotes public confidence in the integrity of the judiciary, and failure to respect a person's gender, contrary to Canon 2(B); (b) failure to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary to Canon 3(A)(3); and (c) failure to treat people with respect with regard to their gender, contrary to Canon 3(A)(14). The Commission reviewed the record de novo and adopts the Master's findings and conclusions as to Count I. In addition, the Commission finds and concludes that Respondent's established misconduct in Count I also constitutes a persistent failure to treat the APAs

fairly and courteously in violation of MCR 9.202(B)(1)(c), and Respondent's unfair and discourteous treatment was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

Respondent presided over the June 2019 homicide trial of James Edward Matthews. (Master's Report p 2.) The case, *People v Matthews*, lasted from June 10, 2019, to June 13, 2019. (*Id*.) The defendant was accused of the 2003 murder of Camille Robinson. He was not charged with any crimes relating to sexual activity, but he acknowledged to the police in 2003 that he had a sexual encounter with the victim before her death. (*Id*.) The Assistant Prosecuting Attorneys ("APAs") in the *Matthews* case were Ms. Ashley Ciaffone ("Ciaffone") and Ms. Anna Bickerstaff ("Bickerstaff"). (*Id*.) Ciaffone had tried one case before Respondent as an intern and had one other case pending before him. (*Id*.) Bickerstaff had never met Respondent until her involvement in the *Matthews* case. (*Id*.)

Respondent often offers advice and criticism to attorneys. (*Id* at p. 3.) On June 11, 2019, during a break, Bickerstaff asked Respondent for feedback about her direct examination of the medical examiner. (*Id*.) She said words to the effect of "was that line of questioning any better?" (*Id*.) Respondent said Bickerstaff's examination was better, but he had another critique for her. (*Id*.) He left the bench, saying that he would talk to Bickerstaff at the counsel's table because giving the critique from the bench might make her "blush." (*Id*.) Respondent sat next to Bickerstaff, who sat in the middle of the three chairs, at the prosecutor's table. (*Id*. at p 4.) The seats were close together, and the arms of the chairs were touching. (*Id*.)

Respondent then illustrated the perceived problem with Bickerstaff's direct examination by using the development of an intimate relationship as an analogy. (*Id*.) He said words to the effect of "when a man and a woman start to get close, what does that lead to?" (*Id*.) Bickerstaff said she didn't understand. (*Id*.) After Respondent repeated his question, Bickerstaff said, "Do you mean sex?" (*Id*.)

Respondent said that foreplay leads to sex and asked Bickerstaff, "Would you want foreplay before or after sex?" (*Id.*) Bickerstaff did not respond. (*Id.*) When Respondent asked the question again, Bickerstaff answered, "Before." (*Id.*) Respondent stated that the climax of the medical examiner's testimony is stating the cause and manner of death. (*Id.*) Respondent said words to the effect that "you start with all the information from the report, all the testimony crescendos to the cause and manner of death, which is the sex of the testimony." (*Id.*) Respondent stated that a lawyer should "tease the jury with the details of the examination." (*Id.*)

Respondent admits he said and did almost all of what Ms. Bickerstaff heard him say and do. Respondent knew ahead of time that what he was going to say might make her blush. At the time he spoke explicitly about sex to Ms. Bickerstaff he had no prior relationship with her. Respondent knew Ms. Bickerstaff was young and inexperienced. She was 27 years old and had only been a prosecutor for a year and a half. He placed himself intimately close to her with the arms of the chairs touching and their faces 12 to 18 inches apart and his eyes locked on hers. He knew or should have known that as a young prosecutor she was a captive audience and did not have the freedom to leave or to end the conversation. As the Master found, Ms. Bickerstaff's reaction or response to the conversation is not the standard by which the appropriateness of the exchange is evaluated and, moreover, it would be unreasonable to expect that, under such circumstances, Ms. Bickerstaff was, or would have considered herself to be, free to disengage from the conversation or complain about the inappropriate nature of the conversation. (Master's Report pp 4-5.)

Respondent claims he did not mean to use the word "climax" in a sexual context. The Commission finds this explanation not credible. After talking to Ms. Bickerstaff about how a relationship between a man and a woman develops and discussing foreplay leading to sex, he told her, quote: "You want to tease the jury with the details of the report and that leads to the climax, which is the cause and manner of death." In context, and where Respondent had already steered the

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conversation to "foreplay" and "sex," it is not plausible, as Respondent contends, that he did not intend to use the word "climax" sexually. The fact that Respondent followed up these questions with a metaphor for eliciting witness testimony does not make his use of sexual language in the above cited dialogue and context necessary or appropriate. (Master's Report p 5.)

Accordingly, the Commission adopts the Master's findings and conclusions as to Count I, including that Respondent committed misconduct by: (a) failing to respect and observe the law, failing to act in a manner that promotes public confidence in the integrity of the judiciary, and failing to respect a person's gender, contrary to Canon 2(B); (b) failing to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary to Canon 3(A)(3); and (c) failing to treat people with respect with regard to their gender, contrary to Canon 3(A)(14).

In addition, the Commission finds and concludes that that Respondent's established misconduct in Count I also constitutes a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c), and Respondent's unfair and discourteous treatment was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

Respondent used inappropriate sexual language with Ms. Bickerstaff because she is a woman. Respondent claims he was teaching and providing feedback to Ms. Bickerstaff. The Master concluded, correctly the Commission believes, that even accepting his explanation, Respondent's explicitly sexual way of teaching was not courteous, respectful, or dignified, and constituted misconduct. Respondent knows how to accomplish teaching and feedback objectives without using sexual words and analogies. For example, he provided feedback to Mr. Kurily, his assigned courtroom assistant prosecutor, many times during Mr. Kurily's 18 months in Respondent's courtroom. During those 18 months Respondent never sat intimately with Mr. Kurily, he never used

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sexual analogies with Mr. Kurily, and he never used the words "tease," "foreplay," "climax," or "crescendo" with Mr. Kurily.

Respondent was on notice that such conduct is not acceptable. In 2004, the State Court Administrative Office (SCAO) warned Respondent it is inappropriate to discuss matters of a personal nature with staff unless that individual is an acquaintance or friend, which resulted from such instances of Respondent's personal contacts with a female secretary. SCAO further warned Respondent to refrain from initiating or participating in inappropriate conversations with staff regarding topics of a personal nature, and to refrain from hugging female employees. (DC Exh. 11.) Similarly, in 2005, the Commission formally admonished Respondent for such hugging of court staff and engaging in conversations with court staff which are of a personal or intimate nature and which may be regarded as offensive or embarrassing. (DC Exh. 10.)

Since Respondent was warned by SCAO in 2004 and the Commission in 2005, public awareness about sexual harassment by people in positions of power has undeniably grown stronger, and people in positions of power are on clear notice that sexually harassing words and conduct are unacceptable.

B. <u>Count II: Inappropriate Use of Sexually Graphic Language</u>.

Count II charged that Respondent used inappropriate sexually graphic language toward another female assistant prosecutor during the same homicide trial in Respondent's chambers on June 12, 2019 while the jury deliberated. The Master concluded the misconduct charged in Count II constitutes: (a) failure to respect and observe the law, failure to act in a manner that promotes public confidence in the integrity of the judiciary, and failure to respect a person's gender, contrary to Canon 2(B); (b) failure to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary to Canon 3(A)(3); and (c) failure to treat people with respect with regard to their gender, contrary to Canon 3(A)(14). The Commission

reviewed the record de novo and adopts the Master's findings and conclusions as to Count II. In addition, the Commission finds and concludes that Respondent's established misconduct in Count II also constitutes a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c), and Respondent's unfair and discourteous treatment was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

When the jury was deliberating on June 12, 2019, Respondent invited counsel — Ms. Ciaffone, Ms. Bickerstaff, and Defense Attorney Mr. Noakes ("Noakes") — into his chambers. (Master's Report p 7.) By that time, Noakes had made a motion for directed verdict, and that motion remained pending during the conversation that followed. (*Id.*) Respondent believed that Ciaffone had cited the wrong standard when responding to Noakes's motion. (*Id.*)

Respondent asked Ciaffone about her decision during the trial to seek admission of evidence showing the defendant's DNA was on the victim's vaginal swab. (*Id.*) Ciaffone responded that she felt the evidence was relevant "because it showed that they had close, recent contact near in time to the homicide." (*Id.*) Respondent disagreed and said words to the effect of "all that shows is that they fucked. Like that's all it shows, that they fucked." (*Id.*)

During this discussion, Ciaffone said the defendant had stated that he had "non-traditional sex" or "not normal sex" with the victim. (*Id.*) That led to a conversation about what "non-traditional sex" meant. (*Id.*) Ciaffone said that "non-traditional sex" meant something other than intercourse. (*Id.*) Ciaffone thought that defendant's statement was inconsistent with the DNA evidence; however, in Respondent's view, defendant meant that the two had engaged in what Respondent called "doggy style" intercourse. (*Id.*) Respondent stated that Ciaffone's view was the product of her own bias and inexperience. (*Id.*) Ciaffone stated that Respondent's view was incorrect because defendant had claimed that he "couldn't penetrate [the victim] because she could have a miscarriage." (*Id.*)

Respondent laughed and stated words to the effect of "oh, so like what — like he [is] saying that, like, what he's working with ... was so big that it would cause a miscarriage[?]" (*Id.* at p 8.)

During this in-chambers conversation, Respondent again criticized Ciaffone's voir dire as being too indirect and said words to the effect of, "If I want to have sex with someone on the first date, what do I ask them?" (*Id.*) When no one responded, Respondent said, "I would ask them, 'Have you ever had sex on a first date?' What's the next question I would ask them?" (*Id.*) Again, no one answered. (*Id.*) Respondent said words to the effect of, "I'd ask, 'Would you have sex with me on a first date?' You don't ask questions like, 'Do you want to get married?' or 'Do you want to have kids?' Like, those things would come later. Right? So just ask the question you want to know." (*Id.*) Respondent was also critical of Noakes during this conference, but he did not use sexual examples in his comments to Noakes, a male defense attorney.

Again, as with the statements forming the basis for Count I, Respondent admits he said virtually all of what is alleged he said during the in-chambers conference with the APAs and defense counsel under Count II. None of it was appropriate. Respondent believed Ms. Ciaffone's voir dire was ineffective, so he created a voir dire example that would help him determine if a woman would sleep with him on their first date.

Respondent also believed that there was no need to present DNA evidence after Ms. Ciaffone explained her reasons. His response: "All it shows is that they fucked." Respondent could have said all it shows is that they were intimate or they had sex, but he chose to use the very graphic word "fucked."

Respondent asked Ms. Ciaffone for her definition of nontraditional sex and commented on her own sexual experience. They discussed the defendant's testimony, and Respondent shared his belief that defendant and the victim had sex, "doggy style." He could have said it in a more professional, less crass way, but he chose not to. Respondent laughed about the defendant's

explanation for not having sex the "normal way," and joked about the size of defendant's penis and what the defendant thought of the size of his penis. Respondent was talking mainly with Ms. Ciaffone at the time he said these things to her. He had no prior relationship with her, except that she had last practiced in front of him when she was an intern nine years earlier.

The APAs were again a captive audience. They were not free to leave and not free to object. Respondent, a judge, was considering a directed verdict motion for the defense, and, if he granted it, the APAs' case would be dismissed.

Just as Respondent claimed he was teaching Ms. Bickerstaff about how to do an exam with respect to Count I, he argued he was only trying to critique and educate Ms. Ciaffone about how she tried the case with respect to Count II. But, again, it was not appropriate for him to choose sexual and offensive demonstratives when he could have, and should have, chosen nonsexual ways to do so. When Respondent critiqued Mr. Noakes, he did not use sexual examples and analogies.

Respondent argued that his use of the words "fuck" or "doggy style" is not misconduct and that people use those words in everyday conversation. This proposition is dubious and, even if accepted, the Commission must consider all of his words in the context in which he used them, which was to inappropriately deluge the APAs with multiple instances of unnecessarily sexually graphic discussions over the course of a three-day homicide trial. The Commission agrees with the Master's finding and conclusion that the totality of the evidence supports a finding that the conversation that took place between Respondent and Ciaffone and Bickerstaff in chambers on June 12, 2019 constituted an inappropriate use of sexually graphic language. (Master's Report p 8.)

Accordingly, the Commission adopts the Master's findings and conclusions as to Count II, including that Respondent committed misconduct by: (a) failing to respect and observe the law, failing to act in a manner that promotes public confidence in the integrity of the judiciary, and failing to respect a person's gender, contrary to Canon 2(B); (b) failing to be patient, dignified, and

courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary to Canon 3(A)(3); and (c) failing to treat people with respect with regard to their gender, contrary to Canon 3(A)(14).

In addition, the Commission finds and concludes that that Respondent's established misconduct in Count II also constitutes a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c), and Respondent's unfair and discourteous treatment was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d). The topic of the defendant's sexual activity with the victim and whether it was relevant to place him with the victim near the time of the homicide did not make Ciaffone's own sexual experience or the size of the defendant's genitalia appropriate or relevant topics of discussion in the case or in chambers. (*Id.*) Respondent unnecessarily and improperly introduced both subjects as well as analogizing voir dire to asking for sex on a first date. (*Id.*)

The inappropriate nature of the progression of this conversation is underscored by the fact that Respondent commented early in the conversation about what he presumed to be Ciaffone's lack of sexual experience. The Commission is persuaded that Respondent's presumptions and conduct toward Ciaffone was motivated by her gender. To deduce that she was sexually inexperienced and then follow up that observation with coarse sexual joking and unnecessary sexual analogies demonstrates an unprofessional discourtesy toward Ciaffone. (Master's Report p 9.) The conversation would have been inappropriate under any circumstances, but if Respondent thought that Ciaffone was, in fact, sexually inexperienced, he could not have reasonably imagined that the conversational path he was pursuing would have made her feel anything less than uncomfortable. (*Id.*) Furthermore, Respondent offered critiques to Mr. Noakes without making use of sexual examples or assessments, thus undercutting the argument that sex was the best or only teaching tool

at his disposal for offering criticism and critique, (*id.*), or that he would use sexually charged language with young attorneys regardless of gender.

C. Count III: Violations of Canons 2(A), 2(B), 3(A)(14).

Count III charged that Respondent committed misconduct by questioning female attorneys who appeared before him about their physical appearance. The Master concluded the misconduct charged in Count III constitutes: (a) failure to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary to Canon 3(A)(3); and (b) failure to treat people with respect with regard to their gender, contrary to Canon 3(A)(14). The Commission reviewed the record de novo and adopts the Master's findings and conclusions as to Count III. In addition, the Commission finds and concludes that Respondent's established misconduct in Count III also constitutes Respondent's failure to respect a person's gender, contrary to Canon 2(B), a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c), and that Respondent's unfair and discourteous treatment was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

After the June 12, 2019 conversation in chambers, Ciaffone and Bickerstaff walked to counsel's table to pack their things. (Master's Report p 10.) While they were there, Respondent spoke to them, (*id.*), which was a "continuation" of the improper in-chambers conversation Respondent was having with them. (R's Ans. ¶ 30.) He asked Ciaffone how tall she was: "What are you, like five-one or five-two?" (Master's Report p 10.) Ciaffone said words to the effect of, "No, but I accept that, Judge." (*Id.*) Bickerstaff volunteered, "Judge, I'm five-three for context." (*Id.*) Respondent then estimated Ciaffone's height as four feet, ten inches. (*Id.*) Ciaffone said that she is "four-eleven and a half." (*Id.*) Respondent then asked if Ciaffone weighed around 105 pounds. (*Id.*) Ciaffone said words to the effect of "Judge, you're not supposed to ask a girl her weight." (*Id.*) Then Respondent asked Bickerstaff if she was 117 pounds. (*Id.*) Bickerstaff said, "That's very generous,

but no, Judge." (*Id.*) Respondent responded, "Well, I haven't assessed you for muscle mass yet." (*Id.*) During this conversation, Respondent looked Ciaffone up and down once and then looked Bickerstaff up and down once. (*Id.*)

Respondent contends that his actions under Count III are not misconduct because he uses height-related illustrations to demonstrate bias to the jury and, at the beginning of the subject homicide trial, he had used the example of his own height to illustrate bias for the jury. But Respondent admitted in his Answer that this dialogue about the APAs' physical characteristics was an immediate continuation of the inappropriate sexual discussion he initiated with the APAs in his chambers, (R's Ans. ¶ 30), and Respondent followed the women out of his chambers to their table in the courtroom for this continued discussion, now involving their height and weight. He did not give them any reason for his questions, professional or otherwise, let alone say that he was interested in learning their height and weight for purposes of future jury illustrations. Assessing their height and weight and muscle mass has nothing to do with bias, and his discussion with jurors about bias already took place at least a day earlier. In light of the other misconduct that occurred as detailed with respect to Counts I and II, it strains credulity that Respondent simply wanted to mentally bank away the information about the APAs' height and weight for future jury instruction to make a point that Respondent already knew how to make with his own height. The APAs both testified that Respondent looked their bodies up and down,[2] and he persisted in his questions even after Ciaffone tried to deflect them by saying he should not ask a woman about her weight.

Accordingly, the Commission adopts the Master's findings and conclusions as to Count III, including that Respondent committed misconduct by: (a) failing to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary

[2] The Commission has not been provided any evidence to substantiate Respondent's assertion that either the APAs' testimony or disciplinary counsel's description of what transpired is racially motivated in any way. Respondent's conduct in this case was misconduct regardless of race.

to Canon 3(A)(3); and (b) failing to treat people with respect with regard to their gender, contrary to Canon 3(A)(14).

In addition, the Commission finds and concludes that that Respondent's established misconduct in Count III also constitutes a failure to respect and observe the law, failure to act in a manner that promotes public confidence in the integrity of the judiciary, and failure to respect the APAs' gender, contrary to Canon 2(B), a persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c), and that Respondent's unfair and discourteous treatment was due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d). Little more need be said here than as already set forth under Counts I and II, as Respondent's misconduct under Count III was a continuation of his inappropriate conduct towards the APAs and targeted them specifically as women.

VII. Conclusions of Law

Respondent's conduct breached the standards of judicial conduct, and he is responsible for the following:

a. Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.202;

b. Misconduct by failing to respect and observe the law, failing to act in a manner that promotes public confidence in the integrity of the judiciary, and failing to respect a person's gender, contrary to Canon 2(B);

c. Misconduct by failing to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals in an official capacity, contrary to Canon 3(A)(3);

d. Misconduct by failing to treat people with respect with regard to their gender, contrary to Canon 3(A)(14);

e. Persistent failure to treat the APAs fairly and courteously in violation of MCR 9.202(B)(1)(c); and

f. Unfair and discourteous treatment due to the fact that the APAs are women, in violation of MCR 9.202(B)(1)(d).

VIII. Respondent's Other Contentions

Besides Respondent's contention that he committed no misconduct, which the Commission rejects as set forth above, Respondent, by counsel, offered additional legal arguments as to why this Commission is assertedly powerless to investigate his conduct and recommend discipline for his misconduct. The Commission finds no merit to Respondent's arguments.

A. <u>These Proceedings Are Constitutional</u>.

Respondent argues that Michigan's judicial discipline system is unconstitutional, relying on *Williams v Pennsylvania*, 136 S Ct 1889 (2016). Respondent acknowledges that the Commission cannot resolve the issue and that he is merely attempting to preserve this issue. (R's 3/9/21 Objections to Master's Report, p 26.) The Commission agrees that the issue is not for the Commission to decide, and therefore notes only that: (1) *Williams* is patently distinguishable, as it involved a prosecutor turned state supreme court justice presiding over a death penalty case he was previously involved with as a prosecutor; and (2) the Michigan Supreme Court has already considered and rejected Respondent's argument in holding Michigan's judicial discipline system is constitutional, including in ways that differentiate the system from the problems found in *Williams*. *See In re Chrzanowski*, 465 Mich 468, 483-86 (2001); *Matter of Del Rio*, 400 Mich 665, 682-84 (1977); *Matter of Mikesell*, 396 Mich 517 (1976); *see also Bruce Morrow v Judicial Tenure Commission*, Order No. 162130 & (4) (Oct. 30, 2020) (denying complaint for superintending control on this issue).

Nor does the Commission find merit in Respondent's argument, without citation to authority, that he had a First Amendment constitutional right to use profane language toward the APAs. The United States Supreme Court distinguishes between things a public employee says as a citizen, which get First Amendment protection, and those the employee says in his official capacity, which do not. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). *Garcetti* establishes that "when public

employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id*. at 422. In fact, a case that Respondent relies upon heavily for other purposes, *Matter of Hocking*, 451 Mich 1, 13 (1996), held that "[a] judge's comments are not immune from censure . . . ." Respondent committed his misconduct, including making the sexually inappropriate statements to the APAs, in his capacity as a judge. Thus, he cannot rely on the First Amendment to protect his misconduct.

B. Conducting The Hearing Virtually Was Proper.

Respondent objected to the Master's decision to conduct the proceedings virtually rather than in person. The Commission concludes the Master had the discretion to choose whether the hearing would be by remote video, and it was a proper exercise of that discretion to opt for a virtual hearing on the facts of this case.

The Michigan Supreme Court has authorized, and even encouraged, courts to conduct virtual proceedings whenever possible, in order to best ensure the safety of all participants during the pandemic. The hearing in this case occurred in November and December 2020. Under Michigan Supreme Court Administrative Order 2020-19, June 26, 2020, the courts were mandated to "continue to expand the use of remote participation technology (video or telephone) as much as possible to reduce any backlog and to dispose of new cases efficiently and safely."

Notwithstanding this mandate, Respondent claimed that MCR 9.231(B), which states that "[t]he master shall set a time and a place for the hearing ...," implies that the hearing must be at a physical "place." He objected that the Master denied his motion for an in-person hearing without providing a reason, although he admits it was "ostensibly" because of the pandemic.

The Master properly chose to conduct the hearing virtually. Nothing in the rule requires that the hearing be held in person, as opposed to virtually. Respondent had full, fair, and ample

opportunity to present his evidence, respond to his opponent's evidence, and to question and cross examine witnesses. The Master was within her authority to hold the hearing remotely; especially in light of concerns about the health consequences of having an in-person hearing due to the ongoing pandemic.

IX. Disciplinary Analysis

The Commission concludes Respondent committed judicial misconduct by using inappropriate sexually graphic language to female assistant prosecutors on multiple occasions, questioning these female attorneys about their physical appearance, and mistreating them in these regards due to their gender. Based on its findings of misconduct, the Commission recommends Respondent be publicly censured and suspended without pay for a period of twelve months. This recommendation is based on the following evaluation of the factors set forth in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (1999). The Commission is aware of MCR 9.244(B)(1), and has included its consideration in the recommendation as well, along with providing the information required under MCR 9.244(B)(1) under seal.

A. The *Brown* Factors.

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

Respondent exhibited a pattern of saying sexually inappropriate things to women. In 2004, SCAO reprimanded Respondent for a variety of misconduct. With respect to his treatment of a female court employee, the SCAO letter stated:

> "You engaged in inappropriate personal conversation with a personnel staff person asking inappropriate questions and making inappropriate personal comments . . .
>
> It is inappropriate to discuss matters of a personal nature with staff unless that individual is an acquaintance or friend (in the instance described above, the staff person was new to you). . .

> You need to discontinue this pattern of behavior immediately. Specifically, you should . . . refrain from initiating or participating in inappropriate conversations with staff regarding topics of a personal nature."

(DC Exh. 11.)

The Commission conducted its own investigation and formally admonished Respondent for the same conduct that SCAO investigated. With respect to Respondent's treatment of women, the Commission's 2005 letter told Respondent:

> "The Commission is concerned about your practice of 'hugging' persons at the court, whether court personnel, attorneys or others. Your perception that individuals have no objection or consent may not be accurate. Many persons may feel they are in no position to object even if they consider the contact to be objectionable. . . . Similarly, the Commission cautions you against engaging in conversations with court staff which are of a personal or intimate nature and which may be regarded as offensive or embarrassing."

(DC Exh. 10). These letters show that Respondent has long been on notice that he should be cautious in his interactions with females, including no longer having intimate personal conversations that may be offensive or embarrassing.

There is evidence that Respondent said inappropriate intimate and sexual things to female prosecutors in 2018 and 2019 that are uncharged acts of misconduct. In 2018, when ruling on a motion to suppress evidence of cell phone records in a drug case – a case that had nothing to do with sex or sex crimes – Respondent posed a hypothetical question to a female prosecutor to the effect: "Would I have an expectation of privacy if I were to have sex with a man in the stall of a restroom?" In 2019, Respondent asked a female prosecutor who wears a hijab what color her armpit hair is, and he shared with her that he shaves his own armpits. The present case involves three more instances of sexually inappropriate language and conduct for two days. Between the early 2000s and June of 2019, Respondent used inappropriate, personal, sexual, and intimate language with at least five different women.

These other acts by Respondent are properly considered in determining an appropriate sanction. In *In re Moore*, 464 Mich 98 (2001), the Commission recommended that Judge Moore be suspended for nine months without pay, and explained that this recommendation was based on the *collective acts* of Judge Moore *throughout his judicial career*, noting that he had received *two admonitions and a public censure*. *Id* at 117. It was proper for the Commission, while limiting its findings of misconduct to the allegations of the complaint, to consider "past behavior in its sanction determination," as such "behavior is relevant." *Id* n16. The Commission's finding with respect to *Brown* factor number 1 was:

> "Respondent's misconduct is not an isolated instance. It represents a pattern of misconduct continuing throughout Respondent's career and resulting in admonitions, public censure, and repeated criticisms and reversals by reviewing courts. Respondent *was warned repeatedly that his conduct was improper*. He cannot justifiably assert ignorance of the error of his ways. He has failed to acknowledge the criticisms were valid and has *failed to alter conduct*."

Id at 119 (emphasis added).

As in *In re Moore*, Respondent's prior warnings about inappropriate intimate personal communications in his official capacity and his prior treatment of female lawyers demonstrate his propensity, knowledge of the criticisms of his conduct, and his failure to alter his conduct. Such failure warrants a determination under the first *Brown* factor that Respondent's misconduct is more serious because it "is not an isolated instance," rather it "represents a pattern of misconduct continuing throughout Respondent's career and resulting in admonitions, public censure, and repeated criticisms[.]" *See id*. Respondent was well aware that his first conversation with Ms. Bickerstaff – which was the subject of Count I – "may be offensive or embarrassing." He warned her that it might make her blush just before talking with her. He had an intimate conversation with her anyhow, despite the SCAO and Commission warnings that he not do so.

The comments Respondent made in the early 2000s and again in 2018 and 2019, to five women in total, show that his 2019 comments to Ms. Bickerstaff and Ms. Ciaffone were not isolated.

Rather, they were part of a long-standing pattern. This factor weighs heavily in favor of a severe sanction.

(2) ***Misconduct on the bench is usually more serious than the same misconduct off the bench.***

Respondent committed the misconduct described in Counts I and III in his courtroom. He committed the misconduct described in Count II in his chambers, during and in connection with a trial. The Michigan Supreme Court considers conduct that occurs in a judge's capacity as judge, but not literally "on the bench," to be "on the bench conduct." *In re Susan R. Chrzanowski*, 465 Mich 468, 490 (2001); *In re Barglind*, 482 Mich 1202 (2008); *In re Adams*, 494 Mich 162 (2013). This factor weighs in favor of a more severe sanction.

(3) ***Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.***

&

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

Respondent's conduct was not prejudicial to the actual administration of justice. However, one aspect of it created an appearance of impropriety. Respondent told Ms. Bickerstaff, in open court, that he had something to say to her, then came off the bench and had an intimate conversation while sitting close to her at the prosecution table. Defense counsel was not present. (Bickerstaff, 11-23-20, p 390/3-5) He did this during a five-minute break in the proceedings, when there were members of the public present. As the Michigan Supreme Court noted while suspending Respondent in 2014, a private meeting with one party during the proceedings, in a public place, creates the appearance of impropriety. *In re Morrow*, 496 Mich 291, 299 (2014).

(5) ***Misconduct that occurs spontaneously is less serious than misconduct that is premediated or deliberated.***

Respondent's conduct in all three counts was premeditated or deliberated, not merely

spontaneous. The facts the Master found with respect to Count I include that Respondent told Ms. Bickerstaff that what he had to say might make her blush. (Report at p 3; Bickerstaff, 11-23-20, p 385/4-7; Kurily, 11-24-20, p 700/2224; DC Exh. 2, ¶ 6; DC Exh.4, ¶ 9.) His words clearly reveal that he had thought about what he was going to say and about the effect it would have on Ms. Bickerstaff. He followed through on his thoughts by sitting very close to her and having the intimate conversation he knew might make her blush.

The facts the Master found with respect to Count II, which addressed the in-chambers discussion, also make clear that Respondent's sexually charged comments were premeditated or deliberated. The statements and their contents were:

- When Ms. Ciaffone explained why the DNA evidence was relevant, Respondent disagreed and said, "all that shows is that they fucked. Like that's all it shows, that they fucked" (Ciaffone, 11-13-20 at p 57/1-18; Bickerstaff, 11-23-20, p 400/2-8; *cf*. DC Exh. 2 ¶12b, 12c [Respondent "probably did use that word"]).

- After asking Ms. Ciaffone what her definition of "non-traditional sex" was, Respondent said that her view of the evidence was a product of her own bias and inexperience. (Ciaffone, 11-13-20, p 59/20-25; Bickerstaff, 11-23-20, p 403/8-12; Noakes, 11-24-20, p 919/6-22.)

- Respondent expressed his belief that the sexual encounter was done "doggy style." (Ciaffone, 11-13-20 at pp 60/1-6; Bickerstaff, 11-23-20, p 403/6-7; Noakes, 11-24-20, p 907/6-8.)

- While discussing defendant Matthews's testimony that he did not want to have sex in the traditional way because he may hurt the baby with whom the murdered woman was pregnant, Respondent laughed and stated words to the effect of "oh, so what –like he [is] saying that, like, what he's working with . . . was so big that it would cause a miscarriage[?]" (Ciaffone, 11-13-20 at pp 62/24-25; 63/1-7.)

- While criticizing Ms. Ciaffone's voir dire, respondent proposed the following sex-based voir dire questions to the attorneys: "if I want to have sex with someone on the first date, what do I ask them?" When no one responded, Respondent said, "I would ask them, 'Have you ever had sex on a first date?" What's the next question I would ask them?" When no one answered, Respondent said words to the effect of, "I'd ask, 'Would you have sex with me on a first date?" (Ciaffone, 11-13-20, pp 66/22-67/11; Bickerstaff, 11-23-20, pp 400/23-401/5; Noakes, 11-2420, p 922/1-11; *cf*. DC Exh. 2, ¶ 15; DC Exh. 4, ¶35.)

As Ms. Ciaffone testified, "it felt like every example that he gave always kept going back to sex or the way someone looked. It felt like they all kept—every example or teaching moment he maybe tried to have about anything always went back to a sexual explanation." (Ciaffone, 11-13-20, p 62/9-13.)

Whether or not Respondent's *first* sexual references in chambers were premeditated, at some point during those two hours, as he repeatedly spoke in sexually explicit ways in several different contexts, it became clear that his sexual references were quite deliberate. He controlled the conversation, and after each sexual reference, he had every opportunity to reassess his use of further sexual references. He purposely chose to continue making them.

Respondent's words and conduct that are the basis for Count III were also premeditated. After leaving his chambers, he could have taken the bench. Instead, he deliberately followed the women to the prosecution's table, to initiate a conversation that was *only* about the women's height, weight, and muscle mass. (Master's Report at p 10; R's Ans. ¶ 30.) The fact that he followed them to initiate just that conversation demonstrates his premeditation.

Respondent effectively admitted that this discussion was premeditated. He wrote in his Answer to Complaint that the exchange was:

> ". . . **part of a continuation of the in-chamber's discussion that was centered on bias.** APA [Bickerstaff] had earlier posed the question, 'Don't you think I'm tough enough' to be able to receive and accept a frank critique, right after asking for that critique. The questions were to communicate that Judge Morrow had his doubts that she was emotionally, spiritually, or physically able to accept an honest and thoughtful critique based on the experience during their discussions."

(R's Ans. ¶ 30) (emphasis added). Other than showing premeditation, the Commission does not accept Respondent's explanation. There is no record evidence of any logical nexus between Ms. Bickerstaff's ability to handle criticism and her height and weight. Whether or not his explanation is plausible, it does make clear that he planned his comments about the women's bodies. Between the time he left his chambers and entered the courtroom, Respondent had time to reconsider the sexual

words and analogies he used in his chambers so that he could avoid saying inappropriate things to the women in the courtroom. By his own admission, instead of changing course, he followed the women to continue the conversation he had begun in chambers.

Respondent continued to explore the women's height and weight even after Ms. Ciaffone reminded him that it is not polite to ask a woman what she weighs. (Ciaffone, 11-13-20, pp 70/25-71/1; Bickerstaff, 11-24-20, p 407/14.) Instead of heeding her advice, he next asked Ms. Bickerstaff about *her* height and weight, and still later, told her he had not yet assessed her muscle mass. (Ciaffone, 11-13-20, pp 70/14-71/25; Bickerstaff, 11-23-20, pp 406/18-20, 407/4-20; DC Exh. 2 ¶¶17a, 17b, 17c; DC Exh. 4 ¶¶37, 38, 39.) In light of Ms. Ciaffone's warning to Respondent, that part of the conversation was especially deliberate, rather than spontaneous.

Pursuant to *Brown*, the fact that a substantial part of Respondent's misconduct was deliberate weighs heavily in favor of a severe sanction.

(6) ***Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.***

There is no evidence that Respondent's conduct undermined the ability of the justice system to discover the truth. This factor is not an issue in this case.

(7) ***Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justices that do not disparage the integrity of the system on the basis of a class of citizenship.***

Respondent's misconduct toward Ms. Bickerstaff and Ms. Ciaffone was unequal treatment on the basis of gender. He used inappropriately graphic sexual language, sexual analogies, and sexual examples with them, while the evidence showed that he did not do so with male lawyers.

In addition to the support for finding gender bias set forth above as to each count above, the effect Respondent's misconduct had on the APAs is telling. Ms. Bickerstaff testified that she felt

"frozen" when Respondent used his explicitly sexual analogies while seated with her at the prosecution table. (Bickerstaff, 11-23-20 at p 388/1-16.) She had two nightmares following this incident. His actions made her feel uncomfortable coming to work because of the possibility she may see him in the common areas of the courthouse. She sometimes encountered him on her way into the building, and due to his conduct in court she did her best to avoid having contact with him on these occasions, including once exiting an elevator she was on because he had entered it. (*Id*. at pp 429/22-430/8, 430/18-431/7, 433/7-18.) A judge should not make a woman feel that way.

Respondent's conduct had a negative effect on Ms. Ciaffone as well, though in a different way. Although she believed his actions to have been inappropriate, she was afraid to report them for the following reasons:

- She was worried about her case.
- She was worried no one would believe her.
- She was worried about what impact this would have on her career and on Ms. Bickerstaff's career.
- She was concerned that "these types of things can follow you your whole entire life, and that you can end up being associated with things like this forever." (Ciaffone, 11-13-20, pps 78, l/09-14.)
- She was worried about what people of the courthouse would think of her.
- She was worried that she would become the subject of gossip.
- She was worried that defense attorneys would look at her differently.
- She was worried that officers on her cases would not want to joke around with her because they would think she could not take a joke.
- She was worried that no judges would invite her into their chambers to give her feedback.

(Ciaffone, 11-13-20, pps 78, l/33-25; p 79 l/1-6.)

Pursuant to *Brown*, Respondent's disparate treatment due to gender weighs in favor of a more severe sanction.

In sum, the Commission's consideration of the totality of all seven *Brown* factors weighs in support of the imposition of a more severe sanction, including the Commission's recommendation for public censure and suspension without pay for a period of twelve months.

B. Other Considerations.

The Commission has also considered other factors in past cases, as suggested by the American Judicature Society ("How Judicial Conduct Commissions Work," American Judicature Society 1999, pp. 15-16):

> **(1) The judge's conduct in response to the Commission's inquiry and disciplinary proceedings. Specifically, whether the judge showed remorse and made an effort to change his or her conduct and whether the judge was candid and cooperated with the Commission.**

The Michigan Supreme Court has endorsed this factor. *See In re Justin*, 490 Mich 394, 424; 809 NW2d 126 (2012); *see also In re Ryman*, 394 Mich 637, 642-643; 232 NW2d 178 (1975); *In re Loyd*, 424 Mich 514, 516; 535-536; 384 NW2d 9 (1986); *In re Ferrara*, 458 Mich at 372-373; *In re Noecker*, 472 Mich at 3; *In re Nettles-Nickerson*, 481 Mich 321, 322; 750 NW2d 560 (2008); *In re James*, 492 Mich 553, 568-570; 821 NW2d 144 (2012). Respondent has persistently refused to acknowledge that he committed any misconduct and contended Ms. Bickerstaff was lying. At the formal hearing, he repeatedly provided facts and explanations which were discredited by other witnesses and the great weight of the evidence. Respondent's lack of remorse and victim-blaming support the sanction of public censure and suspension without pay for a period of twelve months recommended by the Commission.

In *In re Adams*, 494 Mich at 181, the Court reasoned that a sanction may be less severe where a respondent acknowledges his or her misconduct, but "where a respondent is not repentant," a greater sanction may be warranted. (Quoting *In re Noecker*, 472 Mich 1, 18; 691 NW2d 440 (2005) (Young, J., concurring)). This principle further supports the Commission's conclusion that

Respondent's lack of remorse or ownership of responsibility for his misconduct warrants a more severe sanction, as the record shows Respondent has failed to take responsibility for his misconduct and has attempted to minimize his misconduct and blame the APAs throughout these proceedings notwithstanding that he had been on notice for at last fifteen years that such conduct is not appropriate.

(2) The effect the misconduct had upon the integrity of and respect for the judiciary.

Respondent's conduct has garnered a lot of negative publicity. A search of the internet reveals articles about his inappropriate comments to Ms. Ciaffone and Ms. Bickerstaff on the following news sources:

- ClickonDetroit.com
- The Detroit Free Press
- The Detroit News
- WXYZ.com
- Fox2Detroit.com
- Channel 7
- Abajournal.com
- Michiganradio.org
- You Tube
- You Tube – Judicial Tenure Commission hearing with 329-838 views of the five-day hearing.

Respondent's misconduct casts not only Respondent, but the judiciary as a whole, in a negative light.

3. Years of judicial experience.

This factor focuses on whether a judge's relevant experience is an aggravating or mitigating factor. Respondent committed his misconduct after many years on the bench, and notwithstanding previous discipline and an admonition for related misconduct years earlier. Respondent's length of relevant service and prior warnings and discipline only exacerbate his misconduct.

C. <u>The Basis for the Level of Discipline and Proportionality</u>.

The primary concern in determining an appropriate sanction is to "restore and maintain the dignity and impartiality of the judiciary and protect the public." *In re Ferrara*, 458 Mich at 372. In determining an appropriate sanction in this matter, the Commission is mindful of the Michigan Supreme Court's call for "proportionality" based on comparable conduct, as it set forth under MCR 9.244(B)(2). The Commission has undertaken to ensure that the action it is recommending is reasonably proportionate to the conduct of the Respondent and reasonably equivalent to the action that has been taken previously in equivalent cases. Based on the facts, the Commission concludes that public censure and suspension without pay for a period of twelve months is an appropriate and proportional sanction for Respondent's misconduct, and is reasonably equivalent to censure and suspension that has occurred previously in equivalent cases.

The preponderance of evidence establishes that Respondent committed misconduct as alleged under the counts of the amended complaint (Counts I, II, III). That misconduct included violations of the Canons, violations of the Michigan Court Rules, and disrespect of attorneys on account of their gender. *Brown* observed that "[t]he most fundamental premise of the rule of law is that equivalent misconduct should be treated equivalently." 461 Mich at 1292. There have been only two prior Michigan Supreme Court opinions with facts somewhat similar to this case, in that a judge engaged in sexual harassment alone, with no other accompanying misconduct.

i. The *Iddings* Case.

In *In re Iddings*, 500 Mich 1026 (2017), the Court held Judge Iddings responsible for doing the following, despite objections from the victim:

> Sending after-hour[s] text messages to Ms. [*****],[3] in which he discussed his marital problems and his personal feelings.
>
> Making an offer to purchase expensive items for Ms. [*****] as Christmas gifts and inviting her to Rhianna/Eminem and other high-priced concerts.
> Suggesting that Ms. [*****] accompany him to exotic locations for court-related conferences where they could share a hotel room.
>
> Showing Ms. [*****] a sexually suggestive YouTube video of a high-priced lingerie website, Agent Provacateur.
>
> Making comments which he admits Ms. [*****] could have reasonably interpreted as an invitation to have an affair with him.
>
> In a letter of recommendation, while referring to Ms. [*****]'s professionalism and dependability, writing "besides, she is sexy as hell." Respondent deleted the language at the request of Ms. [*****].
>
> Writing "Seduce [*****]" on the court computerized calendar and then directing Ms. [*****] to look at that particular date on the calendar. Respondent deleted the language at the request of Ms. [*****].
>
> Telling Ms. [*****] that the outfits she wore to work were "too sexy."
>
> Telling Ms. [*****] that she "owed him" for allowing her to leave work early to attend her son's after-school activities.
>
> Reaching over her to edit documents which would have put him in physical contact with Ms. [*****].
>
> Staring down the front of Ms. [*****]'s blouse.
>
> While discussing his [t]riathlon training, sitting on Ms. [*****]'s desk and laying on it while she was sitting at her desk.

500 Mich at 1027.

The Court wrote:

[3] The name has been omitted to protect the victim's identity.

> "Here, the respondent, as found by the Commission, engaged in a course of conduct constituting sexual harassment from 2012 to 2015. Although his misconduct occurred while off the bench, it was serious and related to his administrative duties as a judge. The respondent's misconduct created an offensive and hostile work environment that directly affected the job performance of his judicial secretary in her dealings with the public and the court's business and affected the administration of justice. His actions implicated the appearance of impropriety and had a negative impact on the actual administration of justice. Further, his conduct was deliberate."

Id at 1030. The court imposed a public censure with a six-month suspension without pay. *Id* at 1030.

Respondent's conduct did not last as long as Judge Iddings's did, but it was bad in its own right. The violations named in two of the three counts took place in the courtroom, and involved two different women. The APAs were young female attorneys over whom Respondent had significant power, including contempt powers and the power to dismiss their case. He used sexually charged words with Ms. Bickerstaff that included "teasing," "foreplay," climax," and "crescendo," and he explicitly used the word "sex" (Bickerstaff, 11-23-20, p 386/14-15; DC Exh. 2, ¶7d; DC Exh. 4, ¶14). He made an analogy to an orgasm.

In chambers, Respondent commented on Ms. Ciaffone's inexperience with "non-traditional" sex and talked about her personal sexual biases. (Report pp 8, 9; Ciaffone, 11-13-20, p 59/20-25; Bickerstaff, 11-23-20, p 403/8-12; Noakes, 11-24- 20, p 919/6-22.) He created a sex-based voir dire question. (Ciaffone, 11-13-20, pp 66/22-67/11; Bickerstaff, 11-23-20, pp 400/23-401/5; Noakes, 11-24-20, p 922/1-11; cf. DC Exh. 2, ¶ 15; DC Exh. 4, ¶35.) He laughed at the size of defendant Matthews's penis and he described a sex act as "doggy style." (Ciaffone, 11-13-20 at pp 62/24-63/3; 60/1-6; Bickerstaff, 11-23-20, p 403/6-7; Noakes, 11-24-20, p 907/6¬8.) His comment on the evidence was that "it only shows they fucked!" (Ciaffone, 11-13-20 at p 57/1-18; Bickerstaff, 11-23-20, p 400/2-8; cf. DC Exh. 2 ¶12b, 12c [Respondent "probably did use that word"].) He asked the women prosecutors about their height and weight, eyed their bodies and announced his intention to assess Ms. Bickerstaff's muscle mass.

In *Iddings*, the victim reported Judge Iddings's behavior to the Equal Employment Opportunity (EEO). An EEO investigator determined that respondent's behavior "constituted, at a minimum, an offensive, and more probably a hostile working environment." 500 Mich at 1028. Similarly, Respondent created a hostile working environment for Ms. Bickerstaff and Ms. Ciaffone. Respondent's conduct potentially put the State of Michigan at risk for a civil lawsuit from the women, or at a minimum, a complaint with the Civil Rights Division for sexual harassment.

What really distinguishes Respondent from Judge Iddings is what each did after becoming aware that he was the subject of an investigation. Judge Iddings self-reported his misconduct to the Judicial Tenure Commission. In determining that a six-month suspension was adequate, the Michigan Supreme Court recognized that "Respondent is extremely remorseful over these matters, he has co-operated throughout the investigation, and he is desirous of resolving these grievances." *Id* at 1029. Unlike Judge Iddings, Respondent did not self-report his misconduct, and has not expressed an iota of remorse. Quite the opposite, he has argued that there was nothing wrong with what he said and/or did, and has never retracted that position.

The California Commission on Judicial Performance has recognized that "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (Inquiry Concerning Platt (2002) 48 Cal.4th CJP Supp. 227, 248; Ross, 49 Cal.4th CJP Supp. at p. 139.) Respondent's complete failure to appreciate or admit the impropriety of his words and conduct, coupled with the facts that he had been confronted in the past for similar misconduct and that he had been educated on how to behave in the future, suggests that he lacks the capacity to reform. It is a reason he deserves a stronger sanction than Judge Iddings received.

In addition, Judge Iddings did not have a history of misconduct. Respondent, on the other hand, has already been suspended for 60 days, in 2014, for multiple acts of varied misconduct that were unrelated to each other. Before that, he had been confronted and educated by both the SCAO

and the Commission about misconduct that is similar to conduct he committed in this case. He had been cautioned for still other, non-sexually related misconduct. It is clear Respondent is either incapable of conforming his behavior to the expectations of a judge, or is unwilling to do so. That, too, is a strong reason he deserves a more severe sanction than the six-month suspension imposed on Judge Iddings.

ii. The *Servaas* Case.

The other Michigan case that involved sexual harassment and no other misconduct was *In re Honorable Steven R. Servaas*, 484 Mich 63 (2009). On two different occasions, Judge Servaas drew sexually graphic pictures of breasts and of a penis and attached them to court files. He also commented to an employee, while they were at a retirement party, about the small chest size of another employee. The next day, he attempted to apologize to the employee about whose body he had commented. The Supreme Court rejected the Commission's recommendation of removal and instead censured Judge Servaas. In doing so, the Court noted that he had 37 years of unblemished service.

Respondent's conduct was much worse than what Judge Servaas did. His words and actions in face-to-face conversations with the female prosecutors were much more offensive, disrespectful, and discourteous than the pictures Judge Servaas drew and attached to the court files, which were not directed to any particular person. In addition, without anyone prompting him, Judge Servaas attempted to apologize to the female employee for his comment about her body. As already noted, not only has Respondent not apologized for his words and actions, he has doubled down by attempting to justify what he said and did while calling APA Bickerstaff a liar. And while Judge Servaas had 37 years of unblemished service, Respondent is at the other end of the misconduct spectrum. For these reasons, Respondent should be sanctioned much more harshly than was Judge Servaas.

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iii. Cases From Outside Michigan.

Although *Iddings* and *Servaas* are the only two Michigan cases that are similar, cases in other states support a strong sanction for a judge's sexually offensive words when that judge has a prior disciplinary history involving similar conduct. In *In the Matter of the Hon. Paul H. Senzer v New York State Commission on Judicial Misconduct*, 35 NY 3d 216 (New York 2000), the State Commission on Judicial Conduct removed Judge Senzer, a part-time judge, from the bench. In his private practice Judge Senzer repeatedly used vulgar language in emails to his clients, in which he repeatedly insulted other participants in the legal process. He used vulgar and sexist terms and used "an intensely degrading and vile gendered slur" to describe opposing counsel. *Id* at p 220. The New York court held that "use of [the] gender-based slur was particularly concerning because such words denigrate a woman's worth and abilities and convey an appearance of gender bias." *Id* at p 219. Also, Judge Senzer had a history of making sarcastic and disrespectful comments, for which he had been cautioned in the past. The New York Court of Appeals concluded:

> "Such a pattern of conduct, engaged in over several months and combined with a prior caution by the Commission for making sarcastic and disrespectful comments to litigants during a court proceeding, constitutes an unacceptable and egregious pattern of injudicious behavior that warrants removal."

Id at 220.

Although the comments for which Respondent was charged did not take place over several months, they were at least as troubling as Judge Senzer's. Like Judge Senzer, Respondent has already been admonished for similar misconduct, and has been suspended for other, unrelated, misconduct. Senzer suggests that a sever sanction is appropriate for Respondent.

In *In the Matter of Robert A. Rand*, 332 P3d 115 (Colorado 2014), the Colorado Supreme Court imposed a public censure, along with the judge's agreement to resign. In that case, Judge Rand made inappropriate jokes and comments and engaged in an ex parte conversations. He stipulated that he had:

(1) joked about the physical weight of the court collection officer;

(2) joked with a female juror about dancing during a break in the trial;

(3) joked in private to his court clerk about the large breasts of a woman appearing before him in court;

(4) commented on the physical appearance of an attorney who appeared regularly in his courtroom;

(5) made comments from the bench about two attorneys appearing before him wearing "pearl necklaces," which one of the attorneys felt had a sexual connotation;

(6) invited a female public defender appearing in his courtroom to share pictures of her vacation with him and his staff in chambers;

(7) during an interview, told a female applicant for clerk about the time when a defendant in the courtroom speculated about the type of panties the clerk was wearing, and asked the applicant how she would handle that type of situation.

The parties also stipulated that, like Respondent has suggested in this case, Judge Rand believed he was attempting to create a friendly atmosphere in his courtroom. (cf. Fishman, 11-24-20, pp 793/25, 794/1-3, 15-16.) They also stipulated, as is demonstrably true in this case as well, that if this was Judge Rand's goal, his attempt was misinterpreted by some. 332 P.3d at p 115. Judge Rand also stipulated that he had committed some other acts of misconduct that were less serious than his inappropriate statements listed above. It is clear he resigned due to his inappropriate comments of a sexual nature, rather than for those less serious acts.

Respondent's comments to the APAs in this case are at least as inappropriate as the comments that resulted in removal of Judge Rand in Colorado and Judge Selzer in New York. Unlike both of those judges, Respondent has not accepted responsibility. In the course of removing a judge from the bench for inappropriate comments, among other things, the California Commission on Judicial Performance observed that "after 10 years on the bench, it can be expected that a judge's words and conduct will have conformed to the demands of the canons." (State of California, Before the Commission on Judicial Performance; Decision and Order Removing Judge John T. Laettner from

Office, p. 73, Case no. 203, November 6, 2019, https://cjp.ca.gov/pub_discipline_and_decisions). Respondent has been on the bench for more than 25 years, and therefore should be expected to adhere even more closely to the canons.

iv. *Hocking* Is Distinguishable.

Respondent relied heavily on *Matter of Hocking*, 451 Mich 1 (1996), to argue that his offensive words were not misconduct. The Commission finds *Hocking* distinguishable.

Hocking involved a judge's statements *on the record*, at a contentious sentencing hearing of a male lawyer, *to explain his reasoning for departure*. The lawyer had been convicted of criminal sexual conduct for assaulting his female client. Judge Hocking departed below the sentence recommended by the sentencing guidelines. The misconduct complaint against him alleged, in part, that his reasons for the downward departure were blatantly improper and sexist, and in part alleged that his treatment of the female prosecutor was rude. In a companion case, Judge Hocking was charged with treating another female attorney intemperately and abusively (not in a sexual manner), and he admitted to being rude and discourteous to her.

Like Respondent, Judge Hocking was accused of violating the canons by being rude and discourteous to one attorney, and persistently failing to treat two attorneys courteously. That is where the similarities end. The facts of *Hocking* were substantially different than the facts in this case, and did not include any of what Respondent did here. Judge Hocking was not alleged to have sexually harassed anyone. He engaged in dated stereotypes about women inviting sexual abuse in the course of explaining his reasons to depart from sentencing guidelines during a public sentence hearing. Although the stereotypes exposed the judiciary to national ridicule, the Court concluded that the inept effort to explain his decision was not misconduct. The Court was moved by the need for a judge to have latitude to explain his reaction to the facts of a case. 451 Mich at 9-14. And, of course, such reasoning for departure is subject to appellate review.

Respondent, on the other hand, directed sexually graphic language off the record at female attorneys appearing before him, in a close personal setting yet under the authority of his office. He deliberately injected sexual language into conversations that otherwise had nothing to do with sex and improperly questioned the female attorneys about their physical appearance. Respondent was not in Judge Hocking's situation. He was not explaining his decision from the bench on the record. What Judge Hocking said to fulfill his duty to explain his sentence is not similar to what Respondent said to APA Bickerstaff, privately, or what he said to APAs Bickerstaff and Ciaffone in chambers.

Likewise, Judge Hocking's remarks at the sentencing hearing did not address personal and private facts about the attorneys and did not involve Judge Hocking eyeing or discussing anyone's bodies or sexual experiences. While the Supreme Court found no misconduct in Judge Hocking's words, the Court made it clear that there are times when things a judge says can be misconduct, even when said in connection with a case: "A judge's comments are not immune from censure simply because they are based on facts adduced at trial or events occurring during trial." 451 Mich at 13. Respondent is not immune or insulated in this case.

The Commission finds this case to be much more similar to *Iddings* and *Servaas,* except worse in certain respects discussed below, and not like *Hocking*. Respondent had face-to-face conversations with and directed at Ms. Bickerstaff and Ms. Ciaffone, and his comments were much more offensive, disrespectful, and discourteous than were the statements in *Hocking* or the pictures that Judge Servaas drew and attached to files. Respondent has not apologized to the women, like Judge Servaas tried to do with one of the women he offended, rather Respondent denied misconduct and called APA Bickerstaff a liar. The Master found Bickerstaff credible, which the Commission adopts. Respondent has not expressed remorse like Judge Iddings did, and, instead, Respondent still believes that he did not do anything inappropriate. Respondent has not tried to correct his behavior nor did he self-report his behavior, like Judge Iddings did.

Thus, in consideration of all the *Brown* factors and additional factors considered by the Court, the Commission concludes public censure and suspension without pay for a period of twelve months is the appropriate and proportionate discipline for Respondent.

X. Conclusion and Recommendation

The Commission concludes Respondent committed misconduct in office by using inappropriate sexually graphic language to female assistant prosecutors on multiple occasions, questioning these female attorneys about their physical appearance, and mistreating them in these regards due to their gender. On the basis of his judicial misconduct, the Commission recommends that Respondent be publicly censured and suspended without pay for a period of twelve months. Respondent's misconduct is comparable to, or worse than, the misconduct in *Iddings* and *Servaas* that caused the Supreme Court to discipline them, and which resulted in the removal of a New York judge and the agreed resignation of a Colorado judge. Censuring and suspending Respondent without pay for a period of twelve months under the circumstances of this case is consistent and proportionate based upon the discipline other judges have received for similarly sexually-based misconduct.

JUDICIAL TENURE COMMISSION

/s/ Hon. Karen Fort Hood
HON. KAREN FORT HOOD
Chairperson

/s/ *Hon. Jon H. Hulsing*
HON. JON H. HULSING
Vice-Chairperson

/s/ *James W. Burdick*
JAMES W. BURDICK, ESQ.
Secretary

/s/ *Hon. Monte J. Burmeister*
HON. MONTE J. BURMEISTER

/s/ *Danielle Chaney*
MS. DANIELLE CHANEY

/s/ *Hon. Pablo Cortes*
HON. PABLO CORTES

/s/ *Thomas J. Ryan*
MR. THOMAS J. RYAN, ESQ.

/s/ *Siham Awada Jaafar*
SIHAM AWADA JAAFAR

/s/ *Hon. Brian R. Sullivan*
HON. BRIAN R. SULLIVAN

Attachment K

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WILLIAMS *v.* PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 15–5040. Argued February 29, 2016—Decided June 9, 2016

Petitioner Williams was convicted of the 1984 murder of Amos Norwood and sentenced to death. During the trial, the then-district attorney of Philadelphia, Ronald Castille, approved the trial prosecutor's request to seek the death penalty against Williams. Over the next 26 years, Williams's conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review. In 2012, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), arguing that the prosecutor had obtained false testimony from his codefendant and suppressed material, exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U. S. 83. Finding that the trial prosecutor had committed *Brady* violations, the PCRA court stayed Williams's execution and ordered a new sentencing hearing. The Commonwealth asked the Pennsylvania Supreme Court, whose chief justice was former District Attorney Castille, to vacate the stay. Williams filed a response, along with a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the motion to the full court for decision. Without explanation, the chief justice denied Williams's motion for recusal and the request for its referral. He then joined the State Supreme Court opinion vacating the PCRA court's grant of penalty-phase relief and reinstating Williams's death sentence. Two weeks later, Chief Justice Castille retired from the bench.

Held:

1. Chief Justice Castille's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment. Pp. 5–12.

(a) The Court's due process precedents do not set forth a specific test governing recusal when a judge had prior involvement in a case as a prosecutor; but the principles on which these precedents rest dic-

tate the rule that must control in the circumstances here: Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case. The Court applies an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable." *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 872. A constitutionally intolerable probability of bias exists when the same person serves as both accuser and adjudicator in a case. See *In re Murchison*, 349 U. S. 133, 136–137. No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. As a result, a serious question arises as to whether a judge who has served as an advocate for the State in the very case the court is now asked to adjudicate would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. In these circumstances, neither the involvement of multiple actors in the case nor the passage of time relieves the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences his or her own earlier, critical decision may have set in motion. Pp. 5–8.

(b) Because Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision, his failure to recuse from Williams's case presented an unconstitutional risk of bias. The decision to pursue the death penalty is a critical choice in the adversary process, and Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams. Given the importance of this decision and the profound consequences it carries, a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion. The fact that many jurisdictions, including Pennsylvania, have statutes and professional codes of conduct that already require recusal under the circumstances of this case suggests that today's decision will not occasion a significant change in recusal practice. Pp. 9–12.

2. An unconstitutional failure to recuse constitutes structural error that is "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive, *Puckett* v. *United States*, 556 U. S. 129, 141. Because an appellate panel's deliberations are generally confidential, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to ensure that jurists can reexamine old

Syllabus

ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. It does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position—an outcome that does not lessen the unfairness to the affected party. A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. Because Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below, Williams must be granted an opportunity to present his claims to a court unburdened by any "possible temptation . . . not to hold the balance nice, clear and true between the State and the accused," *Tumey* v. *Ohio*, 273 U. S. 510, 532. Pp. 12–14.

__ Pa. __, 105 A. 3d 1234, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which ALITO, J., joined. THOMAS, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 15–5040

TERRANCE WILLIAMS, PETITIONER *v.*
PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

[June 9, 2016]

JUSTICE KENNEDY delivered the opinion of the Court.

In this case, the Supreme Court of Pennsylvania vacated the decision of a postconviction court, which had granted relief to a prisoner convicted of first-degree murder and sentenced to death. One of the justices on the State Supreme Court had been the district attorney who gave his official approval to seek the death penalty in the prisoner's case. The justice in question denied the prisoner's motion for recusal and participated in the decision to deny relief. The question presented is whether the justice's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment.

This Court's precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge "'is too high to be constitutionally tolerable.'" *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 872 (2009) (quoting *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975)). Applying this standard, the Court concludes that due process compelled the justice's recusal.

I

Petitioner is Terrance Williams. In 1984, soon after Williams turned 18, he murdered 56-year-old Amos Norwood in Philadelphia. At trial, the Commonwealth presented evidence that Williams and a friend, Marc Draper, had been standing on a street corner when Norwood drove by. Williams and Draper requested a ride home from Norwood, who agreed. Draper then gave Norwood false directions that led him to drive toward a cemetery. Williams and Draper ordered Norwood out of the car and into the cemetery. There, the two men tied Norwood in his own clothes and beat him to death. Testifying for the Commonwealth, Draper suggested that robbery was the motive for the crime. Williams took the stand in his own defense, stating that he was not involved in the crime and did not know the victim.

During the trial, the prosecutor requested permission from her supervisors in the district attorney's office to seek the death penalty against Williams. To support the request, she prepared a memorandum setting forth the details of the crime, information supporting two statutory aggravating factors, and facts in mitigation. After reviewing the memorandum, the then-district attorney of Philadelphia, Ronald Castille, wrote this note at the bottom of the document: "Approved to proceed on the death penalty." App. 426a.

During the penalty phase of the trial, the prosecutor argued that Williams deserved a death sentence because he killed Norwood "'for no other reason but that a kind man offered him a ride home.'" Brief for Petitioner 7. The jurors found two aggravating circumstances: that the murder was committed during the course of a robbery and that Williams had a significant history of violent felony convictions. That criminal history included a previous conviction for a murder he had committed at age 17. The jury found no mitigating circumstances and sentenced

Williams to death. Over a period of 26 years, Williams's conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review.

In 2012, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. §9541 *et seq*. (2007). The petition was based on new information from Draper, who until then had refused to speak with Williams's attorneys. Draper told Williams's counsel that he had informed the Commonwealth before trial that Williams had been in a sexual relationship with Norwood and that the relationship was the real motive for Norwood's murder. According to Draper, the Commonwealth had instructed him to give false testimony that Williams killed Norwood to rob him. Draper also admitted he had received an undisclosed benefit in exchange for his testimony: the trial prosecutor had promised to write a letter to the state parole board on his behalf. At trial, the prosecutor had elicited testimony from Draper indicating that his only agreement with the prosecution was to plead guilty in exchange for truthful testimony. No mention was made of the additional promise to write the parole board.

The Philadelphia Court of Common Pleas, identified in the proceedings below as the PCRA court, held an evidentiary hearing on Williams's claims. Williams alleged in his petition that the prosecutor had procured false testimony from Draper and suppressed evidence regarding Norwood's sexual relationship with Williams. At the hearing, both Draper and the trial prosecutor testified regarding these allegations. The PCRA court ordered the district attorney's office to produce the previously undisclosed files of the prosecutor and police. These documents included the trial prosecutor's sentencing memorandum, bearing then-District Attorney Castille's authorization to pursue the death penalty. Based on the Commonwealth's files and the evidentiary hearing, the PCRA court found

that the trial prosecutor had suppressed material, exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963), and engaged in "prosecutorial gamesmanship." App. 168a. The court stayed Williams's execution and ordered a new sentencing hearing.

Seeking to vacate the stay of execution, the Commonwealth submitted an emergency application to the Pennsylvania Supreme Court. By this time, almost three decades had passed since Williams's prosecution. Castille had been elected to a seat on the State Supreme Court and was serving as its chief justice. Williams filed a response to the Commonwealth's application. The disclosure of the trial prosecutor's sentencing memorandum in the PCRA proceedings had alerted Williams to Chief Justice Castille's involvement in the decision to seek a death sentence in his case. For this reason, Williams also filed a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the recusal motion to the full court for decision. The Commonwealth opposed Williams's recusal motion. Without explanation, Chief Justice Castille denied the motion for recusal and the request for its referral. Two days later, the Pennsylvania Supreme Court denied the application to vacate the stay and ordered full briefing on the issues raised in the appeal. The State Supreme Court then vacated the PCRA court's order granting penalty-phase relief and reinstated Williams's death sentence. Chief Justice Castille and Justices Baer and Stevens joined the majority opinion written by Justice Eakin. Justices Saylor and Todd concurred in the result without issuing a separate opinion. See ___ Pa. ___, ___, 105 A. 3d 1234, 1245 (2014).

Chief Justice Castille authored a concurrence. He lamented that the PCRA court had "lost sight of its role as a neutral judicial officer" and had stayed Williams's execution "for no valid reason." *Id.*, at ___, 105 A. 3d, at 1245. "[B]efore condemning officers of the court," the chief jus-

tice stated, "the tribunal should be aware of the substantive status of *Brady* law," which he believed the PCRA court had misapplied. *Id.*, at ___, 105 A. 3d, at 1246. In addition, Chief Justice Castille denounced what he perceived as the "obstructionist anti-death penalty agenda" of Williams's attorneys from the Federal Community Defender Office. *Ibid.* PCRA courts "throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group," he wrote, lest Defender Office lawyers turn postconviction proceedings "into a circus where [they] are the ringmasters, with their parrots and puppets as a sideshow." *Id.*, at ___, 105 A. 3d, at 1247.

Two weeks after the Pennsylvania Supreme Court decided Williams's case, Chief Justice Castille retired from the bench. This Court granted Williams's petition for certiorari. 576 U. S. ___ (2015).

II

A

Williams contends that Chief Justice Castille's decision as district attorney to seek a death sentence against him barred the chief justice from later adjudicating Williams's petition to overturn that sentence. Chief Justice Castille, Williams argues, violated the Due Process Clause of the Fourteenth Amendment by acting as both accuser and judge in his case.

The Court's due process precedents do not set forth a specific test governing recusal when, as here, a judge had prior involvement in a case as a prosecutor. For the reasons explained below, however, the principles on which these precedents rest dictate the rule that must control in the circumstances here. The Court now holds that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regard-

ing the defendant's case.

Due process guarantees "an absence of actual bias" on the part of a judge. *In re Murchison*, 349 U. S. 133, 136 (1955). Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U. S., at 881. Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. See *Murchison*, 349 U. S., at 136–137. This objective risk of bias is reflected in the due process maxim that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.*, at 136.

The due process guarantee that "no man can be a judge in his own case" would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision. This conclusion follows from the Court's analysis in *In re Murchison*. That case involved a "one-man judge-grand jury" proceeding, conducted pursuant to state law, in which the judge called witnesses to testify about suspected crimes. *Id.*, at 134. During the course of the examinations, the judge became convinced that two witnesses were obstructing the proceeding. He charged one witness with perjury and then, a few weeks later, tried and convicted him in open court. The judge charged the other witness with contempt and, a few days later, tried and convicted him as well. This Court overturned the convic-

tions on the ground that the judge's dual position as accuser and decisionmaker in the contempt trials violated due process: "Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.*, at 137.

No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge "would be so psychologically wedded" to his or her previous position as a prosecutor that the judge "would consciously or unconsciously avoid the appearance of having erred or changed position." *Withrow*, 421 U. S., at 57. In addition, the judge's "own personal knowledge and impression" of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties' arguments to the court. *Murchison*, *supra*, at 138; see also *Caperton*, *supra*, at 881.

Pennsylvania argues that *Murchison* does not lead to the rule that due process requires disqualification of a judge who, in an earlier role as a prosecutor, had significant involvement in making a critical decision in the case. The facts of *Murchison*, it should be acknowledged, differ in many respects from a case like this one. In *Murchison*, over the course of several weeks, a single official (the so-called judge-grand jury) conducted an investigation into suspected crimes; made the decision to charge witnesses for obstruction of that investigation; heard evidence on the charges he had lodged; issued judgments of conviction; and imposed sentence. See 349 U. S., at 135 (petitioners objected to "trial before the judge who was at the same time the complainant, indicter and prosecutor"). By contrast, a

judge who had an earlier involvement in a prosecution might have been just one of several prosecutors working on the case at each stage of the proceedings; the prosecutor's immediate role might have been limited to a particular aspect of the prosecution; and decades might have passed before the former prosecutor, now a judge, is called upon to adjudicate a claim in the case.

These factual differences notwithstanding, the constitutional principles explained in *Murchison* are fully applicable where a judge had a direct, personal role in the defendant's prosecution. The involvement of other actors and the passage of time are consequences of a complex criminal justice system, in which a single case may be litigated through multiple proceedings taking place over a period of years. This context only heightens the need for objective rules preventing the operation of bias that otherwise might be obscured. Within a large, impersonal system, an individual prosecutor might still have an influence that, while not so visible as the one-man grand jury in *Murchison*, is nevertheless significant. A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion.

B

This leads to the question whether Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision. The Court now concludes that it was a significant, personal involvement; and, as a result, Chief Justice Castille's failure to recuse from Williams's case presented an unconstitutional risk of bias.

As an initial matter, there can be no doubt that the decision to pursue the death penalty is a critical choice in the adversary process. Indeed, after a defendant is charged with a death-eligible crime, whether to ask a jury to end the defendant's life is one of the most serious discretionary decisions a prosecutor can be called upon to make.

Nor is there any doubt that Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams. The importance of this decision and the profound consequences it carries make it evident that a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion and professional judgment.

Pennsylvania nonetheless contends that Chief Justice Castille in fact did not have significant involvement in the decision to seek a death sentence against Williams. The chief justice, the Commonwealth points out, was the head of a large district attorney's office in a city that saw many capital murder trials. Tr. of Oral Arg. 36. According to Pennsylvania, his approval of the trial prosecutor's request to pursue capital punishment in Williams's case amounted to a brief administrative act limited to "the time it takes to read a one-and-a-half-page memo." *Ibid.* In this Court's view, that characterization cannot be credited. The Court will not assume that then-District Attorney Castille treated so major a decision as a perfunctory task

requiring little time, judgment, or reflection on his part.

Chief Justice Castille's own comments while running for judicial office refute the Commonwealth's claim that he played a mere ministerial role in capital sentencing decisions. During the chief justice's election campaign, multiple news outlets reported his statement that he "sent 45 people to death rows" as district attorney. Seelye, Castille Keeps His Cool in Court Run, Philadelphia Inquirer, Apr. 30, 1993, p. B1; see also, *e.g.,* Brennan, State Voters Must Choose Next Supreme Court Member, Legal Intelligencer, Oct. 28, 1993, pp. 1, 12. Chief Justice Castille's willingness to take personal responsibility for the death sentences obtained during his tenure as district attorney indicate that, in his own view, he played a meaningful role in those sentencing decisions and considered his involvement to be an important duty of his office.

Although not necessary to the disposition of this case, the PCRA court's ruling underscores the risk of permitting a former prosecutor to be a judge in what had been his or her own case. The PCRA court determined that the trial prosecutor—Chief Justice Castille's former subordinate in the district attorney's office—had engaged in multiple, intentional *Brady* violations during Williams's prosecution. App. 131–145, 150–154. While there is no indication that Chief Justice Castille was aware of the alleged prosecutorial misconduct, it would be difficult for a judge in his position not to view the PCRA court's findings as a criticism of his former office and, to some extent, of his own leadership and supervision as district attorney.

The potential conflict of interest posed by the PCRA court's findings illustrates the utility of statutes and professional codes of conduct that "provide more protection than due process requires." *Caperton*, 556 U. S., at 890. It is important to note that due process "demarks only the outer boundaries of judicial disqualifications." *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 828 (1986). Most ques-

tions of recusal are addressed by more stringent and detailed ethical rules, which in many jurisdictions already require disqualification under the circumstances of this case. See Brief for American Bar Association as *Amicus Curiae* 5, 11–14; see also ABA Model Code of Judicial Conduct Rules 2.11(A)(1), (A)(6)(b) (2011) (no judge may participate "in any proceeding in which the judge's impartiality might reasonably be questioned," including where the judge "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding"); ABA Center for Professional Responsibility Policy Implementation Comm., Comparison of ABA Model Judicial Code and State Variations (Dec. 14, 2015), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.authcheckdam.pdf (as last visited June 7, 2016) (28 States have adopted language similar to ABA Model Judicial Code Rule 2.11); 28 U. S. C. §455(b)(3) (recusal required where judge "has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding"). At the time Williams filed his recusal motion with the Pennsylvania Supreme Court, for example, Pennsylvania's Code of Judicial Conduct disqualified judges from any proceeding in which "they served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter. . . ." Pa. Code of Judicial Conduct, Canon 3C (1974, as amended). The fact that most jurisdictions have these rules in place suggests that today's decision will not occasion a significant change in recusal practice.

Chief Justice Castille's significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias. This risk so endangered the appearance of neutrality that his participation in the

case "must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U. S., at 47.

III

Having determined that Chief Justice Castille's participation violated due process, the Court must resolve whether Williams is entitled to relief. In past cases, the Court has not had to decide the question whether a due process violation arising from a jurist's failure to recuse amounts to harmless error if the jurist is on a multimember court and the jurist's vote was not decisive. See *Lavoie*, *supra*, at 827–828 (addressing "the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case," where that member's vote was outcome determinative). For the reasons discussed below, the Court holds that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.

The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive. *Puckett* v. *United States*, 556 U. S. 129, 141 (2009) (emphasis deleted). The deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to assure jurists that they can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. As Justice Brennan wrote in his *Lavoie* concurrence,

> "The description of an opinion as being 'for the court' connotes more than merely that the opinion has been

> joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." 475 U. S., at 831.

These considerations illustrate, moreover, that it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party. See *id.*, at 831–832 (Blackmun, J., concurring in judgment).

A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

The Commonwealth points out that ordering a rehearing before the Pennsylvania Supreme Court may not provide complete relief to Williams because judges who

were exposed to a disqualified judge may still be influenced by their colleague's views when they rehear the case. Brief for Respondent 51, 62. An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether. Allowing an appellate panel to reconsider a case without the participation of the interested member will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations.

Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below. Williams must be granted an opportunity to present his claims to a court unburdened by any "possible temptation . . . not to hold the balance nice, clear and true between the State and the accused." *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927).

* * *

Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level. Due process entitles Terrance Williams to "a proceeding in which he may present his case with assurance" that no member of the court is "predisposed to find against him." *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242 (1980).

The judgment of the Supreme Court of Pennsylvania is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 15–5040

TERRANCE WILLIAMS, PETITIONER *v.*
PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

[June 9, 2016]

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

In 1986, Ronald Castille, then District Attorney of Philadelphia, authorized a prosecutor in his office to seek the death penalty against Terrance Williams. Almost 30 years later, as Chief Justice of the Pennsylvania Supreme Court, he participated in deciding whether Williams's fifth habeas petition—which raised a claim unconnected to the prosecution's decision to seek the death penalty—could be heard on the merits or was instead untimely. This Court now holds that because Chief Justice Castille made a "critical" decision as a prosecutor in Williams's case, there is a risk that he "would be so psychologically wedded" to his previous decision that it would violate the Due Process Clause for him to decide the distinct issues raised in the habeas petition. *Ante,* at 6–7 (internal quotation marks omitted). According to the Court, that conclusion follows from the maxim that "no man can be a judge in his own case." *Ante,* at 6 (internal quotation marks omitted).

The majority opinion rests on proverb rather than precedent. This Court has held that there is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975). To overcome that presumption, the majority relies on *In re Murchison*, 349 U. S. 133 (1955). We concluded there that the Due

Process Clause is violated when a judge adjudicates the same question—based on the same facts—that he had already considered as a grand juror in the same case. Here, however, Williams does not allege that Chief Justice Castille had *any* previous knowledge of the contested facts at issue in the habeas petition, or that he had previously made *any* decision on the questions raised by that petition. I would accordingly hold that the Due Process Clause did not require Chief Justice Castille's recusal.

I

In 1986, petitioner Terrance Williams stood trial for the murder of Amos Norwood. Prosecutors believed that Williams and his friend Marc Draper had asked Norwood for a ride, directed him to a cemetery, and then beat him to death with a tire iron after robbing him. Andrea Foulkes, the Philadelphia Assistant District Attorney prosecuting the case, prepared a one-and-a-half page memo for her superiors—Homicide Unit Chief Mark Gottlieb and District Attorney Ronald Castille—"request[ing] that we actively seek the death penalty." App. 424a. The memo briefly described the facts of the case and Williams's prior felonies, including a previous murder conviction. Gottlieb read the memo and then passed it to Castille with a note recommending the death penalty. *Id.,* at 426a. Castille wrote at the bottom of the memo, "Approved to proceed on the death penalty," and signed his name. *Ibid.*

At trial, Williams testified that he had never met Norwood and that someone else must have murdered him. After hearing extensive evidence linking Williams to the crime, the jury convicted him of murder and sentenced him to death. 524 Pa. 218, 227, 570 A. 2d 75, 79–80 (1990).

In 1995, Williams filed a habeas petition in Pennsylvania state court, alleging that his trial counsel had been ineffective for failing to present mitigating evidence of his

childhood sexual abuse, among other claims. At a hearing related to that petition, Williams acknowledged that he knew Norwood and claimed that Norwood had sexually abused him. ___ Pa. ___, ___, 105 A. 3d 1234, 1240 (2014). The petition was denied. Williams filed two more state habeas petitions, which were both dismissed as untimely, and a federal habeas petition, which was also denied. See *Williams* v. *Beard*, 637 F. 3d 195, 238 (CA3 2011).

This case arises out of Williams's fifth habeas petition, which he filed in state court in 2012. In that petition, Williams argued that he was entitled to a new sentencing proceeding because the prosecution at trial had failed to turn over certain evidence suggesting that "Norwood was sexually involved with boys around [Williams's] age at the time of his murder." Crim. No. CP–51–CR–0823621–1984 (Phila. Ct. Common Pleas, Nov. 27, 2012), App. 80a.

It is undisputed that Williams's fifth habeas petition is untimely under Pennsylvania law. In order to overcome that time bar, Pennsylvania law required Williams to show that "(1) the failure to previously raise [his] claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence." ___ Pa., at ___, 105 A. 3d, at 1240. The state habeas court held that Williams met that burden because "the government withheld multiple statements from [Williams's] trial counsel, all of which strengthened the inference that Amos Norwood was sexually inappropriate with a number of teenage boys," and Williams was unable to access those statements until an evidentiary proceeding ordered by the court. App. 95a.

The Commonwealth appealed to the Pennsylvania Supreme Court, and Williams filed a motion requesting that Chief Justice Castille recuse himself on the ground that he had "personally authorized his Office to seek the death penalty" nearly 30 years earlier. *Id.*, at 181a (em-

phasis deleted). Chief Justice Castille summarily denied the recusal motion, and the six-member Pennsylvania Supreme Court proceeded to hear the case. The court unanimously reinstated Williams's sentence.

According to the Pennsylvania Supreme Court, Williams failed to make the threshold showing necessary to overcome the time bar because there was "abundant evidence" that Williams "knew of Norwood's homosexuality and conduct with teenage boys well before trial, sufficient to present [Norwood] as unsympathetic before the jury." ___ Pa., at ___, 105 A. 3d, at 1241. The court pointed out that Williams was, of course, personally aware of Norwood's abuse and could have raised the issue at trial, but instead chose to disclaim having ever met Norwood. The court also noted that Williams had raised similar claims of abuse in his first state habeas proceeding. *Ibid.* Chief Justice Castille concurred separately, criticizing the lower court for failing to dismiss Williams's petition as "time-barred and frivolous." *Id.,* at ___, 105 A. 3d, at 1245.

II

A

In the context of a criminal proceeding, the Due Process Clause requires States to adopt those practices that are fundamental to principles of liberty and justice, and which inhere "in the very idea of free government" and are "the inalienable right of a citizen of such a government." *Twining* v. *New Jersey*, 211 U. S. 78, 106 (1908). A fair trial and appeal is one such right. See *Lisenba* v. *California*, 314 U. S. 219, 236 (1941); *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 825 (1986). In ensuring that right, "it is normally within the power of the State to regulate procedures under which its laws are carried out," unless a procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.*, at 821 (internal quotation marks

omitted).

It is clear that a judge with "a direct, personal, substantial, pecuniary interest" in a case may not preside over that case. *Tumey* v. *Ohio*, 273 U. S. 510, 523 (1927). We have also held that a judge may not oversee a criminal contempt proceeding where the judge has previously served as grand juror in the same case, or where the party charged with contempt has conducted "an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 465–466 (1971) (internal quotation marks omitted); see *Murchison*, 349 U. S., at 139.

Prior to this Court's decision in *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868 (2009), we had declined to require judicial recusal under the Due Process Clause beyond those defined situations. In *Caperton*, however, the Court adopted a new standard that requires recusal "when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.,* at 872 (internal quotation marks omitted). The Court framed the inquiry as "whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.,* at 883–884 (internal quotation marks omitted).

B

According to the majority, the Due Process Clause required Chief Justice Castille's recusal because he had "significant, personal involvement in a critical trial decision" in Williams's case. *Ante,* at 9. Otherwise, the majority explains, there is "an unacceptable risk of actual bias." *Ante*, at 11. In the majority's view, "[t]his conclusion follows from the Court's analysis in *In re Murchison*." *Ante,* at 6. But *Murchison* does not support the majority's

new rule—far from it.

Murchison involved a peculiar Michigan law that authorized the same person to sit as both judge and "one-man grand jury" in the same case. 349 U. S., at 133 (internal quotation marks omitted). Pursuant to that law, a Michigan judge—serving as grand jury—heard testimony from two witnesses in a corruption case. The testimony "persuaded" the judge that one of the witnesses "had committed perjury"; the second witness refused to answer questions. *Id.,* at 134–135. The judge accordingly charged the witnesses with criminal contempt, presided over the trial, and convicted them. *Ibid.* We reversed, holding that the trial had violated the Due Process Clause. *Id.,* at 139.

The Court today, acknowledging that *Murchison* "differ[s] in many respects from a case like this one," *ante,* at 7, earns full marks for understatement. The Court in fact fails to recognize the differences that are critical.

First, *Murchison* found a due process violation because the judge (sitting as grand jury) accused the witnesses of contempt, and then (sitting as judge) presided over their trial on that charge. As a result, the judge had made up his mind about the only issue in the case before the trial had even begun. We held that such prejudgment violated the Due Process Clause. 349 U. S., at 137.

Second, *Murchison* expressed concern that the judge's recollection of the testimony he had heard as grand juror was "likely to weigh far more heavily with him than any testimony given" at trial. *Id.,* at 138. For that reason, the Court found that the judge was at risk of calling "on his own personal knowledge and impression of what had occurred in the grand jury room," rather than the evidence presented to him by the parties. *Ibid.*

Neither of those due process concerns is present here. Chief Justice Castille was involved in the decision to seek the death penalty, and perhaps it would be reasonable under *Murchison* to require him to recuse himself from

any challenge casting doubt on that recommendation. But that is not this case.

This case is about whether Williams may overcome the procedural bar on filing an untimely habeas petition, which required him to show that the government interfered with his ability to raise his habeas claim, and that "the information on which he relies could not have been obtained earlier with the exercise of due diligence." ___ Pa., at ___, 105 A. 3d, at 1240. Even if Williams were to overcome the timeliness bar, moreover, the only claim he sought to raise on the merits was that the prosecution had failed to turn over certain evidence at trial. The problem in *Murchison* was that the judge, having been "part of the accusatory process" regarding the guilt or innocence of the defendants, could not then be "wholly disinterested" when called upon to decide that very same issue. 349 U. S., at 137. In this case, in contrast, neither the procedural question nor Williams's merits claim in any way concerns the pretrial decision to seek the death penalty.

It is abundantly clear that, unlike in *Murchison*, Chief Justice Castille had *not* made up his mind about either the contested evidence or the legal issues under review in Williams's fifth habeas petition. How could he have? Neither the contested evidence nor the legal issues were ever before him as prosecutor. The one-and-a-half page memo prepared by Assistant District Attorney Foulkes in 1986 did not discuss the evidence that Williams claims was withheld by the prosecution at trial. It also did not discuss Williams's allegation that Norwood sexually abused young men. It certainly did not discuss whether Williams could have obtained that evidence of abuse earlier through the exercise of due diligence.

Williams does not assert that Chief Justice Castille had any prior knowledge of the alleged failure of the prosecution to turn over such evidence, and he does not argue that Chief Justice Castille had previously made any decision

with respect to that evidence in his role as prosecutor. Even assuming that Chief Justice Castille remembered the contents of the memo almost 30 years later—which is doubtful—the memo could not have given Chief Justice Castille any special "impression" of facts or issues not raised in that memo. *Id.*, at 138.

The majority attempts to justify its rule based on the "risk" that a judge "would be so psychologically wedded to his or her previous position as a prosecutor that the judge would consciously or unconsciously avoid the appearance of having erred or changed position." *Ante,* at 7 (internal quotation marks omitted). But as a matter of simple logic, nothing about how Chief Justice Castille might rule on Williams's fifth habeas petition would suggest that the judge had erred or changed his position on the distinct question whether to seek the death penalty prior to trial. In sum, there was not such an "objective risk of actual bias," *ante,* at 13, that it was fundamentally unfair for Chief Justice Castille to participate in the decision of an issue having nothing to do with his prior participation in the case.

* * *

The Due Process Clause did not prohibit Chief Justice Castille from hearing Williams's case. That does not mean, however, that it was appropriate for him to do so. Williams cites a number of state court decisions and ethics opinions that prohibit a prosecutor from later serving as judge in a case that he has prosecuted. Because the Due Process Clause does not mandate recusal in cases such as this, it is up to state authorities—not this Court—to determine whether recusal should be required.

I would affirm the judgment of the Pennsylvania Supreme Court, and respectfully dissent from the Court's contrary conclusion.

SUPREME COURT OF THE UNITED STATES

No. 15–5040

TERRANCE WILLIAMS, PETITIONER *v.*
PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

[June 9, 2016]

JUSTICE THOMAS, dissenting.

The Court concludes that it violates the Due Process Clause for the chief justice of the Supreme Court of Pennsylvania, a former district attorney who was not the trial prosecutor in petitioner Terrance Williams' case, to review Williams' fourth petition for state postconviction review. *Ante,* at 8–9, 14. That conclusion is flawed. The specter of bias alone in a judicial proceeding is not a deprivation of due process. Rather than constitutionalize every judicial disqualification rule, the Court has left such rules to legislatures, bar associations, and the judgment of individual adjudicators. Williams, moreover, is not a criminal defendant. His complaint is instead that the due process protections in his state postconviction proceedings—an altogether new civil matter, not a continuation of his criminal trial—were lacking. Ruling in Williams' favor, the Court ignores this posture and our precedents commanding less of state postconviction proceedings than of criminal prosecutions involving defendants whose convictions are not yet final. I respectfully dissent.

I

A reader of the majority opinion might mistakenly think that the prosecution against Williams is ongoing, for the majority makes no mention of the fact that Williams'

sentence has been final for more than 25 years. Because the postconviction posture of this case is of crucial importance in considering the question presented, I begin with the protracted procedural history of Williams' repeated attempts to collaterally attack his sentence.

A

Thirty-two years ago, Williams and his accomplice beat their victim to death with a tire iron and a socket wrench. *Commonwealth* v. *Williams*, 524 Pa. 218, 222–224, 570 A. 2d 75, 77–78 (1990) (*Williams I*). Williams later returned to the scene of the crime, a cemetery, soaked the victim's body in gasoline, and set it on fire. *Id.,* at 224, 570 A. 2d, at 78. After the trial against Williams commenced, both the Chief of the Homicide Unit and the District Attorney, Ronald Castille, approved the trial prosecutor's decision to seek the death penalty by signing a piece of paper. See App. 426. That was Castille's only involvement in Williams' criminal case. Thereafter, a Pennsylvania jury convicted Williams of first-degree murder, and he was sentenced to death. *Williams I*, 524 Pa., at 221–222, 570 A. 2d, at 77. The Supreme Court of Pennsylvania affirmed his conviction and sentence. *Id.,* at 235, 570 A. 2d, at 84.

Five years later, Williams filed his first petition for state postconviction relief. *Commonwealth* v. *Williams*, 581 Pa. 57, 65, 863 A. 2d 505, 509 (2004) (*Williams II*). The postconviction court denied the petition. *Id.,* at 65, 863 A. 2d, at 510. Williams appealed, raising 23 alleged errors. *Ibid.* The Supreme Court of Pennsylvania, which included Castille in his new capacity as a justice of that court, affirmed the denial of relief. *Id.,* at 88, 863 A. 2d, at 523. The court rejected some claims on procedural grounds and denied the remaining claims on the merits. *Id.,* at 68–88, 863 A. 2d, at 511–523. The court's lengthy opinion did not mention the possibility of Castille's bias, and Williams

apparently never asked for his recusal.

Then in 2005, Williams filed two more petitions for state postconviction relief. Both petitions were dismissed as untimely, and the Supreme Court of Pennsylvania affirmed. *Commonwealth* v. *Williams*, 589 Pa. 355, 909 A. 2d 297 (2006) (*per curiam*) (*Williams III*); *Commonwealth* v. *Williams*, 599 Pa. 495, 962 A. 2d 609 (2009) (*per curiam*) (*Williams IV*). Castille also presumably participated in those proceedings, but, again, Williams apparently did not ask for him to recuse.[1]

Williams then made a fourth attempt to vacate his sentence in state court in 2012. ___ Pa. ___, ___, 105 A. 3d 1234, 1237 (2014) (*Williams VI*). Williams alleged that the prosecution violated *Brady* v. *Maryland*, 373 U. S. 83 (1963), by failing to disclose exculpatory evidence. The allegedly exculpatory evidence was information about Williams' motive. According to Williams, the prosecution should have disclosed to his counsel that it knew that Williams and the victim had previously engaged in a sexual relationship when Williams was a minor. *Williams VI*, ___ Pa., at ___, 105 A. 3d, at 1237.[2] The state postcon-

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[1] In 2005, Williams also filed a federal habeas petition, which the federal courts ultimately rejected. *Williams* v. *Beard*, 637 F. 3d 195, 238 (CA3 2011) (*Williams V*), cert. denied, *Williams* v. *Wetzel*, 567 U. S. ___ (2012).

[2] Setting aside how a prosecutor could violate *Brady* by failing to disclose information to the defendant about the defendant's motive to kill, it is worth noting that this allegation merely repackaged old arguments. During a state postconviction hearing in 1998, Williams had presented evidence of his prior sexual abuse, including "multiple sexual victimizations (including sodomy) during his childhood," to support his ineffective assistance claim. *Williams II*, 581 Pa. 57, 98, 863 A. 2d 505, 530 (2004) (Saylor, J., dissenting). And he had "argued [that the victim] engaged in homosexual acts with him." *Williams VI*, __ Pa., at ___, 105 A. 3d, at 1236. Then, in his federal habeas proceedings, Williams admitted that his plan on the night of the murder was to threaten to reveal to the victim's wife that the victim was a homosexual, and he contended that his attorney should have presented related

viction court agreed and vacated his sentence. *Id.*, at ___, 105 A. 3d, at 1239.

The Commonwealth appealed to the Supreme Court of Pennsylvania. Only then—the *fourth* time that Williams appeared before Castille—did Williams ask him to recuse. App. 181. Castille denied the recusal motion and declined to refer it to the full court. *Id.*, at 171. Shortly thereafter, the court vacated the postconviction court's order and reinstated Williams' sentence. The court first noted that Williams' fourth petition "was filed over 20 years after [Williams'] judgment of sentence became final" and "was untimely on its face." *Williams VI*, ___ Pa., at ___, 105 A. 3d, at 1239. The court rejected the trial court's conclusion that an exception to Pennsylvania's timeliness rule applied and reached "the inescapable conclusion that [Williams] is not entitled to relief." *Id.,* at ___, 105 A. 3d, at 1239–1241; see also *id.,* at ___, 105 A. 3d, at 1245 (Castille, J., concurring) (writing separately "to address the important responsibilities of the [state postconviction] trial courts in serial capital [state postconviction] matters").

Finally, Williams filed an application for reargument. App. 9. The court denied the application *without* Castille's participation. *Id.,* at 8. Castille had retired from the bench nearly two months before the court ruled.

B

As this procedural history illustrates, the question presented is hardly what the majority makes it out to be. The majority incorrectly refers to the case before us and Williams' criminal case (that ended in 1990) as a decades-long "single case" or "matter." *Ante,* at 8; see also *ante,* at 7–9. The majority frames the issue as follows: whether

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evidence of the victim's prior sexual relationship with him. *Williams V*, *supra*, at 200, 225–226, 229–230.

the Due Process Clause permits Castille to "ac[t] as both accuser and judge in [Williams'] case." *Ante,* at 5. The majority answers: "When a judge has served as an advocate for the State *in the very case* the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome." *Ante,* at 7 (emphasis added). Accordingly, the majority holds that "[w]here a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision *in the defendant's case*, the risk of actual bias in the judicial proceeding rises to an unconstitutional level." *Ante,* at 14 (emphasis added). That is all wrong.

There has been, however, no "single case" in which Castille acted as both prosecutor and adjudicator. Castille was still serving in the district attorney's office when Williams' criminal proceedings ended and his sentence of death became final. Williams' filing of a petition for state postconviction relief did not continue (or resurrect) that already final criminal proceeding. A postconviction proceeding "is not part of the criminal proceeding itself" but "is in fact considered to be civil in nature," *Pennsylvania* v. *Finley*, 481 U. S. 551, 556–557 (1987), and brings with it fewer procedural protections. See, *e.g., District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 68 (2009).

Williams' case therefore presents a much different question from that posited by the majority. It is more accurately characterized as whether a judge may review a petition for postconviction relief when that judge previously served as district attorney while the petitioner's criminal case was pending. For the reasons that follow, that different question merits a different answer.

II

The "settled usages and modes of proceeding existing in

the common and statute law of England before the emigration of our ancestors" are the touchstone of due process. *Tumey* v. *Ohio*, 273 U. S. 510, 523 (1927); see also *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856). What due process requires of the judicial proceedings in the Pennsylvania postconviction courts, therefore, is guided by the historical treatment of judicial disqualification. And here, neither historical practice nor this Court's case law constitutionalizing that practice requires a former prosecutor to recuse from a prisoner's postconviction proceedings.

A

At common law, a fair tribunal meant that "no man shall be a judge in his own case." 1 E. Coke, Institutes of the Laws of England §212, *141a ("[*A*]*liquis non debet esse judex in propiâ causâ*"). That common-law conception of a fair tribunal was a narrow one. A judge could not decide a case in which he had a direct and personal financial stake. For example, a judge could not reap the fine paid by a defendant. See, *e.g., Dr. Bonham's Case*, 8 Co. Rep. 107a, 114a, 118a, 77 Eng. Rep. 638, 647, 652 (C. P. 1610) (opining that a panel of adjudicators could not all at once serve as "judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture"). Nor could he adjudicate a case in which he was a party. See, *e.g., Earl of Derby's Case,* 12 Co. Rep. 114, 77 Eng. Rep. 1390 (K. B. 1614). But mere bias—without any financial stake in a case—was not grounds for disqualification. The biases of judges "cannot be challenged," according to Blackstone, "[f]or the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 W. Blackstone, Commentaries on the Laws of England, 361 (1768) (Blackstone); see also, *e.g., Brookes* v. *Earl of Riv-*

ers, Hardres 503, 145 Eng. Rep. 569 (Exch. 1668) (deciding that a judge's "favour shall not be presumed" merely because his brother-in-law was involved).

The early American conception of judicial disqualification was in keeping with the "clear and simple" common-law rule—"a judge was disqualified for direct pecuniary interest and for nothing else." Frank, Disqualification of Judges, 56 Yale L. J. 605, 609 (1947) (Frank); see also R. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges §1.4, p. 7 (2d ed. 2007). Most jurisdictions required judges to recuse when they stood to profit from their involvement or, more broadly, when their property was involved. See *Moses* v. *Julian*, 45 N. H. 52, 55–56 (1863); see also, *e.g.*, *Jim* v. *State*, 3 Mo. 147, 155 (1832) (deciding that a judge was unlawfully interested in a criminal case in which his slave was the defendant). But the judge's pecuniary interest had to be directly implicated in the case. See, *e.g., Davis* v. *State*, 44 Tex. 523, 524 (1876) (deciding that a judge, who was the victim of a theft, was not disqualified in the prosecution of the theft); see also T. Cooley, Constitutional Limitations 594 (7th ed. 1903) (rejecting a financial stake "so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment"); *Moses*, *supra*, at 57 ("[A] creditor, lessee, or debtor, may be judge in the case of his debtor, landlord, or creditor, except in cases where the amount of the party's property involved in the suit is so great that his ability to meet his engagements with the judge may depend upon the success of his suit"); *Inhabitants of Readington Twp. Hunterdon County* v. *Dilley*, 24 N. J. L. 209, 212–213 (N. J. 1853) (deciding that a judge, who had previously been paid to survey the roadway at issue in the case, was not disqualified).

Shortly after the founding, American notions of judicial disqualification expanded in important respects. Of particular relevance here, the National and State Legisla-

tures enacted statutes and constitutional provisions that diverged from the common law by requiring disqualification when the judge had served as counsel for one of the parties. The first federal recusal statute, for example, required disqualification not only when the judge was "concerned in interest," but also when he "ha[d] been of counsel for either party." Act of May 8, 1792, §11, 1 Stat. 278–279. Many States followed suit by enacting similar disqualification statutes or constitutional provisions expanding the common-law rule. See, *e.g., Wilks* v. *State*, 27 Tex. App. 381, 385, 11 S. W. 415, 416 (1889); *Fechheimer* v. *Washington*, 77 Ind. 366, 368 (1881) (*per curiam*); *Sjoberg* v. *Nordin*, 26 Minn. 501, 503, 5 N. W. 677, 678 (1880); *Whipple* v. *Saginaw Circuit Court Judge*, 26 Mich. 342, 343 (1873); *Mathis* v. *State*, 50 Tenn. 127, 128 (1871); but see *Owings* v. *Gibson*, 9 Ky. 515, 517–518 (1820) (deciding that it was for the judge to choose whether he could fairly adjudicate a case in which he had served as a lawyer for the plaintiff in the same action). Courts applied this expanded view of disqualification not only in cases involving judges who had previously served as counsel for private parties but also for those who previously served as former attorneys general or district attorneys. See, *e.g.*, *Terry* v. *State*, 24 S. W. 510, 510–511 (Tex. Crim. App. 1893); *Mathis*, *supra,* at 128.

This expansion was modest: disqualification was required only when the newly appointed judge had served as counsel in the *same case*. In *Carr* v. *Fife*, 156 U. S. 494 (1895), for example, this Court rejected the argument that a judge was required to recuse because he had previously served as counsel for some of the defendants in another matter. *Id.*, at 497–498. The Court left it to the judge "to decide for himself whether it was improper for him to sit in trial of the suit." *Id.*, at 498. Likewise, in *Taylor* v. *Williams*, 26 Tex. 583 (1863), the Supreme Court of Texas acknowledged that a judge was not, "by the common law,

disqualified from sitting in a cause in which he had been of counsel" and concluded "that the fact that the presiding judge had been of counsel in the case did not necessarily render him interested in it." *Id.*, at 585–586. *A fortiori*, the Texas court held, a judge was not "interested" in a case "merely from his having been of counsel in *another cause* involving the same title." *Id.*, at 586 (emphasis added); see also *The Richmond*, 9 F. 863, 864 (CCED La. 1881) ("The decisions, so far as I have been able to find, are unanimous that 'of counsel' means 'of counsel for a party in that cause and in that controversy,' and if either the cause or controversy is not identical the disqualification does not exist"); *Wolfe* v. *Hines*, 93 Ga. 329, 20 S. E. 322 (1894) (same); *Cleghorn* v. *Cleghorn*, 66 Cal. 309, 5 P. 516 (1885) (same).

This limitation—that the same person must act as counsel and adjudicator in *the same case*—makes good sense. At least one of the State's highest courts feared that any broader rule would wreak havoc: "If the circumstance of the judge having been of counsel, for some parties in some case involving some of the issues which had been theretofore tried[,] disqualified him from acting in every case in which any of those parties, or those issues should be subsequently involved, the most eminent members of the bar, would, by reason of their extensive professional relations and their large experience be rendered ineligible, or useless as judges." *Blackburn* v. *Craufurd*, 22 Md. 447, 459 (1864). Indeed, any broader rule would be at odds with this Court's historical practice. Past Justices have decided cases involving their former clients in the private sector or their former offices in the public sector. See Frank 622–625. The examples are legion; chief among them is *Marbury* v. *Madison*, 1 Cranch 137 (1803), in which then–Secretary of State John Marshall sealed but failed to deliver William Marbury's commission and then, as newly appointed Chief Justice, Marshall decided

whether mandamus was an available remedy to require James Madison to finish the job. See Paulsen, Marbury's Wrongness, 20 Constitutional Commentary 343, 350 (2003).

Over the next century, this Court entered the fray of judicial disqualifications only a handful of times. Drawing from longstanding historical practice, the Court announced that the Due Process Clause compels judges to disqualify in the narrow circumstances described below. But time and again, the Court cautioned that "[a]ll questions of judicial qualification may not involve constitutional validity." *Tumey*, 273 U. S., at 523. And "matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." *Ibid.*; see also *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 828 (1986) ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications").

First, in *Tumey*, the Court held that due process would not tolerate an adjudicator who would profit from the case if he convicted the defendant. The Court's holding paralleled the common-law rule: "[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court, the judge of which has a *direct, personal, substantial pecuniary interest* in reaching a conclusion against him in his case." 273 U. S., at 523 (emphasis added); see also *Ward* v. *Monroeville*, 409 U. S. 57, 59, 61 (1972) (deciding that a mayor could not adjudicate traffic violations if revenue from convictions constituted a substantial portion of the municipality's revenue). Later, applying *Tumey*'s rule in *Aetna Life Ins.*, the Court held that a judge who decided a case involving an insurance company had a "direct, personal, substantial, and pecuniary" interest because he had brought a similar case against an insurer and his opinion for the court "had the

clear and immediate effect of enhancing both the legal status and the settlement value of his own case." 475 U. S., at 824 (alterations and internal quotation marks omitted).

Second, in *In re Murchison*, 349 U. S. 133 (1955), the Court adopted a constitutional rule resembling the historical practice for disqualification of former counsel. *Id.,* at 139. There, state law empowered a trial judge to sit as a "'one man judge-grand jury,'" meaning that he could "compel witnesses to appear before him in secret to testify about suspected crimes." *Id.*, at 133. During those secret proceedings, the trial judge suspected that one of the witnesses, Lee Roy Murchison, had committed perjury, and he charged another, John White, with contempt after he refused to answer the judge's questions without counsel present. See *id.,* at 134–135. The judge then tried both men in open court and convicted and sentenced them based, in part, on his interrogation of them in the secret proceedings. See *id.,* at 135, 138–139. The defendants appealed, arguing that the "trial before the judge who was at the same time the complainant, indicter and prosecutor, constituted a denial of fair and impartial trial required by" due process. *Id.,* at 135. This Court agreed: "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." *Id.,* at 137. Broadly speaking, *Murchison*'s rule constitutionalizes the early American statutes requiring disqualification when a single person acts as both counsel and judge in a single civil or criminal proceeding.[3]

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[3]The Court has applied *Murchison* in later cases involving contempt proceedings in which a litigant's contemptuous conduct is so egregious that the judge "become[s] so 'personally embroiled'" in the controversy that it is as if the judge is a party himself. *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 465 (1971); see also *Taylor* v. *Hayes*, 418 U. S. 488, 501–503 (1974).

Both *Tumey* and *Murchison* arguably reflect historical understandings of judicial disqualification. Traditionally, judges disqualified themselves when they had a direct and substantial pecuniary interest or when they served as counsel in the same case.

B

Those same historical understandings of judicial disqualification resolve Williams' case. Castille did not serve as both prosecutor and judge in the case before us. Even assuming Castille's supervisory role as district attorney was tantamount to serving as "counsel" in Williams' criminal case, that case ended nearly five years before Castille joined the Supreme Court of Pennsylvania. Castille then participated in a separate proceeding by reviewing Williams' petition for postconviction relief.

As discussed above, see Part I–B, *supra*, this postconviction proceeding is not an extension of Williams' criminal case but is instead a new civil proceeding. See *Finley*, 481 U. S., at 556–557. Our case law bears out the many distinctions between the two proceedings. In his criminal case, Williams was presumed innocent, *Coffin* v. *United States*, 156 U. S. 432, 453 (1895), and the Constitution guaranteed him counsel, *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963); *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932), a public trial by a jury of his peers, *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968), and empowered him to confront the witnesses against him, *Crawford* v. *Washington*, 541 U. S. 36, 68 (2004), as well as all the other requirements of a criminal proceeding. But in postconviction proceedings, "the presumption of innocence [has] disappear[ed]." *Herrera* v. *Collins*, 506 U. S. 390, 399 (1993). The postconviction petitioner has no constitutional right to counsel. *Finley, supra,* at 555–557; see also *Johnson* v. *Avery*, 393 U. S. 483, 488 (1969). Nor has this Court ever held that he has a right to demand that his postcon-

viction court consider a freestanding claim of actual innocence, *Herrera, supra,* at 417–419, or to demand the State to turn over exculpatory evidence, *Osborne*, 557 U. S., at 68–70; see also *Wright* v. *West*, 505 U. S. 277, 293 (1992) (plurality opinion) (cataloguing differences between direct and collateral review and concluding that "[t]hese differences simply reflect the fact that habeas review entails significant costs" (internal quotation marks omitted)). And, under the Court's precedents, his due process rights are "not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." *Osborne*, *supra,* at 69.

Because Castille did not act as both counsel and judge in the same case, Castille's participation in the postconviction proceedings did not violate the Due Process Clause. Castille might have been "personal[ly] involve[d] in a critical trial decision," *ante,* at 9, but that "trial" was Williams' criminal trial, not the postconviction proceedings before us now. Perhaps Castille's participation in Williams' postconviction proceeding was unwise, but it was within the bounds of historical practice. That should end this case, for it "is not for Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is 'due' process." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 28 (1991) (Scalia, J., concurring in judgment).

C

Today's holding departs both from common-law practice and this Court's prior precedents by ignoring the critical distinction between criminal and postconviction proceedings. Chief Justice Castille had no "direct, personal, substantial pecuniary interest" in the adjudication of Williams' fourth postconviction petition. *Tumey*, 273 U. S., at 523. And although the majority invokes *Murchison*, *ante,*

at 6–8, it wrongly relies on that decision too. In *Murchison*, the judge acted as both the accuser and judge in the *same* proceeding. 349 U. S., at 137–139. But here, Castille did not. See Part II–B, *supra*.

The perceived bias that the majority fears is instead outside the bounds of the historical expectations of judicial recusal. Perceived bias (without more) was not recognized as a constitutionally compelled ground for disqualification until the Court's recent decision in *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868 (2009). In *Caperton*, the Court decided that due process demanded disqualification when "extreme facts" proved "the probability of actual bias." *Id.,* at 886–887. *Caperton*, of course, elicited more questions than answers. *Id.,* at 893–898 (ROBERTS, C. J., dissenting). And its conclusion that bias alone could be grounds for disqualification as a constitutional matter "represents a complete departure from common law principles." Frank 618–619; see Blackstone 361 ("[T]he law will not suppose a possibility of bias or favor in a judge").

The Court, therefore, should not so readily extend *Caperton*'s "probability of actual bias" rule to state postconviction proceedings. This Court's precedents demand far less "process" in postconviction proceedings than in a criminal prosecution. See *Osborne*, *supra*, at 69; see also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961) (concluding that the Due Process Clause does not demand "inflexible procedures universally applicable to every imaginable situation"). If a state habeas petitioner is not entitled to counsel as a constitutional matter in state postconviction proceedings, *Finley*, *supra*, at 555–557, it is not unreasonable to think that he is likewise not entitled to demand, as a constitutional matter, that a state postconviction court consider his case anew because a judge, who had no direct and substantial pecuniary interest and had not served as counsel in this case, failed to recuse himself.

The bias that the majority fears is a problem for the state legislature to resolve, not the Federal Constitution. See, *e.g., Aetna Life Ins.,* 475 U. S., at 821 ("We need not decide whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal"). And, indeed, it appears that Pennsylvania has set its own standard by requiring a judge to disqualify if he "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding" in its Code of Judicial Conduct. See Pa. Code of Judicial Conduct Rule 2.11(A)(6)(b) (West 2016). Officials in Pennsylvania are fully capable of deciding when their judges have "participated personally and substantially" in a manner that would require disqualification without this Court's intervention. Due process requires no more, especially in state postconviction review where the States "ha[ve] more flexibility in deciding what procedures are needed." *Osborne, supra,* at 69.

III

Even if I were to assume that an error occurred in Williams' state postconviction proceedings, the question remains whether there is anything left for the Pennsylvania courts to remedy. There is not.

The majority remands the case to "[a]llo[w] an appellate panel to reconsider a case without the participation of the interested member," which it declares "will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations." *Ante,* at 14. The majority neglects to mention that the Supreme Court of Pennsylvania might have done just that. It entertained Williams' motion for reargument without Castille, who had retired months before the court denied the motion. The Supreme Court of Pennsylvania is free to decide on remand that it cured any alleged depriva-

tion of due process in Williams' postconviction proceeding by considering his motion for reargument without Castille's participation.

* * *

This is not a case about the "'accused.'" *Ante*, at 14 (quoting *Tumey*, *supra*, at 532). It is a case about the due process rights of the already convicted. Whatever those rights might be, they do not include policing alleged violations of state codes of judicial ethics in postconviction proceedings. The Due Process Clause does not require any and all conceivable procedural protections that Members of this Court think "Western liberal democratic government ought to guarantee to its citizens." Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353, 358 (1981) (emphasis deleted). I respectfully dissent.

Attachment L

(2) The Supreme Court may shorten the time periods prescribed in this and other provisions of this subchapter at its own initiative or at the request of the commission.

(B) In the commission's discretion, it may issue a "28-day letter" without having first requested the respondent's comments pursuant to MCR 9.221(B).

(C) The commission may continue to investigate until it issues a complaint, at which point the disciplinary counsel may continue investigating as needed.

(D) If a respondent requests in response to a written notice from the commission under this rule, the commission may offer the respondent an opportunity to appear informally before the commission to present such information as the respondent may choose, including information about the factual aspects of the allegations and other relevant issues.

RULE 9.223 CONCLUSION OF INVESTIGATION; NOTICE

(A) If the commission determines at any time in the investigation that there are insufficient grounds to warrant filing a complaint, the commission may:

(1) dismiss the matter;

(2) dismiss the matter with a letter of explanation or caution that addresses the respondent's conduct;

(3) dismiss the matter with or without a letter of explanation or caution that addresses the respondent's conduct contingent upon the satisfaction of conditions imposed by the commission, which may include a period of monitoring;

(4) admonish the respondent; or

(5) recommend to the Supreme Court private censure, with a statement of reasons.

(B) Notice to Respondent. Before taking action under subrule (A)(2)-(5), the commission must first have given written notice to the respondent of the nature of the allegations in the request for investigation and afforded the respondent a reasonable opportunity to respond in writing, pursuant to MCR 9.221(B), MCR 9.222(A), or both.

(C) On final disposition of a request for investigation without the filing of a complaint, the commission shall give written notice of the disposition to the respondent who was the subject of the request. The commission also shall provide written notice to the grievant that the matter has been resolved without the filing of a complaint.

RULE 9.224 COMPLAINT

(A) Upon determining that there is sufficient evidence to believe that the respondent under investigation has engaged in misconduct, the commission may issue a complaint against that respondent.

(B) If the commission issues a complaint, it shall appoint the executive director or another attorney to act as disciplinary counsel. If the executive director assumes the role of

disciplinary counsel, the commission shall appoint outside counsel to act as commission counsel. If the commission appoints outside counsel to act as disciplinary counsel, the executive director shall serve as commission counsel.

(C) Upon issuing a complaint, the commission shall petition the Court for the appointment of a master.

RULE 9.225 INTERIM SUSPENSION

(A) Petition.

(1) With the filing of a complaint, the commission may petition the Supreme Court for an order suspending a respondent from acting as a judge until final adjudication of the complaint.

(2) In extraordinary circumstances, the commission may petition the Supreme Court for an order suspending a respondent from acting as a judge in response to a request for investigation, pending a decision by the commission regarding the filing of a complaint. In such a circumstance, the documents filed with the Court must be kept under seal unless the petition is granted. Conviction of a felony is grounds for automatic interim suspension, with or without pay, pending action by the commission. If the respondent is suspended without pay, the respondent's pay shall be held in escrow pending the final resolution of disciplinary proceedings.

Whenever a petition for interim suspension is granted, the processing of the case shall be expedited in the commission and in the Supreme Court. The commission shall set forth in the petition an approximate date for submitting a final recommendation to the Court.

(3) Notwithstanding any other provision of this rule, in a matter in which a respondent poses a substantial threat of serious harm to the public or to the administration of justice, the commission may petition the Supreme Court for an order suspending a respondent from acting as a judge without pay in response to a request for investigation, pending a decision by the commission regarding the issuance of a complaint. The respondent's pay shall be held in escrow pending the final resolution of disciplinary proceedings.

Whenever a petition for interim suspension is granted, the processing of the case shall be expedited in the commission and in the Supreme Court. The commission shall set forth in the petition an approximate date for submitting a final recommendation to the Court.

(B) Contents; Affidavit or Transcript. The petition must be accompanied by a sworn affidavit or court transcript and state facts in support of the allegations and the assertion that immediate suspension is necessary for the proper administration of justice.

(C) Service; Answer. A copy of the petition and supporting documents must be served on the respondent, who may file an answer to the petition within 14 days after service of the

Attachment M

RULE 9.236 REPORT OF MASTER

The court reporter shall prepare a transcript of the proceedings conducted before the master within 21 days of the conclusion of the hearing, filing the original with the commission, and serving copies on the respondent (or the respondent's attorney) and disciplinary counsel, by e-mail. Within 21 days after a transcript of the proceedings is provided, the master shall prepare and transmit to the commission a report that contains a brief statement of the proceedings and findings of fact and conclusions of law with respect to the issues presented by the complaint and the answer. On receiving the report, the commission must promptly send a copy to the respondent, unless the master has already done so.

RULE 9.240 OBJECTIONS TO REPORT OF MASTER

Within 28 days after the master's report is mailed to the respondent, disciplinary counsel or the respondent may file with the commission an original and 9 copies of a brief in support of or in opposition to all or part of the master's report. The briefs must include a discussion of possible sanctions and, except as otherwise permitted by the commission, are limited to 50 pages in length. A copy of the brief must be served on the opposite party, who shall have 14 days to respond.

RULE 9.241 APPEARANCE BEFORE COMMISSION

When the hearing before the master has concluded, the commission shall set a date for hearing objections to the report. Both the respondent and the disciplinary counsel may present oral argument at the hearing before the commission.

RULE 9.242 EXTENSION OF TIME

For good cause shown, the commission or its chairperson may extend for periods not to exceed 28 days the time for the filing of an answer, for the commencement of a hearing before the commission, for the filing of the master's report, and for the filing of a statement of objections to the report of a master.

RULE 9.243 HEARING ADDITIONAL EVIDENCE

The commission may order a hearing before itself or the master for the taking of additional evidence at any time while the complaint is pending before it. The order must set the time and place of hearing and indicate the matters about which evidence is to be taken. A copy of the order must be sent to the respondent at least 14 days before the hearing.

RULE 9.244 COMMISSION DECISION

(A) Majority Decision.

(1) The affirmative vote of 5 commission members who have considered the report of the master and any objections, and who were present at an oral hearing provided for in MCR 9.241, or have read the transcript of that hearing, is required for a

recommendation of action with regard to a respondent. A commissioner may file a written dissent.

(2) It is not necessary that a majority agree on the specific conduct that warrants a recommendation of action with regard to a respondent, or on the specific action that is warranted, only that there was some conduct that warrants such a recommendation.

(B) Record of Decision.

(1) The commission must make written findings of fact and conclusions of law along with its recommendations for action with respect to the issues of fact and law in the proceedings, but may adopt the findings of the master, in whole or in part, by reference. The commission's report must include a list of all respondent's prior disciplinary actions under MCR 9.223(A)(2)-(5) or MCR 9.224 and must include an acknowledgment that the commission has included its consideration of any prior discipline in the commission's recommended action. The list of previous disciplinary actions shall be submitted under seal and will be retained in a nonpublic manner. Disclosure of any prior disciplinary action will occur only if the information is relevant to any recommendation or imposed sanction.

(2) The commission shall undertake to ensure that the action it is recommending in individual cases is reasonably proportionate to the conduct of the respondent and reasonably equivalent to the action that has been taken previously in equivalent cases.

RULE 9.245 CONSENT AGREEMENTS

(A) Consent Agreements. At any time, the respondent and the disciplinary counsel (or the executive director acting as the putative disciplinary counsel) may enter into confidential negotiations. A consent agreement may

(1) include stipulated facts and an agreement as to the sanction; or

(2) include just the stipulated facts, with no agreement as to the sanction.

The parties may present a signed consent agreement to the commission, which shall review the matter and decide whether to accept it. If the consent agreement is filed under subsection (1), the parties do not file briefs and the matter is not set on the docket for argument following the commission's decision, unless otherwise directed by the Court. If the consent agreement is filed under subsection (2), the matter proceeds pursuant to MCR 9.250 and MCR 9.251.

(B) Commission Action. If the commission agrees to the terms set forth in the consent agreement in subsection (1), the commission shall issue a decision and recommendation as if there had been a master's report filed. If the commission agrees to the terms set forth in the consent agreement in subsection (2), the stipulated facts serve in lieu of a master's report and the matter then proceeds to a hearing before the commission, with the briefing schedule and an appearance before the commission, as set forth in MCR 9.240 and MCR 9.241. The time for filing a brief before the commission in matters filed under subsection (2) shall start with the filing of the consent agreement. A copy of the consent agreement

Attachment N

petition, unless the commission has filed a motion for immediate consideration. The commission must be served with a copy of the answer.

RULE 9.230 PLEADINGS

Other than motions, the complaint and answer are the only pleadings allowed.

(A) Complaint.

(1) Filing; Service. A complaint may not be issued before the completion of a preliminary investigation. Upon concluding that there is sufficient evidence to warrant the issuance of a complaint, the commission shall direct the executive director or equivalent staff member to do the following:

(a) enter the complaint in the commission docket, which is a public record;

(b) retain the complaint in the commission office; and

(c) promptly serve a copy of the complaint on the respondent.

(2) Form of Complaint. A complaint must be entitled:

"Complaint Against _____, Judge. No. _____."

A complaint must be in form similar to a complaint filed in a civil action in the circuit court.

(B) Answer.

(1) Filing. Within 14 days after service of the complaint, the respondent must file with the commission the original and 9 copies of an answer verified by the respondent.

(2) Form. The answer must be in form similar to an answer in a civil action in the circuit court and must contain a full and fair disclosure of all facts and circumstances pertaining to the allegations regarding the respondent. Willful concealment, misrepresentation, or failure to file an answer and disclosure are additional grounds for disciplinary action under the complaint.

(3) Affirmative defenses, including the defense of laches, must be asserted in the answer or they will not be considered.

RULE 9.231 APPOINTMENT OF MASTER

(A) The Supreme Court shall appoint a master to conduct the hearing within a reasonable period of the date of the petition and shall establish a date for completion of the hearing procedure.

(B) The master shall set a time and a place for the hearing and shall notify the respondent and the examiner at least 28 days in advance. The master shall rule on all motions and other procedural matters incident to the complaint, answer, and hearing.

Recommendations on dispositive motions shall not be announced until the conclusion of the hearing, except that the master may refer to the commission on an interlocutory basis a recommendation regarding a dispositive motion.

(C) The master may conduct one or more pretrial conferences, and may order a prehearing conference to obtain admissions or otherwise narrow the issues presented by the pleadings.

(D) Unless the parties agree to waive them, closing arguments at the hearing before the master shall be oral and take place upon conclusion of the presentation of evidence. The master may not adjourn or postpone closing arguments for the preparation of a transcript or the submission of proposed findings of fact.

(E) MCR 2.003(B) shall govern all matters concerning the disqualification of a master.

RULE 9.232 DISCOVERY

(A) Pretrial or discovery proceedings are not permitted, except as follows:

(1) At least 21 days before a scheduled public hearing,

(a) the parties shall provide to one another, in writing, the names and addresses of all persons whom they intend to call at the hearing, a copy of all statements and affidavits given by those persons, and any material in their possession that they intend to introduce as evidence at the hearing, and

(b) the disciplinary counsel or executive director shall provide to the respondent copies of all exculpatory material in its possession.

(2) The parties shall give supplemental notice to one another within 5 days after any additional witness or material has been identified and at least 10 days before a scheduled hearing.

(B) A deposition may be taken of a witness who is living outside the state or who is unable to attend a hearing, or otherwise as allowed for good cause shown.

(C) If a party fails to comply with subrules (A) or (B), the master may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(e).

RULE 9.233 PUBLIC HEARING

(A) Procedure. The public hearing must conform as nearly as possible to the rules of procedure and evidence governing the trial of civil actions in the circuit court. A respondent is entitled to be represented by an attorney. Disciplinary counsel shall present the evidence in support of the charges set forth in the complaint and at all times shall have the burden of proving the allegations by a preponderance of the evidence. Any employee, officer, or agent of the respondent's court, law enforcement officer, public officer or employee, or attorney who testifies as a witness in the hearing, whether called by the

Attachment O

Morrow, Bruce

From: [redacted]
Sent: Tuesday, March 26, 2019 4:27 AM
To: Morrow, Bruce
Subject: Jury duty March 18-20th, 2019

Hello Your Honor,

I just wanted to let you know about my experience as a juror in your courtroom March 18th-20th, 2019.

I just wanted to say that for the first time getting a summons, and getting selected for jury duty, you made the experience an easier one.

With that being said, I wanted to give you some positive feedbacks, from the entire experience.

- When we first entered the court room, on Monday, it was at first a little different to have the judge standing at the doorway shaking our hand greeting us, but it was nice and took some of the pressure off as opposed to having the judge just sit behind the bench, and observe us all as we walked in. That was a nice way to start the day for someone that did not know what to expect for jury duty.

- Taking the time to speak with us and giving us different examples and perceptions was another positive thing. It was nice to have you take the time out to explain stuff to us potential jurors, and show us the clips of Susan Boyle (and how perceptions are perceived), and what senses we would rather have, and what the statue meant and why the eyes were covered. That was a cool bit of information.

-When we were getting selected to be on the jury, I know that being under question with the attorneys is a lot of pressure, since we don't know what kind of answers they are looking for. But with you asking us, and talking to us about what we like to do, and our personal lives (I know it wasn't to get personal), it made the experience easier and less intimidating for me as a juror. Even though I can give presentations and speak in front of everyone, I was nervous with this, since I did not know what was going to be asked of me, where as when I give a presentation, I am familiar with the topic.

-I liked how you read what the defendant was being charged with, so we as jurors knew what we were to take into consideration, and had an idea to know what we had to prove based on what was presented to us by the attorneys.

- Another positive thing that I liked while being a juror, was that you took the time to explain the different terms and roles of the jurors, for someone like me, who has never been on jury duty I had a more clear picture of what was expected of me and my roles. You know that there are many law shows on television, and being in the live court room is different than what you see on TV.

-Another good thing was that we were allowed to take notes, since they are long days, and we always can't remember everything, it was nice to be able to refresh our memory and when we were discussing the case on lunch, we could reference the facts, and I might remember something that someone else forgot or didn't remember as evidence and vice versa.

- Showing us the videos of Sister Act and The Pursuit of Happiness and how they pertained to things we were talking about were a good thing to break up a long day.

-With us, being able to ask you questions and get to know you was another thing that I liked. Also, with you being able to be approachable, and letting us ask questions, showed me that you did not value yourself as someone better than us, even though you held the highest title in the room. I have been in situations, where

Now, with all this being said, overall it was a very positive experience and if you keep doing what you are doing I think the other potential juries would have a decent time.

Let me ask you a question, that has kind of been in my mind all week, since jury duty. Why did you dismiss us on Wednesday after lunch, and did not let us come to a verdict? Was it because their was a lack of evidence, in the case? Was the defendant able to go free? I couldn't put an innocent man behind bars, and I felt that there was a lack of evidence, on the prosecution's part, and too many inconsistencies in the homicide detectives story after the examination video that we watched on Wednesday and the defense attorneys cross exam?

Thank you for making a stressful situation for someone that has never been called, or had to serve on a jury, a less stressful one. Keep up the good work.

Please let me know if you have any other questions. Thank you again, and see you around.

[redacted]

[redacted]

Honorable Judge Bruce Morrow
1200 Frank Murphy Hall of Justice
1441 St. Antoine Street – Room 404 - Detroit, Michigan 48226-2302

RE: Our Loving Daughter - [redacted] - Case No. 8215007034

Dear Judge Morrow:

My wife [redacted] and I have been to each and every court hearing for our daughter [redacted]. As we sat on the wood benches in your court room, we began to admire the several presentations of your hanging wall art in the room. It was rather interesting to see all the various professionals working in front of us through a legal system. We were especially impressed at how you treated each person that came before you. It has been difficult to work with and handle this whole event of our daughter's case these past several months. We have another Daughter – [redacted] as well as our son [redacted] that live at home. Our whole family has been devastated, but we are strong and are coping with this experience each day.

During our attendance in your court room we have noted that you spoke to our daughter with dignity and respect regardless of whatever [redacted] may have or not have done. We cannot tell you how much that meant to us. Both my wife [redacted] and I will continue to support our daughter and help her seek medical and psychological counseling in the years to come. We love our Daughter [redacted] and of course all of our children.

In conclusion, we would like to say a few statements about the nature of our past and present loving relationship with our daughter [redacted] has been a good child all her life. These recent actions of [redacted] are completely out of character. [redacted] was raised by a good family where she was loved, able to thrive, and encouraged to learn about the things that interested and entertained her. She has been gifted with wonderful creative talents. She has created many drawings and paintings through her college (CCS) experience and up to this present time. We will continue to visit and support our daughter in the months and years to come. I know the importance of simply giving her a hug which we have not been able to do for so long. Our Goal is to continue our support for all of our children and see that [redacted] is visited by her family and friends. I humbly request that you urge the Michigan Department of Corrections to provide our daughter with the mental health treatment and counseling that she will surely need. It is beyond words to lose our daughter like this, but we have faith that she will one day be back with her family.

Thank you for showing her your kindness in the court room.

Sincerely

[redacted]

ge Morrow,

I'm not sure if you remember a trial you recently had in your courtroom. It was concerning a vehicle that was taken to [redacted] with my permission and then not returned. The reason for this letter is to thank you. Although everything didn't turn out as I had hoped concerning the conviction and the sentencing I appreciated what I perceived to be professional unbiased judgement concerning this matter; and understood the reasons for the judgements based on the explanations you gave. I appreciated the way you directed the proceedings and your demeanor of respect toward me when making my requests concerning the sentencing.

This letter may seem strange to you, but to make a long story short, both in my personal and professional life I have unfortunately had the pleasure of witnessing the conduct of less ethical individuals involved in the legal practice. This, needless to say, has done it's share in diminishing some of my faith in the justice system. My experience in Wayne County, and specifically in your courtroom, left me with a little bit of that faith restored. For this I thank you. For you this is your job, to me it meant a lot more.

Sincerely,

[redacted]

[redacted]

[redacted]

May 7, 2014

Hon. Bruce U. Morrow
Wayne County (3rd) Circuit Court
1441 Saint Antoine Street, Ste. 404
Detroit, MI 48226

Re: [redacted]
Wayne Circuit File No. [redacted]

Dear Judge Morrow:

Just a note to say thanks for coming out to [redacted]'s lifer public hearing on Tuesday. (Actually, what impressed me the most was when the board member approached you before the hearing to ask if you were the parole agent. Your response was, "No." In my experience, 999 out of 1,000 judges would have answered that question by saying, "No, I'm....") Your appearance and your answer inspired me. I also appreciated that you had reviewed the file carefully and were prepared to testify, and that after the hearing you spoke (a) to the court reporter, to help her out, and (b) to Mr. [redacted]s family, before you headed out. How nice.

After 1994, when the Engler parole board took over and instituted its "life means life" policy, only 2-3 parolable lifers were put forward for public hearings a year. Since January 2005, the board has recommended about 250 non-drug lifers for such hearings. For the last two years the board has averaged 40-50 cases a year – a sea change for a population that consistently has among the lowest recidivism rate of any group of offenders. The one remaining problem is the judicial veto, which has been used to block about 22 percent of the board's recommendations. We are trying to get the legislature to amend the lifer law so that the successor judge's objection can be *considered* by the board, but will not have the effect of a veto – because so often the veto is influenced by political reasons (like re-election) that have nothing to do with the merits of the case, or the relative merits of the case (compared to other cases that have gone forward to hearing and eventual parole).

A quick Google search revealed that you are awaiting a decision from the Michigan Supreme Court. Good luck with that, but whatever the ruling I am confident you will weather the storm. Best wishes, and

[redacted]

From: [redacted]
To: <bruce.morrow@3rdcc.org>
Date: 11/17/2011 8:18 AM
Subject: Jury Summons

Mr. Morrow,

I was in the jury pool selected for you room yesterday. I want to thank you for taking the time out of your day to talk with us and making, what some would call "a waste of the day" into something cool to be a part of. Jury duty can seam to interfere with our lives and our job. Sure I know it's our duty as Americana's but most people done seem to care about that just as long as it the other guy serving and not me! But yesterday I actually found myself listening intently. I can say I learned something or maybe several things from your talk. So I did my civic responsibility and enjoyed it! I just wanted let you know that the day did have meaning and was not a waste of my time. I am glad you were selected by the people and I am glad you do what you do. This may sound silly but I believe I have gotten to relaxed in my job and need to remind myself I am here to teach what I know to my colleagues do what I can so their day is better. Meeting you will help to revive that

In closing it is my hope this note does for you what you did for me.

[redacted]

[redacted]

Attachment P

ATTORNEYS AT LAW

COLLINS EINHORN

Collins Einhorn Farrell PC

Donald D. Campbell

Email: donald.campbell@ceflawyers.com
Direct Dial: 248-351-5426

May 4, 2020

Lora Weingarden
Judicial Tenure Commission
3034 West Grand Blvd., Suite 8-450
Cadillac Place Building
Detroit, MI 48202

Re: Bruce Morrow
Request for Investigation 2019-23818

Dear Ms. Weingarden:

In response to the JTC's February 24, 2020 request for investigation, I submit the following on behalf of Bruce Morrow, Judge 3rd Circuit Court Criminal Division. Where text is [bracketed], it reflects my own statements and not necessarily those of Judge Morrow.

1. Did you preside over a homicide jury trial, *People v James Edward Matthews,* case number 18-7023-01-FC, beginning on June 10, 2019?

ANSWER: **Yes.**

2. Was the case tried by assistant prosecutors Ashley Ciaffone and Anna Bickerstaff?

ANSWER: **For the prosecution, yes.**

4000 Town Center, 9th Floor
Southfield, Michigan 48075-1473

Phone: (248) 355-4141
Fax: (248) 355-2277

www.CEFLawyers.com

3. Was the defense attorney William Noakes, from the Neighborhood Defender Service of Detroit?

ANSWER: **Yes.**

4. Did APA Bickerstaff conduct the direct examination of the medical examiner, Dr. Dan Galita, on June 11, 2019?

ANSWER: **Yes.**

5. Did you desire to give criticism or advice to APA Bickerstaff about how she conducted the direct examination of Dr. Galita?

ANSWER: **As stated, no. Judge Morrow recalls responding to the APAs' requests for critique and review of their presentation of the case at various times during the trial.**

6. Did you tell APA Bickerstaff words to the effect that you were going to come down from the bench to talk to her personally because what you were going to say would make her "blush?"

ANSWER: **Essentially, yes. It was not "what" was going to be said so much as "where" it was going to be said *from* that could cause someone to "blush" in Judge Morrow's view. The statement was made to put in context why Judge Morrow came down from the bench rather than giving that critique from there. His main purpose was to avoid or limit APA Bickerstaff from being embarrassed by an excessively communal and potentially tough critique. She sought a frank review from Judge Morrow; he was concerned that she could be embarrassed by such a critique being given from the bench. He wanted to avoid causing a spectacle that could unnecessarily embarrass APA Bickerstaff and cause her to become flush as a consequence while providing the critique that he understood she was sought.**

[As an aside, Charles Darwin devoted Chapter 13 of his 1872 The Expression of the Emotions in Man and Animals to complex emotional states including self-attention, shame, shyness, modesty, and blushing. He described blushing as "... the most peculiar and most human of all expressions." A blush erupts often when we feel embarrassed. It is a reaction when we recognize that we are out of our depth or have placed ourselves in an uncomfortable place. The blush is involuntary and uncontrollable.]

Judge Morrow was concerned that giving his critique from the bench, commanding the attention of anyone who may have been in the courtroom, could cause unintended and avoidable embarrassment for APA Bickerstaff; where a more direct discussion, while appropriately judicial, professional, and public across counsel's table, would not carry the same risk of such for APA Bickerstaff.

7. On a break that followed APA Bickerstaff's direct examination of Dr. Galita, but before the trial had concluded, did you come down from the bench, while wearing your robe, and sit in a vacant chair at the prosecutor's table next to APA Bickerstaff?

ANSWER: Yes, see responses above for context.

If so:

a. Were members of the public seated in the audience when you did that?

ANSWER: Judge Morrow does not recall.

b. Was Mr. Noakes part of your conversation with APA Bickerstaff?

If not, where was Mr. Noakes at that time?

ANSWER: No. Judge Morrow does not recall specifically, but he does recall Mr. Noakes to be in the area of counsels' tables.

c. During the conversation did you ask APA Bickerstaff words to the effect of "when a man and a woman are romantically close, what does that lead to?"

ANSWER: Yes, this is believed to be accurate.

d. Did you say to APA Bickerstaff words to the effect of "So when a man and a woman are close, they start by holding hands, rubbing elbows, kissing, foreplay, then that leads to sex"?

ANSWER: Yes, this is believed to be essentially accurate but very likely not verbatim.

e. Did you ask APA Bickerstaff words to the effect of "would you want foreplay before or after sex?"

ANSWER: Judge Morrow does not recall this phrasing and does not believe it is entirely accurate. He recalls generally referring to what most people are perceived to want. The discussion was centered on how juries react and think about things; contrasting it with how lawyers tend to present testimony and evidence based on our own perceptions. Indeed, central to the critique was that lawyers present cases as each of us see it when we should present a case as jurors would want or need to have it presented. In context, Judge Morrow is certain that he focused the discussion and his questions on the concept of "everyone." As "everyone" is one of the common definitions of "you," he very likely could have used the word "you" in that particular sense. Still, he believes the phrasing was different from what is presented here.

f. Did you say to APA Bickerstaff words to the effect of "You want the foreplay before the sexual intercourse? That's what we call cuddling. No, you start with holding hands"?

ANSWER: See response to "e." above. The same is adopted for this paragraph.

g. Did you make an analogy for APA Bickerstaff to the effect that the climax of sex is akin to getting the medical examiner to state the cause and manner of death after getting the details of his examination of the body?

ANSWER: No. Judge Morrow does not recall referring to the climax of sex and does not believe he would have. He recalls saying that the cause and manner of death should be the climax of the medical examiner's testimony. He does not recall any intention of linking the word "climax" to its sexual connotation.

h. Did you tell APA Bickerstaff words to the effect of "You start with all the information from the report, all the testimony crescendos to the cause and manner of death, which is the sex of the testimony"?

ANSWER: This is believed to be essentially correct, but the wording is not as Judge Morrow recalls or believes he said it.

i. Did you tell APA Bickerstaff words to the effect of "you want to tease the jury with the details of the examination"?

ANSWER: This is believed to be essentially correct, but the wording is not as Judge Morrow recalls or believed he said it.

j. Did you tell APA Bickerstaff words to the effect of "you want to lead them to the climax of the manner and cause of death"?

ANSWER: Judge Morrow recalls explaining that the climax of the testimony from the medical examiner should be the cause and manner of death. He does not recall saying the sentence as it is produced here and does not believe he did.

8. If you answered in the affirmative to any of the questions in 7(c)-(j), please answer the following questions and identify which statement or statements you are referring to:

a. Was that the sort of question you wanted to ask her or statement you wanted to make to her that you had in mind when you told her what you had to say would make her "blush?"

ANSWER: The responses to 6 and 7e are incorporated by reference here. There was no particular question that Judge Morrow had in his mind at the time he used the word "blush." His use of that word was related to the circumstances of the critique and not the critique itself.

b. Besides APA Bickerstaff, who else may have heard that conversation?

ANSWER: Anyone who wanted to listen may have heard. It was not a private conversation.

c. Was Mr. Noakes part of that conversation?

ANSWER: He did not take part in it. Neither was the conversation directed toward him nor was he excluded from it.

9. While you were discussing the above enumerated statements with APA Bickerstaff, how were each of your bodies positioned?

ANSWER: Without adopting "the above enumerated statements" as true, both Judge Morrow and APA Bickerstaff were seated.

a. How close together were the chairs you and APA Bickerstaff were sitting in?

ANSWER: Judge Morrow and APA Bickerstaff were at what he would consider a judicially and professionally appropriate distance from each other at all times.

b. How close did your head get to her head?

ANSWER: At all times, Judge Morrow and APA Bickerstaff were at what he would consider a judicial, professional, non-offensive distance that respected and protected their respective personal space.

10. While the jury was deliberating, did you summon APA Bickerstaff, APA Ciaffone, and Mr. Noakes into your chambers?

ANSWER: As stated, no. Judge Morrow recalls inviting counsel who tried the case to join him in chambers while the jury deliberated. Counsel for both parties elected to join him.

11. In the course of summoning APA Bickerstaff and APA Ciaffone to your chambers, did you say to them words to the effect of "come along, little ones"?

ANSWER: As stated, no. Judge Morrow does not recall what words he used in inviting counsel for the parties back towards his chambers. He may have said "come along little ones" or words to that effect, but only after both sides had indicated by word or manner that they were open to his invitation.

12. Did you discuss with APA Ciaffone her reasons for having presented evidence that the defendant's DNA was found in the victim's vaginal swab?

ANSWER: Yes.

If so:

a. Did you and she argue over the value of that evidence?

ANSWER: Judge Morrow does not recall arguing with APA Ciaffone and does not believe he did. He does recall that there was a discussion.

b. Did you say words to the effect of "all you did was show they fucked!"

ANSWER: Judge Morrow does not recall saying the words quoted above, but he probably made a similar statement. He certainly does not recall that he emphasized the word "fucked" and does not believe he did so.

c. Did you use that specific word, "Fucked," while you were discussing the issue with her?

ANSWER: Judge Morrow believes that he did probably did use that word. He did so referring to the act of copulation and in a manner that was not unbefitting of the circumstances.

13. At the trial, had the defendant testified that he and the deceased/victim engaged in "non-traditional" sex?

ANSWER: The testimony was that their sex during the morning before the night of the homicide was not the type of sex they "normally" had.

If so:

a. Did you take that testimony to mean that he had had sex with the victim in a position other than the missionary position?

ANSWER: Judge Morrow does not recall that he "took" the testimony in any manner.

b. Did you confront APA Ciaffone about her personal bias and inexperience about what "non-traditional" sex was?

ANSWER: No. There was no confrontation with APA Ciaffone or anyone concerning any aspect of this case. In chambers, where counsel had freely elected to be while the jury was deliberating, the evidence and testimony were discussed. Also, the presentations and arguments were discussed among and with counsel. Judge Morrow recalls that the issue of bias in presentations of a case was discussed. These discussions did involve the concept of what a jury may consider "normal" and "not normal" sex between people.

c. Did you tell APA Ciaffone that most people do not interpret "non-traditional" sex the way she does?

ANSWER: No, Judge Morrow does not recall telling her that. Judge Morrow does not know how APA Ciaffone interprets that term. Nor does he know how most people interpret it. He does recall making the point that if the lawyer's interpretation is not how the jury sees it, then the argument and presentation will likely be ineffective.

14. While in chambers with the parties, did you laugh at the defendant's testimony that he had not had traditional sex with the victim because she was pregnant and he did not want to hurt the baby?

ANSWER: Judge Morrow does not recall laughing at any testimony either in court or in chambers and does not believe he did so.

If so, in the course of commenting on the defendant's testimony did you say words to the effect of any of the following: "how big does this guy think he is?

Does he think his dick is so big that he would hurt that baby?

This guy must feel real good about himself to think his dick is that big."

ANSWER: **N/A**

15. While in chambers with the parties, did you criticize APA Ciaffone's voir dire?

ANSWER: As written, no. Judge Morrow did, upon request, offer a critique as to certain aspects of APA Ciaffone's *voir dire*.

If so, did you say to her words to the effect of "if I want to have sex with a woman on the first date, how would I figure that out? I wouldn't ask if she wants a family or children or what she does, I would ask her 'have you had sex on a first date before?' Would you sleep with me on a first date?"

ANSWER: **Judge Morrow does not recall these exact words, but recalls that he did use a similar example to show and explain that very little if any of APA Ciaffone's *voir dire* seemed actually helpful to what APA Ciaffone professed to have been trying to accomplish in her *voir dire*.**

16. For about how long did you talk to the attorneys in chambers?

ANSWER: **Judge Morrow does not recall.**

17. After the jury was excused for the day on June 11, 2019, did you approach the prosecutors' table and ask the following questions:

a. How tall APA Ciaffone is, and how much she weighs?

ANSWER: Yes.

b. Whether APA Anna Bickerstaff weighs 115 pounds?

ANSWER: Yes.

c. When APA Bickerstaff responded with respect to her weight, did you say words to the effect of "Well, I haven't assessed your muscle mass yet?"

ANSWER: Yes.

d. Prior to, or while, asking these questions, did you overtly eye the bodies of both APA Ciaffone and APA Bickerstaff?

ANSWER: **No.**

18. Have you discussed the events on which these questions are based with the following people at any time?

a. James Bivens, an investigator employed by the Wayne County Prosecutor's Office;

ANSWER: Judge Morrow does not believe he has discussed this matter with this person.

b. Mr. Ulatowski, your court clerk;

ANSWER: Judge Morrow does not believe he has discussed this matter with this person.

c. Mr. Allen, your court reporter;

ANSWER: Judge Morrow does not believe he has discussed this matter with this person.

d. Any of your courtroom deputy sheriffs;

ANSWER: Judge Morrow does not believe he ever has discussed this matter with this person.

e. Any assistant prosecuting attorneys.

ANSWER: Judge Morrow does not believe he has discussed this matter with this person.

f. Any other person?

ANSWER: **Yes.**

If you have discussed the events on which these questions are based with any of the people described above, please identify the person or people with whom you spoke and describe the conversation(s) you had with each such person. Also, please provide contact information for those people.

ANSWER: **[This question is ambiguous and will need clarification. None of the people described above had such a conversation with Judge Morrow. If you intended to include those people not described in 18f and are seeking to know a description of the conversation(s) with such people, this would include privileged and protected information.]**

Please clarify.

19. Did you intend to make APAs Ciaffone or Bickerstaff feel uncomfortable during any of the interactions described above?

ANSWER: No, absolutely not. To the contrary, Judge Morrow made efforts to avoid such.

a. If so, why was that your intent?

ANSWER: N/A

b. If not, what was your intent, and why did you choose the words you chose in order to effectuate your intent?

ANSWER: The intention was to provide the critique requested by the APAs. The words used were the words believed at the time and under the circumstances, as those circumstances were understood, to be an effective manner of providing the requested critique in a public area of the court in a judicially and professionally appropriate manner.

c. If not, why did you tell APA Bickerstaff that what you had to say to her would make her "blush?"

ANSWER: See, again, the responses at 6 and 7e. The concern was that delivering the critique from the bench area would possibly embarrass APA Bickerstaff which could cause an involuntary reaction of a blush. The critique was not likely to cause APA Bickerstaff to blush, but the manner of delivering it from the bench may have.

20. Please explain whether each of the statements to APAs Ciaffone and Bickerstaff that are described above complied with each of the following canons in the Code of Judicial Conduct:

a. Canon 1, which requires that a judge should personally observe high standards of conduct;

ANSWER: [Respectfully, to the extent this question is asking for a response based on alleged statements that are not believed to be accurate is not an appropriate question.]

To the extent the question seeks a response about those statements that Judge Morrow acknowledges, or that he believes were made; the statements were, in the context in which they were made, professionally and judicially appropriate. They were either made publically in the courtroom or in chambers with all counsel. No one reacted in a manner to suggest any concern, upset, offense, distress, or mistreatment. Certainly, neither APA Bickerstaff nor APA Ciaffone showed even a hint of any such reaction.

b. Canon 2(A), which states a judge must avoid all impropriety or appearance of impropriety;

ANSWER: **See response to 20a. The same is adopted for this paragraph.**

c. Canons 2(B) and 3(A)(14), which require that a judge treat every person with courtesy and respect;

ANSWER: **See response to 20a. The same is adopted for this paragraph.**

d. Canon 3(A)(3) which requires that a judge be dignified, and courteous to lawyers.

ANSWER: **See response to 20a. The same is adopted for this paragraph.**

If you believe each of your statements complied with each of these canons, please explain how they did so.

Judge Morrow believed at the time that the statements made were professionally and judicially appropriate. They were either made publically in the courtroom or in chambers with all counsel. No one reacted in a manner to suggest any concern,

upset, offense, distress, or mistreatment. Certainly, neither APA Bickerstaff nor APA Ciaffone showed even a hint of any such reaction.

21. Please explain whether your conversation with APA Bickerstaff during a break in the trial, in the courtroom, at the prosecutor's table, complied with:

a. Canon 3(A)(4), which forbids a judge to engage in ex parte communications;

ANSWER: Judge Morrow did not consider the conversation with APA Bickerstaff to be an *ex parte* communication. APA Bickerstaff's invitation for the critique was made in open court when defense counsel was present, as was Judge Morrow's response prior to descending from the bench. Their conversation took place in the midst of the courtroom where defense counsel or anyone else could have listened and even participated if they elected to do so. Further, the conversation is not viewed as "concerning a pending or impending proceeding."

b. Canon 2(B), which states that the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary.

ANSWER: Judge Morrow believed at the time that the statements made were professionally and judicially appropriate. They were made publically in the courtroom. No one reacted in a manner to suggest any concern, upset, offense, distress, or mistreatment. Certainly, APA Bickerstaff did not show even a hint of any such reaction.

If you believe this conversation did comply with these canons, please explain how it did so.

ANSWER: **Judge Morrow believed at the time that the statements made were professionally and judicially appropriate. They were made publically in the courtroom. No one reacted in a manner to suggest any concern, upset, offense, or distress. Certainly, APA Bickerstaff showed even a hint of any such reaction.**

22. During your conversation in chambers with APAs Ciaffone and Bickerstaff, and Mr. Noakes, did you say words to the effect that you regularly drive jurors and defendants to the courthouse?

ANSWER: **Judge Morrow recalls at one point referencing that he has driven people to the court for jury duty service. He recalls having done so for his wife, his kids, and neighbors over the years that he has been an attorney and while he has been a judge. He undoubtedly drove defendants to the courthouse when he was practicing law. He would not say he has given such rides "regularly" but, rather, as needed.**

23. During your tenure as a judge, have you ever driven jurors, who were assigned to a case in your courtroom, to court?

ANSWER: **No.**

If so:

a. About how many times have you done so?
b. When was the last time you did so?
c. What are the reasons you have done so?
d. Have you talked about the pending case with any jurors you have driven?
e. Have you talked about anything involving the criminal justice system with those jurors?
f. Did you reveal to the assistant prosecutor and defense counsel that you drove a juror to court, on each occasion that you did so?

g. Please provide the case names and case numbers for the cases in which you drove a juror to court.
h. Please explain whether driving jurors, in cases pending before you, to court complies with Canon 2(A), which requires that a judge avoid all impropriety and appearance of impropriety, and Canon 2(B), which requires a judge to promote public confidence in the integrity and impartiality of the judiciary. If you believe driving jurors to court does comply with these canons, please explain how it does so.

ANSWER: **N/A**

24. During your tenure as a judge, have you ever driven defendants, in cases pending before you, to court?

ANSWER: **No.**

If so:

a. About how many times have you done so?
b. When was the last time you did so?
c. What are the reasons you have done so?
d. Have you talked about the pending case with any defendants you have driven?
e. Have you talked about anything involving the criminal justice system with those defendants?
f. Did you reveal to the assistant prosecutor and defense counsel that you drove a defendant to court, on each occasion that you did so?
g. Please provide the case names and case numbers for the cases in which you drove a defendant to court.
h. Please explain whether driving defendants, in cases pending before you, to court complies with Canon 2(A), which requires that a judge avoid all impropriety and appearance of impropriety; Canon 2(B), which requires a judge to promote public confidence in the integrity and impartiality

of the judiciary; and Canon 3(A)(4), which forbids a judge to engage in ex parte communications. If you believe driving defendants to court does comply with these canons, please explain how it does so.

ANSWER: **N/A**

Very truly yours,

COLLINS EINHORN FARRELL PC

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_____

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Attachment Q

STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST

Complaint No. 102

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3rd Circuit Court
Detroit, Michigan

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DISCIPLINARY COUNSEL'S RESPONSE TO RESPONDENT'S OBJECTIONS TO THE MASTER'S REPORT

Disciplinary counsel answers respondent's objections to the Master's report below, in order of the significance of respondent's objections.

RESPONDENT'S BACKGROUND

Paragraph A of respondent's brief provides "Background on Judge Morrow." (R Brief at p 3) The paragraph is less impressive than may appear on the surface,

since it excludes evidence that is highly relevant to the sunny portrait it paints, and also excludes respondent's plentiful disciplinary history.

Respondent omits from this portrait the fact that he has exhibited a pattern of saying sexually inappropriate things to women. As noted in disciplinary counsel's brief in support of the Master's finding (DC Brief), in 2004 and 2005 the State Court Administrative Office (SCAO) and the Commission reprimanded respondent for, among other things, the inappropriate things he said to a woman. (DC Brief pp 1011) Respondent also omits the evidence that in 2019 he asked a modestly dressed female prosecutor the color of her armpit hair and shared with her his own practice of shaving his armpit hair; and that in 2018 he unnecessarily injected the concept of him having sex with another male in a bathroom stall, during a hearing with another female prosecutor.

Furthermore, respondent neglects his history of ex parte actions. As discussed on pages 13 and 20-22 of Disciplinary Counsel's Brief, the Supreme Court suspended him in 2014 for, among other things, having an ex parte encounter with a defendant, in public, during a trial. He leaves out that the Commission admonished him for his ex parte conduct in December 2018, merely six months before he had the ex parte conversation with Ms. Bickerstaff that is the subject of count one.

Respondent also leaves out the fact that the Supreme Court previously suspended him for eight acts of misconduct in eight separate cases. *In re Morrow*, 496 Mich 291 (2014).

In short, the full and fair picture of respondent's history is much less flattering than the picture he offered the Commission.

RESPONDENT'S SEXUALLY-BASED ANALOGIES FOR DIRECT EXAMINATION, SEXUALLY-BASED STATEMENTS IN CHAMBERS, AND OBSERVATIONS ABOUT WOMEN'S HEIGHT AND WEIGHT, WERE ALL MISCONDUCT

Respondent argues that it was not misconduct for him to compare a direct examination to a romantic relationship that leads to sex, during a private conversation with Ms. Bickerstaff. (R Brief at pp 11-15) He also argues that the words, analogies, and examples he used when talking with counsel in chambers were not misconduct. He notes that sex is a common metaphor in judicial writing and in bar journals, citing pieces that use words related to sex, such as "making love," "intercourse," "procedural foreplay," "foreplay," and "real sex." (*Id*. at pp 39-41)

What respondent overlooks is that there is a big difference between using those words in writings that are directed to the world at large, devoid of intimacy and the aura of judicial authority over the listener or reader, and doing what *he* did in the context in which *he* did it. While sitting very close to Ms. Bickerstaff, at the prosecution table, he had a face-to-face, intimate discussion during which he verbally

used analogies and words relating to sex, anticipating that his doing so would make her blush.

In chambers with Ms. Bickerstaff and Ms. Ciaffone, respondent was face-toface with them for about two hours, in circumstances in which they did not feel free to leave, during which he consistently used sexual analogies to make his points. He talked about Ms. Ciaffone's personal sexual biases and experiences, and joked with familiarity about the size of an alleged murderer's penis and the alleged murderer's apparently exaggerated belief in his sexual prowess. He used the words, "doggy style," "dick" or its functional and informal equivalents, and "fucked." The writings he cites did not concern any of these intimacies in these types of settings, and they do nothing to justify or minimize his words and actions with the women.

In the courtroom, respondent overtly eyed the bodies of both women, guessed their height and weight, and announced his intent to assess Ms. Bickerstaff's muscle mass. He did all of these things while he enjoyed a position of power over them. When his words are viewed in their actual context, not the alternative context through which he would like the Commission to view them, they were clearly misconduct.

Respondent seeks to isolate each statement he made to Ms. Bickerstaff and Ms. Ciaffone during the in-chambers discussion, and to argue that when viewed in isolation, none of the statements constitute misconduct. His statements cannot be viewed in isolation, because they were all part of one conversation. When viewed in

their totality, they violated the canons. That totality should be kept in mind as respondent's individual arguments are addressed below.

RESPONDENT'S USE OF THE WORD "FUCKED" IN THE CONTEXT IN WHICH HE USED IT IN CHAMBERS WAS MISCONDUCT

Respondent argues that the First Amendment protects his use of the word "fucked" in chambers. (R Brief at pp 41-43) The fallacy in respondent's argument is shown in part by the fact that it has no limits – it would extend First Amendment protection to every profanity a judge utters, under any circumstance. For the reasons stated below, the First Amendment does not go nearly so far. While it protects *some* public expressions of *every* vulgarity by any person, it does not follow that a judge is free to be as publicly profane as he likes while acting as a judge.

As Canon 2(A) makes clear, "A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." The standard for judges is not the limit of what the First Amendment protects for a member of the public. It is the requirements of dignity and respect and integrity required to uphold the honor and integrity of the judicial office. In the context in which respondent used his particular vulgarities, he was disrespectful and undignified, and he demeaned his judicial office. None of that activity is protected by the First Amendment.

Respondent cites no case to support his argument that he had a First Amendment right to use the language he did, even in violation of his ethical responsibilities. Disciplinary counsel are aware of no cases that provide that support. There appears to be no State of Michigan case that addresses the relationship between the First Amendment and judicial freedom to be profane.[1]

There are cases in other jurisdictions that make clear respondent does not have the First Amendment right to vulgarity that he seeks. For instance, the United States Supreme Court distinguishes between things a public employee says as a citizen, which get First Amendment protection, and those the employee says in his official capacity, which do not. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). *Garcetti* establishes that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 422.

Whether respondent was speaking as a public official or as a citizen is a question of law. *Omokehinde v. Detroit Bd. of Ed.*, 563 F.Supp.2d 717, 724 (E.D. Mich. 2008). The question is answered by looking to the content, audience, setting,

[1] There is a Michigan case in which a judge argued that a canon limiting campaign speech violated the First Amendment. The Michigan Supreme Court ultimately held that campaign speech deserves heightened protection, and Canon 7(B)(1)(d) could not prohibit the potentially misleading, but not literally false, statements a judge made during his election campaign. *In re Chmura*, 461 Mich 517, 532 (2000); *In re Chmura*, 464 Mich 58 (2001)(after remand).

and impetus for the employee's speech. *See Weisbarth v Geauga Park Dist.*, 499 F.3d. 538, at 545-46 (6th Cir. 2007); *Haynes v. City of Circleville*, 474 F.3d 357, 362 (6th Cir. 2008).

Respondent was speaking as a public employee when he made the statements that the Master found to be misconduct. He spoke about a case over which he was presiding. His audience was the attorneys who were trying that case in his courtroom. The setting for the speech was his courtroom and his judicial chambers. The impetus for his speech was ostensibly to teach and provide feedback to two inexperienced assistant prosecutors. The authority of his office commanded their presence. Accordingly, the First Amendment does not protect his profanity or vulgarity or disrespect.

Respondent inexplicably argues that the context of a criminal trial justifies his use of the word "fuck," because criminal proceedings involve difficult subjects and take place in high-stress, high-volume dockets in which judges and attorneys should not have to walk on eggshells. This argument does not survive scrutiny. A judge need not walk on eggshells to be respectful toward others. To the contrary, a judge should be aware of when he is being disrespectful. For most people, there is no need to step gingerly to avoid using words and power in a way that disrespects others. Rather, a little common courtesy suffices. Unfortunately, respondent did not extend common courtesy in this case.

To the extent respondent was uncertain about the boundaries of propriety, he was under the impression that the Commission might not approve of his use of the word "asshole," which is much less problematic than the words he used here. He said as much to the jurors in the *Matthews* trial. (DC Exh. 13, p 131/24-25) He is not facing difficulty here because his footsteps happened to be too firm for fragile eggshells. He is facing difficulty because he deliberately disregarded limits of which he was well aware.

RESPONDENT'S COMMENTS ABOUT DEFENDANT MATTHEWS'S TESTIMONY WERE MISCONDUCT

Respondent attempts to characterize his statement about the size of defendant Matthews's penis as an "offhand expression of skepticism" at the defendant's testimony. (R Brief at p 43) This benign characterization is belied by the evidence, which showed that:

- the alleged exaggeration with which respondent was concerned was solely about the size of the defendant's penis, not just the general tendency of defendant to exaggerate;
- it was respondent who introduced this particular alleged exaggeration into the conversation in chambers, apropos nothing counsel were otherwise discussing;
- he did not do so as an illustration of defendant's tendency to exaggerate in general, but only to mock this defendant for this exaggeration;

- respondent was laughing at what he believed to be the absurdity of Matthews's testimony as he did so;
- in sharing his amusement at this testimony, respondent was laughing at an alleged murderer's explanation for why his semen was found inside the murder victim;
- and he did so as one more gratuitous sexually charged reference in a conversation in which he made several other gratuitous sexually charged comments. (Ciaffone, 11-13-20 pp 64/24-65/10, 65/24-66/1)

Respondent denies that he used the word "dick" when referring to the defendant's penis. (R Brief at p 44) It does not matter whether he did or did not use that precise word. Every witness to this conversation heard him use that word or a functional, equally casual and disrespectful, equivalent (Ciaffone, 11-13-20, pp 65/6-11, 63/810; *cf.* Noakes, 11-24-20, pp 889/18-21, 906/13-17, 920/4-22). Ms. Ciaffone recalled that he laughingly said, "oh, so what—like, he's saying that, like, what he's working with, or something along those lines, was so big that it would cause a miscarriage?" (Ciaffone, 11-13-20, pp 62/24-63/3). Ms. Bickerstaff recalled that respondent laughingly said, "That guy must feel so good about himself," or something along those lines, "that his dick was big enough to, like, hurt her or hurt the baby. Like, he must feel so good about himself that he has such a big dick, like, yeah, right, my guy, or something like that" (Bickerstaff, 11-23-20, pp 401/18-402/2). When the missing

facts are included, respondent's comments were not the "offhand expressions of skepticism" about defendants' testimony that he claims, but were deliberate, unwarranted, and discourteous injections of sex into a conversation in which respondent held a position of authority over the listeners. They therefore constituted misconduct.

RESPONDENT'S INQUIRIES ABOUT THE PROSECUTORS' HEIGHT AND WEIGHT WERE MISCONDUCT

Respondent claims that asking Ms. Ciaffone and Ms. Bickerstaff about their height and weight was not misconduct, and merely admits that doing so "may be impolite." (R Brief at p 45) He accuses disciplinary counsel of attempting to "sexualize" his questions to the women. Even a casual review of the testimony shows that no one – not Ms. Ciaffone, or Ms. Bickerstaff, or disciplinary counsel – attempted to sexualize respondent's comments in any way. Rather, the testimony merely described, in purely objective terms, what respondent said and did (Ciaffone, 11-13-20, pp 70/4-71/22, 74/17-75/25; Bickerstaff, 11-23-20, pp 406/18-409/25; Tr. 12-15-20, pp 1261/23-1264/6). The Commission did not charge and disciplinary counsel did not argue that respondent behaved in a sexual manner with respect to this interaction.

Respondent also claims that the evidence that he "overtly eyed" the women's bodies should be rejected, because there is an "absence of evidence" to support the women's testimony that respondent "overtly eyed" them. (R Brief at p 46). This

argument ignores the actual evidence. Both women testified that they *saw* him look their bodies up and down. Ms. Ciaffone characterized what respondent did as the equivalent of "overtly eyeing" them (Ciaffone, 11-13-20, 350/18-25). This is the precise opposite of an "absence of evidence."

Respondent asks the Commission to disregard the women's direct testimony and instead to rely on character evidence from his two long-time friends. (R Brief p 45) Mr. Edison testified that he never saw respondent "overtly eyeing" anyone, and Mr. Fishman testified he has never seen respondent be "discourteous or disrespectful to anyone" (R Brief p 45) (Edison, 11-24-20, p 672/19-21; Fishman, 11-24-20, p 800/9-14). The contrast between the character witnesses' testimony and the way respondent actually treated the young female APAs is striking. Respondent cannot seriously argue that his tactics, analogies, choice of words, and conduct were in any way dignified or courteous. He cannot seriously suggest that it was an accident or inadvertence that this judge, so praised by his character witnesses for his decorum, chose the sexually charged words he did when speaking with two young women. And, of course, any consideration of this character evidence also has to take into account the uncontroverted evidence that respondent asked another female prosecutor the color of her armpit hair, and with still another, gratuitously asked her to speculate about him having sex in a bathroom with another male.

MATTER OF HOCKING **DOES NOT EXCUSE RESPONDENT'S**

CONDUCT

Respondent uses certain language from *In Matter of Hocking*, 451 Mich 1 (1996), to argue that his offensive words were not misconduct. (R Brief pp 36-44) The Master correctly did not adopt this argument. Respondent now argues that *Hocking* requires the Commission to excuse his offensiveness. He is mistaken.

Hocking involved a judge's statements *on the record*, at a contentious sentencing hearing of a male lawyer. The lawyer had been convicted of criminal sexual conduct for assaulting his female client. Judge Hocking departed below the sentence recommended by the sentencing guidelines. The misconduct complaint against him alleged, in part, that his reasons for the downward departure were blatantly improper and sexist, and in part alleged that his treatment of the female prosecutor was rude.[2]

The *only* similarities between the charges in *Hocking* and this case are two of the ethical rules that both respondent and Judge Hocking were charged with violating. Like respondent, Judge Hocking was accused of being rude and discourteous to one attorney, and he was accused of a persistent failure to treat two attorneys courteously.

[2] In a companion case, Judge Hocking was charged with treating another female attorney intemperately and abusively, and admitted to being rude and discourteous to her.

Critically, the facts of *Hocking* were substantially different than the facts in this case, and did not include any of what respondent did here:

- using inappropriately sexually graphic language in a close personal setting when it was the authority of respondent's office that created the setting;
- deliberately injecting sexual language into conversations that otherwise had nothing to do with sex; again, when it was the authority of respondent's office that created the setting;
- sexually mocking the defendant in a murder case; or
- improperly questioning female attorneys about their physical appearance.

Rather, Judge Hocking engaged in dated stereotypes about women inviting sexual abuse, and did so in the course of explaining his reason to depart from sentence guidelines during a public sentence hearing. Although the stereotypes exposed the judiciary to national ridicule, the Court concluded that the inept effort to explain his decision was not misconduct. The Court was moved by the need for a judge to have latitude to explain his reaction to the facts of a case. 451 Mich at 9-14.[3]

[3] Judge Hocking was also charged with misconduct for some sharp exchanges that he had with the attorneys in this case and another. The attorneys were female. In part because gender bias had not been charged, the Court rejected the suggestion that the mere fact that Judge Hocking's comments were directed at women demonstrated gender bias. As the Court noted, Judge Hocking would likely have made the same comments had the attorneys been male.

> It is difficult to imagine that respondent would have engaged in the same conversations with male attorneys, in the same intimate way, as those he had with Ms. Bickerstaff and Ms. Ciaffone. All of the evidence in the record is that he would *not* have done so.

Respondent was not in Judge Hocking's situation. He was not explaining his decision in the case for the record. Nothing Judge Hocking said to fulfill his duty to explain his sentence in this public proceeding was remotely similar to what respondent said to Ms. Bickerstaff, privately, and to Ms. Bickerstaff and Ms. Ciaffone in chambers. Likewise, Judge Hocking's remarks at the sentencing hearing did not address personal and private facts about the attorneys and did not involve Judge Hocking eyeing or discussing anyone's bodies.

While the Supreme Court found no misconduct in Judge Hocking's words, the Court made it clear that there are times when things a judge says *can* be misconduct, even when said in connection with a case: "A judge's comments are not immune from censure simply because they are based on facts adduced at trial or events occurring during trial." 451 Mich at 13. Respondent omits that from his analysis of *Hocking*. His attempts to justify his "teachings" because they were based on things that occurred during the trial do not insulate him from the consequences of having used those teachings as an opportunity to speak inappropriately or offensively or discourteously about sex.

Whether or not the Master considered Hocking, the Commission should reject respondent's argument that *Hocking* excuses his conduct.

MS. BICKERSTAFF'S CREDIBILITY

Paragraph M of respondent's brief is entitled "Bickerstaff's false allegation." (R Brief at p 22) Respondent unsuccessfully argued at the hearing that Ms. Bickerstaff was a "liar" and that none of her testimony should be believed. The Master rejected that argument and found Ms. Bickerstaff to be credible. Respondent asks the Commission to reject the Master's credibility determination, claiming that Ms. Bickerstaff "lied under oath" when she testified that she never told anyone that Judge Morrow had "hit on her." He further claims that she lied to disciplinary counsel by stating she had not seen the Wayne County Prosecutor's Office report regarding respondent's actions, before disciplinary counsel showed it to her. (Brief pp 22-23)

This is another example of the grossly overblown nature of respondent's defense. The first thing to stress about his claim is that whether or not Ms. Bickerstaff ever said that she thought that respondent was hitting on her has absolutely nothing to do with the charges in the complaint or the evidence that supports those charges. Indeed, respondent *admitted* virtually every fact that makes up those charges, which means that even if Ms. Bickerstaff were not credible, there would be no significant impact on the evidence of misconduct.

The second thing to stress about respondent's claim is that there is little support for it. It rests on two *possible* discrepancies between Ms. Bickerstaff's testimony and other evidence: 1) there is a claimed discrepancy between what she

told the investigators who prepared the report – Detective Kinney or Chief Bivens – about what she believed to be respondent's intent shortly after he used explicitly sexual language while sitting right next to her to discuss examining a witness, and what she recalls telling them; 2) there is a claimed discrepancy between what Ms. Bickerstaff told disciplinary counsel about having previously reviewed Chief Bivens's report and whether she had actually reviewed the report. Respondent uses these potential discrepancies, about matters that are quite collateral to his acts that gave rise to the complaint, to claim that Ms. Bickerstaff not only "lied" – that is, was deliberately untruthful – about these points, but that she is a "liar" generally.

The facts show the weakness of this claim. Although Chief Bivens's report records that Ms. Bickerstaff opined that respondent was hitting on her when he sat next to her in court, she has consistently denied that she ever provided this information to either Detective Kinney or Chief Bivens in the first place. In fact, she took an affirmative step to rebut the statement that was attributed to her, when disciplinary counsel sent her the relevant paragraph from Chief Bivens's report, by promptly informing disciplinary counsel that the report was mistaken (Bickerstaff, 11-23-20 pp 422/15-24, 424/14-22, 597/6-8, 598/16-22).

It does not matter, to the analysis of the charges against respondent, whether Ms. Bickerstaff really did, or really did not, initially believe that respondent's sexually intimate conversation with her was an attempt to hit on her, and said so

when she was speaking to her office's investigators. Respondent is not charged with "hitting on her," and Ms. Bickerstaff's opinion about his intent is irrelevant to whether or not respondent's actions were misconduct. Contrary to what is in Chief Bivens's report, though, she has consistently disavowed making the statement (*Id*. at pp 421/12-14, 422/l15-24).

It is a telling rebuttal of respondent's claim that Ms. Bickerstaff is a "liar" that, if she actually were a liar, she could have simply avoided bringing to disciplinary counsel's attention the discrepancy between her recollection and the report. Not addressing the discrepancy would have caused less trouble for her and more trouble for respondent. Precisely because she is an honest person, though, she did not take the easy route.

It is also worth noting that the evidence that Ms. Bickerstaff told one of the investigators that respondent was hitting on her is hardly conclusive. She denies that she did so. Detective Kinney testified she does not recall Ms. Bickerstaff telling her that (Kinney, 11-24-20 p 858/15-19). Although Chief Bivens believes she did, based on the available information there is no way to sort out whether he properly understood what Ms. Bickerstaff told him, or whether he added his own inference to her actual words, based on his own interpretation of the events. In other words, not only is there no evidence that Ms. Bickerstaff deliberately made a false statement, there is less-than-certain evidence that she even made the statement.

Continuing his loose use of the word "liar," respondent alleges that Ms. Bickerstaff "lied" to disciplinary counsel about whether she had read Chief Bivens's report before disciplinary counsel sent her a copy of the paragraph attributed to her that included the "hitting" allegation. At the time disciplinary counsel sent the paragraph there was some uncertainty whether Ms. Bickerstaff had previously seen it (Bickerstaff, 11-23-20 at pp 615/14-22, 616/6-13). Disciplinary counsel's notes reveal that Ms. Bickerstaff told her she had not reviewed the report before receiving it from counsel, but Ms. Bickerstaff's trial testimony was that she had. (*Id*. at p 421/18-21)

Respondent claims that this discrepancy shows that Ms. Bickerstaff is a liar. His attack on her credibility places too much reliance on the stipulation that is respondent's Exhibit M. That stipulation explains that although disciplinary counsel's notes reflect that Ms. Bickerstaff denied having previously seen the report during a telephone conversation, disciplinary counsel is "unable to ensure that Ms. Bickerstaff accurately understood her question [about having previously read Chief Bivens's report] and she accurately understood Ms. Bickerstaff's answer."

In respondent's eagerness to accuse Ms. Bickerstaff of deliberate deception, he ignores the obvious fact that no one has a perfect memory, as well as the equally obvious fact that Ms. Bickerstaff had no motive to make, or to conceal, either of the supposed false statements he attributes to her. If there is an actual discrepancy in Ms.

Bickerstaff's testimony – and it is not as clear there is as respondent assumes – the fact of a discrepancy does not mean Ms. Bickerstaff "lied" either to Chief Bivens or to disciplinary counsel. She could have had mere failures of memory on these collateral points. There could have been a failure of understanding between her and Chief Bivens, or between her and disciplinary counsel. It is also possible that she *did* have a negative sense of respondent's intent just after her conversation with him, but as time has passed she has concluded that she did not know his intent and simply does not recollect that she once felt otherwise.

It is important to remember how truly collateral respondent's attack on Ms. Bickerstaff's credibility is. He admitted the relevant facts. His collateral attack hinges on whether she made a statement about an inference she drew regarding respondent's words to her – not on whether she made any inaccurate statement about what respondent actually said to her. Whether or not Ms. Bickerstaff ever drew the inference that respondent was hitting on her, or the people interviewing her merely thought she did, the confusion surrounding that question does not demonstrate that she ever had an intent to mislead anyone concerning what respondent did, as opposed to what he thought. It is hard to see how she could have intended to mislead as to his actual words, since he has admitted saying what Ms. Bickerstaff says he did. Any statement Ms. Bickerstaff made about his intent was an unimportant inference that

had no impact on the much broader investigation of his actual actions, stripped of any inference, that form the basis of the charges in the complaint.

Respondent finds it significant that Chief Bivens forwarded his memorandum containing Ms. Bickerstaff's "false" statement, that she believed respondent was "hitting on her," to Prosecutor Kym Worthy. That is also not significant. No matter the source of the error in the report, it had absolutely no impact on this case. The balance of the report accurately describes the misconduct that is the actual basis for the complaint against respondent. It was that actual misconduct that the Master found was established at the hearing. Ms. Bickerstaff should certainly have been more careful about correcting the mistaken statement in Chief Bivens's report, whenever she first became aware of it, but her failure to do that had no impact on any aspect of this case, and remains a molehill, not the mountain respondent would like it to be.

Respondent's challenge to Ms. Bickerstaff's credibility demonstrates that he is very quick to allege that a witness who offered evidence that is harmful to him is a "liar," despite the flimsiness of his claim. It is not hard to imagine the outrage he would be loudly expressing, if disciplinary counsel had alleged *he* had lied, and did so on the basis of facts as weak as these. The Master quite properly found that Ms. Bickerstaff was a credible witness.

RESPONDENT'S OTHER ARGUMENTS

Paragraphs B through G of respondent's objections relate to the *Matthews* criminal case and are irrelevant to the judicial disciplinary proceedings. (R Brief at pp 5-11) Accordingly, disciplinary counsel will not respond to them.

Paragraphs H through J recount the testimony given at the hearing about the facts that underlie counts one, two and three. (R Brief at pp 11-19) Disciplinary counsel agree with these paragraphs, except as follows:

- In Paragraph H, respondent wrote that "he was trying to minimize airing criticism in public" when he spoke privately with Ms. Bickerstaff in the courtroom. (R Brief p 12) This is in tension with his answer to the complaint, in which he claims anyone who wanted to be a part of the conversation could have been. (Exhibit 2, paragraph 8b) It is also in tension with his conduct throughout the trial, during which he did not hesitate to air his criticisms of counsel in public.
- In Paragraph H, respondent also wrote that "Judge Morrow sat at an appropriate distance from Bickerstaff" when he analogized direct examination to sex (R Brief at p 13) The word "appropriate" is conclusory. The evidence shows that he chose not to move his chair away from Ms. Bickerstaff and instead, sat with the arms of their chairs touching and their faces a foot to a foot and a half apart as he spoke intimately with her

(Bickerstaff, 11-23-20, p 386/2-4; p 387/18-20). Although the misconduct with which respondent is charged in count one does not hinge on his distance from Ms. Bickerstaff as he said inappropriate things to her, disciplinary counsel submit that under the circumstances – including the circumstance that the conversation occurred in the courtroom during a murder trial – respondent did not maintain an "appropriate" distance.

- In Paragraph H, respondent also wrote that Ms. Bickerstaff was unclear whether he was referring to her own sexual desires or whether he was referring to the sexual desires of people in general. Respondent now claims that he meant the question as a general one. (R Brief at p 14) The impropriety of this conversation does not hinge on whether respondent's question was focused on Ms. Bickerstaff or was more general, but disciplinary counsel note that there is no evidence to support respondent's interpretation, since he did not testify and did not provide that answer to the request for his comments, the 28-day letter, or to the complaint.

Paragraphs K and L of respondent's objections discuss what occurred when Ms. Bickerstaff and Ms. Ciaffone reported his conduct, and the investigation conducted by Chief Bivens and Detective Kinney. (R Brief at pp 19-22) Disciplinary counsel have no issue with the facts respondent presented. Disciplinary counsel also

take no issue with respondent's Paragraph N (Underlying Proceedings), and his recitation of the standard of review. (R Brief at pp 23-26)

Respondent argues that the Wayne County Prosecutor's Office has a "long history of animosity toward Judge Morrow." (R Brief at p 5) He cites testimony from a former assistant prosecutor and now defense attorney, Nicole James, that the office kept a "book" on Judge Morrow's supposed errors. Ms. James testified that she left the prosecutor's office in 2014, so if the prosecutor's office kept a "book" on Judge Morrow's supposed errors, it was at least five years before the allegations in this case arose. (James, 12-7-20, pp 1005/11) There was no evidence presented that the prosecutor's office kept a "book" on Judge Morrow after Ms. James' departure in 2014. Further, given the judicial misconduct charges for which the Michigan Supreme Court found respondent responsible and suspended him in 2014, it was prudent of the prosecutor's office to keep such a "book," and not in the least suggestive of bias.

In any event, the allegations in this case have nothing to do with any alleged animosity between the prosecutor's office and respondent. The relevant facts are nearly all undisputed. They are facts that *should* be reported to the Commission. Respondent's claim that the prosecutor's office was biased is an attempt to avert the Commission's scrutiny of those facts.

Respondent argues that Assistant Prosecutor Joseph Kurily observed the conversation between himself and Ms. Bickerstaff at the prosecution's table and saw nothing unusual in either respondent's or Ms. Bickerstaff's conduct. (Brief, pp 1415) He neglects to mention that Lt. Derrick Griffin, who, unlike Mr. Kurily, actually overheard some of the conversation, was troubled by what he heard. He was aware that the conversation was of a sexual nature. He heard respondent make sexual analogies, and describe a sex act as leading to a "crescendo." (Griffin, 11-24-20, p 751/9-11) He believed the discussion may have embarrassed Ms. Bickerstaff. (*Id*. at pp 751/20-21, 752/16) and believed it was inappropriate and unprofessional for respondent to talk that way in a courtroom. (*Id.* at pp 751/12-21, 752/16, 753/7-13) He did not interrupt respondent because he did not believe it was his place to do so; he did not feel he has authority over a judge in the judge's courtroom. (*Id*. at p 753/16-22) By writing only about Mr. Kurily's subjective and uninformed impressions but omitting Lt. Griffin's more objective testimony, respondent created a misleading picture of the evidence.

MICHIGAN'S JUDICIAL DISCIPLINE SYSTEM IS CONSTITUTIONAL

Respondent argues that Michigan's judicial discipline system is unconstitutional. He does so merely to preserve this issue. He acknowledges that the Commission cannot resolve it. He also acknowledges that the Michigan Supreme

Court has rejected it.[4] (R Brief at p 31) Disciplinary Counsel will not further address this argument.

THE MASTER HAD DISCRETION TO CONDUCT A REMOTE HEARING

Respondent objects to the Master's decision to conduct the proceedings virtually rather than in person. (R Brief pp 32-36) For the reasons stated below, the Master had the discretion to choose whether the hearing would be by remote video, and it was a proper exercise of that discretion to opt for a virtual hearing on the facts of this case.

The Michigan Supreme Court has authorized, and has even encouraged, courts to conduct virtual proceedings whenever possible, in order best to ensure the safety of all participants during the pandemic.[5] Notwithstanding this encouragement, respondent claims that MCR 9.231(B), which states that "[t]he master shall set a time and a place for the hearing ….," implies that the hearing must be at a *physical* "place." He objects that the Master denied his motion for an in-person hearing without providing a reason, although he admits it was "ostensibly" because of the pandemic.

[4] The Court rejected the argument in *In re Chrzanowski*, 465 Mich 468 (2001); *Matter of Del Rio*, 400 Mich. 665; (1977); and *Matter of Mikesell*, 396 Mich 517 (1976). The Court rejected it again when respondent raised it on an interlocutory basis in this case in October 2020. *Bruce Morrow, v Judicial Tenure Commission*, Order No. 162130 & (4), 10-30-20.

[5] https://courts.michigan.gov/NewsEvents/Documents/ReturntoFullCapacityGuide.

There are at least two problems with his claim. One is the obvious – nothing in the rule requires that the hearing be held in person, as opposed to virtually. The rule is silent about that distinction because it became effective before there was any need to hold judicial disciplinary hearings virtually. The rule's silence about the meaning of "place" in circumstances the rule could not have contemplated does not support respondent's belief that "place" must be singular and physical.

Also problematic, for respondent's interpretation, is that the rule was clearly not aimed at defining the "place" where a hearing is held. It merely empowers the Master to designate that time and place, without restriction. It is irrelevant to that grant of power whether the "place" is physical or virtual, and hence it is not reasonable to interpret the rule as restricting the Master's choice of place as respondent suggests.

Respondent argues that whether the hearing is virtual or physical has a significant impact on assessing witness credibility. (R Brief at p 35) He offers no evidence to support his belief. To the contrary, in fact, the video record of the hearing demonstrates that though it was virtual, it afforded ample ability to assess the witnesses' demeanor. The Master's conduct during the hearing and her well thought out assessment of Ms. Bickerstaff's credibility also show that proceeding virtually did not impair her assessment of witness credibility or negatively affect her ability to understand the witnesses. Had the Master been concerned about the efficacy of

proceeding virtually, she could have changed course at any time during the testimony of the twenty witnesses. She did not do so. Clearly, she believed she was able to assess credibility and understand the witnesses. She was clearly within her authority to hold the hearing remotely; especially when concerns about the health consequences of having an in-person hearing were so strong.

RACE PLAYED NO PART IN THIS CASE

Respondent argues that racist rhetoric has infected this case since the beginning. (R Brief at pp 2-3) With this argument, he is trying to inflame passions despite a complete absence of supporting evidence. Race was not even mentioned until the fourth day of the hearing, when *respondent's* counsel, Ms. Jacobs, asked *respondent's* witness, Nicole James, a question about the race of a *different* judge whose name had been mentioned in the hearing (James, 12-7-20, p 1016/16). Race did not "infect" anything.

Respondent's argument rests on his assertion that Ms. Bickerstaff claimed he "hit on her" during their conversation at the prosecutor's table. (R Brief at p 3) The fact that this is his evidence of "racist rhetoric" underscores how unfounded his claim is. First, Ms. Bickerstaff does not believe she made this statement. If someone understood her to make it, she has thoroughly disavowed it. More important, if she ever did harbor the belief that an older male judge who spoke to her intimately and inappropriately about sex was trying to hit on her, that belief would not be

unreasonable; and the race of the older male judge would be irrelevant to her having such a belief.

With respect to whether Ms. Bickerstaff's belief (if she ever had it) that respondent was trying to hit on her during the conversation at her table, that belief was no part of the Commission's charge or disciplinary counsel's case before the Master. It had nothing to do with Ms. Ciaffone's testimony. It had nothing to do with the facts that respondent himself has admitted.

It is telling that although respondent now makes this inflammatory claim about Ms. Bickerstaff's beliefs, during the hearing he never explored whether she had any prejudice, fear of Black men, or any other bias related to race that somehow affected her recall of the simple facts on which this case rests.

Respondent's claim is telling in another way. His defense rests on overblown and misstated allegations, and this overblown and misstated assertion is typical of his defense as a whole.

Respondent also claims that race infected the hearing because disciplinary counsel argued in closing argument that Mr. Noakes, defense counsel for Mr. Matthews, was "pompous" – an echo of the racist "uppity" label used to dismiss accomplished Black men." (R Brief at p 3) The word "pompous" is defined as: "affectedly and irritatingly grand, solemn, or self-important."[6] The video-recording

[6] https://www.merriam-webster.com/dictionary/pompous

of Mr. Noakes's testimony shows that he was, in fact, "pompous," without regard to his race.

THE APPROPRIATE SANCTION IS REMOVAL OR A LENGTHY SUSPENSION

Respondent argues that the *Brown* factors mitigate in favor of a light discipline, if *any* discipline is warranted. (R Brief at p 47) His unsupported analysis is simply wrong.

First, he claims there was no pattern or practice of misconduct. He argues that the prior incidents that disciplinary counsel cited were from 2004 and 2005, and the fifteen-year gap between them and the facts that gave rise to this case do not constitute a pattern. (R Brief at p 47) He does not address the two other incidents that occurred in 2018 and 2019, written about on pages 10-12 of Disciplinary Counsel's Brief. Nor does he discuss the fact that there were three incidents of misconduct in just over 24 hours involving Ms. Bickerstaff and Ms. Ciaffone. He ignores his 60-day suspension in 2014. His conclusion that there was no pattern or practice of misconduct is simply wrong.

Second, respondent summarily argues that all of the misconduct took place off the bench. (R Brief at p 47) Case law disagrees. As written about in Disciplinary Counsel's Brief on page 12, the Supreme Court considers conduct that occurs in the capacity of being a judge as "on the bench conduct." *In re Barglind*, 482 Mich 1202 (2008); *In re Susan R. Chrzanowski*, 465 Mich 468, 490 (2001).

As to *Brown* factors three and four, respondent argues that none of the alleged misconduct caused prejudice to any party and none of the alleged misconduct implicated "the actual administration of justice." (R Brief at p 47) Disciplinary counsel agree that respondent's conduct was not prejudicial to the actual administration of justice. However, one aspect of his misconduct created an appearance of impropriety. As disciplinary counsel wrote at pages 13 and 20-22 of its brief, and on page 2 above, respondent's private conversation with Ms. Bickerstaff, in open court, during a murder trial, created an appearance of impropriety. *Cf. In re Morrow*, 496 Mich 291, 299 (2014).

As to the fifth *Brown* factor, respondent summarily argues that "All of the comments were spontaneous." (R Brief p 47) To the contrary, as disciplinary counsel wrote on pages 13-17 of its brief, all of respondent's misconduct was premeditated. Disciplinary counsel incorporate that argument here.

Disciplinary counsel agree with respondent that his misconduct did not undermine the ability of the justice system to discover the truth. (R Brief at p 47)

Respondent claims that none of the alleged misconduct involved discrimination. (R Brief at pp 47-48) Disciplinary counsel disagree. As written about on pages 4-6 and 17-18 of Disciplinary Counsel's brief, his misconduct toward Ms. Bickerstaff and Ms. Ciaffone was unequal treatment on the basis of gender. Disciplinary counsel incorporate that argument here.

Respondent claims that all of the *Brown* factors show that his misconduct is on the "less severe" end of the spectrum, and that only minimal discipline, such as public censure, should be imposed. He provides a summary of prior cases and the discipline imposed, and argues that none of his misconduct is even close to the misconduct cited in those cases. He argues that *In re Gorcyca* is the closest analogue to his case and that like Judge Gorcyca, he should merely be publicly censured. (R Brief at p 50)

All but one of the cases respondent cites have absolutely nothing to do with sexual misconduct or sexually charged words or actions. As noted on pages 23-29 of Disciplinary Counsel's brief, there have been only two Michigan Supreme Court opinions with facts somewhat similar to this case, in that a judge engaged in sexual harassment alone, with no other accompanying misconduct. *In re Iddings*, 500 Mich 1026 (2017); *In re Honorable Steven R. Servaas*, 484 Mich 63 (2009). Respondent did not mention *Iddings*, and the omission is significant. Judge Iddings received a six-month suspension, despite expressing full remorse, working to correct his behavior, and having no negative discipline history.

Respondent also did not mention *In the Matter of Honorable Arvom Davis*, 432 Mich 1223 (1989), which, like this case, involved sexually inappropriate comments but did not involve false statements. Judge Davis, who, unlike respondent, had no prior discipline history, was removed by consent after the Commission

recommended his removal. While Judge Davis's words and actions were somewhat more pervasive and more extreme than respondent's, he had not been involved in judicial disciplinary proceedings before his removal, had not been warned about his prior behavior and educated about how to behave in the future, had not deliberately disregarded what he had been told, and had not reoffended in much the same way as he had been warned and educated against. It is also worth noting that Judge Davis was removed more than thirty years ago, when society was much less sensitive to the ways in which people in authority abused that authority in their interactions with women. Even as far back as 1989, the Commission recognized:

> Respondent's conduct has conclusively shown a lack of the requisite moral character and fitness. Due to the extreme gravity of his actions and the severe loss of respect he has caused, the Commission must recommend that sanction which most completely and finally protects all those who may be subject to the jurisdiction of his court.

(Decision and Recommendation For Order of Discipline, p 11)

The same rationale applies now, at a time in our history when there are so many women lawyers who have to practice law before male judges who have authority over them.

Pages 29-32 of Disciplinary Counsel's brief summarizes cases from other states that are also somewhat similar to this case. We will not restate that full argument here, other than to suggest that those cases are much more on point than are the cases cited by respondent, and they support removal or a lengthy suspension.

Comparing respondent's misconduct to that punished in the cases he cites is difficult, because his is not at all similar to any of the misconduct in those cases.[7] He argues that because his misconduct did not involve dishonesty, he should be minimally sanctioned, if at all. (R brief at p 50) While he was not found to have been dishonest, he affronted the judicial system in a different and equally bad way. He made it a point to speak offensively to women during a time when women are publicly speaking out about abuse in the workplace by male superiors who have power over them. He did so after having been warned by the SCAO and by the JTC about his inappropriate words to women with whom he worked. He had been counseled about what to avoid saying. In spite of all this, he intentionally ignored the counseling he received and imitated the misconduct he had been reprimanded for committing in the past. His conduct was different, but equally as bad as those judges who committed dishonest acts.

Contrary to the impression one might get from respondent's brief, judges in addition to Judge Davis, mentioned above, *have* been removed from office for misconduct that did not involve dishonesty, false statements, or misrepresentations.

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[7] The cases respondent cites in which the Supreme Court removed a judge for acts of misconduct include: perjury (*In re Adams*, 2013); misuse of public funds, misrepresentations during the disciplinary process, violation of antinepotism policy, (*In re James*, 2012); fixing tickets, making false statements under oath, (*In re Justin*, 2012); and making false statements after a drunk driving incident, (*In re Noecker*, 2005). The case he cites that resulted in a one year suspension involved assigning cases to an attorney with whom the judge was having an intimate relationship and failing to disclose that relationship, and making false statements to a detective (*In re Chrzanowki*, 2001). Respondent noted that the Court imposed a nine-month suspension on a judge who interfered with an investigation and prosecution, and made an intentional misrepresentation about the purpose of text messages (*In re Simpson*, 2017). Respondent also noted that a judge who was convicted of driving while intoxicated received a ninety-day suspension (*In re Nebel*, 2010) (R Brief at pp 48, 49)

In *In Matter of Bert M. Heideman*, 387 Mich 630 (1972), the Supreme Court removed a judge for failing to order jury trials upon request; failing promptly to move cases through the court system; and failing to keep accurate records of proceedings. In I*n re Hon. James McCauley*, 441 Mich 590 (1993), the Court removed a judge for abuse of contempt power, unprofessional relationships and hostile attitude with employees, willful neglect of his docket, and refusal to respond to SCAO inquiries.

Respondent's objections note two cases in which a judge was suspended for 60 days, one of which involved respondent.[8] He also notes a case in which a judge was suspended for 30 days[9] and another in which a judge was suspended for 14 days.[10] Respondent's misconduct, considered together with his history, is more serious than was the misconduct in each of those cases.

More importantly, respondent's brief does not mention two cases in which the Supreme Court imposed six-month suspensions for actions that are more on par with what respondent did. In *In re the Honorable Thomas S. Gilbert*, 469 Mich 1224 (2004), the Supreme Court imposed six month suspension because a judge smoked

[8] The cases respondent cites in which a judge was suspended for 60 days are his own 2014 case and *In re Hathaway 464 Mich 672* (2001), in which Judge Hathaway conducted an arraignment without the prosecutor, threatened to jail the defendant if he did not waive his right to a jury trial, and engaged in a pattern of untimeliness and adjournments.

[9] The case respondent cites in which a judge was suspended for 30 days is *In re Post, 493 Mich 974* (2013), in which Judge Post refused to allow a witness to invoke the Fifth Amendment and jailed an attorney who counseled his client to remain silent.

[10] The case respondent cites in which a judge was suspended for 14 days is *In re Halloran,486 Mich 1054* (2010), in which a judge was dishonest in managing the courtroom and reporting to the State Court Administrator's Office.

marijuana at a concert and admitted that he had used marijuana two times a year, including after becoming a judge. In *In re Honorable Warfield Moore*, 464 Mich 98 (2001), the Court imposed a six month suspension on a judge who had previously been sanctioned, for using a controversial tone, for being impatient and discourteous when addressing people in the courtroom, and for persistent interference and frequent interruption during trial.[11]

Respondent's argument is essentially that his misconduct is less serious or equal to that of judges who have only been censured. Those cases include a judge who texted a shirtless photo of himself (*In re McCree*, 493 Mich 873 (2012); being discourteous to children (*In re Gorcyca, 500 Mich 1203* (2017)); sending a defamatory letter (*In re Fortinberry, 474 Mich 1203* (2006)); accepting football tickets in court when it was clear that no bribe was involved (*In re Haley, 476 Mich 180* (2006)); having an 18-month delay between arraignment and trial (*In re Moore, 472 Mich 1207* (2005)); and arranging for release on bond for another elected official (*In re Logan, 486 Mich 1050* (2010)). While it is difficult to compare respondent's misconduct with those that have resulted in censure, disciplinary counsel suggest that his was much more serious. That is especially true in light of the facts that he had been reprimanded by the SCAO and the JTC for his prior behavior, he had been educated about how to

[11] The judge had previously been censured in *In re Honorable Warfield Moore*, 449 Mich 1204 (1995).

behave in the future, and he deliberately chose to ignore the instructions given to him. None of that is true in any of the cases in which mere censure was imposed.

Respondent's sanction argument is perhaps more telling than he realizes. It makes clear that he still does not understand that he did anything wrong. He is willing to accept the bare minimum sanction in recognition of the Master's findings, but there is nothing in his brief that demonstrates any acknowledgment that he committed misconduct. In addition, his argument trivializes his actions through a classic, but badly outdated, "boys will be boys" defense.

Respondent overlooks one other very important distinction between his situation and that in most of the cases he cites. Not only does he have no remorse, he is also a repeat offender. He offended even after having been warned about his conduct. That puts him into a different, and far worse, category than that of most of the judges whose sanctions he cites.

CONCLUSION

Disciplinary counsel ask that the Commission reject every one of respondent's challenges to the Master's findings of fact and conclusions of law. We urge the Commission to recommend a sanction that either removes respondent or imposes a suspension significantly greater than the 60-day suspension that proved inadequate to control his misconduct in 2014. In that regard, disciplinary counsel note that

respondent's term expires on December 31, 2022, and he will be ineligible to run again. A suspension until December 31, 2022 is appropriate.

Respectfully submitted,

/s/ Lynn Helland

Lynn Helland (P32192) Disciplinary Counsel

/s/ Lora Weingarden

Lora Weingarden (P37970) Disciplinary Co-Counsel

Dated: March 30, 2021

Attachment R

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST

Hon. Bruce Morrow **FC 102**
3rd Circuit Court
Wayne County, MI
_____/

AMENDED COMPLAINT

The Judicial Tenure Commission ("Commission") has authorized this complaint against Honorable Bruce Morrow ("respondent"), judge of the Third Circuit Court, County of Wayne, State of Michigan, and directed that it be filed. This action is taken pursuant to Article 6, Section 30 of the Michigan Constitution of 1963, as amended, and MCR 9.200 *et seq*.

COUNT ONE
INAPPROPRIATE USE OF SEXUALLY GRAPHIC LANGUAGE

1. Respondent is, and since January 1993 has been, a judge of the Recorder's Court and Third Circuit Court, County of Wayne, State of Michigan.
2. As a judge, respondent has been, and still is, subject to the duties and responsibilities imposed on him by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.104 and 9.202.
3. On June 10 through June 13, 2019, respondent presided over a homicide jury trial, *People v James Edward Matthews*, case number 18-7023-01-FC.

4. Two female assistant prosecuting attorneys tried the case on behalf of Wayne County, and will be referred to herein as "APA A" and "APA B."
5. During a break in the proceedings on June 11, 2019, APA A asked respondent for feedback about her direct examination of the medical examiner.
6. Respondent told APA A he was going to come down from the bench to talk to her personally because what he was going to say to her would make her "blush."
7. Respondent came down from the bench and sat at the prosecutor's table next to APA A, who was seated in the middle of the table. The officer in charge was seated to APA A's left and respondent took the seat to her right.
8. Respondent positioned himself very close to APA A, with his head very close to her head.
9. Respondent asked APA A words to the effect of "so when a man and a woman are close, they start by holding hands, rubbing elbows, kissing, foreplay, then that leads to sex?"
10. Respondent asked APA A words to the effect of "would you want foreplay before or after sex?"
11. Respondent said to APA A words to the effect of "You want the foreplay before the sexual intercourse. That's what we call cuddling. No, you start with holding hands."

12. Respondent made an analogy for APA A to the effect "that the climax of sex is akin to getting the medical examiner to state the cause and manner of death after getting the details of his examination of the body."

13. Respondent told APA A words to the effect of "You start with all the information from the report, all the testimony crescendos to the cause and manner of death, which is the sex of the testimony."

14. Respondent told APA A words to the effect of "you want to tease the jury with the details of the examination."

15. Respondent told APA A words to the effect of "you want to lead them to the climax of the manner and cause of death."

16. Respondent's discussion with APA A caused her to feel "frozen" and afraid to move.

17. Respondent's conduct described in this count violated Michigan Code of Judicial Conduct:

    a. Canon 1, which requires that a judge should personally observe high standards of conduct;

    b. Canons 2(B) and 3(A)(14), which require that a judge treat every person with courtesy and respect;

    c. Canon 3(A)(3), which requires that a judge be dignified and courteous to lawyers.

COUNT TWO
INAPPROPRIATE USE OF SEXUALLY GRAPHIC LANGUAGE

18. Paragraphs one through sixteen are incorporated in this count.

19. On June 12, 2019, while the jury in *People v Matthews* was deliberating, respondent invited counsel for both sides to join him in chambers. Both assistant prosecutors and defense counsel joined respondent in chambers.

20. Respondent discussed with APA B her reasons for having presented evidence that the defendant's DNA was found in the deceased victim's vaginal swab.

21. Respondent disagreed with APA B's reasons for having presented that evidence, and said words to the effect of "all you did was show they fucked!"

22. Respondent made fun of the defendant's testimony that he and the deceased did not have sex the way they normally did because the deceased was pregnant and he did not want to hurt the baby and cause a miscarriage.

23. Respondent said words to the effect of "how big does this guy think he is?

24. Respondent said words to the effect of "does he think his dick is so big that he would hurt that baby?"

25. Respondent said words to the effect of "this guy must feel real good about himself to think his dick is that big."

26. During the in-chambers discussion, respondent criticized some of APA B's voir dire. During the critique respondent said to her words to the effect of "if I want to have sex with a woman on the first date, how would I figure that out? I

wouldn't ask her if she wants family or children or what she does, I would ask her 'have you had sex on a first date before?' Would you sleep with me on a first date?"

27. During the in-chambers discussion, in response to APA B's statement that defendant claimed he and the victim had "non-traditional" sex, respondent spoke with APA B about what her definition is of "non-traditional" sex. When APA B answered "not intercourse," respondent told her that her view was shaped by her own bias and that most people did not define "non-traditional" sex the way she does.

28. Respondent's conduct described in this count violated Michigan Code of Judicial Conduct:

    a. Canon 1, which requires that a judge should personally observe high standards of conduct;

    b. Canons 2(B) and 3(A)(14), which require that a judge treat every person with courtesy and respect;

    c. Canon 3(A)(3), which requires that a judge be dignified and courteous to lawyers.

COUNT THREE
VIOLATION OF CANONS 2(A), 2(B), 3(A)(3) & 3(A)(14) BY QUESTIONING FEMALE ATTORNEYS WHO APPEARED BEFORE HIM ABOUT THEIR PHYSICAL APPEARANCE

29. Paragraphs one through sixteen and nineteen through twenty-seven are incorporated in this count.

30. After the jury in *People v Matthews* was excused for the day on June 12, 2019, respondent approached the prosecutors' table and asked APA B how tall she was and how much she weighed.

31. After the jury was excused for the day on June 12, respondent asked APA A whether she weighed 115 pounds.

32. When APA A responded with respect to her weight, respondent said words to the effect of "Well, I haven't assessed your muscle mass yet."

33. While respondent was having this conversation with APAs A and B, he was overtly eyeing both of their bodies.

34. Respondent's conduct described in this count violated:

    a. MCR 9.202(B)(1)(D), which forbids treating a person discourteously because of the person's gender;

    b. Michigan Code of Judicial Conduct Canon 2(A), which states a judge must avoid all impropriety or appearance of impropriety;

    c. Michigan Code of Judicial Conduct Canons 2(B) and 3(A)(14), which require a judge to treat every person with courtesy and respect;

d. Michigan Code of Judicial Conduct Canon 3(A)(3), which requires a judge to be dignified and courteous to lawyers.

35. Respondent's conduct as described in Counts One through Three was a persistent failure to treat APAs A and B fairly and courteously, in violation of MCR 9.202(B)(1)(c).

Pursuant to MCR 9.230(B), an original verified answer to the foregoing complaint, and nine copies thereof, must be filed with the Commission within 14 days after service of the complaint upon respondent. Such answer must contain a full and fair disclosure of all facts and circumstances pertaining to the allegations. Willful concealment, misrepresentation, or failure to file an answer and disclosure are additional grounds for disciplinary action.

JUDICIAL TENURE COMMISSION
OF THE STATE OF MICHIGAN

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October 21, 2020

Attachment S

Attachment T

Attachment U

Attachment V

Attachment W

Attachment X

Attachment Y

Attachment Z