STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

DETERMINATION

JOHN D. COX,

a Justice of the LeRay Town Court, Jefferson County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

Gary W. Miles for Respondent

The respondent, John D. Cox, a justice of the LeRay Town Court, Jefferson County, was served with a Formal Written Complaint dated July 31, 2001, containing one charge. Respondent filed an answer dated August 30, 2001.

On October 30, 2002, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On November 8, 2002, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Justice of the LeRay Town Court since January 1, 1978. He is not a lawyer. He has attended and successfully completed all required training sessions for judges.

2. In People v. Lyle Hughes, in which the defendant had been convicted on December 9, 1998, of violating Sections 240.20 (Disorderly Conduct) and 240.26 (Harassment) of the Penal Law, both violations, and sentenced to pay a $300.00 fine, respondent re-sentenced the defendant to 15 days in jail on January 13, 1999, for failing to pay the $300.00 fine and surcharge, without advising him of his right to apply for a re-sentencing hearing in the event that he was unable to pay the fine and without holding such a hearing as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. The jail sentence imposed by respondent on January 13, 1999, was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction 13 months earlier. Respondent included in the revised sentence

the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. Prior to the re-sentencing proceeding, respondent had contacted the defendant and requested, without success, that he pay the unpaid fine. The defendant had been represented by counsel during earlier stages of the proceeding but respondent took no steps to notify the defendant's counsel of the re-sentencing proceeding as required by Section 170.10(3) of the Criminal Procedure Law, which entitled the defendant to counsel. The defendant paid the $300.00 fine at the jail immediately after being re-sentenced and was released on the same day.

3. In People v. Lynn Makowecki, in which the defendant had been convicted on November 4, 1998, of violating Section 1192.1 of the Vehicle and Traffic Law (Driving While Ability Impaired, a violation), and sentenced to pay a $200.00 fine, respondent re-sentenced the defendant to 30 days in jail on January 18, 1999, for failing to pay the $200.00 fine and surcharge, without advising the defendant of her right to apply for a re-sentencing hearing in the event that she was unable to pay the fine and without holding such a hearing as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. The sentence imposed by respondent on January 18, 1999, was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction 14 months earlier. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. Respondent had contacted the

defendant prior to the re-sentencing proceeding and requested, without success, that she pay the unpaid fine. The defendant had been represented by counsel during earlier stages in the proceeding, but respondent took no steps to notify the defendant's counsel of the re-sentencing proceeding as required by Section 170.10(3) of the Criminal Procedure Law, which entitled the defendant to counsel. The defendant paid the $200.00 fine at the jail immediately after the re-sentencing and was released the same day.

4. In People v. Brently Knaus, in which the defendant had been convicted on March 10, 1997, of violating Section 240.26 (Harassment) of the Penal Law and sentenced to pay a $200.00 fine, respondent re-sentenced the defendant to 15 days in jail on July 6, 1999, for failing to pay the $200.00 fine and surcharge without advising him of his right to apply for a re-sentencing hearing in the event that he was unable to pay the fine and without holding such a hearing as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. The sentence imposed by respondent on July 6, 1999, was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction, more than 26 months earlier. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. Respondent had contacted the defendant prior to the re-sentencing and requested, without success, that he pay the unpaid fine. The defendant had been represented by

counsel during earlier stages in the proceedings, but respondent took no steps to notify the defendant's counsel of the re-sentencing proceeding as required by Section 170.10(3) of the Criminal Procedure Law, which entitled the defendant to counsel. The defendant paid the $200.00 fine at the jail immediately after being re-sentenced and was released on the same day.

5. In People v. Ronald Katz, in which the defendant was convicted on June 18, 1997, of violating Sections 1192.1 (Driving While Ability Impaired) and 1102 (Failure To Obey A Police Officer) of the Vehicle and Traffic Law, both violations, respondent re-sentenced the defendant to jail on September 8, 1999, for failing to pay a $400.00 fine and surcharge, without advising the defendant of his right to apply for a re-sentencing hearing in the event that he was unable to pay the fine and without holding such a hearing as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. The sentence imposed by respondent was statutorily authorized and commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. Respondent had contacted the defendant prior to the re-sentencing and requested, without success, that he pay the unpaid fine. The defendant had been represented by counsel during earlier stages in the proceeding, but respondent did not notify the defendant's attorney about the re-sentencing proceeding

as required by Section 170.10(3) of the Criminal Procedure Law, which entitled the defendant to counsel. The defendant paid the $400.00 fine at the jail immediately after the re-sentencing and was released the same day.

6. On or about April 14, 1999, Dale Snyder was convicted of Attempted Endangerment Of A Child, Third Degree, a misdemeanor, and sentenced by respondent to pay a fine and surcharge totaling $595.00. In May 1999 Mr. Snyder wrote to respondent advising him that he was financially incapable of paying the fine and surcharge. Respondent extended the period in which the defendant was required to pay the fine until August 25, 1999, but the defendant paid no portion of the fine and surcharge. On September 22, 1999, the defendant was brought before respondent on a bench warrant and respondent re-sentenced him to 89 days in jail, a sentence that was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction five months earlier. Respondent re-sentenced the defendant to jail without advising him of his right to apply for a re-sentencing hearing in the event that he was financially unable to pay the fine and without holding such a hearing, as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. The defendant had been represented by counsel during earlier stages of the proceedings. Respondent took no steps to notify counsel about the re-sentencing proceeding as required by Section

170.10(3) of the Criminal Procedure Law, which entitled the defendant to counsel. The defendant served 59 days in jail.

7. On or about January 11, 1999, Richard A. Welsh was convicted of two counts of Issuing A Bad Check and sentenced by respondent to pay a fine and restitution totaling $422.77. The defendant failed to pay the fine and restitution and was brought before respondent on a bench warrant on September 24, 1999. The defendant was at that time in jail in connection with an unrelated felony matter pending in County Court. The defendant advised respondent that he was financially incapable of paying the fine and restitution, and respondent re-sentenced him to 89 days in jail, a sentence that was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction eight months earlier. Respondent re-sentenced the defendant to jail without advising him of his right to apply for a re-sentencing hearing in the event that he was financially unable to pay the fine and without holding such a hearing, as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and restitution. The defendant served the 89 days in jail in connection with the re-sentencing concurrent with the time he was being held in custody in connection with the felony matter. The defendant was being represented by counsel in connection with the felony matter. The defendant's counsel was notified by the police of the

defendant's arrest on the bench warrant and arrived in court after the re-sentencing had been completed.

8. On or about February 8, 1999, Vicky A. Brow was convicted of Criminal Use Of A Device and sentenced by respondent to pay a fine and restitution totaling $500.00. The defendant had waived her right to counsel and was not represented during any part of the proceeding. In April 1999 the defendant advised respondent that she was financially incapable of paying the entire fine and restitution. Respondent established a payment schedule in which the defendant was to pay $100.00 toward the fine in April and May 1999 and required to make bi-weekly payments of $50 to $75 toward restitution beginning on May 28, 1999. The defendant paid $40.00 on May 3, 1999, but made no further payments despite repeated requests by respondent. The defendant was brought before respondent on a bench warrant on January 3, 2000, and re-sentenced to 89 days in jail, a sentence that was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction, nearly eleven months earlier. Respondent re-sentenced the defendant to jail without advising her of her right to apply for a re-sentencing hearing in the event that she was financially unable to pay the fine and without holding such a hearing, as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and restitution. The defendant spent 55

days in jail in connection with the re-sentencing.

9. On December 14, 1998, Jamal Phillipus was convicted of Speeding and sentenced to pay a fine and surcharge totaling $130.00. The defendant waived his right to counsel and was not represented by counsel during any part of the proceeding. The defendant did not pay the fine and surcharge, and respondent issued an order on March 30, 1999, directing the Commissioner of Motor Vehicles to suspend the defendant's driver's license. The defendant did not thereafter respond to the license suspension order. On February 29, 2000, the defendant appeared before respondent in connection with an unrelated felony charge and was committed to jail in lieu of bail. Respondent also re-sentenced the defendant to 15 days in jail in connection with his failure to pay the $130.00 fine and surcharge. The re-sentence imposed by respondent was commensurate with the sentence that respondent could have imposed at the time of the defendant's conviction, more than one year earlier. Respondent re-sentenced the defendant to jail without advising him of his right to apply for a re-sentencing hearing in the event that he was financially unable to pay the fine and without holding such a hearing, as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. Respondent included in the revised sentence the provision that the defendant be released from jail immediately upon payment of the fine and surcharge. The defendant served nine days in jail in connection with the re-sentencing concurrent within the time that he continued to be held in custody in

connection with the felony matter.

10. As set forth in Schedule A, between November 24, 1998, and April 17, 2000, in four criminal cases involving misdemeanors and violations, in which the defendants did not pay the fines and surcharges imposed by respondent after conviction, respondent re-sentenced the defendants to jail without advising the defendants of their right to apply for a re-sentencing hearing in the event that they were unable to pay the fine, and without holding such a hearing as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. Each sentence was commensurate with the sentence that respondent could have imposed at the time of the defendants' convictions. Respondent included in each revised sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. In each case, respondent had contacted the defendant prior to re-sentencing and requested, without success, payment of the unpaid fine. Each of these defendants had waived the right to counsel and was not represented by counsel at any stage of the proceeding. Two of the defendants were released from jail on the day that they were re-sentenced after paying their fines and surcharges at the jail. Two of the defendants paid their fines and surcharge the day after they were re-sentenced and were released from jail.

11. As set forth in Schedule B, in six Vehicle and Traffic and Environmental Conservation cases between January 9, 1999, and February 8, 2000, in

which the defendants did not pay the fines and surcharges imposed by respondent after conviction, respondent re-sentenced the defendants to jail without advising the defendants of their right to apply for a re-sentencing hearing in the event they were unable to pay the fine, and without holding such a hearing, as required by Sections 420.10(3) and (5) of the Criminal Procedure Law. Each sentence was commensurate with the sentence that respondent could have imposed at the time of the defendants' convictions. Respondent included in each re-sentence the provision that the defendant be released from jail immediately upon payment of the unpaid fine and surcharge. In each case, respondent had contacted the defendant prior to re-sentencing and requested, without success, that the defendant pay the unpaid fine. Each of these defendants waived the right to counsel and was not represented during any stage in the proceeding. George Buckner, who had been convicted of Driving While Ability Impaired, a violation, was incarcerated for two days before he paid his $460.00 fine and surcharge and was released from jail. Jamie Hartwell, who had been convicted of Driving While Intoxicated, a misdemeanor, was incarcerated for six days before he paid his $673.00 fine and surcharge and was released from jail. Marvin Hayes, who had been convicted of Aggravated Unlicensed Operation, Third Degree, a misdemeanor, and Speeding, was incarcerated for nine days before he paid his $320.00 fine and surcharge and was released from jail. The other three defendants (Washington, Anderson and Isaac) paid their outstanding fines and surcharges at the jail on the day they were re-sentenced and

were released.

12. In none of the cases in which the defendants had been previously represented by counsel did the defendants request counsel in connection with their re-sentencing.

13. At the time respondent re-sentenced the above defendants to jail, he was unaware of Section 420.10 of the Criminal Procedure Law. Respondent, a non-lawyer, had not been instructed about the provisions of Section 420.10 of the Criminal Procedure Law during his attendance at the annual judicial training classes. As a consequence of these proceedings, respondent has taken affirmative action to include this subject in the judicial training course curriculum.

14. Respondent was also unaware that those defendants who had been represented by counsel in connection with the underlying convictions were entitled to have counsel present at the re-sentencing proceeding pursuant to Criminal Procedure Law Section 170.10(3). Since learning in April 2000 of the requirements of this statute, respondent has regularly advised defendants of their right to a hearing prior to re-sentencing and has held such a hearing when requested. He has also advised such defendants of their right to counsel at the re-sentencing and does not proceed if a defendant, who had previously been represented by counsel, appears without counsel.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1) and

100.3(B)(6) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By re-sentencing defendants to jail who did not pay the fines imposed by respondent while failing to hold a re-sentencing hearing or to advise the defendants of their right to apply for such a hearing, respondent failed to "be faithful to the law" and failed to provide the defendants with a full opportunity to be heard according to law, as required by Sections 100.3(B)(1) and 100.3(B)(6) of the Rules Governing Judicial Conduct. The Criminal Procedure Law provides that when a defendant can be imprisoned for failure to pay a fine, the judge must advise the defendant of the right to apply for re-sentencing and that, after re-sentencing, if the defendant is unable to pay the fine, the court must either adjust the terms of payment or lower the amount of the fine or revoke the sentence (CPL §420.10[3], [5]). As a result of respondent's failure to comply with statutory procedures, some defendants were summarily incarcerated for lengthy periods in violation of their rights, even after they had informed respondent that they were financially incapable of paying the fines he had imposed.

Every judge, lawyer or non-lawyer, is required to be competent in the law and to insure that all those with a legal interest in a proceeding have a full opportunity to be heard according to law. Sections 100.2(A) and 100.3(B)(1) of the Rules; *Matter of Curcio*, 1984 Ann Rep 80 (Commn on Jud Conduct, March 1, 1983). As a judge since 1978, respondent should be familiar with basic statutory procedures.

In mitigation, respondent, a non-lawyer, had not been instructed about the requirements of Section 420.10 of the Criminal Procedure Law during his judicial training classes and was unaware of the provision. To be sure, every judge has a fundamental obligation to ensure that a defendant facing incarceration has been afforded the full panoply of statutory rights, and it is patently unjust to incarcerate a defendant who may simply be too poor to pay a fine. However, respondent's failure to comply with the particular requirements pertaining to resentencing procedures does not, in our view, constitute such an egregious violation of basic, fundamental rights that it casts doubt on his fitness to continue to serve as a judge. *Compare, Matter of McGee*, 59 NY2d 870 (1984). Respondent's attempts to get the defendants to pay the unpaid fines, in one case setting an extended payment schedule, suggest a sincere effort to obtain compliance without resorting to incarceration. Since learning in April 2000 of the requirements of this statute, respondent has regularly advised defendants of their rights as required and has held a hearing prior to resentencing when requested. Moreover, as a consequence of these proceedings, respondent has taken affirmative action to include this subject in the judicial training curriculum. We conclude that these mitigating factors, viewed in their totality, demonstrate that admonition, rather than a more severe sanction, is appropriate.

By reason of the foregoing, the Commission determines that the appropriate sanction is admonition.

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez,

Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Ms. Moore was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: December 30, 2002

Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct

SCHEDULE A

Defendant	Conviction	Date of Original Sentencing	Date of Re-sentence	Re-sentence/ Amount Owed	Date of Release
Ramona Kirklin	PL 190.05-1 (misd)	08/03/98	11/24/98	30 days/ $147	11/24/98
James Isaac	PL 190.05 (misd)	05/24/99	07/06/99	30 days/ $401	07/06/99
Kerri Phelps	PL 240.20 (viol)	07/08/98	01/23/00	15 days/ $300	01/24/00
Robert Concepcion	PL 190.05 (misd)	12/28/98	04/17/00	89 days/$200	04/18/00

SCHEDULE B

Defendant	Conviction	Date of Conviction	Date of Re-sentence	Re-sentence/ Amount Owed	Date of Release
George Buckner	VTL 1192.1 (viol) VTL 1110A (viol)	12/06/98	01/09/99	15 days/$460	01/11/99
Jamie Hartwell	VTL 1192.3 (misd) VTL 1180b (viol)	11/16/98	01/09/99	89 days/$673	01/15/99
Levi Washing-ton	VTL 509.1 (viol) VTL 375.2a3 (viol)	02/22/99	04/14/99	10 days/$85	04/14/99
Daniel Anderson	NYCRR-ENC 55.3b (viol)	12/07/98	04/22/99	10 days/$100	04/22/99
James Isaac	VTL 1192.1 (viol) VTL 1102 (viol)	04/14/99	07/06/99	30 days/$460	07/06/99
Marvin Hayes	VTL 511(1)(A) (misd) VTL 1180d (viol)	10/05/99	02/28/00	15 days/$320	03/08/00

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COMMISSION ON JUDICIAL CONDUCT

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Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

JOHN D. COX,

a Justice of the LeRay Town Court,
Jefferson County.

CONCURRING OPINION
BY JUDGE CIARDULLO,
WHICH MR. COFFEY
JOINS

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This Commission's publications state that it "does not act as an appellate court" and "does not review the judicial decisions or alleged errors of law." *E.g.*, 2002 Annual Report at p. 51. It is not easy, however, to distinguish between what constitutes judicial misconduct and what constitutes a mere error of law. Egregious violations of basic fundamental rights, such as failing to set bail in misdemeanor cases (*Matter of LaBelle*, 79 NY2d 350 [1992]) or convicting a defendant without a trial or plea *(Matter of Maxon*, 1986 Ann Rep 143 [Commn on Jud Conduct, Dec 12, 1985]); *Matter of Hise*, 2003 Ann Rep 143 [Commn on Jud Conduct, May 17, 2002]), are errors of law, but such failures also raise an issue of a judge's unfitness to perform his or her duties. Thus, these matters fall within the realm of misconduct. Likewise, errors of law that suggest either an intentional disregard of legal principles, bias, incompetence or insensitivity to the proper role of a judge also rise to the level of misconduct and, hence, require the Commission to act (*E.g., Matter of Reeves*, 63 NY2d 105, 110-11 [1984]).

Beyond these examples, however, it is not clear where the line should be drawn between "errors of law" and judicial misconduct. This case illustrates the point. From everything that appears in the record, respondent is a diligent and conscientious public servant. There is no suggestion that respondent acted out of malice or bias, or that he is incompetent to perform the duties of a judge. In all the cited cases, defendants were incarcerated for the same reason: they failed to pay fines and/or restitution imposed by the court after other attempts to gain compliance had been exhausted. In each case, respondent imposed a jail sentence without complying with the requirements of the Criminal Procedure Law sections 170.10(3), 420.10 (3) and (5).

Was respondent's ignorance of these complex statutory Criminal Procedure Law provisions an "egregious violation of basic fundamental rights"? Our judicial system permits non-lawyer justices, and newly-elected lay justices take the bench after having completed a course of five or six days of mandated training. They cannot be expected to learn in three weekends what law school teaches in three years. The State also requires that all town and village justices complete 12 hours of additional training per year but an overburdened Unified Court System can only provide limited training resources. Lay justices can receive assistance if they ask, but they cannot be expected to ask if they do not know that an issue of law has presented itself. One could persuasively argue that under such a system, lay justices cannot reasonably be expected to have mastered every statute, regulation or legal principle.

While I sympathize with respondent's mistakes, I join in the majority opinion for the reason that respondent's many years of experience on the bench should

have alerted him that these defendants could not be summarily incarcerated without affording them certain procedural rights. It should have been obvious to respondent that incarceration implicates a defendant's fundamental rights. In my view, respondent, at a minimum, had a duty to make full inquiry as to proper legal procedure prior to resorting to this ultimate sanction. Therefore, I concur in the majority opinion.

Dated: December 30, 2002

Frances A Ciardullo

Honorable Frances A. Ciardullo, Member
New York State
Commission on Judicial Conduct