STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

ROBERT G. DUNLOP,

a Justice of the Chazy Town Court,
Clinton County.

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THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cheryl L. Randall and Cathleen S. Cenci, Of Counsel) for the Commission

Stephen A. Johnston for Respondent

The respondent, Robert G. Dunlop, a Justice of the Chazy Town Court, Clinton County, was served with a Formal Written Complaint dated January 25, 2007, containing two charges. The charges alleged that in two cases respondent accepted a guilty plea and sentenced to jail an unrepresented defendant who was incapable of understanding the proceedings, without making a searching inquiry into whether the defendant's waiver of the right to counsel and the guilty plea were knowing and intelligent. Respondent filed a verified Answer dated March 20, 2007.

By Order dated May 29, 2007, the Commission designated David M. Garber, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on January 22 and 23, 2008, in Plattsburgh. The referee filed a report dated May 20, 2008.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Respondent's counsel waived oral argument. On September 18, 2008, the Commission heard oral argument by Commission counsel and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a Justice of the Chazy Town Court and has served in that capacity since January 1, 2005. Prior to that, he was a Justice of the Beekmantown Town Court from 1992 to 2000. Respondent is a retired New York State trooper. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On August 15, 2005, at approximately 4:20 A.M., U. S. Border Patrol agents found Jordan Marsh, age 19, lying in the middle of a road in the Town of Champlain. Mr. Marsh was in an intoxicated condition, having been drinking heavily over the previous two days.

3. When Mr. Marsh was 17 years old, he had been involved in an accident resulting in a traumatic brain injury, which left him somewhat cognitively impaired.[1]

4. Two State troopers were called to the scene. Trooper Ryan Fountain concluded that Mr. Marsh was intoxicated, based upon the smell of alcohol and Mr. Marsh's overall appearance. Trooper Eric L. Brown likewise concluded that Mr. Marsh was intoxicated based upon Mr. Marsh's "deer-in-the-headlights look."

5. The Border Patrol agents informed the troopers that they had found a marijuana pipe in Mr. Marsh's backpack. When Trooper Fountain attempted to search the backpack, Mr. Marsh ran away and threw his backpack into a river. Trooper Fountain chased Mr. Marsh, ultimately tackling him. While Trooper Fountain struggled with Mr. Marsh to handcuff him, Trooper Brown pepper-sprayed Mr. Marsh.

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[1] The referee, describing Mr. Marsh's testimony at the hearing, noted that the witness did not comprehend many questions asked of him, that his responses "were often not logical, relevant or coherent," that he "had extreme difficulty in expressing himself," and that he "testified in a halting, barely audible mumble which sometimes was unintelligible" (Referee's report, p. 5). Respondent testified that Mr. Marsh's demeanor and affect at the Commission hearing and at his arraignment on August 15, 2005, were "very similar" (Tr. 339).

6. Troopers Fountain and Brown transported Mr. Marsh to the New York State Police Chazy substation, where Trooper Fountain prepared Informations charging Mr. Marsh with Disorderly Conduct, a violation under Section 240.20 of the Penal Law, and Resisting Arrest, a misdemeanor under Section 205.30 of the Penal Law. In the Information charging Marsh with Disorderly Conduct, Trooper Fountain affirmed that "it was determined subject [Mr. Marsh] was intoxicated/ alcohol."

7. Troopers Fountain and Brown also prepared an Incident Report, which stated that Mr. Marsh "appears to be impaired with drugs" and that "US Border Patrol advised the subject [Mr. Marsh] is intoxicated and has a smoking pipe in his back pack."

8. In an Arrest Report, which Trooper Fountain executed after respondent had arraigned and sentenced Mr. Marsh, Trooper Fountain stated that Mr. Marsh "appears to be impaired with alcohol."

9. According to Trooper Fountain, neither of the Town Justices for the Town of Champlain or the adjoining Town of Mooers answered the troopers' telephone calls when they called them to arraign Mr. Marsh, so the troopers contacted respondent, who agreed to arraign Mr. Marsh.

10. Trooper Fountain transported Mr. Marsh to the Chazy Town Court for arraignment. Respondent arraigned Mr. Marsh at approximately 6:45 A.M.

11. Prior to the arraignment, Trooper Fountain provided respondent with the two Informations and Mr. Marsh's "rap sheet." Respondent reviewed the

Informations and was aware that Mr. Marsh had been found lying in the middle of a road, that Trooper Fountain had determined that Mr. Marsh was intoxicated when he was arrested, and that he had a marijuana pipe in his backpack. Respondent also was aware that the troopers had pepper-sprayed Mr. Marsh to subdue him.

12. At the arraignment, respondent informed Mr. Marsh of the charges, asked if he understood the charges and informed him of the maximum penalty that could be imposed. He also informed Mr. Marsh that he had a right to an attorney and that if he could not afford an attorney, respondent would appoint one for him. Mr. Marsh stated that he did not want an attorney.

13. Respondent inquired as to whether Mr. Marsh understood what it meant to proceed without the advice of legal counsel, and Mr. Marsh replied that he did. Respondent told Mr. Marsh that he would have a criminal record if he pled guilty. Respondent asked Mr. Marsh how he wanted to plead and Mr. Marsh stated that he was pleading guilty.

14. Respondent did not question Mr. Marsh about his alcohol consumption or mental competency, notwithstanding that (i) respondent had read the Information stating that Marsh had been found lying in the middle of a roadway and was intoxicated at the time of his arrest; (ii) Mr. Marsh, according to respondent, looked as if he "had been up all night" and had "partied into the wee hours"; and (iii) respondent suspected that Mr. Marsh had substance abuse problems.

15. After Mr. Marsh pled guilty, respondent asked him if he was

employed or attending school. Mr. Marsh responded that he was unemployed and was not attending school.

16. Respondent then sentenced Mr. Marsh to a term of 90 days of incarceration on the Resisting Arrest charge and to a term of 15 days on the Disorderly Conduct charge, to run concurrently.

17. Mr. Marsh served 60 days in the Clinton County Jail on the sentence imposed by respondent.

18. Respondent testified that he was aware of the requirements of Section 170.10 of the Criminal Procedure Law, which provides that at arraignment upon an Information a defendant has the right to counsel and to have counsel assigned if he or she cannot afford one and that the court must "take such affirmative action as is necessary to effectuate" the defendant's rights.

19. Respondent failed to conduct a searching inquiry to determine whether Mr. Marsh competently, intelligently and voluntarily waived his right to counsel and pled guilty, and he failed to take the affirmative action mandated by law to effectuate Mr. Marsh's rights.

20. Respondent's testimony that Mr. Marsh was not intoxicated at the arraignment, that he fully understood his rights and the charges against him and that he knowingly and intelligently waived his right to counsel and pled guilty is not credible.

As to Charge II of the Formal Written Complaint:

21. The charge is not sustained and therefore is dismissed.

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 ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established. Charge II is not sustained and therefore is dismissed.

Respondent deprived a young defendant of his due process rights and liberty when, in the absence of counsel and with good cause to believe that the defendant was intoxicated and incapable of understanding and asserting his rights, he accepted a guilty plea at the arraignment and sentenced the defendant to 90 days in jail. The record establishes that respondent failed to make any significant inquiry into whether the defendant was capable of entering a plea or appreciated the "dangers and disadvantages" of waiving the fundamental right to the assistance of counsel (*People v. Smith*, 92 NY2d 516, 520 [1998]). By flagrantly disregarding his obligations under well-established law, respondent engaged in misconduct and abused the power of his office.

At an arraignment upon an Information, a judge must not only advise a defendant of the right to counsel and to have counsel assigned if he or she cannot afford one, but must "take such affirmative action as is necessary to effectuate" the defendant's rights; the court may permit a defendant to proceed without an attorney only "if it is

satisfied that [the defendant] made such decision with knowledge of the significance thereof" (CPL §170.10[4][a], [6]). To determine whether a defendant has knowingly and intelligently waived this fundamental right, the court must "'undertake a sufficiently "searching inquiry"'" in order to be "'reasonably certain"' that a defendant appreciates the risks inherent in proceeding without an attorney (*People v. Smith, supra*, 92 NY2d at 520). While there is no rigid formula for such an inquiry, the record as a whole must reflect that the court has explored the relevant factors bearing on an intelligent and voluntary waiver of the right to counsel, including the defendant's age, education, occupation and previous exposure to legal procedures (*People v. Arroyo*, 98 NY2d 101, 104 [2002]; *People v. Smith, supra*; *People v. Providence*, 2 NY3d 579, 582 [2004]).

In the instant case, where the circumstances should have immediately raised serious questions as to the defendant's competence to proceed, respondent simply ignored the warning signs that the defendant was intoxicated and incapable of understanding and asserting his rights. In view of the Information stating that Marsh had been found lying on a road in an intoxicated condition about two hours earlier, and respondent's own testimony that he suspected that the defendant had substance abuse issues and that the defendant looked as if he "had been up all night" and had "partied into the wee hours," it should have been clear that the defendant was not competent to waive counsel and enter a plea.[2] As the Court of Appeals has stated, if a defendant is "not alert enough to

[2] Although there is no medical evidence in the record as to the defendant's cognitive impairment, the testimony of an attorney who represented Marsh in a contemporaneous proceeding in the Plattsburgh City Court as to the defendant's ability to understand the proceedings (Tr. 160-61)

understand the advice" as to his or her rights, the judge "must make sure the defendant *does* understand before proceeding, even – if necessary – briefly deferring the arraignment." *Matter of Bauer*, 3 NY3d 158, 160 (2004). Instead, after asking a few perfunctory questions, respondent accepted the defendant's guilty plea, in the absence of counsel, to charges of Disorderly Conduct and Resisting Arrest and sentenced the defendant to 90 days in jail. Respondent's testimony that he simply concluded, based on his expertise as a former trooper, that the defendant was not intoxicated is unpersuasive in view of convincing evidence to the contrary and the lack of any searching inquiry in the record into whether this vulnerable defendant was competent to proceed.

Although respondent, after accepting the plea, asked the defendant about his education and employment, this belated inquiry did nothing to protect the youthful defendant's rights. Significantly, the defendant's responses (that he was not attending school and was unemployed) did not trigger any concern about his competence to waive the right to counsel and to enter a guilty plea. To the contrary, those responses were apparently an aggravating factor in respondent's decision to impose a 90-day sentence, which was the maximum permitted without a presentence report (CPL §390.20). As respondent testified during the investigation apropos of Mr. Marsh: "[S]omebody just floundering around with no job or anything else, what good is it going to do to leave him out on the street...?" (Tr. 248).

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and the referee's observations as to Marsh's demeanor (Referee's report, pp. 5, 11) bolster the conclusion that respondent should have questioned the defendant's fitness to proceed without counsel.

Depriving a litigant of fundamental rights not only constitutes legal error, but may also constitute judicial misconduct. *See*, *Matter of Reeves*, 63 NY2d 105, 109-10 (1984); *see also*, *Matter of Feinberg*, 5 NY3d 206, 215 (2005) (legal error and misconduct "are not necessarily mutually exclusive"). In numerous cases the Court of Appeals and the Commission have held that a pattern of violating fundamental rights of litigants constitutes serious misconduct warranting removal from office. *E.g.*, *Matter of Bauer*, *supra*; *Matter of Reeves*, *supra*; *Matter of Sardino*, 58 NY2d 286 (1983); *Matter of McGee*, 59 NY2d 870 (1983); *Matter of Ellis*, 1983 Annual Report 107 (Comm on Judicial Conduct). Yet even a single instance of such behavior constitutes misconduct especially where, as here, there is an egregious violation of well-established legal principles, resulting in a proceeding that was patently lacking in fundamental fairness.

The conclusion is inescapable that respondent, an experienced jurist, willfully ignored the law and, thus, violated his duty to be faithful to the law (Rules, §100.3[B][1]).

By reason of the foregoing, the Commission determines that the appropriate disposition is censure.

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Peters and Judge Ruderman concur, except that Judge Klonick and Ms. Hubbard dissent as to Charge II and vote to sustain the charge, and Mr. Belluck, Mr. Emery and Mr. Harding dissent as to the sanction and vote that respondent be removed.

Ms. DiPirro and Judge Konviser were not present.

CERTIFICATION

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

Dated: October 28, 2008

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

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DISSENTING OPINION BY MR. EMERY, IN WHICH MR. BELLUCK AND MR. HARDING JOIN

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Respondent Dunlop cavalierly sent an unrepresented, almost certainly incompetent, defendant to prison for 90 days absent even a modicum of due process. He is being censured. Justice Laura D. Blackburne released an innocent defendant, whom police wanted to arrest in her courtroom. She was removed from the bench for frustrating law enforcement procedure. *Matter of Blackburne*, 7 NY3d 213 (2006). Because we should not be operating in parallel universes where good faith lapses of judgment in favor of liberty are punished more severely than similar lapses of judgment in favor of loss of liberty, I must dissent.

When the 19 year old defendant appeared before respondent for arraignment at 6:45 A.M. on August 15, 2005 after State troopers had called respondent an hour or so earlier to arrange the hastily convened court proceeding, what respondent knew was as follows: the defendant, two hours earlier, was found drunk lying in the

middle of the road; he had a marijuana pipe; he looked like a "deer in the headlights"; he appeared to have substance abuse problems; and the troopers had to pepper spray him to subdue him. Instead of letting this defendant dry out to collect his wits, respondent extracted a superficial "waiver" of his right to counsel and a guilty plea. By 7:00 A.M. this defendant was sentenced to 90 days in jail. He served two months.

A knowing and voluntary waiver of such profoundly important rights as the right to counsel and the right to a trial before conviction of a crime and the infliction of jail are fundamental to our system of justice and values. Respondent knew this, and he knowingly and intentionally ignored it. It was perfectly plain that when he extracted these waivers from this inebriated young man, the defendant had no idea what was going on. Why the rush? Why was it necessary to arraign the defendant, take a plea and impose a lengthy jail sentence, all within the space of a few minutes? The record does not clearly answer these questions, but the fact that respondent is a former State trooper and that the troopers who had arrested this defendant had a physical confrontation with him before they brought him before this judge might explain, in part, these hastily extracted waivers as well as the lengthy sentence he received. The record also suggests another explanation.

When asked what led him to impose a 90-day jail sentence on this defendant, the judge candidly acknowledged, "That was the maximum I could impose without a presentence investigation" (Tr. 247). He added: "[T]his will resolve the case and he does 60 days then, this particular fellow, it's not going to bother him to do 60 days

in jail in my opinion, you know?" Referring to "a bunch of crack heads in downtown Plattsburgh" who are "collecting welfare checks and...working part-time jobs for cash and buying their crack cocaine with that," the judge added: "So, somebody just floundering around with no job or anything else, what good is it going to do to leave him out on the street, you know?" (Tr. 248). Those comments strongly suggest that the judge acted out of bias, rather than based on a good faith determination that the defendant competently waived his rights. Viewed in that light, the judge's admitted eagerness to "resolve the case" without counsel or a presentence report, at the cost of sending the defendant to jail without careful scrutiny, is particularly suspect, and the judge's rationale that, based on his brief appraisal, "it's not going to bother [the defendant] to do 60 days in jail" provides a troubling undercurrent for the judge's actions. The conclusion is inescapable that the judge did not wish to be obstructed by either counsel or a presentence report before he sentenced this defendant to jail.

It is this type of impulsivity in abusing power that the Commission sanctioned in *Blackburne* and other cases involving a single instance of misconduct that resulted in removal. *See, e.g.*, *Matter of Ellis*, 2008 Annual Report 123 (Comm on Judicial Conduct) (ordered eviction without due process and used religious slur); *Matter of Brownell*, 2005 Annual Report 129 (Comm on Judicial Conduct) (awarded a judgment with no lawful basis, then issued court check to pay the judgment); *Matter of Levine*, 74 NY2d 294 (1989) (made *ex parte* promise to political leader to adjourn a case); *Matter of Molnar*, 1989 Annual Report 115 (Comm on Judicial Conduct) (solicited sexual favor

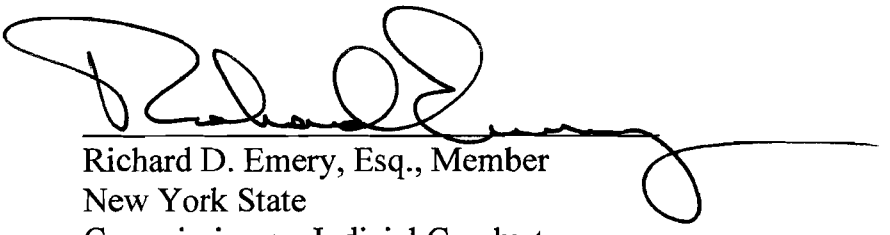
from a defendant); *Matter of Reedy*, 64 NY2d 299 (1985) (attempted to fix son's ticket).

By contrast, Justice Blackburne's good faith was far clearer than respondent's, notwithstanding that her conduct was impulsive and lacked judgment. She supervised a drug treatment court that attempted to wean addicts by giving them an opportunity to avoid convictions on pending charges if they successfully completed treatment and regularly reported to her court. On one such reporting day a police officer, who suspected that a defendant who was a participant in the program had committed an unrelated crime, came to the court to arrest him. Once Justice Blackburne understood what the officer wanted, she reacted angrily, refusing to allow the arrest in her court, and arranged for the defendant to elude the police by leaving through a back door. The suspect was arrested the next day and turned out to be innocent. Notwithstanding that Justice Blackburne quickly acknowledged that she had made a serious mistake, the Commission removed her. I dissented. *See Matter of Blackburne*, 2006 Annual Report 103. The Court of Appeals affirmed the Commission (*supra*, 7 NY3d 213).

In my universe, what's good for the goose is good for the gander. Respondent's lawless and reactive abuse of power was at least as profoundly aberrant as Justice Blackburne's and had more severe consequences. A young man spent 60 days in jail absent due process in this case. By contrast, no one suffered, other than from a one day shock of public outrage, from Justice Blackburne's misconduct. To me, punishing an individual absent due process is far worse than setting free a suspect absent due process. Consequences mean something. Appearances, though extremely important, should not

drive our decisions. Here, I am afraid an incident of extremely serious abuse of power with profound consequences to its victim is being implicitly tolerated by too much leniency. Respondent should be removed because he is unfit to serve as a judge. Therefore, I dissent.

Dated: October 28, 2008



Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct