

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

WALTER W. HAFNER, JR.,

A Judge of the County Court,
Oswego County.

AGREED
STATEMENT OF FACTS

Subject to the approval of the Commission on Judicial Conduct

("Commission"):

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission, and Honorable Walter W. Hafner, Jr. ("Respondent"), who is represented in this proceeding by Gerald Stern, Esq., that further proceedings are waived and that the Commission shall make its determination upon the following facts, which shall constitute the entire record in lieu of a hearing.

1. Respondent was admitted to the practice of law in New York in 1978. He has been a Judge of the County Court, Oswego County, since January 1, 1999.

Respondent's current term expires on December 31, 2018.

2. Respondent was served with a Formal Written Complaint dated November 18, 2013, a copy of which is appended as Exhibit 1. He filed an Answer dated January 3, 2014, a copy of which is appended as Exhibit 2.

3. Respondent was served with a Second Formal Written Complaint dated May 27, 2015, a copy of which is appended as Exhibit 3. He filed an Answer dated June 18, 2015, a copy of which is appended as Exhibit 4.

As to Charge I

4. On November 15, 2010, while presiding over *People v Steven M. Swank*, Respondent failed to be patient, dignified and courteous when he made condescending and inappropriate remarks about a teenage sexual assault victim during a plea discussion while the jury was deliberating.

As to the Specifications to Charge I

5. Steven M. Swank was indicted on April 15, 2010, on one count of rape in the second degree (Penal Law §130.30[1]), two counts of criminal sexual act in the second degree (Penal Law §130.45[1]), and one count of unlawfully dealing with a child in the first degree (Penal Law §260.20[2]). From November 9, 2010, to November 16, 2010, Respondent presided over a jury trial in *People v Steven M. Swank*.

6. At trial, evidence was offered that the defendant, Mr. Swank, who was about 30 years of age, had provided alcohol to a 14-year-old girl and then engaged in sexual intercourse and oral sexual conduct with her. The defendant, who had no criminal record, denied having sex with the girl, and there was no eyewitness testimony or DNA evidence presented confirming the girl's testimony that she and the defendant had sex. The incident was not reported to law enforcement for more than seven months after it occurred. At the time of Mr. Swank's trial, about two years after the incident, the girl had given birth to a child fathered by a different man.

7. Respondent avers, and the Administrator has no information to the contrary, that from the beginning of the trial to the jury deliberations, Respondent's judicial actions were consistent with his duties and he showed no favoritism to either side.

8. On November 15, 2010, the jury was in its second day of deliberations. In the courtroom, outside of the jury's presence, Respondent, the defense counsel and the prosecutor discussed the possibility that the jury may be deadlocked, based in part on a note from one juror stating that she was troubled about her participation in the deliberations. After that juror appeared before Respondent and counsel to express and be questioned about her concerns, the juror returned to deliberate with the other jurors.

9. While the jurors continued to deliberate, Respondent initiated a discussion with counsel regarding a possible plea disposition of the case. Respondent suggested a plea to the class A misdemeanor of endangering the welfare of a child, which would not require the defendant to register as a sex offender. That suggestion was based on Respondent's understanding that the defendant refused to plead guilty to any charge that would compel him to register as a sex offender. Assistant District Attorney Gregory S. Oakes replied that he would consider a plea to two other class A misdemeanors – sexual misconduct and unlawfully dealing with a child – and that sexual misconduct would require Mr. Swank to register as a sex offender. Respondent asked Mr. Swank's attorney, David E. Russell, whether his client would plead guilty to endangering the welfare of a child. Mr. Oakes noted his opposition to a plea to that charge and reiterated his plea offer.

10. Respondent clarified that the charge of unlawfully dealing with a child was based on giving the girl alcohol, and Mr. Russell indicated he would have to talk to Mr. Swank about a plea to that charge. Respondent said, “Certainly nothing that had anything to do with even touching that girl.”

11. Addressing Mr. Oakes, Respondent stated, “Frankly, I was a little surprised that you still want him to plead to a sex crime when she is apparently not upset at the whole incident, from her testimony.”

12. Mr. Oakes responded that the point of the New York State statute was that 14-year-olds could not have consensual sexual relations with adults. Respondent replied:

I understand, but you weren't successful. She's got a baby. She's only sixteen now. So the statute didn't save her, did it [?] ... I don't think it's going to save her.

13. Respondent's comments were made in the presence of the attorneys in the case and court personnel. The victim was not present.

14. The plea-bargain attempt failed. On the following day, November 16, 2010, the jury returned a verdict finding Mr. Swank guilty of all charges. The defendant moved to set aside the verdict based on post-trial statements of the victim's sister. After a hearing, Respondent denied the motion. The Appellate Division, Fourth Department, affirmed the conviction. A copy of the decision is appended as Exhibit 5.

15. By reason of the foregoing, Respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that Respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the

integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules Governing Judicial Conduct (Rules); failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law¹ and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules; and failed to perform the duties of judicial office impartially and diligently, in that he failed to be patient, dignified and courteous to a witness, in violation of Section 100.3(B)(3) of the Rules.

Additional Factors as to Charge I

16. Respondent acknowledges that the comments he made to explore a plea bargain were inappropriately focused on the victim and created the appearance that he was being critical of her. Respondent avers that his comments, at a point in time when it appeared that the jury was deadlocked, were part of an attempt to demonstrate to both counsel that a plea bargain might be an acceptable alternative. Respondent acknowledges that his choice of words was careless, harsh and insensitive and asserts that in the future he will be more sensitive to the appearance such comments convey.

As to Charge II

17. On September 5, 2013, while presiding over *People v Lee A. Johnson, Jr.*, Respondent failed to be patient, dignified and courteous when he made loud and derogatory statements in response to the Oswego County District Attorney's inquiry into advancing the defendant's trial date in place of another case.

¹ “ ‘Law’ denotes court rules as well as statutes, constitutional provisions and decisional law” (22 NYCRR 100.0[G]) and perforce includes the Rules Governing Judicial Conduct.

As to the Specifications to Charge II

18. On December 10, 2012, seven days after Lee A. Johnson, Jr., was arrested, arraigned and held on \$10,000 cash/\$20,000 bond, he appeared with his defense attorney, Mary A. Felasco, before the Honorable Spencer J. Ludington in Fulton City Court for a preliminary hearing. No hearing was held and the matter was waived to superior court. A copy of the divestiture order is appended as Exhibit 6. On that same date, both Mr. Johnson and Ms. Felasco signed a “Waiver for Pre-Plea Probation Investigation and Report,” authorizing the Oswego County Probation Department to proceed with an investigation of Mr. Johnson and submit a report to the Court “in contemplation of a plea of guilty to the crime[s] of Rape 3rd.” The executed waiver stated: “**THE DEFENDANT**, by execution of this document, **EXPRESSLY WAIVES any time limitations contained in the Criminal Procedure Law, including but not limited to CPL §§30.30, 180.80, 190.80, 30.20 and the Sixth Amendment to the U.S. Constitution**” (emphasis in original document). The waiver did not specify a termination date. A copy of the waiver is appended as Exhibit 7. The “Court Order for Investigation and Report” was dated December 10, 2012, and indicated January 23, 2013 as the return date. A copy of the court order is appended as Exhibit 8.

19. On January 23, 2013, Mr. Johnson, Ms. Felasco and Assistant District Attorney Thomas Christopher appeared before Respondent for the pre-plea report. Respondent indicated that, upon a guilty plea, he would sentence Mr. Johnson to a four-year determinate sentence of incarceration with ten years of post-release supervision along with \$1,425 in various charges and an order of protection. The matter was

adjourned for a report. A handwritten court document of Mr. Johnson's court appearances is appended as Exhibit 9.

20. On February 8, 2013, Mr. Johnson, Ms. Felasco and Mr. Christopher again appeared before Respondent. No plea agreement was reached.

21. The District Attorney provided Mr. Johnson and Ms. Felasco a "Notice of Presentment to Grand Jury" dated February 14, 2013, advising that evidence against Mr. Johnson was scheduled for presentment on February 27, 2013. A copy of the notice is appended as Exhibit 10.

22. On February 25, 2013, Mr. Johnson and Ms. Felasco signed a "Waiver of Speedy Trial/Waiver of CPL §190.80 and §180.80" that provided for Mr. Johnson "to gain more time for the purpose of negotiating a plea bargain" by waiving the statutory provisions mandating his release from custody based upon the non-occurrence of Grand Jury action within 45 days of his confinement. Mr. Johnson further agreed both that the waiver nullified "any time that has so far accumulated for the purpose of CPL §190.80" and that the 45-day period set forth in CPL §190.80 "begins anew the day after this agreement is rescinded or revoked." The waiver, which was unlimited in duration, stated directly above the signatures of Mr. Johnson and Ms. Felasco: "This matter has been discussed between defendant and counsel for the defendant and the defendant is in accord with this waiver." A copy of the waiver is appended as Exhibit 11. The waiver was forwarded to the District Attorney's Office under cover of letter from Ms. Felasco dated February 26, 2013, which stated that she had met with Mr. Johnson and that he had

agreed to voluntarily provide a DNA sample to the District Attorney's Office. A copy of the letter is appended as Exhibit 12.

23. Under cover of letter dated March 29, 2013, Assistant District Attorney Allison M. O'Neill forwarded a copy of the lab report in Mr. Johnson's case to Ms. Felasco. A copy of the letter is appended as Exhibit 13.

24. By letter dated April 24, 2013, Ms. Felasco acknowledged receipt of Mr. Johnson's lab report, confirmed Mr. Johnson's rejection of the People's plea offer of rape in the third degree, and rescinded the speedy trial waiver signed on February 25, 2013. A copy of the letter is appended as Exhibit 14.

25. The District Attorney provided Mr. Johnson and Ms. Felasco a second "Notice of Presentment to Grand Jury" dated April 26, 2013, advising that evidence against Mr. Johnson would be presented on May 29, 2013. A copy of the second notice is appended as Exhibit 15.

26. On May 17, 2013, after unsuccessful plea negotiations, Ms. Felasco filed an application seeking Mr. Johnson's release on his own recognizance for the prosecution's failure to take timely grand jury action.

27. On May 20, 2013, Mr. Johnson, Ms. Felasco and Ms. O'Neill appeared before Respondent concerning Ms. Felasco's application seeking Mr. Johnson's release. A copy of Ms. Felasco's affidavit in support of her application is appended as Exhibit 16. Mr. Johnson acknowledged that he had signed the February 25, 2013 speedy trial waiver but claimed that he felt pressured by his attorney. Respondent relieved Ms. Felasco as

Mr. Johnson's attorney and replaced her with Anthony J. DiMartino, Jr. A copy of the notice of assignment is appended as Exhibit 17.

28. On May 22, 2013, Ms. O'Neill filed a response to Ms. Felasco's application for the defendant's release on his own recognizance. A copy of the response is appended as Exhibit 18.

29. On May 24, 2013, Ms. O'Neill, Mr. Johnson and Mr. DiMartino appeared before Respondent for further legal argument and a decision concerning Mr. Johnson's custodial status. Respondent determined that Mr. Johnson was not legally entitled to be released on his own recognizance.

30. On May 29, 2013, an Oswego County Grand Jury heard evidence against Mr. Johnson.

31. On June 5, 2013, a ten-count indictment was filed against Mr. Johnson, charging him with: one count of rape in the first degree (Penal Law §130.35[1]); one count of rape in the third degree (Penal Law §130.25[3]); one count of sexual abuse in the first degree (Penal Law §130.65[1]); two counts of unlawful imprisonment in the second degree (Penal Law §135.05); one count of menacing in the third degree (Penal Law §120.15); and four counts of harassment in the second degree (Penal Law §240.26[1]). Mr. Johnson's bail was subsequently reduced to \$5,000 cash or \$10,000 bond. Mr. Johnson had been in pre-trial detention for six months at that point.

32. On September 5, 2013, Respondent presided over a preliminary conference in *People v Lee A. Johnson, Jr.*, for the purpose of either accepting a plea resolution or scheduling a trial. After Mr. DiMartino informed the court that Mr. Johnson rejected the

prosecution's plea offer, Respondent indicated that Mr. Johnson's case would be scheduled for trial as the second jury matter on December 9, 2013. Mr. DiMartino responded that Mr. Johnson had been incarcerated for nine months and moved for his release from custody pending trial.

33. Oswego County District Attorney Gregory S. Oakes,² who was present in the courtroom, asked Respondent if Mr. Johnson's case could be tried in October in place of a previously scheduled trial in the matter *People v James E. Rogers*, the first of two pending indictments against Mr. Rogers, who was not in custody. The first *Rogers* matter was the oldest case on Respondent's calendar and had been pending longer than the court system's promulgated "standards and goals" for the timely disposition of matters. Mr. Rogers' first attorney had succumbed to illness during his representation, and by September 2013, four different attorneys had appeared on his behalf.

34. Respondent, who asserts that he had told Mr. Oakes' office earlier that the first Rogers case had to be tried in October, yelled at Mr. Oakes, in a frustrated tone, stating *inter alia* as follows:

...How come [Mr. Johnson] isn't indicted by January 1st? Why is it June? So don't come here now and make this argument. Okay? It -- it just doesn't hold water. I don't understand why it happens. You indict people in your office. Okay? Why does it take till June? Why does it take over six months to get him indicted? He's always said no rape occurred. He should have been indicted in January. Okay?

² Mr. Oakes was elected as Oswego County District attorney on November 8, 2011 and took office on January 1, 2012.

35. Respondent announced that he would continue Mr. Johnson's bail at \$5,000 cash/\$10,000 bond. After ruling on Mr. Johnson's bail, Respondent, who was aware that the District Attorney's Office had a practice of asking defense counsel to sign speedy trial waivers, stated to Mr. DiMartino:

And maybe the defense counsel -- ...if you want to make the argument he's nine months in custody -- shouldn't sign speedy trial waivers, shouldn't ask for pre-plea investigations, and should be beating on Mr. Oakes's door repeatedly, constantly, daily, I want my client indicted. Okay?

36. Respondent thereafter yelled in an angry tone:

They don't indict people. They leave them sit in the jail forever. For whatever reason, I don't have any clue.

37. After Mr. DiMartino noted that he was not Mr. Johnson's first attorney,

Respondent engaged in a loud angry dispute with Mr. Oakes, as follows:

THE COURT: ... So, it isn't just this case, it's for many cases. Okay?

MR. OAKES: No, that's just absolutely not true, your Honor.

THE COURT: Oh, really?

MR. OAKES: Yes.

THE COURT: You wanna have an argument today about it? I'll go get my figures. Okay? I'll show you right now how many cases we have divestitures that are sitting forever. You wanna start this debate? We can start it. And it's not only people in custody, it's all these people that are out on Pretrial Release. I'll get probation down here that's monitoring them, asking -- okay? It is absolutely true, Mr. Oakes. And I can give you the numbers, and I can give you the divestitures. I can show you the divesti -- there are many cases that are old.

In fact, they're so old, I've been dismissing them lately. Just the other day I released somebody on a 190.80 motion that

wasn't indicted in 45 days. You wanna have the debate, we'll have it another day, and I can give you the numbers. You got -- I betcha at least 25, 50 cases, okay, that are way old. Not all in custody. Because the only ones you keep hearing about is from the sheriff complaining about the jail being full and all these people sitting over there forever. Okay? You got hundreds more out there that nothing's happening. So you better go back with your office and figure out what's going on.

MR. OAKES: And your Honor, again, I wasn't trying to raise this -- this Court is raising the issue that the DA's Office is --

THE COURT: You raised it. You said it's not true. It is absolutely true.

MR. OAKES: No, you're the one, your Honor, who started the idea the DA's Office isn't moving, we're the only ones with indictment -- last year we filed over 300 SCI's and indictments. If I look back, you have not had 300 SCI's and indictments filed in this court.

THE COURT: What do I care how many hundred there are? If they're making arrests, you gotta do something with them. Okay? He's complaining he's been in jail for nine months. And he's been saying from day one he didn't commit any rape. So why does it take till June to indict him? Got an answer?

MR. OAKES: Your Honor, I'm not gonna argue about the merits of this particular case and why it took long exactly. We have six months to indict the case. He was indicted within the statutory period of time. Again, there's no 30.30 issues here. Again, my understanding was that cases where a defendant is in custody take priority over those cases where a defendant's not in custody. That was the only issue I was raising. But again, if the Court wants to keep the matter on for December 9th, keep the matter on for December 9th. And certainly if this Court wants to have a discussion --

THE COURT: You know -- see, you know --

MR. OAKES: -- we can have a discussion --

THE COURT: You know, you started this whole thing, Mr. Oakes. You know, I gave him a trial date, and then you start in, you wanna change my trial schedule. Why don't you run your own calendar, and leave me run mine. Okay? I gave him a date, and that's the date. Okay? Don't start suggesting everything. Okay?

MR. OAKES: That's fine, your Honor. Your Honor, I was simply asking.

THE COURT: You run your calendar, I'll run mine. Okay?

MR. OAKES: Certainly, your Honor.

THE COURT: Always got a suggestion. Again today. Now you want me to change Rogers that's six months old, the oldest case, and give him another date, and this date, and switch everything around. I've gotta do one and two, because I can't even figure out who's going to trial, because you keep these offers open till the last minute. I don't even know what Rancier's (ph) gonna do. I think he's coming in and pleading, but I don't know, because you keep the offer open. Can't even figure out which case is going to trial.

So go back up into your office and figure out your own calendar. Okay? And if you want a list of all the divestitures, and you want all of them, you can have them. There's many of them, and they're really old. Couple weeks ago I dismissed a couple for speedy trial, lack of speedy trial. They were way over six months. I think they were like a year and a half that I dismissed those indictments.

MR. OAKES: Indictments, your Honor?

THE COURT: Yeah, they were indictments, weren't they? Oh, no, they weren't indictments, excuse me. They never were indicted. A year and a half old. Okay. We're all done, right?

MR. DIMARTINO: Yes, your Honor.

A copy of the audio recording of the proceeding in *People v Johnson*, referred to in paragraphs 34-37, is appended as Exhibit 19.

38. By letter dated October 29, 2013, Respondent advised counsel that Mr. Johnson's matter was scheduled for trial on November 12, 2013. A copy of the letter is appended as Exhibit 20.

39. By letter dated November 7, 2012, Respondent confirmed that the jury trial in Mr. Johnson's matter would commence on November 12, 2013. A copy of the letter is appended as Exhibit 21.

40. On November 15, 2013, the jury in *People v Lee A. Johnson, Jr.* returned a verdict acquitting Mr. Johnson of five charges: one count of rape in the first degree (Penal Law §130.35[1]); one count of rape in the third degree (Penal Law §130.25[3]); one count of unlawful imprisonment in the second degree (Penal Law §135.05); one count of menacing in the third degree (Penal Law §120.15); and one count of harassment in the second degree (Penal Law §240.26[1]). The jury convicted Mr. Johnson of four charges: one count of unlawful imprisonment in the second degree (Penal Law §135.05) and three counts of harassment in the second degree (Penal Law §240.26[1]). The single count of sexual abuse in the first degree (Penal Law §130.65[1]) had been dismissed by motion of the District Attorney, without objection, on November 14, 2013.

41. By reason of the foregoing, Respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that Respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety, in that

he failed to respect and comply with the law³ and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules; and failed to perform the duties of judicial office impartially and diligently, in that he failed to be patient, dignified and courteous to lawyers, in violation of Section 100.3(B)(3) of the Rules.

Additional Factors as to Charge II

42. Pursuant to CPL 190.80, a felony defendant who has been held in custody for more than 45 days without action by the grand jury must be released upon the defendant's application. Pursuant to CPL 30.30, a criminal case can be dismissed if the People are not ready for trial within six months of commencement, unless that time is extended by various statutory factors. As in this case, however, a defendant may waive these time limits.

43. Respondent handles post-indictment felony cases, and is aware that some cases are not presented to the grand jury until at or near the statutory time limits, including cases in which defendants are in custody. Respondent recognizes that there are legitimate reasons why a particular case may not be expeditiously presented to a grand jury.

44. Respondent became angry with Mr. Oakes for suggesting that Respondent alter the court's trial schedule by placing the *Johnson* case ahead of the *Rogers* case which had been pending longer, and for challenging Respondent's observations about

³ “ ‘Law’ denotes court rules as well as statutes, constitutional provisions and decisional law” (22 NYCRR 100.0[G]) and perforce includes the Rules Governing Judicial Conduct.

moving cases expeditiously. Respondent regrets his tone and volume in addressing the District Attorney. Respondent recognizes his ethical obligation under the Rules to be “patient, dignified and courteous” and that he failed to meet that standard. He pledges to be more sensitive in the future.

As to Charge III

45. On October 16, 2013, while presiding over *People v* [REDACTED], Respondent failed to be patient, dignified and courteous when he made disparaging and provocative comments regarding the familial relationship between Oswego County District Attorney Gregory S. Oakes and a potential witness, who was a defendant in a related case that was not before Respondent. Respondent stated that there appeared to have been impropriety in the prosecution of both cases and that the defendant [REDACTED] and the relative of Mr. Oakes “got away with a burglary basically.”

As to the Specifications to Charge III

46. On December 19, 2012, [REDACTED] was charged with burglary in the second degree (Penal Law §140.25) and criminal possession of stolen property in the third degree (Penal Law §165.50), both felonies. On January 7, 2013, [REDACTED], a cousin of Oswego County District Attorney Gregory Oakes, was arraigned in the Albion Town Court on the misdemeanor charge of making a punishable false written statement (Penal Law §210.45) in connection with the law enforcement investigation of [REDACTED]. [REDACTED] was a potential witness against [REDACTED], but was not charged with any felony and was not a co-defendant of [REDACTED]. No charges were filed against [REDACTED] in the Oswego County Court.

47. On February 5, 2013, District Attorney Gregory Oakes petitioned for the appointment of a special prosecutor in *People v* [REDACTED] and *People v* [REDACTED]. [REDACTED] because of his relationship to [REDACTED]. Respondent appointed David Russell as Special District Attorney in both cases.

48. On October 10, 2013, Respondent appointed Michael G. Cianfarano to serve as Special District Attorney in place of Mr. Russell, whom he had relieved after communication between them concerning questions regarding the timing of [REDACTED]'s prosecution.

49. On October 16, 2013, Respondent presided over an appearance in the [REDACTED] case. Neither Mr. Russell nor Mr. Oakes was present in the courtroom.

50. Mr. Cianfarano advised Respondent that he intended to prepare an application to have the [REDACTED] case returned to the Albion Town Court to be resolved by a misdemeanor plea with restitution. Respondent inquired twice about [REDACTED], whose case was not before Respondent. Respondent gratuitously referred to [REDACTED]'s familial relationship with the District Attorney, stating as follows:

- A. "What happened to [REDACTED], the District Attorney's cousin?"
- B. "So, you don't even know what happened to the co-defendant, the ...DA's cousin?"

51. While questioning [REDACTED]'s attorney as to why he was still in custody in excess of 10 months, Respondent looked through the file and found a letter which refreshed his recollection that he had appointed a Special District Attorney to prosecute both [REDACTED] and [REDACTED]. The file also contained a letter to Respondent from

Mr. Russell dated August 16, 2013, advising Respondent that [REDACTED] was being held in custody on a local sentence and was scheduled to be released on October 17, 2013. A copy of the letter is appended as Exhibit 22.

52. Respondent identified the charges against both [REDACTED] and [REDACTED], commented that Mr. Russell had been originally appointed as Special District Attorney in both cases, stated that there appeared to have been impropriety in the prosecution of the cases and indicated that he believed [REDACTED] and [REDACTED] to be guilty. In doing so, Respondent stated *inter alia*:

- A. “In the meantime, we have a C violent felony burglary and over \$6,000 of restitution, and nothing’s happened. There seems to be more to this story than this Court’s being informed of, that’s for sure.”
- B. “And the special prosecutor in the application was appointed for the purposes of avoiding the appearance of impropriety. Well, there certainly appears to be a lot of impropriety in how both of these cases were handled.”
- C. “I mean, they got away with a burglary basically. Nobody prosecuted it. Obviously, the improprieties continue.”

53. By reason of the foregoing, Respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that Respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety, in that

he failed to respect and comply with the law⁴ and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules; and failed to perform the duties of judicial office impartially and diligently, in that he failed to be patient, dignified and courteous to lawyers and others with whom the judge deals in an official capacity, in violation of Section 100.3(B)(3) of the Rules.

Additional Factors as to Charge III

54. Respondent acknowledges that he should not have identified the relationship between [REDACTED] and the District Attorney during the proceeding in [REDACTED]'s case, and acknowledges further that his comments on October 16, 2013, created the appearance of bias, notwithstanding that he took no action in *People v [REDACTED]* that was contrary to the defendant's interests.

55. Respondent avers that he had a significant concern on October 16, 2013, that the felony charge in the [REDACTED] matter would likely be dismissed in accordance with law because it had not been prosecuted by the special prosecutor, who had been replaced.

Additional Factors Generally

56. Respondent has been cooperative with the Commission throughout its inquiry and regrets his failure to abide by the Rules in these matters and pledges to conduct himself in accordance with the Rules for the remainder of his term as a judge.

⁴ “ ‘Law’ denotes court rules as well as statutes, constitutional provisions and decisional law” (22 NYCRR 100.0[G]) and perforce includes the Rules Governing Judicial Conduct.

IT IS FURTHER STIPULATED AND AGREED that Respondent withdraws from his Answers any denials or defenses inconsistent with this Agreed Statement of Facts.

IT IS FURTHER STIPULATED AND AGREED that the parties to this Agreed Statement of Facts respectfully recommend to the Commission that the appropriate sanction is public Admonition based upon the judicial misconduct set forth above.

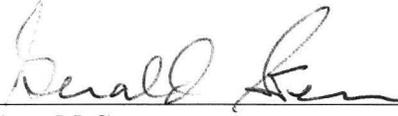
IT IS FURTHER STIPULATED AND AGREED that if the Commission accepts this Agreed Statement of Facts, the parties waive oral argument and waive further submissions to the Commission as to the issues of misconduct and sanction, and that the Commission shall thereupon impose a public Admonition without further submission of the parties, based solely upon this Agreed Statement. If the Commission rejects this Agreed Statement of Facts, the matter shall proceed to a hearing and the statements made herein shall not be used by the Commission, the Respondent or the Administrator and Counsel to the Commission.

Dated: 5/23/16



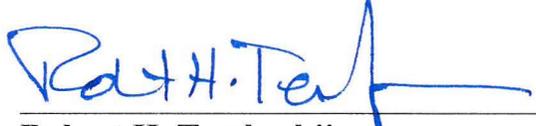
Honorable Walter W. Hafner, Jr.
Respondent

Dated: 5/17/16



Gerald Stern
Attorney for Respondent

Dated: May 25, 2016



Robert H. Tembeckjian
Administrator & Counsel to the Commission
(John J. Postel and David M. Duguay, Of Counsel)

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

WALTER W. HAFNER, JR.,

a Judge of the Oswego County Court,
Oswego County.

**NOTICE OF FORMAL
WRITTEN COMPLAINT**

NOTICE is hereby given to Respondent, Walter W. Hafner, Jr., a Judge of the Oswego County Court, pursuant to Section 44, subdivision 4, of the Judiciary Law, that the State Commission on Judicial Conduct has determined that cause exists to serve upon Respondent the annexed Formal Written Complaint; and that, in accordance with said statute, Respondent is requested within twenty (20) days of the service of the annexed Formal Written Complaint upon him to serve the Commission at its Rochester office, 400 Andrews Street, Suite 700, Rochester, New York 14604, with his verified Answer to the specific paragraphs of the Complaint.

Dated: November 18, 2013
New York, New York

ROBERT H. TEMBECKJIAN
Administrator and Counsel
State Commission on Judicial Conduct
61 Broadway, Suite 1200
New York, New York 10006
(646) 386-4800

To: Robert Julian, Esq.
Attorney for Respondent
7868 Salt Springs Road
Fayetteville, New York 13066

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

WALTER W. HAFNER, JR.,

a Judge of the Oswego County Court,
Oswego County.

**FORMAL
WRITTEN COMPLAINT**

1. Article 6, Section 22, of the Constitution of the State of New York establishes a Commission on Judicial Conduct (“Commission”), and Section 44, subdivision 4, of the Judiciary Law empowers the Commission to direct that a Formal Written Complaint be drawn and served upon a judge.

2. The Commission has directed that a Formal Written Complaint be drawn and served upon Walter W. Hafner, Jr. (“Respondent”), a Judge of the Oswego County Court.

3. The factual allegations set forth in Charge I state acts of judicial misconduct by Respondent in violation of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct (“Rules”).

4. Respondent was admitted to the practice of law in New York in 1978. He has been a Judge of the Oswego County Court, Oswego County, since 1999. Respondent’s current term expires on December 31, 2018.

CHARGE I

5. On or about November 15, 2010, while presiding over *People v Steven M. Swank*, Respondent failed to be patient, dignified and courteous when he made derogatory and otherwise inappropriate remarks about a teenage sexual assault victim.

Specifications to Charge I

6. From on or about November 9, 2010, to on or about November 16, 2010, Respondent presided over a jury trial in *People v Steven M. Swank*. Mr. Swank had been indicted on one count of rape in the second degree (Penal Law §130.30(1)), two counts of criminal sexual act in the second degree (Penal Law §130.45(1)), and one count of unlawfully dealing with a child in the first degree (Penal Law §260.20(2)).

7. At trial, evidence was offered that Mr. Swank, who was about 30 years of age, had provided alcohol to a 14-year-old girl and then engaged in sexual intercourse and oral sexual conduct with her. At the time of Mr. Swank's trial, about two years after the incident, the girl had given birth to a child fathered by a different man.

8. On or about November 15, 2010, the jury was in its second day of deliberations. In the courtroom, outside the jury's presence, Respondent initiated a discussion with counsel regarding a possible plea disposition of the case. Respondent suggested a plea to the class A misdemeanor of endangering the welfare of a child, which would not require the defendant to register as a sex offender. Assistant District Attorney Gregory S. Oakes responded that he would consider a plea to two other class A misdemeanor offenses – sexual misconduct and unlawfully dealing with a child – and that sexual misconduct would require Mr. Swank register as a sex offender. Respondent

asked Mr. Swank's attorney, David E. Russell, whether his client would plead guilty to endangering the welfare of a child. Mr. Oakes noted his opposition to a plea to that charge and reiterated his plea offer.

9. When Respondent clarified that the charge of unlawfully dealing with a child was based on giving the girl alcohol, Mr. Russell indicated he would have to talk to Mr. Swank about a plea to that charge. Respondent said, in a derogatory and disdainful tone, "Certainly nothing that had anything to do with even touching that girl."

10. Addressing Mr. Oakes, Respondent stated in a denigrating tone, "Frankly, I was a little surprised that you still want him to plead to a sex crime when she is apparently not upset at the whole incident, from her testimony."

11. Mr. Oakes responded that the point of the New York State statute was that 14-year-olds could not have consensual sexual relations with adults. Respondent replied, in a disparaging and derisive tone:

I understand, but you weren't successful. She's got a baby. She's only sixteen now. So the statute didn't save her, did it [?] ... I don't think it's going to save her.

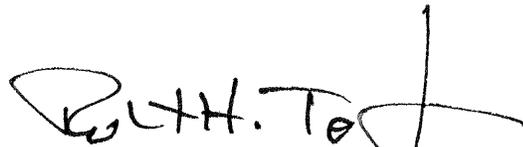
12. On or about November 16, 2010, the jury returned a verdict finding Mr. Swank guilty of all charges.

13. By reason of the foregoing, Respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that Respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section

100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules; and failed to perform the duties of judicial office impartially and diligently, in that he failed to be patient, dignified and courteous to witnesses, lawyers and others with whom the judge deals in an official capacity, in violation of Section 100.3(B)(3) of the Rules.

WHEREFORE, by reason of the foregoing, the Commission should take whatever further action it deems appropriate in accordance with its powers under the Constitution and the Judiciary Law of the State of New York.

Dated: November 18, 2013
New York, New York



ROBERT H. TEMBECKJIAN
Administrator and Counsel
State Commission on Judicial Conduct
61 Broadway
Suite 1200
New York, New York 10006
(646) 386-4800

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

VERIFICATION

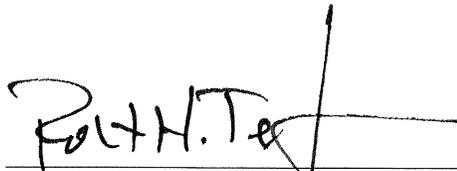
WALTER W. HAFNER, JR.,

a Judge of the Oswego County Court,
Oswego County.

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

ROBERT H. TEMBECKJIAN, being duly sworn, deposes and says:

1. I am the Administrator of the State Commission on Judicial Conduct.
2. I have read the foregoing Formal Written Complaint and, upon information and belief, all matters stated therein are true.
3. The basis for said information and belief is the files and records of the State Commission on Judicial Conduct.



Robert H. Tembeckjian

Sworn to before me this
18th day of November 2013



Notary Public

KAREN KOZAC
Notary Public, State of New York
No. 02KO6171500
Qualified in New York County
Commission Expires November 2, 2015

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

WALTER W. HAFNER, JR.,

a Judge of the Oswego County Court,
Oswego County.

MANDATORY: Judge's Home Address

In the event that a determination of the Commission on Judicial Conduct is made in the above matter requiring transmittal to the Chief Judge and service upon the judge in accordance with Judiciary Law § 44, subd. 7, the Court of Appeals has asked the Commission to provide the judge's home address.

Judge's Home Address

OPTIONAL: Request and Authorization to Notify Judge's Attorney of Determination

In the event that a determination of the Commission on Judicial Conduct is made in the above matter requiring transmittal to the Chief Judge and service upon me in accordance with Judiciary Law § 44, subd. 7, the undersigned judge or justice:

(1) requests and authorizes the Chief Judge to cause a copy of my notification letter from him and a copy of the determination to be sent to my attorney(s) by mail:

Attorney's Name, Address, Telephone

(2) requests and authorizes the Clerk of the Commission to transmit this request to the Chief Judge together with the other required papers.

This request and authorization shall remain in force unless and until a revocation in writing by the undersigned judge or justice is received by the Commission.

Dated:

Signature of Judge or Justice

Acknowledgment:

Signature of Attorney for Judge or Justice

SEND TO: Clerk of the Commission
NYS Commission on Judicial Conduct
61 Broadway (Suite 1200)
New York, NY 10006

**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

VERIFIED ANSWER

WALTER W. HAFNER, JR.

A Judge of Oswego County Court, Oswego County.

WALTER W. HAFNER, JR., as and for his Verified Answer to the Formal Written
Complaint dated November 18, 2013 states as follows:

1. Admits the allegations contained in paragraph 1.
2. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 2, and adds that the Respondent is also designated as an Acting Supreme Court Justice.
3. Denies the allegations contained in paragraph 3.
4. Admits the allegations contained in paragraph 4.
5. Denies the allegations contained in paragraph 5.
6. Admits the allegations contained in paragraph 6.
7. Admits the allegations contained in paragraph 7, but alleges the facts contained in said paragraph are incomplete, as they do not include the fact that the Defendant expressly testified that he had no sexual or other inappropriate contact with a 14 year old girl or include the fact that the Defendant asserted at trial the testimony of the 14 year old girl, "was internally inconsistent and was also inconsistent with her

statements to the police and her grand jury testimony,” *People v. Steven M. Swank*,
109 A.D.3d 1089 (4th Dept. 2013)

8. Admits the allegations contained in paragraph 8, but alleges the facts contained in said paragraph are incomplete, as they do not include the fact that, prior to any discussion of any plea resolution, the jury had been deliberating for a longer period of time than it took to hear all of the evidence in the case. Paragraph 8 further does not indicate that the Respondent asked the parties if a resolution was possible and that the then Assistant District Attorney indicated to the Respondent that the Parties had previously discussed a possible disposition and that the Defendant’s counsel had expressly rejected any disposition that would require the Defendant to register as a sex offender. Paragraph 10 also fails to allege that one of the jurors, Juror Number 11, had informed the Respondent that the Parties were advised that she was having a problem during deliberations.
9. Admits the factual allegation in Paragraph 9 that states, when speaking to the Parties, the Respondent inquired into the possibility of the Defendant accepting a plea to Unlawful Dealing with a Minor by stating, “Certainly nothing that had anything to do with touching that girl”. The Respondent expressly denies that statement was articulated in a derogatory or disdainful tone, as the Respondent was merely attempting to ascertain if the Defendant would accept that offer.
10. Admits the factual allegation in Paragraph 10 that the Respondent stated to the then Assistant District Attorney, “Frankly, I was a little surprised that you still want him to plead to a sex crime when it is apparent that she is not upset at the whole incident, from her testimony”. The Respondent expressly denies the allegation in Paragraph

10 that the statement was said in a derogatory or disdainful tone. The Respondent asserts that the language was taken out of context, but could be regarded as inappropriate. This sentence was expressed in the context of a plea bargaining discussion, was articulated by Respondent in a discussion about the victim's testimony, her presentation and appearance in the Courtroom, and the Respondent's impression as to her demeanor and how that might impact the jurors based upon Respondent's observation.

11. Admits the factual allegation in Paragraph 11. The Respondent denies that the statement was in any way intended to disparage the victim. The Respondent asserts that the language was taken out of context, but could be regarded as inappropriate. This sentence was expressed in the context of a plea bargaining discussion, was articulated by Respondent in a discussion about the victim's testimony, her presentation and appearance in the Courtroom, and the Respondent's impression as to her demeanor and how that might impact the jurors based upon Respondent's observation.

12. Admits the allegation in paragraph 12 that the jury, ultimately, found the Defendant guilty. The Appellate Division, Fourth Department, however, opined in its review of the sufficiency of the weight of the evidence that a, "...different result would not have been unreasonable." *Swank, supra*.

13. Denies each and every allegation of paragraph 13.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

14. Based on the factual allegations, the complaint fails to state a cause of action as a Judge can appropriately and properly characterize the evidence heard as the Judge

might perceive a jury or juror's perspective of the evidence for the purpose of discussing a plea bargain, which is what occurred in this case.

WHEREFORE, Walter W. Hafner, Jr., moves the Commission to dismiss the Formal Written Complaint, and for such other relief as the Commission deems just, proper, and equitable.

Dated: January 3, 2014



A handwritten signature in black ink, appearing to read "Robert F. Julian", is written over a horizontal line.

Robert F. Julian, Esq.
ROBERT F. JULIAN, P.C.
Attorney for Hon. Walter Hafner, Jr.
2037 Genesee Street
Utica, NY 13501
(315) 733-2396

**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

VERIFICATION

WALTER W. HAFNER, JR.

A Judge of Oswego County Court, Oswego County.

STATE OF NEW YORK

SS

COUNTY OF OSWEGO

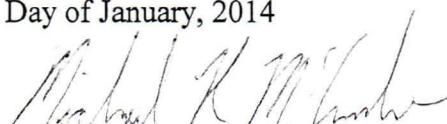
HON. WALTER W. HAFNER, JR., being duly sworn and deposed, states as follows:

1. I am a County Court Judge for the County of Oswego and have been designated an Acting Supreme Court Justice of the Fifth Judicial District of the State of New York and am the Respondent herein.
2. I have read the foregoing VERIFIED ANSWER WITH AFFIRMATIVE DEFENSES and the factual allegations contained therein are truthful and true, except those made upon information and belief, as to those matters I believe them to be true.

Dated: January 6, 2014


HON. WALTER HAFNER, JR.
COUNTY COURT JUDGE

Sworn to before me this 6th
Day of January, 2014



NOTARY PUBLIC

MICHAEL R. McANDREW
Notary Public, State of New York
No. 02MC6110540
Qualified in Oswego County
My Commission Expires May 24, 2016

=====

**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

WALTER W. HAFNER, JR.

A Judge of Oswego County Court, Oswego County.

VERIFIED ANSWER

PLEASE TAKE NOTICE

that the within is a true copy of a _____ entered in the office of the Clerk of the within named Court on _____.

that a _____ of which the within is a true copy will be presented for settlement to the Hon. _____ one of the judges of the within named Court at _____, on _____ at _____ a.m./p.m.

ROBERT F. JULIAN, ESQ.

Attorneys for Plaintiff(s)
Office & PO Address
2037 Genesee St.
Utica, NY 13501
(315) 797-5610
Fax: 877-292-2037

**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

AFFIDAVIT OF SERVICE

WALTER W. HAFNER, JR.

A Judge of Oswego County Court, Oswego County.

STATE OF NEW YORK)

ss.

COUNTY OF ONEIDA)

Tracey A. Mills, being duly sworn, deposes and says:

I am over the age of eighteen (18) years, and on January 13, 2014, I served a true copy of the following:

- Respondent's Answer to the Formal Written Complaint

in the following manner:

by mailing them in a sealed envelope, with postage prepaid, PRIORITY MAIL, in a post office or official depository of the United States Postal Service within the State of New York, addressed to the last known address of the addressee as follows:

Jean M. Savanyu – Clerk
Commission on Judicial Conduct
61 Broadway, Suite 1200
New York, NY 10006

David M. Duguay, Senior Attorney
NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT
400 Andrews St., Suite 700
Rochester, NY 14604


Tracey A. Mills

Sworn to before me this 13th day of
January, 2014


Notary Public

BOBBI A. PECKHAM
Commissioner of Deeds, City of Utica
Cert. Filed in Oneida County
Commission Expires on 12/31/14

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

WALTER W. HAFNER, JR.,

a Judge of the County Court,
Oswego County.

**NOTICE OF
SECOND FORMAL
WRITTEN COMPLAINT**

NOTICE is hereby given to Respondent, Walter W. Hafner, Jr., a Judge of the County Court, Oswego County, pursuant to Section 44, subdivision 4, of the Judiciary Law, that the State Commission on Judicial Conduct has determined that cause exists to serve upon Respondent the annexed Second Formal Written Complaint; and that, in accordance with said statute, Respondent is requested within twenty (20) days of the service of the annexed Second Formal Written Complaint upon him to serve the Commission at its Rochester office, 400 Andrews Street, Suite 700, Rochester, New York 14604, with his verified Answer to the specific paragraphs of the Complaint.

Dated: May 27, 2015
New York, New York

ROBERT H. TEMBECKJIAN
Administrator and Counsel
State Commission on Judicial Conduct
61 Broadway
Suite 1200
New York, New York 10006
(646) 386-4800

To: Robert Julian, Esq.
Attorney for Respondent
2037 Genesee Street
Utica, New York 13501

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

WALTER W. HAFNER, JR.,

a Judge of the County Court,
Oswego County.

**SECOND FORMAL
WRITTEN COMPLAINT**

1. Article 6, Section 22, of the Constitution of the State of New York establishes a Commission on Judicial Conduct (“Commission”), and Section 44, subdivision 4, of the Judiciary Law empowers the Commission to direct that a Formal Written Complaint be drawn and served upon a judge.

2. The Commission has directed that a Second Formal Written Complaint be drawn and served upon Walter W. Hafner, Jr. (“Respondent”), a Judge of the County Court, Oswego County.

3. The factual allegations set forth in Charges II and III state acts of judicial misconduct by Respondent in violation of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct (“Rules”).

4. Respondent was admitted to the practice of law in New York in 1978. He has been a Judge of the County Court, Oswego County, since 1999. Respondent’s current term expires on December 31, 2018.

5. Respondent was served with a first Formal Written Complaint dated November 18, 2013, containing one charge (I), which has not yet been adjudicated and which is still pending. Charge I is not repeated here.

CHARGE II

6. On or about September 5, 2013, while presiding over *People v Lee A. Johnson, Jr.*, Respondent failed to be patient, dignified and courteous when he made loud, derogatory, provocative and misleading statements in response to the Oswego County District Attorney's inquiry into advancing a defendant's trial date.

Specifications to Charge II

7. On or about May 17, 2013, after unsuccessful plea negotiations in *People v Lee A. Johnson, Jr.*, defense attorney Mary A. Felasco filed an application, seeking Mr. Johnson's release on his own recognizance for the prosecution's failure to take timely grand jury action. On or about May 24, 2013, Respondent denied the application.

8. On or about June 5, 2013, a ten-count Indictment was filed against Mr. Johnson, charging him with: one count of rape in the first degree (Penal Law §130.35[1]); one count of rape in the third degree (Penal Law §130.25[3]); one count of sexual abuse in the first degree (Penal Law §130.65[1]); two counts of unlawful imprisonment in the second degree (Penal Law §135.05); one count of menacing in the third degree (Penal Law §120.15); and four counts of harassment in the second degree (Penal Law §240.26[1]). Mr. Johnson's bail was subsequently reduced to \$5,000 cash or \$10,000 bond.

9. On or about September 5, 2013, Respondent presided over a preliminary conference in *People v Lee A. Johnson, Jr.*, for the purpose of either accepting a plea resolution or scheduling a trial. Mr. Johnson was represented by Anthony J. DiMartino, who informed the court that the defendant rejected the prosecution's plea offer. Respondent indicated that Mr. Johnson's case would be scheduled for a jury trial on December 9, 2013, and Mr. DiMartino responded that Mr. Johnson had been incarcerated for nine months and moved for his release from custody pending trial.

10. Oswego County District Attorney Gregory S. Oakes, who was present, asked Respondent if Mr. Johnson's case could be tried in October in place of a previously scheduled trial in a matter involving an out-of-custody defendant, in accordance with Respondent's general policy. Respondent, over the next minute and a half, yelled at Mr. Oakes, stating *inter alia* as follows:

...How come [Mr. Johnson] isn't indicted by January 1st? Why is it June? So don't come here now and make this argument. Okay? It -- it just doesn't hold water. I don't understand why it happens. You indict people in your office. Okay? Why does it take till June? Why does it take over six months to get him indicted? He's always said no rape occurred. He should have been indicted in January. Okay?

11. Respondent announced that he would continue Mr. Johnson's bail at \$5,000 cash/\$10,000 bond and stated to Mr. DiMartino:

And maybe the defense counsel -- ...if you want to make the argument he's nine months in custody -- shouldn't sign speedy trial waivers, shouldn't ask for pre-plea investigations, and should be beating on Mr. Oakes's door repeatedly, constantly, daily, I want my client indicted. Okay?

12. Respondent then yelled, in a demeaning and offensive tone:

They don't indict people. They leave them sit in the jail forever. For whatever reason, I don't have any clue.

13. Respondent engaged in a diatribe against Mr. Oakes during which he made the following statements in a loud voice, using a provocative and offensive tone:

- A. You wanna have an argument today about it?
- B. So you better go back with your office and figure out what's going on.
- C. You raised it. You said it's not true. It is absolutely true.
- D. So why did it take till June to indict him? Got an answer?
- E. You know, you started this whole thing, Mr. Oakes.
- F. You run your calendar, I'll run mine.
- G. Always got a suggestion. Again today.
- H. So go back up into your office and figure out your own calendar.

14. By reason of the foregoing, Respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that Respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules; and failed to perform the duties of judicial office impartially and diligently, in that he failed to be patient, dignified and courteous to witnesses, lawyers

and others with whom the judge deals in an official capacity, in violation of Section 100.3(B)(3) of the Rules.

CHARGE III

15. On or about October 16, 2013, while presiding over *People v* [REDACTED], Respondent failed to be patient, dignified and courteous when he made disparaging and provocative comments regarding the familial relationship between Oswego County District Attorney Gregory S. Oakes and a potential witness, who was a defendant in a related case that was not before Respondent. Respondent stated that there appeared to have been impropriety in the prosecution of both cases and that the defendant [REDACTED] and the relative of Mr. Oakes “got away with a burglary.”

Specifications to Charge III

16. On or about December 19, 2012, [REDACTED] was charged with burglary in the second degree (Penal Law §140.25) and criminal possession of stolen property in the third degree (Penal Law §165.50), both felonies. On or about January 7, 2013, [REDACTED], a cousin of Oswego County District Attorney Gregory Oakes, was arraigned in the Albion Town Court on the misdemeanor charge of making a punishable false written statement (Penal Law §210.45) in connection with the law enforcement investigation of [REDACTED]. [REDACTED] was a potential witness against [REDACTED], but was not charged with any felony and was not a co-defendant of [REDACTED]. No charges were filed against [REDACTED] in the Oswego County Court.

17. On or about February 5, 2013, District Attorney Gregory Oakes petitioned for the appointment of a special prosecutor in *People v* [REDACTED] and *People v*

██████████ because of his relationship to ██████████. Respondent appointed David Russell as Special District Attorney in both cases.

18. On or about October 10, 2013, Respondent appointed Michael G. Cianfarano to serve as Special District Attorney in place of Mr. Russell, whom he had relieved pursuant to their mutual agreement.

19. On or about October 16, 2013, Respondent presided over an appearance in the ██████████ case. Neither Mr. Russell nor Mr. Oakes was present in the courtroom.

20. Mr. Cianfarano advised Respondent that he intended to prepare an application to have the ██████████ case returned to the Albion Town Court to be resolved by a misdemeanor plea with restitution. Respondent inquired twice about ██████████ whose case was not before Respondent. Respondent gratuitously referred to ██████████'s familial relationship with the District Attorney, stating as follows:

- A. What happened to ██████████, the District Attorney's cousin?
- B. So, you don't even know what happened to the co-defendant, the ... DA's cousin?

21. Respondent identified the charges against both ██████████ and ██████████, commented that Mr. Russell had been originally appointed as Special District Attorney in both cases, stated that there appeared to have been impropriety in the prosecution of the cases and indicated that he believed ██████████ and ██████████ to be guilty. In doing so, Respondent stated *inter alia*:

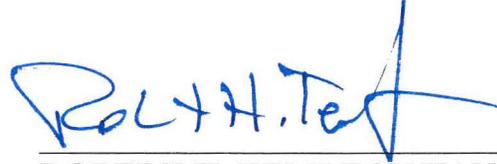
- A. In the meantime, we have a C violent felony burglary and over \$6,000 of restitution, and nothing's happened. There seems to be more to this story than this Court's being informed of, that's for sure.

- B. And the special prosecutor in the application was appointed for the purposes of avoiding the appearance of impropriety. Well, there certainly appears to be a lot of impropriety in how both of these cases were handled.
- C. I mean, they got away with a burglary basically. Nobody prosecuted it. Obviously, the improprieties continue.

22. By reason of the foregoing, Respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that Respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules; and failed to perform the duties of judicial office impartially and diligently, in that he failed to be patient, dignified and courteous to witnesses, lawyers and others with whom the judge deals in an official capacity, in violation of Section 100.3(B)(3) of the Rules, failed to perform judicial duties without bias or prejudice against or in favor of any person, in violation of Section 100.3(B)(4) of the Rules, and made a public comment about a pending proceeding in a court within the United States, in violation of Section 100.3(B)(8) of the Rules.

WHEREFORE, by reason of the foregoing, the Commission should take whatever further action it deems appropriate in accordance with its powers under the Constitution and the Judiciary Law of the State of New York.

Dated: May 27, 2015
New York, New York



ROBERT H. TEMBECKJIAN
Administrator and Counsel
State Commission on Judicial Conduct
61 Broadway
Suite 1200
New York, New York 10006
(646) 386-4800

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

VERIFICATION

WALTER W. HAFNER, JR.,

a Judge of the County Court,
Oswego County.

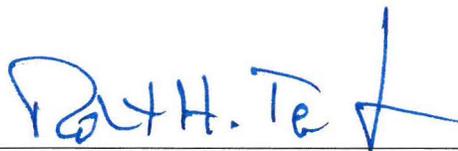
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

ROBERT H. TEMBECKJIAN, being duly sworn, deposes and says:

1. I am the Administrator of the State Commission on Judicial Conduct.
2. I have read the foregoing Second Formal Written Complaint and, upon

information and belief, all matters stated therein are true.

3. The basis for said information and belief is the files and records of the State Commission on Judicial Conduct.



Robert H. Tembeckjian

Sworn to before me this
27th day of May 2015



Notary Public

PAMELA TISHMAN
Notary Public, State of New York
Registration No. 0216240741
Qualified in New York County
Commission Expires May 09, 2019

**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

VERIFIED ANSWER

WALTER W. HAFNER, JR.

A Judge of Oswego County Court, Oswego County.

WALTER W. HAFNER, JR., as and for his Verified Answer to the Second Formal
Written Complaint dated May 27, 2015 states as follows:

1. Admits the allegations contained in paragraph 1.
2. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.
3. Denies the allegations of misconduct contained in paragraph 3.
4. Admits the allegations of misconduct contained in paragraph 4.
5. Admits the allegations contained in paragraph 5.
6. Denies the allegations of misconduct contained in paragraph 6.
7. Admits the allegations contained in paragraph 7.
8. Admits the allegations contained in paragraph 8.
9. Admits the allegations contained in paragraph 9.
10. Denies the allegations of misconduct contained in paragraph 10.
11. Admits the allegations contained in paragraph 11.
12. Denies the allegations of misconduct contained in paragraph 12.
13. Denies the allegations of misconduct contained in paragraph 13.

14. Denies the allegations of misconduct contained in paragraph 14.
15. Denies the allegations of misconduct contained in paragraph 15.
16. Denies knowledge and information sufficient to form a belief as to the truth of the allegations of misconduct contained in paragraph 16.
17. Admits the allegations contained in paragraph 17.
18. Admits the allegations contained in paragraph 18.
19. Admits the allegations contained in paragraph 19.
20. Denies the allegations of misconduct contained in paragraph 20.
21. Admits to the allegation of impropriety. Denies the allegation of alleging guilt.
22. Denies the allegations of misconduct contained in paragraph 22..

WHEREFORE, Walter W. Hafner, Jr., moves the Commission to dismiss the Second Formal Written Complaint, and for such other relief as the Commission deems just, proper, and equitable.

Dated: *June 18, 2015*



Robert F. Julian, Esq.
ROBERT F. JULIAN, P.C.
Attorney for Hon. Walter Hafner, Jr.
2037 Genesee Street
Utica, NY 13501
(315) 733-2396

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

VERIFICATION

WALTER W. HAFNER, JR.

A Judge of Oswego County Court, Oswego County.

STATE OF NEW YORK)

ss

COUNTY OF ^{ONEIDA}OSWEGO)

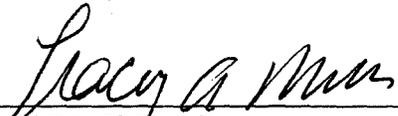
HON. WALTER W. HAFNER, JR., being duly sworn and deposed, states as follows:

1. I am a County Court Judge for the County of Oswego and have been designated an Acting Supreme Court Justice of the Fifth Judicial District of the State of New York and am the Respondent herein.
2. I have read the foregoing VERIFIED ANSWER WITH AFFIRMATIVE DEFENSES and the factual allegations contained therein are truthful and true, except those made upon information and belief, as to those matters I believe them to be true.

Dated: June 18, 2015


HON. WALTER HAFNER, JR.
COUNTY COURT JUDGE

Sworn to before me this 18
day of June, 2015.


NOTARY PUBLIC

TRACEY A. MILLS
Notary Public - State of New York
No. 01MI6185254
Qualified in Oneida County 16
My Commission Expires April 14, 2016

**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

VERIFIED ANSWER

WALTER W. HAFNER, JR.

A Judge of Oswego County Court, Oswego County.

STATE OF NEW YORK)

ss.

COUNTY OF ONEIDA)

Tracey A. Mills, being duly sworn, deposes and says:

I am over the age of eighteen (18) years, and on June 19, 2015, I served a true copy of the attached VERIFIED ANSWER TO THE SECOND FORMAL WRITTEN COMPLAINT, in the following manner:

by mailing them in a sealed envelope, with postage prepaid, in a post office or official depository of the United States Postal Service within the State of New York, First Class PRIORITY mail, addressed to the last known address of the addressee as follows:

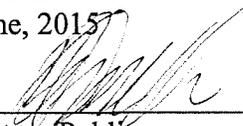
Jean M. Savanyu – Clerk
Commission on Judicial Conduct
61 Broadway, Suite 1200
New York, NY 10006

David M. Duguay, Senior Attorney
NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT
400 Andrews St., Suite 700
Rochester, NY 14604



Tracey A. Mills

Sworn to before me this 19th day of
June, 2015



Notary Public

OLGA V. BRUTSKAYA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01BR6310142
Qualified in Oneida County
My Commission Expires August 18, 2018

People v Swank, 109 A.D.3d 1089 (2013)

971 N.Y.S.2d 611, 2013 N.Y. Slip Op. 06105

109 A.D.3d 1089, 971 N.Y.S.2d 611, 2013 N.Y. Slip
Op. 06105

****1** The People of the State of New York,
Respondent

v

Steven M. Swank, Appellant.

Supreme Court, Appellate Division, Fourth
Department, New York
September 27, 2013

CITE TITLE AS: People v Swank

HEADNOTES

Crimes
Rape

Credibility of Victim's Testimony

Crimes
Immunity from Prosecution

Failure to Grant Witness Immunity

Amy L. Hallenbeck, Johnstown, for defendant-appellant.
Gregory S. Oakes, District Attorney, Oswego (Courtney
E. Pettit of counsel), for respondent.

Appeal from a judgment of the Oswego County Court
(Walter W. Hafner, Jr., J.), rendered February 24, 2011.
The judgment convicted defendant, upon a jury verdict, of
rape in the second degree, criminal sexual act in the
second degree (two counts) and unlawfully dealing with a
child in the first degree.

It is hereby ordered that the judgment so appealed from is
unanimously affirmed.

Memorandum: On appeal from a judgment convicting
him upon a jury verdict of, inter alia, rape in the second
degree (Penal Law § 130.30 [1]), defendant contends that
the verdict is against the weight of the evidence based on
his own testimony, the testimony of the victim, and the
lack of evidence supporting the victim's testimony.

Specifically, defendant contends that the victim's
testimony is not credible because her trial testimony was
internally inconsistent and was also inconsistent with her
statements to the police and her grand jury testimony.
Viewing the evidence in light of the elements of the
crimes as charged to the jury (*see People v Danielson*, 9
NY3d 342, 349 [2007]), we conclude that the verdict is
not against the weight of the evidence (*see generally*
People v Bleakley, 69 NY2d 490, 495 [1987]). "Although
a different result would not have been unreasonable, the
jury was in the best position to assess the credibility of the
witnesses and, on this record, it cannot be said that the
jury failed to give the evidence the weight it should be
accorded" (*People v Orta*, 12 AD3d 1147, 1147 [2004], *lv*
denied 4 NY3d 801 [2005]; *see generally Bleakley*, 69
NY2d at 495).

Defendant failed to seek immunity for a witness that he
called *1090 to testify at a hearing on his CPL article 330
motion, and he thus failed to preserve for our review his
further contention that the prosecutor abused his
discretion "when he refused to request that [the witness]
be granted immunity from prosecution" (*see generally*
People v Callicut, 101 AD3d 1256, 1262 n 4 [2012], *lv*
denied 20 NY3d 1096 [2013]; *People v Norman*, 40
AD3d 1130, 1131 [2007], *lv denied* 9 NY3d 925 [2007];
People v Grimes, 289 AD2d 1072, 1073 [2001], *lv denied*
97 NY2d 755 [2002]). In any event, that contention is
without merit inasmuch as the decision of a District
Attorney to request immunity for a witness is
discretionary " 'and not reviewable unless the District
Attorney acts with bad faith to deprive a defendant of his
or her right to a fair trial' " (*People v Bolling*, 24 AD3d
1195, 1196 [2005], *affd* 7 NY3d 874 [2006]; *see*
generally CPL 50.30), and here there was no showing of
bad faith (*see **2 People v Adams*, 53 NY2d 241,
247-248 [1981]). Furthermore, the witness's testimony
"could have been produced at trial with the exercise of
due diligence, and it was not of 'such character as to
create a probability that had such evidence been received
at the trial the verdict would have been favorable to the
defendant' " (*People v Broadnax*, 52 AD3d 1306, 1308
[2008], *lv denied* 11 NY3d 830 [2008], quoting CPL
330.30 [3]).

Defendant failed to seek dismissal of a sworn juror on the
ground that she was grossly unqualified, and thus he also
failed to preserve for our review his contention that
County Court erred in refusing to grant that relief (*see*
generally People v Hicks, 6 NY3d 737, 739 [2005]). We
decline to exercise our power to review that contention as
a matter of discretion in the interest of justice (*see* CPL
470.15 [6] [a]). We reject defendant's further contention

that he was denied effective assistance of counsel based on defense counsel's failure to move to disqualify the juror as grossly unqualified. It is " 'incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]), and defendant failed to make such a showing here, particularly in light of the indications in the record that the juror in question was the only juror who was of the opinion that defendant should not be convicted.

Finally, the sentence is not unduly harsh or severe. Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

Copr. (c) 2015, Secretary of State, State of New York

DIVESTITURE TO SUPERIOR COURT (SECTION 170 AND 180 CPL)

EXHIBIT 6

STATE OF NEW YORK
COUNTY OF OSWEGO: FULTON CITY COURT
HON. SPENCER J. LUDINGTON

THE PEOPLE OF THE STATE OF NEW YORK

-Vs-

LEE JOHNSON

ORDERED: Date: 12-10-2012
Held for Grand Jury Waived ✓
Ret to Local Crim Ct under CPL 180.40
Divestiture after Indictment/SCI Notice
Indictment/SCI #
Date Transmitted: December 10, 2012

LOCAL COURT INFORMATION

DOCKET # 12-01203 COURT CTR #: 65793490P
ARRAIGN DATE: 12-03-2012 ARREST DATE: 12-03-2012
NYSID NUMBER: 08563782Y AGENCY: FULTON PD
DEF. ADDRESS: [REDACTED] DEF ATTY: MARY A. FELASCO, ESQ.
DEF ATTY : AS
PHONE: [REDACTED] CUST. STATUS:
DOB: [REDACTED] BAIL: 10,000C/20000B
SEX:
RACE:

CHARGES HELD FOR ACTION OF THE GRAND JURY (including section numbers)

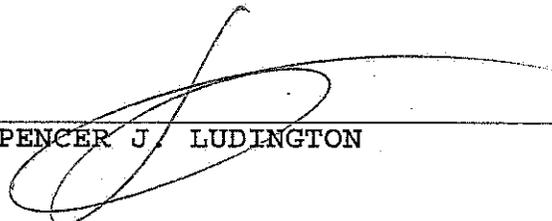
- PL-130.35-01 -BF- 1-RAPE-1ST:FORCIBLE COMPULSIO
- PL-120.14-02 -AM- 2-MENACING 2ND - STALKING
- PL-135.05 -AM- -N-003 2-UNLAWFUL IMPRISONMENT 2ND
- PL-120.15 -BM- 3-MENACING 3RD
- PL-240.26-01 -V - -N-002 2-HARASSMENT 2ND- PHY CONTACT

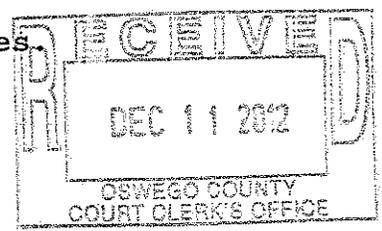
THE FOLLOWING ARE BEING FORWARDED TO OSWEGO COUNTY COURT (check all that apply)
 Felony Complaint (mandatory) Notice of Appearance
 Supporting Deposition (mandatory) 501 Card
 UCS 540 License Forwarded to Albany
 Arrest Report Date Forwarded ___/___/___
 Bail Papers DCJS Report
 Securing Order UTT's ___ (number enclosed)
Other (DWI refusal, appearance ticket, etc.) _____

Submit this form along with originals of the appropriate papers as provided in CPL Section 180.70(1) to the Superior Court, County of Oswego

Until such time that these papers are received, this action is deemed to be still pending in the local criminal court.

Please notify this court of the outcome of these charges.

HON. SPENCER J. LUDINGTON




WAIVER FOR PRE-PLEA PROBATION INVESTIGATION AND REPORT

We, the undersigned, do hereby permit the Oswego County Probation Department to proceed with the probation investigation of Lee A Johnson and to submit a report to the Court in contemplation of a plea of guilty to the crimes of

Rape 3rd

We agree that in the event of a subsequent trial of this defendant, no person of the Probation Department will be called to testify regarding any statement made by the defendant to the Probation Department or regarding any information acquired in the investigation or contained in the Pre-Plea Report. Information obtained by the Probation Department may not be used in a subsequent trial. However, this does not bar admittance of defense or prosecutorial investigation materials that may be included in the Pre-Plea Report.

Access to the probation report shall be limited to persons authorized by statute or court order.

The scope of the investigation and report shall conform to CPL §390 and Part 350 of the NYS Division of Probation Rules and Regulations governing Investigations and Reports.

THE DEFENDANT, by execution of this document, **EXPRESSLY WAIVES** any time limitations contained in the **Criminal Procedure Law**, including but not limited to CPL §§30.30, 180.80, 190.80, 30.20 and the **Sixth Amendment** to the U.S. Constitution.

ALL PARTIES, by execution of this document:

AGREE that all charges currently pending against the Defendant in Oswego County shall be included in the Report.

Oswego, New York
December 10, 12

Lee A Johnson
Defendant

[Signature]
Attorney for Defendant

Allison M. O'Neill
District Attorney

[Signature]
Judge

Original to Probation
Copy to all Parties

STATE OF NEW YORK
COURT ORDER FOR INVESTIGATION AND REPORT

Date: 12/10/12

To: OSWEGO COUNTY PROBATION DEPARTMENT
(NAME OF PROBATION AGENCY)

From: HON. WALTER W. HAFNER, JR. - OSWEGO COUNTY COURT
JUDGE COURT PART (DOCKET No./INDICTMENT No./ PETITION No.)

DEFENDANT'S/RESPONDENT'S NAME: Johnson, Lee A
LAST FIRST M.I.

Address: Oswego County Jail
STREET, APT# CITY/BOROUGH/VILLAGE

DOB: [REDACTED] SOC. SEC. No.: PHONE No.:

CJTN: (FORMERLY CCN) 65793490P NYSID# 85637824

CONVICTED OF: OR (CRIMINAL MATTERS)

ADJUDICATED AS: (FAMILY/CRIMINAL COURT MATTERS)

DATE OF CONVICTION/ADJUDICATION: CONVICTED BY: PLEA TRIAL ADJUDICATION

CUSTODY STATUS: BAIL R.O.R. DETENTION

RETURN DATE: 1/23/13 COUNSEL'S NAME: Mary Felasco, Esq

TYPE OF INVESTIGATION AND REPORT REQUESTED:
 PRE-PLEA (WAIVER REQUIRED) OTHER (SPECIFY):
 PRE-SENTENCE PRE-DISPOSITION

SPECIFIC INSTRUCTIONS:

PLEASE SUBMIT PRE-PLEA REPORT TO THE JUDGE AT LEAST THREE DAYS PRIOR TO THE RETURN DATE.

SELECT ONE:

INSTRUCTED TO REPORT TO PROBATION DEPARTMENT ON TO AWAIT CONTACT BY PROBATION DEPARTMENT: A.M. P.M.

By: Patricia A Cune DATE TIME

Note: Please Attach Copy of Information/Petition, Statement, ROR Report, Fingerprint Record, etc.

- 1-23-13 JCL, ADA A. O'Neill, Δ produced, app'd w/ atty M. Felasco;
PTC held; offer Rape 3rd to satisfy all chips, PPR Ordered
for 1-23-13; bail continued \$10kc / \$20kb (10:47:00 - 10:55:57)
- 1-23-13 WWH, ADA T. Christopher, Δ produced, app'd w/ atty M. Felasco for PPR
① 4Y det - 10Y PPS, \$1000 ssovF, \$50 SO Reg fee, \$50 DNA fee, \$325 ms, OP
Adj for rpt - 2-5-13 (9:03:07 - 9:08:03)
- 2-8-13 WWH, ADA T. Christopher, Δ produced, app'd w/ atty M. Felasco
for rpt; No plea agreement - to the Grand Jury.
(9:48:38 - 10:05:30)
- 5-20-13 WWH; ADA O'Neill; Δ App'd w/ Atty Felasco for 190.80 mot;
Case law to be submitted; Atty Felasco (Relieved);
Assign Atty DiMartino; 9:39:02 - 10:06:43.
- 5-24-13 WWH; ADA O'Neill; Δ App'd w/ Atty DiMartino for Rpt; Motion Denied;
(4/24/13 - is start date); CALENDAR; TO S.J; 9:03:37 - 9:29:09.
- 7-22-13 WWH, ADA A. O'Neill, Δ produced, app'd w/ atty A. DiMartino for
Motions; Adj for Huntley Hrg 7-25-13 @ 9:45 AM, Bail set at \$5kc / \$10kb
(9:26:22 - 9:31:13)
- 7-25-13 WWH, ADA A. O'Neill, Δ produced, app'd w/ atty A. DiMartino - Huntley Hrg
held - see hearing minutes / exhibit list. (10:04:26 - 10:31:30 & 10:48:06 -
11:29:50)
- 9-5-13 WWH, ADA A. O'Neill, Δ produced, app'd w/ atty A. DiMartino, No plea agreement
Adj for Jury Trial 12-9-13 2nd Jury Ordered. (1:00:25 - 1:12:38)
- 10-23-13 WWH, ADA A. O'Neill, Δ produced app'd w/ atty A. DiMartino - Jury selection.
MISTrial - ran out of Jurors - Jennifer Agydan, ct rpt

OSWEGO COUNTY
CLERK'S OFFICE
2013 NOV 21 A 10:12

STATE OF NEW YORK
COUNTY OF OSWEGO COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

vs

NOTICE OF
PRESENTMENT
TO GRAND JURY

LEE A. JOHNSON, JR.

Defendant(s).

CPL §190.50(5)

PLEASE TAKE NOTICE, that there is currently pending against the above-named defendant an undisposed Criminal Proceeding in a Local Criminal Court, charging an offense which is the subject of prospective or pending Grand Jury consideration.

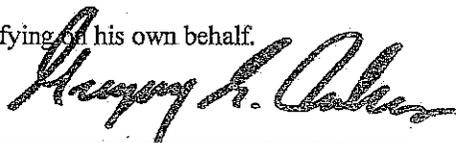
Please take notice that a presentment of evidence to the Oswego County Grand Jury will occur on **February 27, 2013**.

In the event the defendant should wish to appear before the Grand Jury and offer testimony in his own behalf, you are hereby given notice for the defendant to be physically present on **February 27, 2013 at 2:00 p.m.**, at the Oswego County District Attorney's Office, Public Safety Center, 39 Churchill Road, Oswego, New York 13126.

Pursuant to CPL §190.45 the District Attorney's Office will require the defendant to execute a written Waiver of Immunity prior to the defendant's testimony to the Grand Jury.

That a presentment of evidence will be made to the Grand Jury on the date and time set forth irrespective of whether the defendant is physically present for the purpose of testifying on his own behalf.

Date: February 14, 2013



GREGORY S OAKES
OSWEGO COUNTY DISTRICT ATTORNEY

TO: Lee A. Johnson, Jr.
Oswego County Public Safety Center

39 Churchill Road

Oswego, New York 13126

TO: Mary A. Felasco, Esq.
Attorney for Defendant

151 North Second Street

Fulton, New York 13069

STATE OF NEW YORK
COUNTY COURT

COUNTY OF OSWEGO

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

WAIVER OF SPEEDY TRIAL
WAIVER OF CPL §190.80 and
§180.80Lee Johnson Jr
Defendant

The above named defendant does hereby waive the provisions of §30.20, §30.30 of the Criminal Procedure Law and the speedy trial requirements of the Sixth Amendment to the U.S. Constitution time limitations.

The reason for these waivers is that counsel for the defendant deems the waiver advantageous for a plea bargain which has been reached already with the People, or advantageous for the defendant to gain more time for the purpose of negotiating a plea bargain.

Further, the above named defendant does waive the provisions of CPL §180.80; §190.80 and mandating release of the defendant from confinement in custody based upon the non- occurrence of Grand Jury action relative to the felony complaint charging the defendant.

Further, the above named defendant hereby agrees that this waiver nullifies any time that has so far accumulated for the purpose of CPL § 190.80, and defendant agrees that should he/she rescind or revoke this agreement, the 45-day period set forth in CPL § 190.80 begins anew the day after this agreement is rescinded or revoked, provided the matter has been divested.

The defendant acknowledges and agrees that this waiver of §190.80 relief constitutes good cause shown. The good cause shown being the negotiations between the defendant and/or defendant's attorney with the District Attorney's Office seeking a disposition of the now pending felony charge(s) favorable to the defendant.

It is intended by the defendant to extend the time limitations for the foregoing purposes for a period of _____ days. (It is agreed that if no specific number of days are set forth herein, the extension of time shall be deemed to be unlimited, until defendant, by his or her counsel, notifies the District Attorney's Office that this agreement is no longer in effect.) This matter has been discussed between defendant and counsel for the defendant and the defendant is in accord with this waiver.

Dated: 2/25/13

Dated: 2/25/13

Lee Johnson Jr
Defendant[Signature]
Attorney for Defendant

2012-8465

FELASCO & CUOMO
ATTORNEYS AT LAW
MARY A. FELASCO
LISA S. CUOMO

151 North Second Street
Fulton, New York 13069

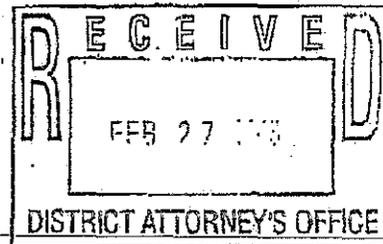
6007 Fair Lakes Road, Suite 200
East Syracuse, New York 13057

*** ALL MAIL TO FULTON ADDRESS**

Telephone: (315) 402-2390
Fax: (315) 402-2954

February 26, 2013

ADA Allison O'Neill
Oswego County District Attorney's Office
Public Safety Center
39 Churchill Road
Oswego, New York 13126



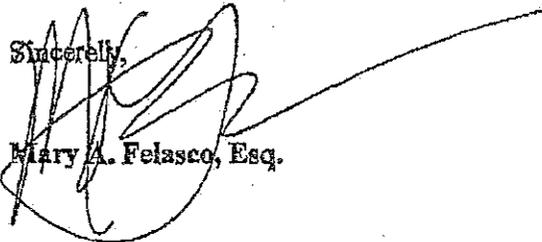
Re: **People v. Lee Johnson**
Oswego County Court

Dear Allison:

I have met with my above referenced client and provided you with a Speedy Trial Waiver. My client has agreed to voluntarily provide a DNA sample to you for the purposes of comparing same with DNA on the panties found in the schoolyard.

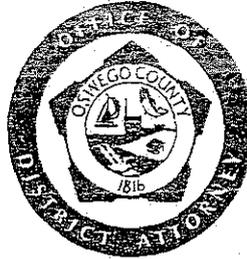
I ask that you arrange to have a swab taken from my client and I will waive my right to be present when the sample is taken.

Please try to expedite the results of the DNA comparison as my client is incarcerated.

Sincerely,

Mary A. Felasco, Esq.

MAF:llw

PUBLIC SAFETY CENTER
39 CHURCHILL ROAD
OSWEGO, NEW YORK 13126



TELEPHONE: (315) 349-3200
FAX: (315) 349-3212

Office of the District Attorney

MARK M. MOODY
FIRST ASSISTANT
DISTRICT ATTORNEY

GREGORY S. OAKES
DISTRICT ATTORNEY / CORONER

ASSISTANT
DISTRICT ATTORNEYS
MICHAEL G. CIANFARANO
JAMES M. NICHOLSON
MATTHEW J. BELL
ROBERT E. GENANT
ALLISON M. O'NEILL
COURTNEY E. PETTIT
THOMAS W. CHRISTOPHER
CHARLES H. CIESZESKI

~~KATHLEEN M. MACPHERSON~~
INVESTIGATOR

March 29, 2013

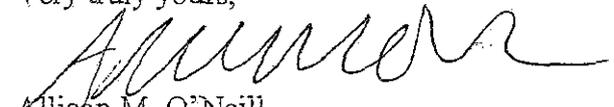
Mary Felasco, Esq.
163 South First Street
Fulton, NY 13069

People v. Lee Johnson

Dear Ms. Felasco:

Enclosed please find a copy of the lab report we have been waiting for in the People v. Lee Johnson case. Please feel free to call me to discuss this when you have a chance.

Very truly yours,


Allison M. O'Neill
Assistant District Attorney

FELASCO & CUOMO
Attorneys at Law

Mail: 151 N. Second St. Fulton NY 13069
Ph. 315-402-2390
Fx. 315-402-2954
felascolaw@yahoo.com
6007 Fair Lakes Rd. STE 200 E. Syracuse NY 13057

Mary A. Felasco, Esq.

Lisa S. Cuomo, Esq.

Associate: Jessica Senn, Esq.

April 24, 2013

SENT VIA FACSIMILE
315-349-3212

ADA Allison O'Neill
Oswego County District Attorney's Office
Public Safety Center
39 Churchill Road
Oswego, New York 13126

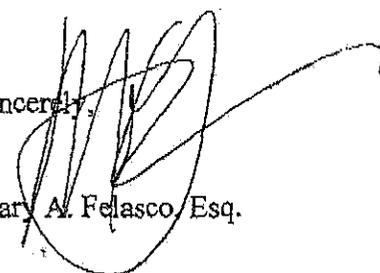
RE: People v. Lee Johnson
Oswego County Court

Dear Allison:

I am in receipt of the lab report and your offer of Rape 3rd. My client has instructed me to reject your offer and requests that the Speedy Trial Waiver signed on February 25, 2013 be withdrawn.

Please keep me apprised of the status of the case.

Sincerely,


Mary A. Felasco, Esq.

MAF:llw

Cc: Lee Johnson

STATE OF NEW YORK
COUNTY OF OSWEGO

COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

vs

NOTICE OF
PRESENTMENT
TO GRAND JURY

LEE A. JOHNSON, JR.

Defendant(s).

CPL §190.50(5)

PLEASE TAKE NOTICE, that there is currently pending against the above-named defendant an undisposed Criminal Proceeding in a Local Criminal Court, charging an offense which is the subject of prospective or pending Grand Jury consideration.

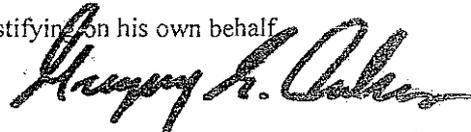
Please take notice that a presentment of evidence to the Oswego County Grand Jury will occur on May 29, 2013.

In the event the defendant should wish to appear before the Grand Jury and offer testimony in his own behalf, you are hereby given notice for the defendant to be physically present on May 29, 2013 at 9:30 a.m., at the Oswego County District Attorney's Office, Public Safety Center, 39 Churchill Road, Oswego, New York 13126.

Pursuant to CPL §190.45 the District Attorney's Office will require the defendant to execute a written Waiver of Immunity prior to the defendant's testimony to the Grand Jury.

That a presentment of evidence will be made to the Grand Jury on the date and time set forth irrespective of whether the defendant is physically present for the purpose of testifying on his own behalf.

Date: April 26, 2013



GREGORY S OAKES
OSWEGO COUNTY DISTRICT ATTORNEY

TO: Lee A. Johnson, Jr.

Public Safety Center
39 Churchill Road

Oswego, New York 13126

TO: Mary A. Felasco, Esq.
Attorney for Defendant

151 North Second Street

Fulton, New York 13069

STATE OF NEW YORK

COUNTY OF OSWEGO COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

AFFIDAVIT

Vs.

LEE JOHNSON,

Defendant.

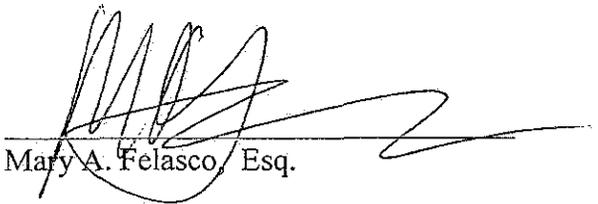
STATE OF NEW YORK)
COUNTY OF OSWEGO) ss:

MARY A. FELASCO, ESQ., being duly sworn deposes and says to the Court:

1. I have been appointed to represent Lee Johnson in the above referenced matter.
2. I am an attorney and counselor at law admitted to practice law in the State of New York with an office at 151 North Second Street, Fulton, New York 13060.
3. The Defendant was arrested by the New York State Police on December 3, 2012 and charged with Rape 1st, Menacing 2nd, Unlawful Imprisonment 2nd, Menacing 3rd and Harassment 2nd, and arraigned in the City of Fulton.
4. The Defendant was held on \$10,000.00 cash/\$20,000.00 bail bond at the Oswego County Jail pending a Preliminary Hearing.
5. A Preliminary Hearing was waived on December 10, 2012 in City of Fulton Court, Judge Spencer Ludington presiding. On the same date, Assistant District Attorney Allison O'Neill offered to allow the Defendant to plead guilty to a Rape 3rd in full satisfaction of his pending charges.
6. The Defendant was held for action by the Grand on December 10, 2012. On February 8, 2013 the Defendant rejected the offer made by the Assistant District Attorney O'Neill.

7. From December 3, 2012 (the date of Defendant's arrest) through December 10, 2012 (date of scheduled Preliminary Hearing), no plea bargaining took place.
8. From February 8, 2013 through February 25, 2013, no plea bargaining took place.
9. On February 25, 2013 through April 25, 2013 the Defendant waived his Speedy Trial rights including his CPL Section 190.80 rights. See attached Speedy Trial waiver and letter fax of April 25, 2013 withdrawing same.
10. Since April 25, 2013, no further plea bargaining has occurred.
11. From December 3, 2012 through December 10, 2012, seven days have passed, from February 8, 2013 to February 25, 2013, seventeen days have passed and from April 25, 2013 to May 17, 2013, twenty-two have passed. Thus from Defendant's arrest, forty-six days have passed without plea negotiation.
12. At present, no certificate of indictment has been filed.

WHEREFORE, Defendant is entitled to an Order releasing Defendant on his own recognizance pursuant to CPL §190.80


Mary A. Felasco, Esq.

Sworn to before me this 16th
day of May, 2013.


NOTARY PUBLIC

LAURA L. WILLIS
Notary Public, State Of New York
No. 01W18074903
Qualified in Oswego County
My Commission Expires May 27, 2014

FOR USE BY COURTS ASSIGNING LAWYERS TO INDIGENT DEFENDANTS

NOTICE TO ASSIGNED ATTORNEY & ASSIGNED COUNSEL PLAN

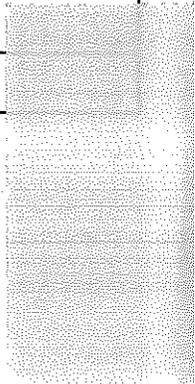
RETURN ATTACHED QUESTIONNAIRE TO THIS COURT

LAWYER'S NAME	ANTHONY J. DIMARTINO, JR., ESQ.
ADDRESS	P.O. BOX 858, OSWEGO, NEW YORK 13126
PHONE NUMBER	(315)341-5815
DEFENDANT'S NAME	LEE A. JOHNSON, JR.
ADDRESS	[REDACTED]
PHONE	[REDACTED]
AGE	35 D.O.B. [REDACTED]
SEX	<input checked="" type="checkbox"/> MALE <input type="checkbox"/> FEMALE
PRESENT LOCATION OF DEFT.	<input type="checkbox"/> ROR <input type="checkbox"/> ON BAIL <input checked="" type="checkbox"/> CONFINED
DATE OF ASSIGNMENT	5-20-2013
COURT	Oswego County Court
JUDGE'S NAME	HON. WALTER W. HAFNER JR.
ADDRESS	OSWEGO COUNTY COURT - PUBLIC SAFETY CENTER 39 CHURCHILL ROAD - OSWEGO, NY 13126
PHONE	(315) 349-8666
CHARGE(S)	Rape 1 st , Rape 3 rd , Sexual Abuse 1 st , Unlaw imprison 2 nd (2 cts), Menacing 3 rd , Harassment 2 nd (4 cts)
PLEASE CHECK ONE	<input type="checkbox"/> VIOLATION <input type="checkbox"/> MISD. <input checked="" type="checkbox"/> FELONY
ADJOURNED DATE	5-24-2013
INDICTMENT OR INFO NUMBER	IND# 13C-0162
DATE OF COMMISSION OF ALLEGED OFFENSE	7-30-2012

Mail promptly one copy to assigned lawyer AND mail promptly one copy to:

OSWEGO COUNTY ASSIGNED COUNSEL PLAN

Stephen C. Greene, Jr., Esq., Administrator
 Legislative Office Building
 46 East Bridge Street
 Oswego, New York 13126
 Phone: 315-349-8296
 Fax: 315-349-8298



STATE OF NEW YORK
COUNTY OF OSWEGO

COUNTY COURT

RECEIVED
MAY 22 2013

OSWEGO COUNTY COURT
JUDGE'S OFFICE

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

PEOPLE'S RESPONSE TO
DEFENDANT'S MOTION FOR
RELEASE ON RECOGNIZANCE

LEE JOHNSON,

Defendant

I, ALLISON M. O'NEILL, an attorney admitted to practice in this state, affirm the following statement cognizant of the penalties of perjury, pursuant to CPLR §2106:

I am an Assistant District Attorney in and for the County of Oswego and I submit the following in support of the People's Response in Opposition to Defendant's Motion for Release on Recognizance:

1. On May 17, 2013, the People received a Motion for Release on Recognizance Pursuant to CPL §190.80 from defense counsel.
2. On May 20, 2013, the People and defense counsel appeared in County Court to argue the motion. The defendant claimed that he was entitled to release under CPL §190.80. The People argued that the defendant had signed a speedy trial waiver which nullified any time that had so far accumulated under CPL §190.80, and that should the defendant revoke the waiver, the 45 day period set forth in CPL §190.80 would begin anew. The Court heard the arguments and the People stated that they would submit case-law on the matter.
3. The People have researched this issue, and have not been able to find any cases on the specific issue of the 45 day period starting anew. There is, however, a statutory provision that is relevant to this issue.
4. Under CPL §190.80 a defendant who is in custody on a felony complaint must be released after 45 days when there has been no Grand Jury action or disposition unless as set forth in CPL §190.80(a) "the lack of a grand jury disposition during such period of confinement was due to the defendant's request, action or condition, or **occurred with his consent.** (Bold added).
5. In the present case, a review of what has occurred in this matter thus far will make it clear that the lack of Grand Jury action or disposition during the defendant's period of confinement occurred with the defendant's consent.
6. The defendant was arrested on December 3, 2012.
7. The matter was divested on December 10, 2012. (See divestiture attached).
8. On December 10, 2012, a pre-plea probation investigation and report was ordered. The defendant "expressly waived" any time limitations contained in CPL §190.80. (See waiver attached).
9. On February 8, 2013, all parties appeared in County Court. The Court gave the defendant

a sentence promise on February 8, 2013. The defendant rejected the People's offer to plead guilty to one count of Rape 3rd.

10. On February 14, 2013, a Grand Jury Notice of Presentment was sent to Defense Counsel Mary Felasco and to the defendant. This case was scheduled to be presented to the Grand Jury on February 27, 2013. (See Grand Jury notice attached).
11. Prior to the scheduled Grand Jury presentment, defense counsel, Mary Felasco and the defendant both signed a speedy trial waiver and agreed that her client would voluntarily submit a DNA sample. As set forth in Ms. Felasco's letter, the defendant's DNA sample was taken in order to compare his DNA to the DNA that was found on the victim's underwear.
12. A copy of both the letter provided by Mary Felasco and the speedy trial waiver is attached. It is clear from the speedy trial waiver that the defendant waived his right to be released based upon the non-occurrence of grand jury pursuant to CPL §190.80. Furthermore, the waiver contains the following statement: "The waiver nullifies any time that has so far accumulated for the purposes of CPL §190.80, and the defendant agrees that should he/she recind or revoke this agreement, the 45 day period set forth in CPL §190.80 begins anew the day after the agreement is rescinded or revoked..." (See letter and signed waiver attached). Both the defendant and his attorney signed this waiver.
13. If the defendant had not agreed to waive his speedy trial/CPL §190.80 rights, the People would not have agreed to postpone Grand Jury until we received the results of the lab report.
14. On March 28, 2013, the People received the results of the lab report, and on March 29, 2013, the results were forwarded to defense counsel. (See letter and lab results attached)
15. On April 24, defense counsel sent the People a letter revoking his Speedy Trial waiver. (See letter from defense counsel attached)
16. On April 26, 2013, the People scheduled the matter for Grand Jury a second time. The case is currently scheduled for May 29, 2013. (See new Grand Jury notice attached).

Conclusions

17. It is clear that the defendant and his attorney signed a waiver in which they waived the defendant's CPL §190.80 rights and agreed that the any time that had accumulated under CPL §190.80 was nullified.
18. Although the defendant now claims that his attorney pressured him into signing the waiver, he admitted in County Court that he signed the document. Furthermore, a defendant's statutory speedy trial rights may be waived by defense counsel alone. See: *People v. Trepasso*, 197 AD2d 891 (4th Dept. 1993).
19. The defendant signed the speedy trial/ CPL §190.80 waiver two days before his case was scheduled for Grand Jury. By signing this waiver he obtained the benefit of having his case adjourned so that the underwear in the case could be sent out for DNA testing prior to indictment.
20. Now that the DNA results are not to the defendant's liking, he should not be permitted to withdraw his signature from a waiver that he signed under the advice of counsel.
21. The People assert that the waiver signed by the defendant was valid and that the 45 day time period as set forth in CPL §190.80 started one day after the People received notice

from the defendant that they had revoked their waiver.

22. Pursuant to CPL §190.80(a), the lack of a grand jury disposition during the defendant's period of confinement was "due to the defendant's request, action or condition, or **occurred with his consent.**" (Bold added).

WHEREFORE, the People respectfully request this Court deny the defendant's motion in all respects and enter an order in accordance herewith.

DATED: 5-22-13
Oswego, NY 13126


ALLISON M. O'NEILL
Assistant District Attorney
39 Churchill Road
Oswego, NY 13126
Phone: (315) 349-3211

Hon. Walter W. Hafner, Jr.
Oswego County Court
39 Churchill Road
Oswego, NY 13126

Anthony DiMartino, Esq.
351 West First St.
Oswego, NY 13126

Mary Felasco, Esq.
151 North 2nd Street
Fulton, NY 13069

Lee A. Johnson
Oswego County Jail

MATTER OF WALTER W. HAFNER
AUDIO EXHIBIT

Exhibit 19: Audio recording of the proceedings in *People v Lee Johnson*, held September 5, 2013, before Hon. Walter W. Hafner, Jr. in Oswego County Court.

The audio is appended to the original Agreed Statement of Facts and is available upon request.



STATE OF NEW YORK
OSWEGO COUNTY COURT

HON. WALTER W. HAFNER, JR.
Oswego County Court Judge

County Court Chambers
Public Safety Center
39 Churchill Road
Oswego, New York 13126
Telephone (315) 349-8666
Fax (315) 349-8669

Tuesday, October 29, 2013

Mr. Anthony J. DiMartino, Esq.
351 West First Street
Oswego, New York 13126

Ms. Allison O'Neill, Esq.
Assistant District Attorney
39 Churchill Road
Oswego, New York 13126

Re: People v. LEE JOHNSON, Jr. - IND No. 13C-162

Counselors:

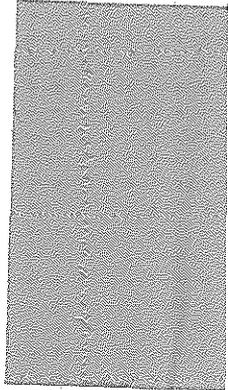
Please be advised that the above captioned matter is now **second** jury ordered for trial on **TUESDAY, NOVEMBER 12th, 2013**. In the event a plea is entered in the first jury ordered matter of People v. Frank Russell (IND 13C-055), jury selection in the matter of People v. Lee Johnson, Jr. (IND 13C-162) will commence at **9:30 a.m.**

Very truly yours,


WALTER HAFNER, JR.
OSWEGO COUNTY COURT JUDGE

WWH:smp

cc: Court Clerk
Timothy Kirwan, Esq.
Commissioner of Jurors (via fax)
Court File





STATE OF NEW YORK
OSWEGO COUNTY COURT

HON. WALTER W. HAFNER, JR.
Oswego County Court Judge

County Court Chambers
Public Safety Center
39 Churchill Road
Oswego, New York 13126
Telephone (315) 349-8666
Fax (315) 349-8669

Thursday, November 7, 2013

Mr. Anthony J. DiMartino, Esq.
351 West First Street
Oswego, New York 13126

(via fax)

Ms. Allison O'Neill, Esq.
Assistant District Attorney
39 Churchill Road
Oswego, New York 13126

Re: People v. LEE JOHNSON, Jr. - IND No. 13C-162

Counselors:

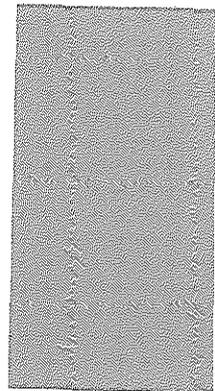
This letter is to confirm that the Jury trial in the above captioned matter will commence on **TUESDAY, NOVEMBER 12th, 2013 at 9:30 a.m.**

Very truly yours,

WALTER HAFNER, JR.
OSWEGO COUNTY COURT JUDGE

WWH:smp

cc: Court Clerk
Court File



Russell, Russell & Grasso

A Professional Limited Liability Company
ATTORNEYS AND COUNSELORS AT LAW
3250 FULTON AVENUE - P.O. BOX 503
CENTRAL SQUARE, NEW YORK 13036-0503

BENJAMIN A. RUSSELL (1940 - 2007)
DAVID E. RUSSELL
DAVID S. GRASSO

TELEPHONE: (315) 668-2669
FAX: (315) 668-3335
EMAIL: RRG@russell-grasso.com

August 16, 2013

Hon. Walter Hafner, Jr.
Oswego County Court
39 Churchill Road - PSC
Oswego, NY 13126
fax: 349-8669

RECEIVED
SEP 01 2013
TOWN OF ALBION COURT
OSWEGO COUNTY

Re: [REDACTED]

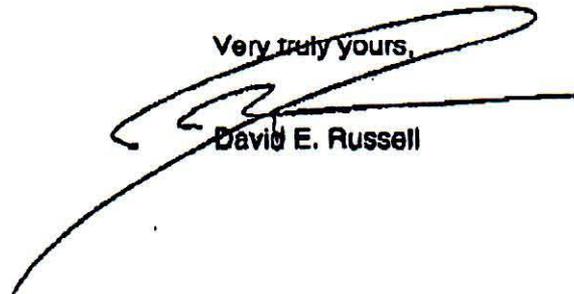
Dear Hon. Walter Hafner, Jr:

I have discussed this matter with attorney Pagano on several different occasions. I made an offer, which [REDACTED] is accepting, for a plea to a misdemeanor, restitution and probation.

According to the Oswego County Correctional Facility, [REDACTED] is being held on a sentence out of Oswego City Court wherein his release date is October 17, 2013. According to Mr. Pagano, [REDACTED] will accept my offer on September 16, 2013.

If you have any questions or concerns, please do not hesitate to call me. Again, I'd like to thank the Court for assigning me special prosecutor on various cases.

Very truly yours,



David E. Russell

CC: Joe Pagano, Esq. - 343-7960

Syracuse Office
307 South Clinton Street - Suite 300, Syracuse, New York 13202
315-668-8671

*Not for service of process.