STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

DAVID F. JUNG,

a Judge of the Family Court,
Fulton County.

- -

THE COMMISSION:

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

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Edward Lindner and Kathryn J. Blake, Of Counsel) for the Commission

Capasso & Massaroni LLP (by Vincent Capasso, Jr.) for the Respondent

The respondent, David F. Jung, a Judge of the Family Court, Fulton County, was served with a Formal Written Complaint dated December 6, 2006, containing five

charges. The Formal Written Complaint alleged that in five cases respondent violated fundamental due process rights of litigants, including the right to be heard and the right to counsel. Respondent filed a Verified Answer dated December 22, 2006.

By Order dated January 27, 2007, the Commission designated Honorable Frank J. Barbaro as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 26, 2007, in Albany. The referee filed a report dated September 7, 2007.

The parties submitted briefs with respect to the referee's report. On November 2, 2007, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Judge of the Family Court, Fulton County, since 1990.

As to Charge I of the Formal Written Complaint:

2. On March 3, 2005, respondent presided over *Wendy Hohenforst v. Thomas DeMagistris*, in which the parties were scheduled to appear for trial on custody, visitation and family offense petitions and counter-petitions. The case was scheduled to commence at 9:00 A.M.

3. Ms. Hohenforst was represented by Ronald Schur, Esq., and Mr. DeMagistris was represented by Brian Toal, Esq.

4. Prior to the scheduled proceeding, while respondent was in his

chambers, Mr. DeMagistris was involved in an incident near the entrance to the courthouse in which he allegedly threatened Mr. Schur. Mr. DeMagistris was taken into custody by a court officer and was placed in a holding cell in the courthouse, awaiting arrest by the Johnstown police.

5. Immediately following the incident, Mr. Schur, Mr. Toal and the law guardian met with respondent in chambers and advised respondent that Mr. DeMagistris had threatened Mr. Schur a short time earlier in the presence of a court officer and had been taken into custody. A court officer confirmed to respondent that such an incident had occurred and that Mr. DeMagistris had been arrested and was in custody awaiting the arrival of local police.

6. At a court appearance two months earlier, Mr. DeMagistris had physically accosted Mr. Schur in the courtroom in respondent's presence.

7. Respondent convened the proceeding in the courtroom. The attorneys, the law guardian and Ms. Hohenforst were present. Respondent stated on the record that Mr. DeMagistris was not present. He stated that it had been "brought to [his] attention" that Mr. DeMagistris had threatened Mr. Schur a short time earlier and had been placed under arrest for "criminal behavior." Respondent further stated, "Now, that is not the basis for an adjournment at the request of Mr. DeMagistris. If he's unable to proceed because of his own conduct that is not excusable, in the view of the Court, and these cases must proceed."

8. Respondent knew at that time that Mr. DeMagistris was in custody,

either in a holding cell at the courthouse or in the custody of local police.

9. At the parties' previous court appearance, respondent had advised the parties that if they were not present on the trial date, absent a good excuse, the other side could proceed and the relief requested could be granted in their absence.

10. Counsel for both parties made motions to withdraw as counsel for their respective clients, which respondent granted. In granting Mr. Toal's motion to withdraw as Mr. DeMagistris' counsel, respondent did not inquire whether Mr. Toal had advised his client that he was seeking to withdraw, and respondent did not know whether Mr. DeMagistris knew that his attorney intended to withdraw. After granting Mr. Schur's application to withdraw as Ms. Hohenforst's attorney, respondent asked Ms. Hohenforst if she wanted an adjournment, and she stated that she wished to proceed without an attorney. Respondent took no affirmative steps to advise Mr. DeMagistris that the proceeding was going forward without him or his counsel.

11. Following an inquest by the law guardian on behalf of the parties' children, respondent declared Mr. DeMagistris in default and granted the relief requested in Ms. Hohenforst's petitions, including divesting Mr. DeMagistris of custody of his children and issuing a three-year order of protection. Respondent dismissed the petition filed by Mr. DeMagistris for failure to prosecute. Respondent then sentenced Mr. DeMagistris *in absentia* to two consecutive 180-day terms in jail for family offenses and violation of an order of protection.

12. Pursuant to the sentence imposed by respondent, Mr. DeMagistris

served five months in jail before being released on a writ of *habeas corpus*. On October 18, 2007, the Appellate Division, Third Department reversed respondent's decision, vacating the default judgment and remitting the proceedings for a new hearing before a different judge.

13. As a result of the incident at the courthouse on March 3, 2005, Mr. DeMagistris pleaded guilty in the Johnstown City Court to Harassment in the Second Degree and Disorderly Conduct and was sentenced to 15 days in jail to be served concurrently with the sentence imposed by respondent.

As to Charge II of the Formal Written Complaint:

14. On April 11, 2005, respondent presided over *Matter of Angelic Constantino*, which concerned custody and visitation petitions and a charge that Ms. Constantino had violated an order of protection.

15. Ms. Constantino did not appear in court on that date because she was incarcerated at the Schenectady County Jail on unrelated charges. Five days earlier, Ms. Constantino had been served at the jail with a summons, directing her appearance in the Fulton County Family Court on April 11, 2005. The summons form states that the Family Court may conduct a hearing and grant the relief requested if the party does not appear.

16. It was respondent's policy that when an incarcerated individual was scheduled to appear in Family Court, respondent would issue an order to produce only upon receiving a request from the individual requesting such an order. Unless the Family Court received such a request, an order to produce would not be issued and thus an

incarcerated individual could not appear.

17. Although respondent's policy was not specified on the summons she received, Ms. Constantino attempted to have jail officials contact the Family Court on her behalf to have herself produced in court on April 11th. No notice of any such request was received by the Family Court, and respondent did not issue an order to produce.

18. When respondent convened the *Constantino* matter on April 11, 2005, the father and grandparents of the children, their attorneys, the law guardian and representatives of the Department of Social Services were present. Respondent inquired if Ms. Constantino was present, and the attorney for the father and grandparents told respondent on the record that she was in the Schenectady County Jail.

19. Respondent examined the summons and affidavit of service to confirm that Ms. Constantino had been properly served. The summons indicated that Ms. Constantino had been served at the Schenectady County Jail on April 6, 2005.

20. Respondent declared Ms. Constantino in default. Although respondent knew she had been served at the jail, and had been advised by the attorney that she was in jail, he chose not to make any further inquiry to confirm whether she was incarcerated and did not take any action to produce her in court.

21. After an inquest by the attorney for the Department of Social Services, respondent granted the relief requested in the petition, including terminating Ms. Constantino's right to joint custody of her children, finding a willful violation of an order of protection and imposing a 180-day sentence of incarceration.

22. The next day, according to notations on Family Court records, Ms. Constantino called the court from jail and inquired as to why she had not been brought to court the previous day. Court staff told her that it is the court's policy that an inmate must make a request to be produced and further told her that "if she disagrees with the court policy she is to put her concerns in writing and forward them to the court."

23. On April 15, 2005, Van Zwisohn, Esq., Ms. Constantino's assigned counsel in a Saratoga County Family Court matter, sent a letter to respondent stating that Ms. Constantino was incarcerated and asking that respondent produce her to inquire into the matter and assign counsel in the proceeding. By letter dated April 25, 2005, the Chief Clerk replied to the letter, stating that "it is the policy of this Court that if an inmate wishes to be present for any court proceeding that he or she make that request in writing to the Court. That request is then put before the Judge for consideration." Respondent testified at the Commission hearing that he did not see Mr. Zwisohn's letter at the time and was unaware of the Chief Clerk's response. Respondent did not take any action to bring Ms. Constantino before the court.

24. Ms. Constantino was released on a writ of *habeas corpus* by a Supreme Court Justice entered June 28, 2005. She did not move to vacate the default. On April 27, 2006, the Appellate Division, Third Department, affirmed the judgment granting the writ.

As to Charge III of the Formal Written Complaint:

25. On April 28, 2005, respondent presided over *Julie A. Dacre v.*

Dennis A. DaCorsi, Jr., in which the parties were scheduled to appear on a custody petition and allegations that Mr. DaCorsi had violated an order of child support.

26. On that date, Ms. Dacre, her attorney and the law guardian were present. Mr. DaCorsi, who had been served with the petition, was not present because he was incarcerated at the Fulton County Jail, pursuant to commitments from another court. At a prior appearance, the parties had been advised that if they were not present on the scheduled date, absent a good excuse, the other side could proceed and the relief requested could be granted in their absence.

27. On April 27, 2005, according to notations on the court disposition sheet, a woman identifying herself as Mr. DaCorsi's sister had called the court and stated that her brother had been arrested earlier that week and had to be in Family Court the next day; a court clerk told the caller that either Mr. DaCorsi or the police would have to contact the court and ask that he be produced. Respondent testified that the updated disposition sheet was probably not in the court file when the case was before him on April 28, 2005, and that he was unaware at the time of the phone call.

28. On April 28, 2005, after checking the affidavit of service to confirm that Mr. DaCorsi had been properly served, respondent declared Mr. DaCorsi in default. Respondent either knew or should have known that Mr. DaCorsi was incarcerated.

29. Respondent advised Ms. Dacre's attorney and the law guardian that they could either proceed or have an adjournment, and they elected to proceed. After testimony was taken, respondent granted the relief requested in the petition, declaring that

Mr. DaCorsi had willfully failed to pay child support, terminating Mr. DaCorsi's custody of his child and sentencing him *in absentia* to two consecutive terms of incarceration, of 90 days and 180 days.

30. On June 16, 2006, respondent granted Mr. DaCorsi's motion to vacate the default and disqualified himself from the case.

As to Charge IV of the Formal Written Complaint:

31. On January 12, 2005, in *Dale A. Rulison v. Nickie L. Smith*, the parties appeared before a support magistrate on a petition alleging that Ms. Smith had violated an order of support and was in contempt. The support magistrate advised the parties of the right to counsel and to have counsel assigned if they could not afford one. Ms. Smith stated that she wanted an attorney to represent her. She was provided with an application for the public defender and was advised that the application had to be filed within 14 days. A trial was scheduled for April 27, 2005. The parties received and signed a written notice of the trial date.

32. It was respondent's policy that a litigant requesting representation by the public defender was required to submit an application within 14 days of being advised of his or her rights at the initial appearance. According to respondent, this policy was based on the need to move cases expeditiously and to comply with procedural mandates that require *inter alia* a trial in a support matter to take place within 30 days of the initial appearance, that no more than one adjournment to obtain counsel be permitted absent good cause, and that no adjournment exceed 14 days (22 NYCRR §205.43).

33. On February 8, 2005, Ms. Smith submitted an application for representation by the public defender in the support matter. On February 14, 2005, respondent denied the application as untimely, notwithstanding that the trial in the support matter was not scheduled to be held until April 27, 2005.

34. On February 14, 2005, the parties appeared before respondent in another matter, involving custody and visitation issues. Respondent advised them of their rights, and Ms. Smith applied for representation by the public defender in that matter. Respondent approved the application on February 18, 2005.

35. On April 27, 2005, Ms. Smith failed to appear for the scheduled trial before the support magistrate. By decision and order dated April 27, 2005, the support magistrate declared Ms. Smith in default and recommended that she be held in contempt for willful and intentional failure to pay child support and that she be sentenced to 90 days in jail. The support magistrate also set a "purge" amount, which could be paid prior to confirmation to avoid incarceration.

36. On May 18, 2005, respondent presided at a confirmation proceeding on the decision and order of the support magistrate.

37. Respondent testified before the Commission that a confirmation proceeding has a "very narrow" purpose: to review the decision and order of the support magistrate[1] and to provide the litigant with an opportunity to pay the "purge" amount set

[1] A party may file "specific written objections" to the support magistrate's decision and order; the judge may confirm the support magistrate's findings and recommendations in whole or in part or, in the alternative, modify or refuse to confirm such findings and refer the matter back to

by the support magistrate to avoid incarceration; it is not an evidentiary hearing, and no testimony is taken. Respondent testified that it was his practice to give litigants an opportunity to address the court at a confirmation proceeding although he was not required by law to do so.

38. Ms. Smith appeared without counsel at the confirmation proceeding. She attempted to defend herself against the petition, disputing the amount of arrears and stating that she had made partial payments through friends, who were waiting for cancelled checks from the bank. Respondent told her that the exact amount owed did not matter; "[T]he point is...it hasn't been paid."

39. Ms. Smith stated that she had sought representation by the public defender but had heard nothing from that office. Respondent told her that she would "have to take that up with" the public defender's office.

40. At the proceeding, Ms. Smith did not indicate that she was represented by the public defender in the custody and visitation matter. Respondent testified before the Commission that he was unaware that Ms. Smith was represented by the public defender in another proceeding; that information was probably in the court file before him but he "didn't catch it." He testified that since many litigants are involved in multiple proceedings, it is his policy to have an attorney assigned by the public defender represent a litigant in all pending Family Court cases and that had he known that Ms.

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the support magistrate for further proceedings (Fam Ct Act §439[a], [e]; 22 NYCRR §205.43[i]). The court "may, if necessary, conduct an evidentiary hearing" (22 NYCRR §205.43[i]).

Smith had such counsel in another matter, he would have assigned that attorney in the support matter.

41. Respondent reviewed the decision and order of the support magistrate, confirmed the decision and sentenced Ms. Smith to 90 days jail; he also set a "purge" amount of $1,000, which could be paid to avoid incarceration. Ms. Smith did not appeal or move to vacate respondent's decision. She was released from jail after paying the "purge" amount.

As to Charge V of the Formal Written Complaint:

42. On January 20, 2005, in *Timothy Foote v. Karrie Foote*, the parties appeared before a support magistrate on a petition alleging that Karrie Foote had violated an order of support and was in contempt. The support magistrate advised the parties of the right to counsel and to have counsel assigned if they could not afford one. Ms. Foote stated that she wanted an attorney to represent her. She also told the support magistrate that she could not read. She was given an application for the public defender and was advised that the application had to be filed within 14 days. A trial was scheduled for May 11, 2005. The parties were given oral and written notice of the trial date, which stated that if a party failed to appear, the court may proceed in their absence.

43. On April 4, 2005, the parties appeared before respondent in another matter, in which Ms. Foote was seeking to modify custody. Respondent advised the parties of their rights and told Ms. Foote that she could apply for representation by the public defender. He also advised the parties that mediation was available. The parties

met with a court mediator, which resulted in a resolution of the custody dispute. Ms. Foote did not file an application for the public defender.

44. On May 11, 2005, Ms. Foote failed to appear on the date scheduled for trial on the support matter. By decision and order dated May 13, 2005, the support magistrate declared Ms. Foote in default and recommended that she be held in contempt for willful and intentional failure to pay over $4,000 in child support. The support magistrate also set a "purge" amount, which could be paid prior to confirmation to avoid incarceration.

45. On May 25, 2005, respondent presided over a confirmation proceeding on the decision and order of the support magistrate.

46. Under the statewide system of Standards and Goals promulgated by the Chief Administrative Judge, there is a 180-day time frame in Family Court from the date of filing of the petition to the disposition. The relevant dates under the Standards and Goals for each case are noted on respondent's daily calendar. On May 25, 2005, the *Foote* case was more than 170 days past the filing date of the petition.

47. Ms. Foote appeared without counsel. She told respondent that she did not know that she had a trial date on May 11, 2005, and that she had lost her job. She also told respondent that she did not want to proceed without a lawyer; she said, referring to the support magistrate, "I told her that I wanted a lawyer." Respondent replied that "it's too late" since the support magistrate had issued a decision. Respondent confirmed the decision and order of the support magistrate and sentenced Ms. Foote to 180 days in

jail.

48. Respondent then stated that he would give Ms. Foote "a break" in that she could avoid incarceration by immediately paying the arrears of $4,488. When Ms. Smith began to explain why she had difficulty making the support payments, respondent said, "You have to think about your ability...to support children before you have them. You don't think about that after."

49. After respondent had sentenced Ms. Foote to jail, her mother, Karen O'Brien, asked to address the court. Ms. O'Brien stated that her daughter has a learning disability, did not understand the papers and needed an attorney; she also stated that her daughter had "a fourth grade reading level" and believed that the support issues had been resolved earlier. Respondent replied that the support magistrate had heard the case, that Ms. Foote had been advised of her rights, including the right to counsel, and that there was no indication in the record that Ms. Foote had applied for assigned counsel.

50. Ms. Foote served for two months in jail on the sentence imposed by respondent before being released on July 21, 2005, on a writ of *habeas corpus*. The Appellate Division, Third Department, affirmed on April 13, 2006, holding that the writ was properly granted.

51. Shortly after the Appellate Division decision in *Foote*, respondent issued a press release. The press release states, *inter alia*, that "to further streamline and simplify" procedures, in future cases respondent will issue a written confirmation of a support magistrate's decision without a court appearance of the parties unless he

determines that the support magistrate has erred.

Supplemental findings:

52. Following criticism of his decision in *Matter of Constantino*, respondent modified his procedures in the following manner with respect to the production of an incarcerated person. On the forms for a summons and the notice to appear in court, language was added in bold stating: "If you are incarcerated, you must contact the Court and ask to be produced." Also, a form was created for Family Court staff to fill out upon receiving notice by telephone that an individual is incarcerated, and the completed form is promptly given to the judge. Another form was created and distributed to correctional facilities, to be made available to inmates, whereby an inmate with a scheduled appearance in Family Court can request to be produced; the form states that the inmate must ask to be produced.

53. Respondent states that following the decision of the Appellate Division in *Matter of Constantino*, he further modified his procedures with respect to the production of an incarcerated person and now issues an order to produce *sua sponte* upon receiving any notification, hearsay or otherwise, that an individual is incarcerated.

54. Respondent states that following the decision of the Appellate Division in *Matter of Foote*, he modified his procedures with respect to the assignment of counsel and that he now assigns a public defender immediately upon request, subject to completion of a financial application to be reviewed by the court and/or the public defender.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(3) and 100.3(B)(6) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through V of the Formal Written Complaint are sustained, and respondent's misconduct is established.

In five cases respondent deprived litigants in Family Court proceedings of fundamental constitutional and statutory rights, including, significantly, the right to be heard and the right to be represented by counsel, while depriving them of liberty and, in three cases, their parental rights. Respondent's handling of these matters was patently lacking in fundamental fairness and showed a profound disregard for the rule of law and for the basic rights of the individuals before him. Such a systematic disregard of basic legal requirements constitutes serious misconduct (*see Matter of Bauer*, 3 NY3d 158 [2004]).

On three occasions, respondent conducted proceedings in the absence of the litigants, sentencing them to jail and divesting them of custody of their children, although he knew or should have known that the litigants were incarcerated or otherwise in custody and therefore unable to appear. Respondent took no action to determine whether the parties had voluntarily waived their right to be present and to be heard when their parental rights were being litigated.

In *DeMagistris*, despite knowing that the litigant had just been taken into custody for allegedly threatening his former wife's attorney, respondent proceeded in the litigant's absence, declaring that Mr. DeMagistris was in default and that his "criminal behavior" provided no excuse for an adjournment. His actions appeared retaliatory for the litigant's alleged criminal acts that had not yet even been charged, let alone proved. Compounding the proceeding's patent unfairness, respondent permitted Mr. DeMagistris' attorney to withdraw from the case without ascertaining whether Mr. DeMagistris had notice of the attorney's intended withdrawal. Respondent proceeded to divest the unrepresented and absent litigant of custody, dismissed his petition for failure to prosecute and sentenced him to two consecutive 180-day terms in jail.

We reject respondent's argument that his actions in *DeMagistris* did not constitute misconduct because, in an emotionally charged situation, he acted in a good faith belief that the litigant had forfeited his right to be heard by engaging in the conduct that led to his arrest. No fair-minded person even cursorily versed in legal process could reasonably regard the litigant's alleged behavior – at that point based only on hearsay – as an effective legal waiver of the right to be present and the right to be represented by counsel on matters involving custody and a likely lengthy jail sentence for family offenses. It is fundamental that regardless of the allegations against Mr. DeMagistris, he was entitled to due process and all the protections afforded by law, including the right to the assistance of counsel (*see* Family Ct Act §262). Moreover, respondent's conclusory pronouncement, based on the hearsay accounts presented to him, as to Mr. DeMagistris'

"criminal behavior" suggests that his erroneous determination to proceed in the litigant's absence was tainted by prejudgment.

In *Constantino* and *DaCorsi*, respondent proceeded in the absence of litigants who were incarcerated without ascertaining whether they had effectively and knowingly waived their right to be present. It was respondent's policy that an incarcerated litigant would not be brought to court unless the litigant had specifically asked to be produced. The patent unfairness of that policy was demonstrated in *Constantino*, where a litigant incarcerated in another county had unsuccessfully attempted to contact the court to ask to be produced. Notwithstanding that respondent knew that the litigant had been served in jail and notwithstanding that an attorney for one of the parties told respondent that the litigant was at that moment in jail, respondent ignored that information and held the absent litigant in default, divesting her of custody and sentencing her to 180 days in jail. Respondent's claim that he did not have actual notice that she was incarcerated is disingenuous; indeed, it is striking that in this case he rejected the attorney's statement as "hearsay," although he readily accepted the attorneys' account of Mr. DeMagistris' behavior as true. More to the point, it appears that in view of respondent's "policy," such notice was irrelevant to his decision since the court required a specific "request" for an order to produce and had not received one. Respondent's "policy" thus elevated form over substance where liberty and parental rights hung in the balance.

Respondent claims that he was unaware of subsequent efforts by Ms.

Constantino and by an attorney on her behalf to advise the court of her circumstances and to urge him to bring her to court and inquire into the matter. At best, he studiously ignored the litigant's efforts to secure her rights. Similarly, as to *DaCorsi*, another case in which he declared the absent litigant in default, respondent claims that he was unaware that a woman identifying herself as the litigant's sister had called the court the day before his scheduled appearance and said that he had been arrested. Even if true, those claims do not relieve respondent of responsibility for practices that had the effect of depriving litigants of fundamental rights.

In two matters involving alleged violations of orders of support, respondent deprived the litigants of the right to counsel. It was respondent's policy that a party who wanted to have counsel assigned was required to submit an application within 14 days of being advised initially of the right to counsel. Respondent has asserted that such a policy was based on the need to move cases expeditiously and to comply with statutory mandates as well as the Standards and Goals prescribed by court administrators. However laudable those goals, they do not excuse failing to protect the fundamental constitutional and statutory right of counsel. *See, e.g., Matter of Bauer, supra*, 3 NY3d at 164 ("The right to counsel, in practical respects, remains absolutely fundamental to the protection of a defendant's other substantive rights..."). The right to counsel cannot be forfeited by the imposition of restrictive and arbitrary policies, the sole purpose of which is to move cases.

In *Rulison v. Smith*, respondent denied an application for assigned counsel

as untimely because it was filed 13 days after the 14-day deadline he routinely imposed. Although respondent's purported rationale for such a deadline was the requirement that the trial be commenced within 30 days of the petition (*see* 22 NYCRR §205.43[b]), that rationale did not apply in this case since, at the time he denied the application, the trial date was more than two months away. Without counsel, Ms. Smith defaulted before the support magistrate. When Ms. Smith appeared before respondent for confirmation of the support magistrate's decision, respondent brushed aside her comment that she had not heard from the public defender's office, callously telling her "to take it up with" that office, before summarily sentencing her to 90 days in jail. It is a judge's responsibility to determine whether a litigant is eligible for assigned counsel; that responsibility cannot be delegated. This is especially so when a litigant is facing a jail sentence. Respondent also appears to blame Ms. Smith for not volunteering that she was represented by the public defender in another matter. Respondent's failure to ask that question is part and parcel of his policies and behavior that unduly restricted the right to counsel. In the interests of moving cases quickly and, as he testified, "protecting the taxpayers' pocketbook," respondent chose to sacrifice defendants' fundamental rights.

In *Foote*, respondent deprived another litigant of the right to counsel at a confirmation proceeding when he disregarded her request for an attorney, again stating that it was "too late," before sentencing her to 180 days in jail based on her default before the support magistrate. Even after Ms. Foote's mother told him that Ms. Foote mistakenly believed that the support issues had been resolved at an earlier proceeding

and, moreover, that she had "a fourth grade reading level" and did not understand the papers, respondent did not reconsider his decision, appoint counsel or remand the matter to the support magistrate for further proceedings. Respondent's explanation that the case was near the end of the 180-day time frame imposed by Standards and Goals in no way excuses his failure as a judge to protect the rights of a vulnerable, unrepresented litigant. Moreover, respondent's snide remark to Ms. Foote that she should have thought about her ability to support children before she had them was a condemnation of an entire class of litigants who appear in Family Court, suggesting invidious assumptions and hostility for parents who are unable to provide adequate financial support for a child.

While we note that respondent's decisions in *Foote*, *Constantino* and *DeMagistris* were later criticized by other courts, those appellate decisions do not establish respondent's misconduct. More importantly, we do not accept respondent's claim that the law became clear only after his actions were subjected to appellate review. Each of these matters involved principles of well-established constitutional and statutory law, and any judge should have known that those principles must override concerns about economy and avoiding perceived delays. It was an abuse of power for respondent to elevate his "policies" above the right to counsel and the right to be heard on matters of paramount importance to litigants in Family Court. Respondent should have known that he was violating core rights at the heart of the proceedings. His policies were his own arbitrary inventions to effectuate a waiver of the rights of litigants who were incarcerated, unrepresented or unfamiliar with court procedures, and the resulting "waivers" were

neither knowing, voluntary nor legally sufficient. It is well-established that legal error and judicial misconduct "are not necessarily mutually exclusive" (*Matter of Feinberg*, 5 NY3d 206 [2005]; *Matter of Reeves*, 63 NY2d 105, 109-10 [1983]; *see also*, *Matter of Bauer*, *supra*). In this case they overlap.

As the Court of Appeals has stated, a pattern of conduct that "necessarily has the effect of leaving litigants with the impression that our judicial system is unfair and unjust...would be unacceptable if engaged in by any member of the judiciary; for a Judge of the Family Court, where matters of the utmost sensitivity are often litigated by those who are unrepresented and unaware of their rights, it is simply intolerable." *Matter of Esworthy*, 77 NY2d 280, 283 (1991). To be sure, Family Court judges face significant challenges on a daily basis in balancing their judicial and administrative responsibilities with the demands of a crowded calendar. But among a judge's responsibilities, none has a higher priority than protecting the basic rights of every litigant. Here, the record demonstrates that the rights of litigants were sacrificed repeatedly. Due process when it comes to protecting parental rights and depriving an individual of liberty is not a balancing test; its protections are sacrosanct.

The record in its totality shows a judge who not only callously disregarded the rights of litigants, but who continued to defend his practices after three writs of *habeas corpus* were issued, who changed his procedures only reluctantly after sharp criticism by the Appellate Division, and whose conduct still suggests an insensitivity to the importance of ensuring that every litigant is accorded all the protections provided by

law. Significantly, respondent's press release in response to the appellate decision in *Foote* declared that in the future he will simply issue written confirmations of a support magistrate's findings rather than provide an opportunity for the parties to personally appear, as he had previously done. It was at such appearances that Ms. Foote and Ms. Smith had asked for assigned counsel. Respondent's press release also stated that while he had changed his policy on assigning counsel in accordance with the appellate criticism, his new policy will be more costly and will also mean that "parties seeking assigned lawyers will be less encouraged to be responsible." That language is consistent with the mean-spirited, insensitive jurist depicted in this record who is more concerned with fiscal matters than with protecting the basic rights of every litigant.

In considering an appropriate sanction, we note that as a consequence of respondent's disregard of fundamental rights, five litigants were sentenced to significant terms of incarceration, and the record indicates that at least three of those litigants served several months in jail on the unlawful sentence he imposed. We also note that although respondent modified his procedures after criticism by the Appellate Division, his continued insistence that his actions were consistent with the law and his insensitivity to the overriding importance of protecting the rights of litigants, as shown by this record, "strongly suggest[ ] that, if he is allowed to continue on the bench, we may expect more of the same" (*Matter of Bauer*, *supra*, 3 NY3d at 165). In view of the totality of this record, we find respondent's belated expression of contrition at oral argument unconvincing. The conclusion is inescapable that respondent's future retention on the

bench would continue to place the rights of litigants in serious jeopardy.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Judge Konviser and Judge Ruderman concur.

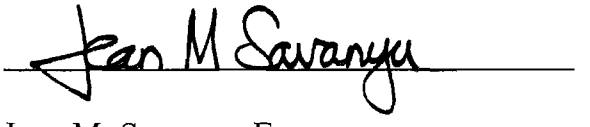
Judge Peters did not participate.

Mr. Felder and Ms. DiPirro were not present. Mr. Jacob was present for the oral argument but did not participate in the decision.

CERTIFICATION

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

Dated: February 13, 2008



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New York State
Commission on Judicial Conduct