STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

ROBERT M. RESTAINO,

a Judge of the Niagara Falls City Court,
Niagara 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 (John J. Postel, Stephanie A. Fix and Edward Lindner, Of Counsel) for the Commission

Joel Daniels and Mark Uba for the Respondent

The respondent, Robert M. Restaino, a Judge of the Niagara Falls City Court, Niagara County, was served with a Formal Written Complaint dated June 20,

2006, containing one charge. The Formal Written Complaint alleged that while presiding in a Domestic Violence Part, respondent threatened to commit to jail and did revoke the recognizance release of 46 defendants when no one took responsibility for a ringing cell phone. Respondent filed an Answer dated August 9, 2006.

By Order dated August 29, 2006, the Commission designated Honorable Edgar C. NeMoyer as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 1, 2 and 15, 2006, in Buffalo. The referee filed a report dated March 30, 2007.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of removal, and counsel for respondent recommended censure. On September 19, 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 Niagara Falls City Court Judge since 1996. He initially served in a part-time capacity and became a full-time judge in January 2002.

2. Respondent presided in the Domestic Violence Part on a weekly basis from 1999 through March 11, 2005. The Domestic Violence Part handles cases of defendants who, after arraignment on charges involving violence against family members, have been screened to determine whether they are eligible for a court-supervised, 26-week program of counseling and education. If accepted into the program, defendants are required to refrain from using drugs or alcohol, to undergo counseling and testing, and to

report to court on a weekly basis so their progress can be monitored. As a matter of practice, defendants in the Domestic Violence Part are released each week on their own recognizance unless they violate a condition of participation, in which case they face the possibility of sanctions, including the revocation of their release and the imposition of bail. When defendants appear in the Part, they are generally required to remain in the courtroom until the completion of all the proceedings that day, even after their own cases have been concluded.

3. Shortly after 9:00 AM on March 11, 2005, respondent took the bench in the Domestic Violence Part. About 70 cases were scheduled, and approximately 70 people were in the courtroom. In addition to defendants, also present were defense attorneys and prosecutors, court administrative personnel, court security officers, and representatives from counseling programs. The courtroom was open to defendants and others entering and leaving.

4. For about 45 minutes, respondent handled in a routine manner eleven cases involving defendants who were participants in the Domestic Violence Program. In accordance with the customary procedures, respondent questioned the defendants, released them on their own recognizance and directed them to remain in court until the proceedings were concluded. At approximately 10:00 AM, a device that appeared to be a cell phone rang in the back of the courtroom. Addressing the defendants in the courtroom, respondent stated:

> Now, whoever owns the instrument that is ringing, bring it to me now or everybody could take a week in jail and please

> don't tell me I'm the only one that heard that. Mr. Martinez, did you hear that ringing?...
>
> Everyone is going to jail; every single person is going to jail in this courtroom unless I get that instrument now. If anybody believes I'm kidding, ask some of the folks that have been here for a while. You are all going.

5. When no one took responsibility for the ringing phone, respondent directed that everyone remain in the courtroom and then took a five-minute recess while court security attempted to locate the phone. An officer stood at the doorway to prevent anyone from leaving the courtroom. Prior to that time, there had been traffic in and out of the courtroom.

6. Notwithstanding the recess, respondent did not withdraw his threat to send all of the defendants to jail if the owner of the phone was not discovered.

7. When respondent returned to the bench, he was told that the phone had not been located. Respondent then asked Reginald Jones, the defendant who had been standing before him when the phone had sounded, if he knew whose phone it was. Mr. Jones replied, "No. I was up here." Although respondent knew that Mr. Jones did not have the phone that had been ringing, he revoked Mr. Jones' recognizance release, set bail at $1,500 and committed him into custody.

8. Respondent proceeded to call the remaining cases on the calendar and then to recall the cases of the eleven defendants who had been released on their own recognizance earlier that morning. Respondent questioned each defendant as to his or her knowledge of the phone. After each defendant denied having the phone or knowing

whose it was, respondent revoked the defendant's recognizance release and reinstated bail; he set additional bail for two defendants who were previously released on bail. In total, he committed 46 defendants into custody. In five of the cases, he revoked the defendant's release and committed the defendant with little or no discussion.

9. Three of the defendants committed into custody were making their first appearance in the Domestic Violence Part that day. The remaining defendants had regularly appeared in the Part as required; 15 defendants had previously appeared on at least a dozen occasions as required in connection with the program; one defendant had appeared 25 times and was one or two weeks away from completing the program. Only one of the defendants committed into custody had an attorney who was present.

10. In questioning the defendants, respondent repeatedly admonished the "selfish" person who refused to take responsibility for the phone, and chastised the defendants who claimed not to know whose phone it was. At one point he said, "[T]his hurts me more than any of you imagine because someone in this courtroom has no consideration for you, no consideration for me and just doesn't care." He stated:

> As I have indicated, this troubles me more than any of you people can understand. Because what I am really, really having a hard time with, that someone in this courtroom who is so self-absorbed, so concerned only for their own well-being, they kind of figure they're going to be able to establish the bail and it won't matter so screw all of the rest of you people. Some of you people may not be in the economic situation this selfish person is in and you have to start realizing amongst your own selves someone out there who is the typical reason we have this Part; they put their interests above everybody else's. They don't care what happens to anybody.

A short time later he stated:

> This person, whoever he or she may be, doesn't have a whole lot of concern. Let's see how much concern they have when they are sitting in the back there with all the rest of you. Ultimately when you go back there to be booked, you got to surrender what you got on you. One way or another we're going to get our hands on something. See, the sadness in all of this is that this individual is prepared to put everybody through a reassessment of bail rather than dealing with it.

11. During the questioning, many defendants told respondent that the noise had come from the back corner and that if they knew who had the phone, they would say so. Several defendants pleaded with the phone's owner to come forward.

12. During the questioning, numerous defendants commented on the unfairness of respondent's actions in committing all the defendants into custody. When one defendant said, "This is not fair to the rest of us," respondent replied, "I know it isn't," before committing the defendant. Another defendant told respondent, "I know this ain't right," and respondent replied, "You're right, it ain't right. Ain't right at all." To another defendant, respondent commented, "That's really a shame and it isn't fair at all. Somebody completely doesn't care." One defendant said, "I don't see everybody going to jail for this, I really don't." Another defendant said, "It's a shame, everybody being penalized." One defendant told respondent, "I think the more people you send to jail, [the] less likely [the] culprit is to come forward."

13. As he was committing the defendants, respondent alternated between verbalizing sympathy and outright sarcasm. When one defendant said, "I'm sorry I had to

be here today," respondent said, "I'm sorry too." After several defendants said that the noise had appeared to come from the back corner, respondent said, "Life gets dizzy in that back corner"; he commented to one defendant, "There's a whole lot of phones back there but nobody's phone was ringing." At another point he said, "[I]t seems to me I'm supposed to be dealing with grown-ups..."; then he compared the defendants' responses to a scene from "a mob movie":

> The other thing which is amazing here with this group, this is better than watching a mob movie. Everybody that comes to this microphone, and I got to tell you something, you're all pretty good, when you come up to this microphone, and if you saw somebody got shot or killed, you would say, "I didn't see nothing, I heard shots." And if a body dropped right in front of you, you would say that, "I didn't see a thing."

14. In committing the defendants, respondent ignored the special circumstances cited by several defendants who asked not to be taken into custody. Three defendants told respondent that their jobs would be at risk if they were incarcerated; one said, "You know I just got a job and I love the job. I don't have $1000. I really don't." One defendant said he was scheduled to be in school; one defendant said that he had a doctor's appointment that day and might need surgery; another said that his mother was having surgery that day. One defendant, who had previously appeared four times as required, told respondent, "My little girl is coming home at 3:00. Can I be sanctioned next week so I can get my girl?" Respondent committed each of these defendants into custody.

15. At the hearing before the referee, respondent acknowledged that,

while he was committing the defendants into custody, he knew that he had no legal basis for doing so; he explained that he simply focused on attempting to locate the phone's owner and was frustrated by his inability to do so. Although a sign in the court warns that cell phones and pagers must be turned off, bringing a cell phone into the courtroom or having a cell phone ring in the court was not a violation of the Domestic Violence Program requirements.

16. Respondent questioned only defendants about the ringing phone. He did not question any of the prosecutors, defense attorneys, court personnel, program representatives or others who were present in the courtroom.

17. In addition to the 46 defendants who were committed into custody, respondent handled several other cases in a routine manner that morning after the phone had sounded. He allowed four defendants to leave, two after dismissing the charges against them and asking them about the phone, one after his attorney told respondent that the defendant had "wandered in at the wrong time," and another because he had been outside of the courtroom.

18. Throughout all the proceedings that morning, respondent did not raise his voice; he appeared calm and in control.

19. In reinstating bail for the defendants and setting additional bail for two defendants, respondent did not consider any of the factors required by Section 510.30 of the Criminal Procedure Law to be considered before setting bail.

20. At the conclusion of the proceedings, shortly before noon,

respondent left the bench and made a scheduled trip to tour a juvenile detention facility in Erie County.

21. After being committed into custody, the 46 defendants were taken by police to the booking area in the City Jail, where they were searched and their property was confiscated. They were then placed in crowded "holding" cells or jail cells. Thereafter, 17 defendants were released from custody after it was determined that the court still held bail that had previously been posted on their behalf, and 15 defendants were released after posting the bail set by respondent. The remaining 14 defendants could not post bail and were committed to the custody of the Niagara County Sheriff.

22. The 14 defendants who could not post bail were shackled; their wrists were handcuffed to a lock box attached to a waist chain; and they were transported by bus to the County Jail in Lockport, a ride that took about 30 minutes. The defendants arrived at the jail between 3:00 and 3:30 and were searched again and placed in cells.

23. While touring the juvenile detention facility, respondent received a call on his pager from his clerk, and when he returned the call, the clerk told him that the press was inquiring about his actions earlier that day. Respondent told the clerk that he would return to court and that the clerk should have the paperwork and a court reporter ready so that he could order the defendants' release. Respondent testified at the hearing that prior to receiving the call from his clerk, he reflected on his conduct and decided to contact his clerk to arrange for the defendants' release.

24. Respondent returned to court around 3:00 PM. About an hour later,

in a proceeding held in his chambers, he ordered the release of the 14 defendants who had been sent to the County Jail.

25. The 14 defendants were released at the County Jail in Lockport between 5:00 and 5:30 PM. They were not provided with transportation back to Niagara Falls.

26. After March 11, 2005, respondent did not preside in the Domestic Violence Part.

27. In his Answer and at the hearing in this matter, respondent acknowledged that his conduct was improper and inexcusable.

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. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

In an egregious and unprecedented abuse of judicial power, respondent committed 46 defendants into police custody in a bizarre, unsuccessful effort to discover the owner of a ringing cell phone in the courtroom. In doing so, he inexplicably persisted in his conduct over some two hours, questioning the defendants individually about the phone before committing them into custody, and ignoring the pleas of numerous

defendants who protested that his conduct was unfair and pleaded that he reconsider. Respondent's conduct, which resulted in the unjustified detention of the defendants for several hours and the incarceration of 14 defendants in the County Jail, caused irreparable damage to public confidence in the fair and proper administration of justice in his court.

The salient facts are undisputed. When the cell phone rang while respondent was presiding in a Domestic Violence Part, he immediately directed the owner to come forward or else "everybody could take a week in jail...Everyone is going to jail; every single person is going to jail in this courtroom unless I get that instrument now." It is shocking that respondent's immediate response to what was, at worst, a breach of courtroom etiquette by an unknown individual was a threat to incarcerate all the defendants present *en masse*. Even as a threat, such a reaction was disproportionate and improper. It is even more shocking that, over the next two hours, he methodically proceeded to carry out his threat without realizing that his extreme response was far more disruptive than a ringing phone.

When no one took responsibility for the phone, respondent directed that no one be allowed to leave the courtroom while court security conducted a search and respondent himself took a brief recess. Barring anyone from leaving the courtroom while the search was conducted was, in itself, an excessive response to the ringing phone since it affected scores of people who had done nothing wrong. Despite the opportunity during the recess to reconsider his actions, respondent did not withdraw the threat. Returning to court, he began to question the defendants individually, starting with the defendant who

had been standing before him when the phone rang. Although it was clear that that individual was not the owner of the phone – as respondent now concedes – respondent committed him into custody, revoking his recognizance release and setting $1,500 bail. He then proceeded to call the remaining cases on the calendar and to recall the cases of eleven defendants who had been released earlier that morning. After questioning each defendant about the phone, he revoked his or her recognizance release and reinstated bail or set additional bail, committing a total of 46 defendants into custody. After being placed in crowded holding cells which could scarcely accommodate the large numbers of individuals who were being committed, 32 defendants were released on bail, and the remaining 14 defendants who could not post bail were transported by bus, in handcuffs and shackles, to the County Jail in Lockport, where they were held for several hours until respondent came to his senses and ordered their release later that day.

In summarily committing the defendants into custody, respondent acted without any semblance of a lawful basis, disregarding the statutory criteria for bail or contempt of court. In doing so, he violated the trust of the defendants and of the public at large, who place their confidence in the administration of justice by the courts. Respondent also did a grave injustice to the Domestic Violence Part, its principles and its worthy aims. Except for three defendants who were appearing for the first time in the Part that day, all the defendants whom respondent committed had previously been released on recognizance or bail in connection with the terms of the Domestic Violence Program, having agreed to undergo counseling and other conditions for six months and to

report to court on a weekly basis so their progress could be monitored. Notably, all the defendants had previously appeared in court regularly as required, many for a dozen or more times. It was their understanding that as long as they fulfilled the requirements of the program, they would not be incarcerated. In fact, although two defendants who appeared before respondent that morning prior to the ringing phone had violated a condition of their release, respondent, who had discretion to incarcerate them for those lapses, did not do so. For all these defendants, including the majority who had not violated a single condition of their release, respondent's peremptory decision to hold them in custody because of a ringing cell phone can only have been perceived as a shocking injustice.

The record reveals that over the two hours in which respondent was ordering the defendants' detention, he had many opportunities to grasp the enormity of what he was doing. He inexplicably disregarded the comments of numerous defendants regarding the unfairness of his actions. When one defendant commented, "I know this ain't right," respondent replied, "You're right, it ain't right. Ain't right at all." When another said, "This is not fair to the rest of us," he replied, "I know it isn't," before committing the defendant. Another defendant perceptively observed, "I think the more people you send to jail, [the] less likely [the] culprit is to come forward." It is difficult to understand why these and other similar remarks did not cause respondent to reflect, reconsider and recognize the impropriety of his conduct. Instead, he continued to interrogate, chastise and commit the defendants while repeatedly blaming the "selfish"

individual who failed to take responsibility for the phone; he even compared the defendants' proclamations of ignorance concerning the phone's owner to a scene from "a mob movie."

It is sad and ironic that even as respondent was scolding the defendants for their behavior, in a court where trust and personal accountability were of paramount importance, respondent's own irresponsible behavior provided a poor example of such attributes. His conduct was injurious not only to the defendants themselves, but to the public as a whole, who expect every judge to act in a manner that reflects respect for the law the judge is duty-bound to administer. It is also ironic that in repeatedly berating the "selfish" and "self-absorbed" individual who "put their interests above everybody else's" and "[doesn't] care what happens to anybody," respondent failed to recognize that he was describing himself.

In committing the defendants, respondent ignored the special circumstances cited by several defendants who asked not to be taken into custody. Three defendants told respondent that their jobs would be at risk if they were incarcerated; another told the judge that he had to pick up his child that afternoon and asked if he could be sanctioned the following week instead. Oddly, in the midst of his wholesale incarceration of dozens of defendants, respondent handled several matters routinely and, somewhat arbitrarily, allowed four individuals to leave after interrogating them about the phone. One defendant was permitted to leave after his attorney vouched for him (of the 46 defendants committed by respondent, only one had an attorney who was present). The totality of the

circumstances – including the fact that there had been considerable traffic in and out of the court when the phone had rung and that only defendants (and not attorneys, counselors or court personnel who were present) were subjected to respondent's inquisition and punishment – compounded the appearance that respondent's actions were arbitrary and unjust.

Not until hours later that afternoon did respondent arrange for the release of the incarcerated defendants. Although he has testified that he reached an independent realization that he had acted improperly, it is undisputed that he took no steps to arrange for the defendants' release until he learned that the press was inquiring into his actions. By the time the 14 defendants were eventually released from the County Jail, they had been in custody for six or seven hours. Under these circumstances, we cannot give respondent credit for timely remorse or sensitivity to his ethical responsibilities. Indeed, while respondent now expresses remorse for his actions, we note that, except for a subsequent chance encounter with one individual who was incarcerated on March 11th, he has never apologized to the individuals who were deprived so unjustly of their liberty. In any event, as the Court of Appeals has stated with respect to contrition, in some instances "no amount of it will override inexcusable conduct." *Matter of Bauer*, 3 NY3d 158, 165 (2004).

Simply stated, we find no mitigating circumstances in the record before us. Respondent characterizes his behavior as aberrational and attributes it, at least in part, to certain stresses in his personal life. Such an explanation cannot excuse his behavior.

Presiding in a busy court presents every judge with significant challenges on a daily basis, and every judge is obliged to set aside his or her personal problems upon entering the courtroom and to be an exemplar of dignity, courtesy and patience (Rules, §100.3[B][3]). No doubt many if not most of the defendants in respondent's court were experiencing significant stresses in their own lives, but the message consistently imparted by the Domestic Violence Part, and indeed by every court, is the importance of self-control and personal accountability. Surely that message applies as well to the presiding judge.

We reject the dissent's argument that respondent's conduct was part of "a single *res gestae*" or a single episode of poor judgment. Rather, it was a painfully prolonged series of acts over several hours that transcended poor judgment.

We conclude that respondent's behavior was such a gross deviation from the proper role of a judge that it warrants the sanction of removal, notwithstanding his previously unblemished record on the bench and the testimony as to his character and reputation. *See, Matter of Shilling*, 51 NY2d 397, 399 (1980); *Matter of Blackburne*, 7 NY3d 213 (2006). "Judicial misconduct cases are, by their very nature, *sui generis*" (*Matter of Blackburne*, *supra*, 7 NY3d at 220-21). In causing 46 individuals to be deprived of their liberty out of pique and frustration, respondent abandoned his role as a reasonable, fair jurist and instead became a petty tyrant, abusing his judicial power and placing himself above the law he was sworn to administer. It is tragic that in a crowded courtroom, only the individual wearing judicial robes, symbolizing his exalted status and the power it conferred, seems to have been oblivious to the enormous injustice caused by

his rash and reckless behavior. Although "removal is not normally to be imposed for poor judgment, even extremely poor judgment" (*Matter of Sims*, 61 NY2d 349, 356 [1984]), respondent's actions "exceeded all measure of acceptable judicial conduct," bringing the judiciary into disrepute and irreparably damaging public confidence in his ability to serve as a judge (*Matter of Blackburne*, *supra*, 7 NY3d at 221). Such a "breach of the public trust" warrants the sanction of removal (*Matter of McGee*, 59 NY2d 870, 871 [1983]; *see also*, *Matter of Gibbons*, 98 NY2d 448, 450 [2002]).

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

Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder dissents only as to the sanction and votes that respondent be censured.

CERTIFICATION

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

Dated: November 13, 2007

Jean M Savanyu

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

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
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ROBERT M. RESTAINO,

a Judge of the Niagara Falls City Court,
Niagara County.

CONCURRING OPINION
BY MR. EMERY

Commissioner Felder's dissent argues that this case is not controlled by the Court of Appeals' decision in *Matter of Blackburne*. Though I dissented from the Commission's decision to remove Justice Blackburne, which was affirmed by the Court of Appeals, it is plain to me that the *Blackburne* precedent squarely controls this case. In fact the "aberrant" behavior of Judge Restaino was more egregious than that of Justice Blackburne.

Justice Blackburne, in an aberrant and arrogant fit of pique, asserting that a police officer had misrepresented facts to her, prevented the arrest of a defendant in her drug treatment court after being warned by a court officer and an assistant district attorney that she should allow the arrest to go forward. Judge Restaino, in an aberrant fit of pique, over the course of several hours, wrongfully jailed 46 defendants for up to seven hours because no one of them would admit that his or her cell phone rang in court.

Several of these defendants warned Judge Restaino as he was remanding them that what he was doing was unfair and seriously harmful to them.

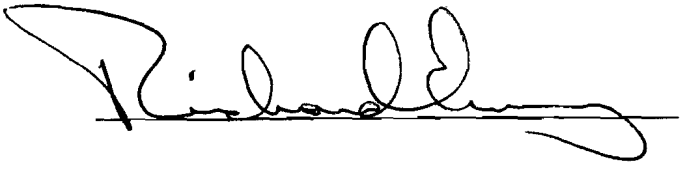
To my mind the cases are indistinguishable except perhaps with respect to the persistent and sustained nature of Judge Restaino's misconduct and the much shorter duration of Justice Blackburne's. Both judges presided in a specialty court and testified that trust and responsibility were a key component in the success of those programs. In both cases they perverted justice and their role as judges in a very similar way, in a thoroughly misguided belief that the integrity of their respective courts required them to thwart normal procedure. Justice Blackburne erred on the side of liberty; Judge Restaino, on the side of captivity.

In both cases the judges realized their errors shortly after they completed their misconduct – Judge Restaino when he learned the press was interested, Justice Blackburne when she learned that people in the courthouse were discussing her actions. In both cases a parade of distinguished character witnesses convincingly testified about each judge's impressive career of public service and blemishless record and underscored that the conduct was aberrant. Both judges expressed remorse. It seems clear in both cases that the conduct was unlikely to be repeated.

Commissioner Felder's legerdemain in characterizing the cases as warranting a distinction in favor of Judge Restaino is breathtaking, especially in light of his vote to remove Justice Blackburne. In my view he must either admit his mistake in *Blackburne* and argue that it should be overturned, or vote to remove Judge Restaino.

Instead, he chooses to mischaracterize the precedential effect of *Blackburne* in order to reach his desired result. Because I am bound by the *Blackburne* decision, with which I do not agree, I concur with the majority.

Dated: November 13, 2007



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

STATE OF NEW YORK
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ROBERT M. RESTAINO,

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OPINION
BY MR. FELDER,
DISSENTING AS TO
SANCTION

- -

In the four years that I have served as a member, Vice Chair and, ultimately, as now, its Chairman, this has been the most difficult decision for me to make.

The record establishes that respondent, after a long period of personal stress, while presiding in a domestic violence part,[1] simply "snapped" when he heard a cell phone go off in his courtroom and engaged in what can only be described as two hours of inexplicable madness. The record also establishes that his conduct over those

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[1] Chief Judge Mark Violante of the Niagara Falls City Court, who set up the Domestic Violence Part in 1997, describes it as "a standard criminal part ... ." "[In] some cases, as conditions while the case is continuing to be pending, a condition of their bail is that they were involved or are involved in some anger management programs or batterer's programs" (Tr. 453).

Judge Richard Kloch, the Supervising Judge for the Criminal Courts for the Eighth Judicial District, described the caseload in the court as "crushing" (Tr. 542).

In addition to his responsibilities as a Niagara Falls City Court judge, the testimony indicated that respondent has served as an acting County Court judge, Family Court judge and Buffalo City Court judge as needed and that he has an impeccable reputation as a dedicated, fair, hard-working jurist with great integrity.

two hours was a total aberration from his character and demeanor as a judge for eleven years (and previously as public defender for ten years) and that he has received the support and praise of his judicial colleagues, court personnel and community leaders.

Judge Violante describes respondent as being "dedicated," and testified that when he appointed him, he believed that respondent's "dedication...for this assignment was second to none and I sat in that part for three years, so I'm including myself in that vein of assigned judges" (Tr. 457). Judge Violante further indicated that respondent was vice president of the New York State City Court Judges organization and that he "handled himself as a distinguished member of our group and a distinguished member of the bench" (Tr. 462). He went on to say regarding respondent, "on his social, his personal and his professional character, it's been nothing but impeccable from what I can comment upon and that would be my only response" (Tr. 466). Angelo Morinello, respondent's co-judge, knew respondent both when he was practicing before the court, and "pretty much on a daily basis" when he was City Court judge (Tr. 479). He said that respondent's reputation was "excellent" – one "that exceeds that of most judges" (Tr. 480, 481).

Putting aside the question of competency and dedication, what respondent did here is beyond reprehensible. He abused the most serious power that a judge possesses: taking away a person's liberty. Previously, I have stated that "Tyrants come in more varieties than Baskin-Robbins has flavors" (*Matter of Mills*, 2005 Annual Report 185), and if I believed that this respondent was indeed a tyrant, I certainly would not hesitate to vote for his removal.

Although the majority insists that the improper incarceration of defendants for several hours required respondent's removal, the fact is that in numerous cases, for various reasons, the Commission has censured or even admonished judges who improperly held defendants in custody for far lengthier periods. In *Matter of Mills*, for example, the Commission, on the recommendation of Commission counsel, censured a City Court judge who abused his power by holding one individual (a college student who had interrupted the judge during a post-acquittal lecture) in solitary confinement for four days, and another individual (a courtroom spectator) in handcuffs for several hours for having used an expletive in the courthouse parking lot. In *Mills*, I voted for the judge's removal since the record amply demonstrated the judge's arrogance and dishonesty in attempting to justify his actions. (In contrast, in this case respondent appears to be sincerely remorseful and quite humble.) In *Matter of Teresi*, 2002 Annual Report 163, pursuant to a stipulation, the Commission censured a Supreme Court Justice for numerous acts of misconduct, including abusing his contempt power by sentencing a *pro se* litigant to six months in jail for refusing to sign a corrective deed (the litigant was incarcerated for 45 days until he was released by another court). I note these cases not to minimize the conduct of those judges, but merely to place in perspective the severity and consequences of respondent's actions. Admittedly, this case involves more than one person whose rights were violated egregiously, but the judge's conduct here, in my view, was a single *res gestae* – two hours of viral lunacy out of a person's entire professional life.

Although *Matter of Blackburne*, 7 NY3d 213 (2006) establishes that a judge can be removed for a single incident of notoriously poor judgment, the conduct in that case arose from a calculated determination to undermine the criminal justice process by thwarting a lawful arrest. In contrast, the respondent here was attempting to have an individual (as well as the individual's peers who may have witnessed the breach) take responsibility for a breach of courtroom decorum. In *Blackburne*, the judge acted purely out of personal pique, based on incomplete information, and, further, she persisted in the face of contrary advice from experienced court personnel. Perhaps most significantly, in *Blackburne* there was a serious question as to the sincerity and timeliness of the judge's contrition. In contrast, in this case the referee, a distinguished former judge who heard the testimony, concluded that the respondent, who testified at great length, appeared to be sincerely remorseful. The referee also commented on the impressive testimony of a psychologist and a psychiatrist who gave persuasive testimony as to the unlikelihood of a recurrence.

In *Matter of Carter*, 2007 Annual Report 79, the Commission censured a judge who left the bench and attempted to assault a defendant but was unsuccessful only because he was physically restrained by court officers; a few months later, the judge suggested to a police officer that the officer "thump the s---" out of a defendant. If Judge Carter is deemed fit to remain on the bench and was given an opportunity to continue to serve as a judge, I believe that Judge Restaino deserves the same opportunity.

Having heard from respondent, I believe along with the referee that he is sincerely filled with remorse. The record also reveals that respondent promptly sought counseling in an effort to understand what may have prompted such aberrational misbehavior and to do whatever is humanly possible to insure that such a serious lapse would not be repeated. The judge is continuing to receive regular counseling, and his therapist has stated that, insofar as we can ever be certain about the future, such an aberrational act will likely not recur. In this regard, I cannot conclude that he is unfit to continue to serve or is a menace to the public, as the majority suggests.

At the oral argument, my colleagues expressed dismay that respondent did not apologize to each individual defendant (except in a chance encounter with one defendant) either in person or by letter. I can understand that when respondent consulted a lawyer, the lawyer's reaction might well have been, "Put nothing in writing and admit nothing," since this might be construed as an admission against interest. Most people follow – for better or worse – their lawyer's advice. I believe it is most unfair and unprecedented to use the lack of a personal apology as the linchpin for determining that the judge should be removed.

I would have preferred to vote for a more serious penalty than censure, but a lesser one than removal; however, none is available. This speaks for the value of the Commission having the ability to vote to suspend a judge without pay, as a penalty that would be in severity between censure and removal. In my view this case would have easily fallen into such a category. Further, in the only other public case involving a

disturbance created by an electronic device, we were far less draconian in our remedy. In *Matter of Feinman*, 2000 Annual Report 105, the Commission admonished a judge who held a defendant in custody for 90 minutes after the defendant's pager rang in his court. There may well be value in having some uniformity in the rules as to how such disturbances should be handled (and, indeed, as to whether cell phones should even be permitted in the courtroom), and had such rules existed, the situation in respondent's courtroom on March 11th would likely not have escalated to the degree that it did. However, this should be addressed by a different forum.

The reality here is that even a public censure would undoubtedly have a deleterious effect on the judge's career. In any event, I believe this is a case where it should be up to the public, who elected respondent to serve in his community, to decide when he is up for re-election whether he should remain on the bench.

When, in my view, the Commission votes for removal of a judge, it should not be as part of a game of "gotcha." The reason should be (1) if a judge is unchecked, he or she would be a danger to the community, and (2) unless restrained by our determination, the judge would repeat his or her misconduct. Viewing this judge, for the reasons stated above, I do not believe such to be the case. A third rationale for removal may be "to send a message" to the judiciary. I believe, short of Western Union, that message has been sent by this proceeding. Certainly, if our purpose is to show we are "tough guys" and will wield the bludgeon of removal if a judge loses control in the courtroom, then that is not a proper purpose, either by its intention or result.

I am constrained to comment on Commission counsel's attempt to belittle respondent's explanation that he "snapped" because of personal stresses in his life. Although Commission counsel argues that such an explanation is not believable because no single triggering event in his personal life had occurred that morning and that prolonged stress cannot explain a temporary loss of reason, I believe that simple human experience has shown that that is simply untrue.

I can understand the Commission's judgment, having been confronted with respondent's atrocious actions. The facts are so hypnotically awful that one's judgment can comfortably and perhaps even logically be closed to a more searching analysis. In this case it was the majority's decision to toss respondent into that judicial dustbin of removed and disgraced judges. I admit that initially, after reading all the material concerning respondent, I agreed with that view. I then listened to respondent with an open mind and particular attention. The repulsive nature of his actions on March 11, 2005 (and I believe that respondent himself would accept that characterization), juxtaposed against his otherwise impeccable judicial career, was particularly puzzling.

Having listened to the judge, and having considered the matter carefully, I cannot find it within myself to destroy this individual's professional life over this regrettable episode. The record shows without contradiction that he is a decent, humble, dedicated individual who is well-liked and respected. After growing up in public housing, he built an exemplary career in public service. Significantly, one individual who was incarcerated by respondent on March 11th testified on the judge's behalf at the

hearing and stated, quite movingly, that the judge had been a positive influence in his life. He expressed gratitude for the judge's encouragement in his staying with the Domestic Violence Program and earning a diploma, stating that "[without] the judge's helpfulness to really keep me focused in what I need to get done, I would have to say...I probably wouldn't have that diploma now" (Tr. 554). Indeed, he also testified that a year and a half after the incident, when he appeared before respondent in traffic court, he bought a photograph of himself with his diploma and in his cap and gown to show to the judge to thank him for his encouragement, at which time the judge led the court in applauding him. To be sure, it is likely that most defendants who were held in custody that day by respondent may not regard him so fondly, but I believe this individual's testimony is quite revealing as to the kind of judge respondent has been, and can continue to be, if permitted to serve.

Although the ultimate cause of respondent's bizarre behavior that day may never be known with certainty, it is uncontroverted that the conduct was a profound aberration in an otherwise unblemished career. On a human level, I simply do not believe that such an episode should outweigh a lengthy, distinguished career of public service.

Dated: November 13, 2007

Raoul Lionel Felder, Esq., Chair
New York State
Commission on Judicial Conduct