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

JOSEPH SLAVIN,

a Judge of the Civil Court of the City of New York and Acting Supreme Court Justice, 2nd Judicial District, Kings County.

# Determination

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THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Myriam J. Altman
Henry T. Berger, Esq.
John J. Bower, Esq.
Honorable Carmen Beauchamp Ciparick
E. Garrett Cleary, Esq.
Dolores Del Bello
Victor A. Kovner, Esq.
Honorable Isaac Rubin
Honorable Eugene W. Salisbury
John J. Sheehy, Esq.

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission

Meissner, Kleinberg & Finkel (By George S. Meissner and Richard A. Finkel) for Respondent

The respondent, Joseph Slavin, a judge of the Civil Court of the City of New York, Kings County, and acting justice of the Supreme Court, 2d Judicial District, was served with a Formal Written Complaint dated December 18, 1987, alleging that

he improperly jailed a criminal defendant because his lawyer failed to appear in court and that he engaged in intemperate and discourteous conduct in five cases. Respondent filed an answer dated January 28, 1988.

By order dated March 4, 1988, the Commission designated Michael A. Cardozo, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 27 and October 7, 1988, and the referee filed his report with the Commission on December 12, 1988.

By motion dated March 1, 1989, the administrator of the Commission moved to disaffirm the referee's report, to adopt additional findings and conclusions and for a determination that respondent be censured. Respondent opposed the motion by cross motion on April 28, 1989.*

On May 19, 1989, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

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*Respondent's papers included numerous affidavits attesting to respondent's character and appropriate conduct in other matters--testimony that was excluded by the referee at the hearing. While we do not find that it was in error for the referee to exclude such testimony, it is appropriately before us on the question of sanction, upon notice and without objection by the administrator.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Civil Court of the City of New York since January 1, 1976, and an acting justice of the Supreme Court since January 3, 1986. He also sat as an Acting Supreme Court Justice from September 1977 to December 1981.

2. On December 2, 1986, Albert Mattocks appeared before respondent on two indictments charging Criminal Sale of A Controlled Substance, Third Degree.

3. Mr. Mattocks was free on bail pending trial. He had previously appeared in connection with the first indictment on each of 20 scheduled court dates. In the second case, he had appeared for six of seven scheduled court dates. On the seventh date, Mr. Mattocks had not appeared because of illness.

4. Mr. Mattocks' attorney, Eugene Prosnitz, did not appear before respondent on December 2, 1986. Mr. Prosnitz had also failed to appear for three previous court dates in connection with the first indictment, causing the matter to be adjourned. The first case had also been adjourned on nine other occasions at Mr. Prosnitz's request. In the second case, respondent had also granted three adjournments because of Mr. Prosnitz's absence and gave three additional adjournments at his request.

5. Because of Mr. Prosnitz's absence on December 2, 1986, respondent decided to remand Mr. Mattocks to jail and adjourn the case to December 11, 1986.

6. On the record and in open court, respondent said:

> ...I've had it up to here with this lawyer, and the only way I'll get him to move is if I put his client in. If his client walks around, he don't care; he just doesn't care....
>
> Somebody better go tell Mr. Prosnitz I'm sick and tired of this. The only way I'll get this case tried is if his client is in. He won't come in to try these cases. He's always busy with something else, and enough is enough is enough.
>
> Goodbye.

7. Mr. Mattocks remained in jail for nine days, until another judge ordered that his prior bail conditions be restored.

As to Charge II of the Formal Written Complaint:

8. The charge is not sustained and is, therefore, dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.3(a) of the Rules Governing Judicial Conduct; Canons 1, 2 and 3A of the Code of Judicial Conduct, and Sections 700.5(a) and 700.5(e) of the Special Rules Concerning Court Decorum of the Appellate Division, Second Department. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established. Charge II is dismissed.

A judge's only legitimate concern with regard to bail is insuring a defendant's future appearances in court. Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 289 (1983); Section 510.30(2)(a) of the Criminal Procedure Law. In the Mattocks case, the defendant had demonstrated in 26 appearances on scheduled court dates that he was a good bail risk. Respondent acknowledges that his sole purpose in revoking Mr. Mattocks' bail and ordering him jailed was to insure the presence of his lawyer.

While a judge has broad discretion in setting and revoking bail for "good cause shown" (Section 530.60[1] of the Criminal Procedure Law), the cases cited by respondent* do not give a judge the right to revoke a defendant's bail because of the acts of another and, thus, do not provide an arguable basis to believe that respondent could jail Mr. Mattocks for the conduct of his lawyer, an act respondent now concedes was in error.

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*People ex rel. Calascione v. Ramsden, 20 AD2d 142 (2d Dept. 1963), in which defendants' bail was revoked after the prosecutor alleged repeated intimidation of his witnesses and after one witness had drowned and the property of another had been damaged; State ex rel. Shakur v. McGrath, 62 Misc2d 484 (Sup. Ct., Queens Co. 1970), in which numerous interruptions of court proceedings by the defendants, fist fights in the courtroom, demonstrations outside the court and the firebombing of the trial judge's home were said to have interfered with the expeditious trial of the case; People v. Torres, 112 Misc2d 145 (Sup. Ct., NY Co. 1981), in which the defendant continually threatened the life of a witness against him and was subsequently arrested for stabbing him; People ex rel. Corcione v. Krueger, 309 NYS2d 773 (Sup. Ct., Nassau Co. 1970), in which no facts are given.

We conclude that respondent knew or should have known that it was improper to deny Mr. Mattocks his liberty because of the actions of another person over whom he had no control. To do so constituted an abuse of judicial power. Matter of Sharpe, 1984 Annual Report 134, 139 (Com. on Jud. Conduct, June 6, 1983).

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

Mrs. Robb, Mr. Bower, Mrs. Del Bello, Mr. Kovner, Judge Salisbury and Mr. Sheehy concur, except that Mrs. Del Bello dissents as to Charge II only and votes that the charge be sustained.

Judge Altman dissents and votes that the Formal Written Complaint be dismissed.

Mr. Berger and Judge Ciparick dissent as to sanction only and vote that the appropriate disposition would be to issue a confidential letter of dismissal and caution.

Mr. Cleary and Judge Rubin were not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: August 7, 1989

Lillemor T. Robb

Lillemor T. Robb, Chairwoman
New York State
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

JOSEPH SLAVIN,

DISSENTING OPINION
BY JUDGE ALTMAN

a Judge of the Civil Court of the City of New York and Acting Supreme Court Justice, 2nd Judicial District, Kings County.

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I dissent and vote to confirm the referee's report in its entirety. The remanding of a defendant is a bail decision within the discretion of the court and is immediately reviewable by writ of habeas corpus.

Respondent's difficulty arises because the press of business prevented him from making a record adequate to justify his action. Further, the pressure of potential judicial discipline caused him to leap to a statement of contrition without giving sufficient thought to the catechism.

Section 510.30 of the Criminal Procedure Law sets forth the criteria to be used by a judge in setting bail. Thereafter a judge has broad discretion to change a defendant's bail status for "good cause shown" (CPL 530.60[1]).

An experienced judge is well aware that, notwithstanding the constitutional right to a speedy trial,

delay is frequently a defendant's strategy of choice.* With that knowledge, respondent, who saw defense counsel repeatedly request adjournments while failing to appear on three separate occasions, had a sound basis for believing that the strategy of delay may well have included the risk that if the case finally did proceed to trial, the defendant would fail to appear. The failure to articulate that fear should not be the linchpin which allows the Commission to intrude on matters of law (see Matter of Lenney v. State Commission on Judicial Conduct, 71 NY2d 456). Indeed, there is authority for increasing bail on the basis of a defendant's delaying tactics (see People v. Pearson, 55 AD2d 685).

Without supporting authority, the majority has adopted a rule that the remanding of a defendant to ensure the appearance of counsel, in and of itself, constitutes misconduct. Such a bail ruling might be inappropriate or constitute an abuse of discretion, but in this case the error, if any, does not rise to the level of judicial misconduct.

The majority reliance upon Matter of Sharpe (1984 Annual Report 134, 139 [Com. on Jud. Conduct, June 6, 1983]), is misplaced. There the prosecutor, who had been held in contempt, had no control over a police witness. A defendant does have

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*See e.g., "Rothwax - Here Comes the Judge," Vanity Fair, June 1989, Vol. 52, No. 6, p. 123.

control over retained counsel.* Such counsel can be discharged. It is the judge who appears to have no control. I can find no cases in New York in which a judge has relieved retained counsel. Neither reporting counsel to a departmental grievance committee nor resort to the contempt power would have accelerated counsel's trial readiness. A judge must, consequently, rely on the judicious exercise of discretionary powers to control a calendar.

This case is also distinguishable from Matter of Sardino v. State Commission on Judicial Conduct (58 NY2d 286). There the judge had engaged in a pattern of misconduct, including the setting of bail, without regard to the statutory standards (supra, 289, 290). This case involves a single decision under colorable legal authority (see People v. Pearson, 55 AD2d 685, supra).

Respondent's problem is compounded by the nature of his statement of contrition, which was no doubt made to conform with the premium we appear to place on a judge's admission of wrongdoing. A more carefully worded statement, developing every step of the reasoning process which went into the making of the bail decision, might have been closer to reality and have avoided the result reached by the majority. Respondent might

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*I am assuming counsel was retained as assigned counsel could readily have been relieved and new counsel assigned.

well have honestly said that he did not remand the defendant solely to ensure the appearance of counsel, but also because of the possibility that if the defendant were really forced to trial, he might not appear in court.

To convert respondent's bail ruling into an act of misconduct undermines the independence of the judiciary and unduly interferes with a judge's exercise of discretion. A good-faith bail decision, reviewable on appeal and by writ of habeas corpus, should not be the subject of disciplinary action. If the judge made a mistake in this case, it was a mistake of law that does not rise to the level of misconduct. I would, therefore, confirm the referee's report and dismiss the charges.

Dated: August 7, 1989

Myriam J. Altman

Honorable Myriam J. Altman, Member
New York State
Commission on Judicial Conduct