To Be Argued By
Robert H. Tembeckjian, Esq.
Time Requested: 15 Minutes

JCR-2022-00010

Court of Appeals of the State of New York

In the Matter of the Request of
ROBERT J. PUTORTI,
a Justice of the Whitehall Town and Whitehall Village Courts,
Washington County,

Petitioner,

For Review of a Determination of the
NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,

Respondent.

BRIEF FOR RESPONDENT STATE COMMISSION ON JUDICIAL CONDUCT

ROBERT H. TEMBECKJIAN
Counsel for Respondent State Commission on Judicial Conduct
Corning Tower, Suite 2301
Empire State Plaza
Albany, New York 12223
518-453-4600

Of Counsel:

Edward Lindner, Esq.
David P. Stromes, Esq.
Cathleen S. Cenci, Esq.
S. Peter Pedrotty, Esq.

Dated: March 15, 2023

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

INTRODUCTION 1

PROCEDURAL HISTORY

A. The Formal Written Complaints 2

B. Petitioner's Verified Answers 4

C. The Agreed Statement of Facts 4

D. The Commission's Determination 5

THE FACTS 5

Charge I: Petitioner brandished a loaded firearm at an unarmed defendant in his courthouse, gave an interview about that incident, and – on three different occasions – gave accounts of the tale in which he emphasized that he had pulled a gun on a "big" or "large" "Black" man.

A. Petitioner unjustifiably brandished a gun at defendant Brandon Mr. Wood, who was in court for the call of a case 6

B. Petitioner gave an interview about pulling his gun on a defendant in his courtroom, carrying a concealed firearm while on the bench, and other incidents outside of court during which he had carried or brandished a gun 8

C. In showing the article to his co-judge, Petitioner appeared to boast about having pulled a gun on a "big Black man." 9

D. At a 2018 magistrates meeting, Petitioner told other judges

in attendance that he once brandished his handgun in his courthouse at a "large [B]lack man." 10

E. Petitioner told his supervising judge that he had pulled his gun on a "large [B]lack man." 11

Charge II: Petitioner personally participated in the solicitation of funds or other fund-raising activities for his own personal benefit and the benefit of the Whitehall Elks Lodge.

A. Petitioner promoted a fundraiser benefitting himself and his family on his public Facebook page 14

B. Petitioner shared to his public Facebook page seven posts advertising fundraisers benefitting the Elks Lodge 15

THE COMMISSION'S DETERMINATION 16

A. The Majority Opinion.....17

B. The Lone Dissent.....20

ARGUMENT

PETITIONER SHOULD BE REMOVED FROM OFFICE FOR UNJUSTIFIABLY BRANDISHING A LOADED GUN AT AN UNARMED DEFENDANT IN COURT, REPEATEDLY BOASTING ABOUT THE INCIDENT AND DESCRIBING IT IN RACIAL TERMS, AND ENGAGING IN OTHER MISCODNUCT WHILE HE KNEW HE WAS UNDER INVESTIGATION.

A. Petitioner has conceded that he committed misconduct by unjustifiably brandishing a loaded gun at a defendant in open court, which itself subjects him to removal from judicial office 23

B. Petitioner has conceded that he created the appearance of racial bias by unnecessarily referring to Mr. Wood as a "Black man" while recounting the gun incident, which aggravates his misconduct and further supports the sanction of removal 28

C. Petitioner committed additional aggravating misconduct by repeatedly boasting about the gun incident, further warranting the sanction of removal 32

D. Petitioner has conceded that he engaged in improper fundraising on Facebook while he knew he was being investigated for the gun incident, which creates yet additional grounds for the sanction of removal 34

E. Petitioner's contention that his cited mitigating factors support a lesser sanction than removal is uncompelling 36

CONCLUSION 40

TABLE OF AUTHORITIES

CASES

Calderone v City of Chicago, 2019 WL 4450496 at (ND Ill Sept 17, 2019), *aff'd* 979 F3d 1156 (7th Cir 2020) 34

Matter of Blackburne, 7 NY3d 213 (2006) 28, 38

Matter of Duckman, 92 NY2d 141 (1998) 30

Matter of Harris, 72 NY2d 335 (1988) 34

Matter of Jacqueline F, 47 NY2d 215 (1979) 30

Matter of Kuehnel, 49 NY2d 465 (1980) 23, 24

Matter of Mazzei, 81 NY2d 568 (1993) 19

Matter of Miller, 35 NY3d 484 (2020) 35, 36, 38

Matter of O'Connor, 32 NY3d 121 (2018) 35, 36, 38

Matter of Sardino, 58 NY2d 286 (1983) 30

Matter of Schiff, 83 NY2d 689 (1994) 30, 38

Matter of Sims, 61 NY2d 349 (1984) 30

Matter of Steinberg, 51 NY2d 74 (1980) 36

Matter of Watson, 100 NY2d 290 (2003) 30

People v Ayala, 75 NY2d 422 (1990) 32

People v Brown, 33 NY3d 323 (2019) 26

People v Kinchen, 60 NY2d 772 (1983) 30

People v Perry, 19 NY3d 70 (2012) 26, 27

People v White, 79 NY2d 900 (1992) 32

COMMISSION DETERMINATIONS

Matter of Ciganek, 2002 Ann Rep 85 (Commn on Jud Conduct, Mar 29, 2001) 21, 27

Matter of Moskos, 2017 Ann Rep 177
(Commn on Jud Conduct, Oct 3, 2016) 21, 27

Matter of Pennington, 2006 Ann Rep 224
(Commn on Jud Conduct, Sept 7, 2005) 29

Matter of Post, 2011 Ann Rep 141 (Commn on Jud Conduct, Oct 12, 2010) 34

Matter of Sgueglia, 2013 Ann Rep 304
(Commn on Jud Conduct, Aug 10, 2012) 21, 27

STATUTES AND REGULATIONS

Judiciary Law §44(4) 2, 37

Penal Law §120.14(1) 26

RULES GOVERNING JUDICIAL CONDUCT

100.1 ..... 5, 16, 23

100.2(A) 5, 16, 23

100.2(C) 5, 16

100.3(B)(3) 5, 16, 23

100.3(B)(4) 5, 16, 23

100.4(A)(1) 5, 16

100.4(A)(2) 5

100.4(C)(3)(b)(i) 5, 16

OTHER AUTHORITIES

Cambridge Dictionary, *available at*
https://dictionary.cambridge.org/us/dictionary/english/acknowledge 30

Cynthia Lee, *Firearms and Initial Aggressors*,
101 NC L Rev 1, 14 (2022) 34

Dictionary.com, *available at* https://www.dictionary.com/browse/acknowledge . 30

Macmillan Dictionary, *available at* https://www.macmillandictionary.com/us/dictionary/american/acknowledge 30

Opinion 06-51 of the Advisory Committee on Judicial Ethics 6

Opinion 18-165 of the Advisory Committee on Judicial Ethics 26, 27

PRELIMINARY STATEMENT

This brief is respectfully submitted by Counsel to the Commission on Judicial Conduct ("Commission") in response to Petitioner's brief, dated January 26, 2023, and in support of the Commission's September 9, 2022, determination that the Honorable Robert J. Putorti ("Petitioner") committed judicial misconduct warranting removal from office.

INTRODUCTION

In late 2015, Petitioner brandished a loaded handgun at an unarmed Black defendant who was appearing in court for the call of his case. Far from expressing concern or contrition for what he later admitted was an unjustified display of deadly force, Petitioner at first boasted about the gun incident in a published interview, then repeated his story on several occasions for assorted fellow judges. In those retellings, Petitioner gratuitously referred to the defendant's race, grossly exaggerating that he had pulled a gun on a "Black man" who was "large," "big," or six-foot-nine and "built like a football player." Petitioner now describes for this Court a provocation that he says explains his action but that no one else saw – including the police officer he says was with him at bench.

Petitioner committed additional, separate misconduct when, at a time that he knew the Commission was investigating the gun incident, he used his Facebook account to fundraise for his own personal benefit and for his Elks Lodge.

Petitioner stipulated to the facts of this case and acknowledged that his conduct violated the Rules Governing Judicial Conduct. The question before this Court is whether Petitioner's misconduct warrants his removal from judicial office.

This Court should accept the Commission's determination that the Petitioner should be removed from the bench. Standing alone, Petitioner's unjustified act of pointing a loaded firearm at an unarmed, unthreatening defendant in his court was egregious and warrants his removal. Petitioner severely aggravated that misconduct by boasting about it on several occasions and repeatedly injecting the defendant's race into the matter, which created at least the appearance of racial bias by implying that he had pulled his gun because the defendant was Black. Finally, Petitioner's improper fundraising at a time when he should have been especially mindful of his ethical responsibilities demonstrates an unacceptable disregard for his ethical obligations.

PROCEDURAL HISTORY

A. The Formal Written Complaints

Pursuant to Judiciary Law § 44(4), the Commission authorized a Formal Written Complaint, dated June 11, 2020, containing one charge, and a Second Formal Written Complaint, dated January 20, 2021, containing a second charge. Charge I alleged that Petitioner: (A) unjustifiably brandished a loaded semi-automatic handgun at Brandon Wood, an unarmed defendant who was at the

Whitehall Village Court for the call of a case; (B) gave an interview to a Hofstra University journalism student in which he described his practice of carrying a concealed firearm while presiding on the bench, stated that he had brandished his handgun in court at a defendant, meaning Mr. Wood, and described other purported encounters he had while carrying a firearm; (C) told other judges in attendance at a magistrates association meeting that he had once brandished his handgun in the courthouse at a "large [B]lack man," again meaning Mr. Wood (FWC ¶¶6-8), and (D) was counseled by his supervising judge about displaying a firearm in court and signed a counseling memorandum agreeing that he would not "display, use or threaten to use a firearm while in the courtroom" unless necessary to defend against the imminent use of deadly force.[1]

Charge II alleged that Petitioner personally participated in the solicitation of funds or other fund-raising activities for his own personal benefit and for the benefit of the Whitehall Elks Lodge ("Elks Lodge"), and lent the prestige of his judicial office to those same activities, by sharing and promoting on his personal Facebook page: (A) a post by his sister advertising a fundraiser for Petitioner and

[1] References to "FWC" and "FWC2," "Ans," and "Ans2" are to the Formal Written Complaint, the Second Formal Written Complaint, Petitioner's Answer to the Formal Written Complaint, and Petitioner's Answer to the Second Formal Written Complaint, respectively. References to "ASF" are to the Agreed Statement of Facts, and references to "ASF Ex" are to exhibits to the ASF. References to "Det," "Dissent," and "PetBr" are to the Commission determination below, the dissent below, and Petitioner's brief before this Court. References to "AO" are to opinions of the Advisory Committee on Judicial Ethics ("Advisory Committee"), available at https://ww2.nycourts.gov/ip/acje/search_landing.shtml (last visited Mar 10, 2023).

his family, and (B) various posts by the Elks Lodge advertising fundraisers for the Lodge (FWC2 ¶ 5).

B. Petitioner's Verified Answers

Petitioner filed a Verified Answer to the Formal Written Complaint, dated August 14, 2020, in which he denied nearly all the substantive factual allegations of Charge I (Ans ¶ 2). Petitioner admitted that he was counseled by his supervising judge and signed a counseling memorandum regarding his display of a firearm to Mr. Wood (Ans ¶ 5).

Petitioner filed a Verified Answer to the Second Formal Written Complaint, dated March 8, 2021. With respect to Charge II, Petitioner admitted that, on his personal Facebook page, he wrote, "I am very humbled by this, I hope to see as many people as I can. Thank you" above a post by his sister that included an invitation to a "SPAGHETTI DINNER – BASKET PARTY BENEFIT FOR ROBERT PUTORTI JR." (Ans2 ¶ 6). Petitioner also admitted that the "spaghetti dinner" event was attended by over 500 people and raised a net amount of $9,400, which was applied to medical expenses Petitioner incurred (Ans2 ¶ 7). Petitioner denied essentially all other substantive factual allegations.

C. The Agreed Statement of Facts

By Orders dated October 6, 2020, and March 12, 2021, the Commission designated David M. Garber, Esq., to act as Referee to hear and report to the

Commission as to both Formal Written Complaints. By agreement of the parties and the Referee, the two matters were combined into one proceeding. A hearing before the Referee was scheduled to take place on June 2 and 3, 2021. The hearing was adjourned and, in lieu thereof, the parties entered into an Agreed Statement of Facts ("ASF") dated November 26, 2021, which the Commission accepted.

D. The Commission's Determination

On September 9, 2022, the Commission issued a determination that Petitioner violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(3), 100.3(B)(4), 100.4(A)(1), 100.4(A)(2), and 100.4(C)(3)(b)(i) of the Rules Governing Judicial Conduct ("Rules") and imposed the sanction of removal from office (Det: R17, R25).[2] One Commission member dissented as to the sanction and would have imposed no more than a censure (Dissent: R26, R46).

THE FACTS[3]

Petitioner has been a Justice of the Whitehall Town Court, Washington County, since January 1, 2014. In June 2014, he was appointed as an Acting Justice of the Whitehall Village Court, Washington County, and was elected as a Justice of that court in April 2018. Petitioner's current term as Whitehall Town

[2] Citations preceded by R are to Petitioner's "Record for Review," which he filed with his brief.

[3] Because no hearing was held in this matter, this fact section refers to facts determined by the Commission, which reviewed and approved the ASF.

Justice expires on December 31, 2025, and his term as Whitehall Village Justice expires on April 6, 2025. Petitioner is not an attorney (Det: R3).

Charge I: **Petitioner brandished a loaded firearm at an unarmed defendant in his courthouse, gave an interview about that incident, and – on three different occasions – gave accounts of the tale in which he emphasized that he had pulled a gun on a "big" or "large" "Black" man.**

Since at least 2003, Petitioner has been licensed in New York State to carry a concealed firearm. At a judicial training course in December 2013, Petitioner was advised by an instructor that he could legally carry a concealed firearm at the bench.[4] His practice was to have a concealed and loaded firearm, though with the chamber empty, with him at the bench while he presided. Typically, Petitioner attached the handgun to the underside of the bench via a magnet (Det: R4).

A. Petitioner unjustifiably brandished a gun at defendant Brandon Wood, who was in court for the call of a case.

Brandon Wood is a Black man who, at the time of the events herein, was approximately 34 years old, six feet tall, and 165 pounds (Det: R5).

On March 30, 2015, Mr. Wood was charged in the Whitehall Village Court with Attempted Assault in the First Degree, Criminal Mischief in the Third Degree, Menacing in the Second Degree, and Criminal Possession of a Weapon in

[4] Opinion 06-51 of the Advisory Committee provides that "there is no prohibition in the Rules Governing Judicial Conduct barring [a judge] from carrying a firearm while performing . . . duties on the bench," provided that the judge otherwise abides by the Rules and "there are no legal or administrative barriers that would preclude such possession."

the Fourth Degree. The allegations specified that Mr. Wood had attacked his wife and another man with a knife while Mr. Wood's wife and the other man sat in a parked car. Petitioner was aware of the violent nature of the allegations against Mr. Wood, as he had presided over the matter. However, the attempted-assault and criminal mischief charges were ultimately merged and dismissed on consent of the prosecution, leaving Mr. Wood charged with only the menacing and weapon charges, both misdemeanors (Det: R5).

On June 22, 2015, Mr. Wood pled guilty to those misdemeanors before Petitioner. Petitioner sentenced Mr. Wood to a one-year conditional discharge and imposed fines and surcharges totaling $555. Upon learning that Mr. Wood could not afford to pay that amount and had been jailed as a result, Petitioner reduced Mr. Wood's fine to community service and released him (Det: R5-6).

In late 2015, Mr. Wood was scheduled to appear before Petitioner in the Whitehall Village Court, and he was present in the courthouse before the call of his case. He was not represented by counsel (Det: R6).

While Mr. Wood was inside the courthouse, Petitioner brandished a loaded handgun at him (Det: R6). At the time, Petitioner had no basis to believe that Mr. Wood was about to use imminent deadly force against Petitioner or anyone else (Det: R6, R18). Although Petitioner claims to have subjectively feared for his safety when he brandished his gun at Mr. Wood, he admits, in retrospect, that he

was not justified in doing so (Det: R6). There were no other witnesses to the event (Det: R6).

B. Petitioner gave an interview about pulling his gun on a defendant in his courtroom, carrying a concealed firearm while on the bench, and other incidents outside of court during which he had carried or brandished a gun.

In the fall of 2015, Petitioner's cousin, Reba Putorti, was a journalism student at Hofstra University. That semester, Reba Putorti wrote an article about firearms and firearm laws for publication in an online magazine. Petitioner agreed to be interviewed by Reba Putorti for an article about his possession of numerous firearms and firearms licenses. Petitioner wrongly believed the article would be published only within Hofstra University (Det: R6-7).

During the interview, Petitioner: (A) described his general practice of carrying a concealed firearm while presiding on the bench; (B) stated that he once brandished his gun at "someone" who had come running up to him at the bench;[5] (C) described an out-of-court incident in which he brandished his handgun at an unidentified man while helping his now-deceased grandfather recover a stolen car;

[5] Petitioner has claimed that Assistant District Attorney Devin Anderson and Police Officer Joel Archambault were present in the courtroom at the time. However, if called to testify, neither would have corroborated the version of events Petitioner recounted in the interview (Det: R9; ASF: R53).

and (D) described an instance in April 2015 in which police officers in Virginia observed him carrying a firearm in a convenience store at 3:00 AM (Det: R7).[6]

The resulting article, "Carrying in the courtroom," was published online in the *Long Island Report* on December 8, 2015, and remained viewable through at least November 26, 2021. The article, which Petitioner admits is accurate, quoted him as stating, "I carry a gun now because I'm a judge; I send people to jail and you never know how someone will respond to the calls I make. I carry all the time, especially today, because you never know when someone is going to pull out a gun and start shooting people; if I have a gun at home, that's not doing anybody any good; if it's on my hip, I can respond immediately" (Det: R7-8).

C. In showing the article to his co-judge, Petitioner appeared to boast about having pulled a gun on a "big Black man."

In early 2016, Petitioner showed the article to his former co-judge, Hon. Julie Eagan, and others around his courthouse. Petitioner contemporaneously told Judge Eagan about having pulled a gun on an "agitated" "big Black man" when the man, whom Petitioner did not identify by name, approached him too quickly at the bench. From Petitioner's manner and tone, he appeared to be "boast[ing]" or "bragging" about his actions, and he expressed pride about being featured in the article (Det: R8, R18).

[6] Petitioner had a license to carry in Virginia but acknowledged that the handgun may have been visible on his waist.

Later that year, at a meeting of the Washington County Magistrates Association, Judge Eagan overheard Petitioner telling other judges about the article and the incident with the gun in the courtroom (Det: R8, R18-19).

D. At a 2018 magistrates meeting, Petitioner told other judges in attendance that he once brandished his handgun in his courthouse at a "large [B]lack man."

On October 23, 2018, while discussing courthouse security at a meeting of the Washington County Magistrates Association, Petitioner told several other judges, including his supervising judge, Hon. Gary Hobbs, that he once had brandished his handgun in court at a "large [B]lack man" after the man, a defendant, passed the "stop line" and came within a couple feet of Petitioner at the bench. Petitioner told his fellow judges that the defendant, whom he did not identify by name, said he just wanted to talk to Petitioner, and that the police officer who was standing at the bench at the time joked with Petitioner about how quickly he had been able to pull the gun.[7] Petitioner did not mention anything about the defendant's criminal record or penchant for violence (Det: R8-9).[8]

The parties stipulated that, had there been a hearing in this matter, Petitioner would have testified that when he recounted the gun incident at the magistrates

[7] Petitioner identified the officer as Joel Archambault, who has no recollection of any such incident (Det R9; ASF: R53).

[8] Judge Hobbs' contemporaneous notes about Petitioner's comments were annexed to the ASF as Exhibit 4 (ASF: R83-84).

meeting, he was seeking advice from his supervising judge about what to do in the future under similar circumstances. Petitioner further would have testified that he referred to the defendant's race as a means of describing him (Det: R9).

E. Petitioner told his supervising judge that he had pulled his gun on a "large [B]lack man."

On October 25, 2018, after another judge expressed concern to Judge Hobbs about Petitioner's comments at the 2018 Magistrates Association meeting, Judge Hobbs had a telephone conversation with Petitioner about the gun incident. Judge Hobbs made notes of his conversation with Petitioner, and Petitioner agreed that the notes accurately reflect what Petitioner had said (Det: R9). Petitioner also agreed that some of what he told Judge Hobbs was different from what he had said at the meeting (Det: R9-10).

At Judge Hobbs' request, Petitioner repeated his account of the incident over the phone and told Judge Hobbs the following:

- The described incident had occurred about three years prior;
- Petitioner routinely carried a concealed gun at the bench. His gun would not have a bullet "in the chamber," but it took him just "a split second to load" one;
- The defendant – whom Petitioner did not identify by name and whose "case ha[d] been long since resolved" – was a "large [B]lack man," about 6'9" tall and "built like a football player";
- Petitioner said nothing about the defendant's criminal history or propensity for violence;

- The incident occurred when Petitioner called the defendant's case and the defendant ran quickly to the bench, past a line where defendants are supposed to stand, and came within two feet of Petitioner;

- A police officer, who was standing at the bench "for [Petitioner's] security," allowed the defendant to pass the line and go directly to the bench;

- Petitioner "pulled his hand gun and pointed it at the defendant,"[9] "told him to stop, asked him where he was going and told the defendant to move back behind the line," to which the defendant replied that "he just wanted to talk to" Petitioner. Petitioner "said that he would talk to the defendant once he moved back behind the line," after which "[t]he defendant . . . moved back and [Petitioner] put his gun back under the bench."

(Det: R10).

Judge Hobbs advised Petitioner that he may not display his gun to a defendant unless he reasonably believes it is necessary to defend himself or someone else from the use or imminent use of deadly physical force by the defendant. Judge Hobbs added that the fact that a defendant may present as "large" or make Petitioner feel uncomfortable or nervous is an insufficient basis for Petitioner to display his gun (Det: R11).

On March 2, 2019, Petitioner signed a counseling memorandum provided by Judge Hobbs, in which he agreed never to display, use, or threaten to use a firearm in court unless he or someone else was facing "deadly physical force" (Det: R11).

[9] This is contrary to Petitioner's statement to the Commission, in which he said that he made a "fanning motion" with the gun but did not point it at the defendant (*see* ASF: R56-57).

In the ASF, Petitioner averred that he has not carried his gun into the courtroom while presiding over cases since October 2018, when Judge Hobbs counseled him as described above (Det: R11). Petitioner acknowledged that, even if his purpose in recounting the Wood incident with fellow judges was to discuss courthouse security, and his intent in referring to the defendant's race was merely to describe him, the defendant's race was immaterial, and his identification of Mr. Wood by race may have created the appearance of racial bias (Det: R11, R18-19).

Charge II: Petitioner personally participated in the solicitation of funds or other fund-raising activities for his own personal benefit and the benefit of the Whitehall Elks Lodge.

Petitioner maintains a Facebook account under the name "Robert Putorti Jr." and has over 1,300 Facebook "friends." Although Petitioner's account does not mention his position as a judge, a number of his Facebook friends were aware he was a New York State judge, including: Whitehall Police Officer Bryan Greco; Washington County District Attorney Tony Jordan; Whitehall Police Officer Chris Kyne; Whitehall Police Sergeant Richard LaChapelle; Washington County Public Defender Michael Mercure; Washington County Assistant Public Defender Amanda Ross; and Whitehall Police Investigator Frank Hunt. Petitioner set his account settings so that his Facebook page was viewable by the public (Det: R12-13).

Petitioner has been a member of the Elks Lodge since 1992 and has held various leadership positions since April 2017. On April 1, 2020, Petitioner was elected to the position of Exalted Ruler, the highest position. It is generally known among the members of the Lodge that Petitioner is a judge (Det: R11-13).

A. Petitioner promoted a fundraiser benefitting himself and his family on his public Facebook page.

On October 24, 2019, Petitioner was "tagged"[10] in a Facebook post by his sister, Kristy Putorti, which included an invitation to an event entitled "SPAGHETTI DINNER – BASKET PARTY BENEFIT FOR ROBERT PUTORTI JR.," scheduled for November 9, 2019, at the Whitehall Elks Lodge. The invitation listed the cost to attend the benefit as $10, announced that there would be raffles for baskets and "large items," and reported injuries and medical expenses suffered by Petitioner due to a motorcycle accident on August 31, 2019. The invitation concluded, "We Need Your Help!! We are accepting donations and items to raffle off: baskets, gift cards, or large items. Proceeds to go to Bobby and his family. We can't do this without your assistance and attendance! Please Share!! Thank You Very Much for Your Support!!" The post did not identify Petitioner as a judge, nor did it mention his position or affiliation with the

[10] A Facebook Help Center article about "tagging" was annexed to the ASF (*see* R87-98).

Whitehall Court. The post identified Petitioner as "Whitehall Elks Leading Knight and community friend to all" (Det: R13-14).

Because Kristy Putorti "tagged" Petitioner in her Spaghetti Dinner post, the post appeared on Petitioner's Facebook page, and thus was viewable to any member of the public who viewed Petitioner's page. Instead of deleting the post from his Facebook page or removing the tag, Petitioner commented on the post, "I am very humbled by this, I hope to see as many people as I can. Thank you" (Det: R14). At the time of this posting, Petitioner was aware that the Commission was investigating his display of a gun in his courthouse (Det: R17).

Over 500 people attended the Spaghetti Dinner event and it raised about $9,400, which Petitioner received and/or which organizers of the event applied to Petitioner's medical expenses (Det: R13-14).

B. Petitioner shared to his public Facebook page seven posts advertising fundraisers benefitting the Elks Lodge.

On seven occasions in between July 20, 2020, and October 5, 2020, Petitioner shared to his public Facebook page posts by the Elks Lodge advertising various fundraising events (Det: 14-16; *see* ASF Exs: R104-20). On each post, Petitioner wrote comments promoting the fundraisers, including: "Come support our lodge everyone, we're trying to keep the doors open, because of the COVID-19, we need all your help to bring in some revenue. We help support the communities around us with various fundraisers, but now we need yours!! Thank

you!" (ASF Ex: R105), and "Come out and support our lodge, help us so we can give back to the people in the communities around us!" (ASF Ex: R107).

Petitioner's intent in sharing and promoting each of the Lodge's Facebook posts was to raise funds for the Elks Lodge (Det: R16). All of these posts were viewable by the public and remained viewable as of January 20, 2021, the date of the Second Formal Written Complaint, notwithstanding that Petitioner was notified by letter dated November 12, 2020, that the Commission was investigating a complaint alleging that he had engaged in the conduct charged herein (Det: R16). Petitioner changed his Facebook security setting to "private" prior to submitting his Verified Answer to the Second Formal Written Complaint (Det: R16-17).

At the time Petitioner promoted the Lodge's posts, he was aware that the Commission was investigating a claim that he brandished a gun in his courtroom (Det: R17).

THE COMMISSION'S DETERMINATION

The Commission unanimously determined that Petitioner's conduct violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(3), 100.3(B)(4), 100.4(A)(1), and 100.4(C)(3)(b)(i) of the Rules, and a 10-member majority determined that his misconduct warranted his removal from office. One member dissented, opining that Petitioner deserved no more than a censure.

A. The Majority Opinion

The Commission concluded that Petitioner "engaged in highly inappropriate conduct" when he "brandished his loaded gun in the courtroom at a litigant," "boasted" or "bragg[ed]" about the incident thereafter, and repeatedly noted the defendant's race when recounting the incident, which at least "created the appearance of racial bias" (Det: R17-19, R24). To make matters worse, while Petitioner knew that he was under investigation for the gun incident, he demonstrated further "lack of attention to his ethical obligations" by "engag[ing] in improper fundraising" for the Elks Lodge by promoting "at least seven" paid events on his public Facebook page (Det: R21, R24).

As to the gun incident, the Commission was particularly troubled that Petitioner "brandished" or "pointed" his gun at Mr. Wood in the courtroom (Det: R18). As the determination emphasized, "[l]itigants appear in court for the safe and orderly resolution of matters impacting their lives" (Det: R18). Thus, "brandishing" or "point[ing]" a "loaded gun in his courtroom at a litigant who was appearing before him was an extreme breach of judicial decorum" (Det: R18). Worse still, Petitioner knew and acknowledged that "Mr. Wood did not pose an imminent threat to [Petitioner] or anyone else" (Det: R11, R18), making his actions in brandishing the gun all the more "disturbing and dangerous" (Det: R24).

The Commission further determined that Petitioner "exacerbated" his courtroom misconduct by "boast[ing]" or "bragging" about "brandishing his gun" at Mr. Wood (Det: R18-19, R24). It noted that Petitioner volunteered the story of pulling his gun on Mr. Wood on several occasions, including in 2015, when his cousin interviewed him about his assorted firearm licenses, and in both 2016 and 2018, to fellow judges (Det: R6-9, R19). One of those judges felt that Petitioner "was bragging about the gun incident," and another "was sufficiently concerned about [Petitioner]'s statements concerning the gun incident to contact [his] supervising judge about the matter" (Det: R19). That repeated boasting, the Commission held, demonstrates that "[r]ather than being remorseful about his inappropriate courtroom conduct," Petitioner was "proud of his actions" and was "unable to recognize the serious impropriety of brandishing his gun on the bench" (Det: R19).

Beyond the mere fact that Petitioner kept repeating his story of the gun incident, the Commission was also "troubled by [Petitioner's] repeated description of [Mr. Wood's] race" when he told and retold the tale (Det: R18). Specifically, when recounting the story to fellow judges in 2018, Petitioner included that Mr. Wood was a "big Black man" or a "large Black man" – a fact that simply "was not relevant" for any purpose other than highlighting Mr. Wood's race (Det: R18-20). In that same vein, Petitioner greatly "exaggerated [Mr. Wood's] physical stature"

in his retellings as 6'9" and "built like a football player," when in fact Mr. Wood stood about 6'0" tall and weighed around 165 pounds (Det: R19-20). As Petitioner himself ultimately recognized, those repeated references to Mr. Wood's race and exaggerations about his size "created the appearance of racial bias," which – "particularly in the context of [Petitioner's] extremely inappropriate actions" toward Mr. Wood – "is wholly unacceptable for a member of the judiciary" (Det: R19).

Finally, the Commission held that Petitioner's misconduct was further compounded by his improper fundraising activities, which he undertook "after he knew that he was under investigation" for the gun incident, and thus "during a time when he should have been particularly attentive to [his ethical] responsibilities" (Det: R21). Specifically, despite "decades" of opinions by the Advisory Committee on Judicial Ethics warning judges not to engage in fundraising activities, Petitioner promoted at least seven fundraisers for the Elks Lodge on his public Facebook page (Det: R21). The majority noted that the "Facebook posts were repetitive," and thus "not an isolated incident" (Det: R21).

All told, the Commission concluded, "[g]iven the seriousness of [Petitioner's] conduct," he should be removed from judicial office (Det: R24). Though "mindful that 'removal, the ultimate sanction, should . . . be reserved for truly egregious circumstances'" (Det: R23-24, citing *Matter of Mazzei,* 81 NY2d

568, 572 [1993]), the Commission determined that Petitioner's "disturbing and dangerous act of brandishing his loaded weapon at a litigant in his courtroom" – and that he "repeatedly "referenced the litigant's race" while "boast[ing]" about the incident – met that standard (Det: R24). The determination concluded that "the totality" of Petitioner's misconduct "demonstrated that he lacks the appropriate judicial temperament" and "irreparably undermined confidence in his ability to continue as a judge" (Det: R24).

B. The Lone Dissent

One Commission member dissented as to sanction only, asserting that Petitioner should have received an "admonition, or at the very worst, [a] censure" (Dissent: R26). The dissent asserted that the gun episode was an "isolated incident" and a "single lapse in judgment" that "does not justify the drastic sanction of removal" (Dissent: R26, R33).[11] To that end, the dissent opined that Petitioner was "unaware that he could not display or use or threaten the use of a firearm in court unless he or someone else was facing deadly physical force" and pointed out that "there was no ethical rule, statute, advisory opinion, or court decision . . . which addressed when it is appropriate for a Judge to display his firearm in court" (Dissent: R34-35) (internal quotation marks omitted). The

[11] In response to this assertion, the majority noted that in giving the interview for the "Carrying in the Courtroom" article, Petitioner acknowledged another incident in which he had brandished his gun (*see* Det: R20).

dissent also pointed to three Commission decisions involving firearms and noted that they resulted in two admonitions and a censure: *Matter of Moskos*, 2017 Ann Rep 177 (Commn on Jud Conduct, Oct 3, 2016) (judge admonished for surreptitiously bringing firearm into county building that prohibited firearms); *Matter of Sgueglia*, 2013 Ann Rep 304 (Commn on Jud Conduct, Aug 10, 2012) (judge censured for accidentally discharging firearm while cleaning it in chambers); *Matter of Ciganek*, 2002 Ann Rep 85 (Commn on Jud Conduct, Mar 29, 2001) (judge admonished for discharging firearm to scare wild turkeys away from an intersection) (Dissent: R36-37).

The dissent dismissed the notion that Petitioner is "racist" or acted with "racial bias" in recounting the gun incident. Despite Petitioner's overt admission in the ASF that his identification of Mr. Wood "by race may have created the appearance of racial bias" (ASF: R59), the dissent inaccurately characterized the majority's finding of that very same admission as "unsupported" (Dissent: R42). The dissent also disagreed that Petitioner's retellings of the gun incident amounted to "bragging" (Dissent: R40-41).

Contrary to the majority's finding, the dissent contended that Petitioner was remorseful (Dissent: R39) and that the majority had ignored other mitigating factors (Dissent: R37).

Finally, as to the Facebook fundraising, the dissent agreed that such conduct was improper but would have found that it does not justify removal (Dissent: R45).

ARGUMENT

PETITIONER SHOULD BE REMOVED FROM OFFICE FOR UNJUSTIFIABLY BRANDISHING A LOADED GUN AT AN UNARMED DEFENDANT IN COURT, REPEATEDLY BOASTING ABOUT THE INCIDENT AND DESCRIBING IT IN RACIAL TERMS, AND ENGAGING IN OTHER MISCONDUCT WHILE HE KNEW HE WAS UNDER INVESTIGATION.

By itself, Petitioner's shocking act of unjustifiably brandishing a loaded firearm at an unarmed defendant in open court was so egregious, dangerous, and prejudicial to the administration of justice that it compels his removal. Petitioner exacerbated that misconduct by boasting about the incident in an interview for an online publication and in conversations with other judges. On three separate occasions while recounting his tale, he volunteered that he had pulled his gun on a "Black man," thus gratuitously injecting the defendant's race into the story and creating at least the appearance of racial bias. And, while he knew he was being investigated for that misconduct – and thus should have been taking extra care to abide by his ethical responsibilities – he committed additional misconduct by repeatedly engaging in prohibited fundraising on Facebook. As the Commission appropriately determined below, Petitioner's misconduct so compromised public

confidence in his ability to preside as a fair and impartial arbiter that he should be removed from the bench.

A. Petitioner has conceded that he committed misconduct by unjustifiably brandishing a loaded gun at a defendant in open court, which itself subjects him to removal from judicial office.

There is no dispute that Petitioner committed judicial misconduct by brandishing a loaded gun in his courtroom at Brandon Wood, an unarmed and unthreatening defendant. Petitioner and his attorney so stipulated, acknowledging that the unjustifiable "brandish[ing of] a gun" in court at Mr. Wood violated the Rules (ASF: R52, R58-59). That led the Commission to determine that Petitioner "engaged in highly inappropriate conduct when he brandished his loaded gun in the courtroom at a litigant" without justification, in violation of Sections 100.1, 100.2(A), 100.3(B)(3), and 100.3(B)(4) of the Rules (Det: R17-18). Petitioner does not challenge that determination now, but instead asks this Court to alter his sanction to something other than removal from office. That request should be rejected.

By itself, brandishing a loaded gun at an unarmed and unthreatening defendant warrants removal. To borrow words from this Court's decision in *Matter of Kuehnel*, 49 NY2d 465 (1980), the unjustifiable brandishing of a loaded firearm by "a member of the public" would be, "at a bare minimum, a flagrant breach of accepted norms. [But] [w]hen performed by a Judge, a person required

to observe 'high standards of conduct so that the integrity of the judiciary may be preserved,' such conduct is inexcusable." *Id.* at 469 (internal citations omitted). Because judges must at all times abide by the highest standards of conduct lest they "subject[ ] the judiciary as a whole to disrespect and impair[ ] the usefulness of the individual Judge to carry out his or her constitutionally mandated function" (*id.*), Petitioner's bare act of pulling a gun on Mr. Wood must subject him to stern discipline.

To make matters worse, Petitioner admitted – and the Commission determined – that he pulled his gun while presiding in his courtroom. As the Commission noted, "[a] courtroom is no place for a judge to brandish or point a gun at a litigant," as litigants "appear in court for the safe an orderly resolution of matters impacting their lives" (Det: R18). The sanctity of the courtroom, where the accused are entitled to full and fair process before a neutral magistrate, is irreparably damaged when the judge himself points a loaded gun at a defendant expecting constitutional due process. Such an act is inimical to the core values of the American legal system.

Petitioner's assorted arguments for a lesser sanction are unavailing. First, his contention that the Commission removed him for "discourteous conduct" (PetBr: 12, 16) demonstrates a fundamental misunderstanding of the gravamen of both his behavior and the Commission's determination. Petitioner's conduct was

so far beyond "discourteous" as to be egregious, dangerous, and diametrically opposed to his role as impartial arbiter and guardian of the Constitution.

Nor is it true, as Petitioner suggests, that his conduct constituted a justifiable means of "gaining control of his courtroom" (PetBr: 16, 25). In Petitioner's own version of events, at the time the brandishing incident occurred, a police officer was standing at the bench "for [Petitioner's] security" (Det: R10; ASF: R57; Hobbs Mem: R83). Petitioner stipulated that when Mr. Wood passed the "stop line" and came within a couple feet of [Petitioner] at the bench, the police officer "allowed" him to do so (ASF: R55, R57). Given that the police officer stationed at the bench for Petitioner's security did not see Mr. Wood as a threat, Petitioner's subjective claim that Mr. Wood approached "too quickly" or that he seemed "agitated" (ASF: R56-57) does not remotely suggest that the judge had lost control of his courtroom, let alone that he had to pull a loaded gun to regain it.

Petitioner puts forward a flawed argument that the Commission's "*per se* rule that a judge cannot brandish a weapon absent facts supporting the legal defense of justification" is "untenable" and "conflate[s] a judge's ethical obligations . . . with the penal law's justification affirmative defense" (PetBr: 14, 23-25). To begin, the Commission made no such *per se* rule. Rather, the Commission decided the appropriate sanction based on Petitioner's own stipulation that he was "not justified" in brandishing his weapon in the courtroom and that his

conduct in this case violated the Rules (ASF: R52, 58-59). As it does in every proceeding, the Commission weighed the "totality of the evidence" before deciding, on these facts, that removal is the appropriate sanction (Det: R24).

Moreover, Petitioner's attack on the Advisory Committee's conclusion that a judge cannot brandish a gun at a defendant unless the defendant presents an imminent threat of deadly physical force is unavailing (*see* PetBr: 24; AO 18-165). It is well-established that absent such a dire threat, pointing or brandishing a gun at another person – even as a deterrent with no intent to fire – constitutes the crime of Menacing in the Second Degree, which criminalizes "intentionally plac[ing] or attempt[ing] to place another person in reasonable fear of physical injury, serious physical injury or death by displaying . . . a pistol . . . or other firearm." Penal Law § 120.14(1). As this Court has expressly held, "[f]rightening a man with a gun" constitutes second-degree menacing and "is not a justified 'emergency measure' for ending a tussle, or a fistfight," but only "in defense of one's own life." *People v Perry*, 19 NY3d 70, 73 (2012); *cf People v Brown*, 33 NY3d 316, 323 (2019) (a person who pulls a gun as "a deterrent" against less than deadly physical force is not acting with legal justification).

That is exactly what Petitioner did in pulling his gun on Mr. Wood. By his own admission, he brandished the gun to deter Mr. Wood from coming closer and to force him backward at a time when Petitioner "had no reasonable basis to

believe that [Mr. Wood] was about to use imminent deadly force against him or anyone else" (ASF: R52, R57; ASF Ex: R83). Thus AO 18-165's assertion about justification is correct, and Petitioner is wrong to claim that "the justification analysis involving deadly force has no bearing" here because "neither party suffered any injury" (PetBr: 24-25). Petitioner's contention that he "had every reason to think he acted appropriately" until his supervising judge advised him otherwise (PetBr: 23; *see* Hobbs Mem: R82-84; Counseling Mem: 86) is doubly troubling, as his conduct not only constituted a "substantial" ethical violation (AO 18-165), but likely a crime as well. *See Perry*, 19 NY3d at 73.

Finally, Petitioner cites three prior Commission determinations involving guns and sanctions other than removal to argue that a lesser sanction is appropriate here (PetBr: 26-27). All three are easily distinguishable. In *Matter of Sgueglia*, 2013 Ann Rep at 304, the accidental discharge of a licensed firearm in chambers, while plainly dangerous, did not overtly threaten either an unarmed defendant in the courtroom or the integrity of the judicial process more generally. In *Matter of Moskos*, 2017 Ann Rep at 177, the judge acted inappropriately by trying to bring a licensed gun into a building that did not allow firearms, but he did not use his weapon to threaten a defendant or anyone else in a courtroom. And, in *Matter of Ciganek*, 2002 Ann Rep at 85, the judge used his firearm to scare off wild turkeys, not another person, let alone a defendant in his courtroom.

As Petitioner correctly notes, the Commission determination "relie[d] on few cases or rules" in removing him for brandishing a gun at a defendant in open court (PetBr: 17). But that is not surprising, as there is simply no precedent for this kind of singularly flagrant misconduct. As in *Matter of Blackburne,* 7 NY3d 213, 220 (2006), the fact that "until now no judge has thought" to brandish a weapon in a courtroom "cannot shield [P]etitioner from the necessary consequence of [his] actions." It is no argument to say that removal on these facts would be unprecedented because, as in *Blackburne*, "Petitioner's [own] conduct was unprecedented." *Id*.

B. Petitioner has conceded that he created the appearance of racial bias by unnecessarily referring to Mr. Wood as a "Black man" while recounting the gun incident, which aggravates his misconduct and further supports the sanction of removal.

Petitioner exacerbated his already-egregious misconduct by signaling in subsequent accounts, intentionally or not, that his actions were racially motivated (Det: R18-19). On three separate occasions during which he recounted the gun incident – twice while speaking casually with fellow judges, and once when called to account for his actions by his supervising judge – he gratuitously injected Mr. Wood's race into the story, with melodramatic flourish, referring to him as a "big Black man" or "large [B]lack man" about 6'9" tall and "built like a football player" (Det: R10, R18-19; ASF: R54-55, R57).

As Petitioner has acknowledged, his gratuitous comments about Mr. Wood's skin color demonstrated at least the appearance of racial bias (Det: R11, R18-20; ASF: R59). Mr. Wood's skin color was not relevant to Petitioner's story, no matter the reason he chose to tell it. Indeed, Mr. Wood's race did not make him any more dangerous to Petitioner or anyone else in court, and it absolutely strains credulity to believe that, had Mr. Wood been White, Petitioner would have specified that he had pulled a gun on a "White man." The reasonable inference to be drawn from Petitioner's gratuitous mention of Mr. Wood's skin color is that, to Petitioner if no one else, this added detail somehow aggravated the event. Accordingly, the Commission appropriately found those comments to be "troubl[ing]" and "unacceptable for a member of the judiciary" (Det: R18-19).

Put simply, Petitioner's "gratuitous comments about a defendant's race were manifestly inappropriate," and "[r]egardless of whether [Petitioner's] remarks were knowingly racist or simply ill-considered, the use of such language by a judicial officer serves to undermine public confidence in the integrity and impartiality of the judiciary." *Matter of Pennington*, 2006 Ann Rep 224, 226 (Commn on Jud Conduct, Sept 7, 2005). This is true even if Petitioner harbors no actual bias against Black people because, as this Court has repeatedly held, "[t]he perception of impartiality is as important as actual impartiality . . . [in] those who have been chosen to pass judgment on legal matters involving their lives, liberty and

property." *Matter of Duckman*, 92 NY2d 141, 153 (1998) (quoting *Matter of Sardino*, 58 NY2d 286, 290-91 [1983]); *see also Matter of Watson*, 100 NY2d 290, 302 (2003); *see eg, Matter of Schiff*, 83 NY2d 689, 692 (1994) (removing judge who said that "he recalled a time when it was safe for young women to walk the streets 'before the blacks and Puerto Ricans moved here'").

In arguing against removal, Petitioner nonsensically contends that his "acknowledgement" in the ASF that he "may have created the appearance of racial bias . . . does not constitute an admission of the same" (PetBr: 21). The prevailing definitions of "acknowledge" – "to accept, admit, or recognize,"[12] "to admit to be real or true,"[13] or "to accept or admit that something exists [or] is true"[14] (emphases added) – render Petitioner's "acknowledgement" an admission, albeit grudging, that he may have created the appearance of racial bias.[15]

---

[12] Cambridge Dictionary, *available at* https://dictionary.cambridge.org/us/dictionary/english/acknowledge (emphasis added) (last visited Mar 10, 2023).

[13] Dictionary.com, *available at* https://www.dictionary.com/browse/acknowledge (emphasis added) (last visited Mar 10, 2023).

[14] Macmillan Dictionary, *available at* https://www.macmillandictionary.com/us/dictionary/american/acknowledge (emphasis added) (last visited Mar 10, 2023).

[15] Perhaps understanding as much, Petitioner asks this Court to "reconsider the agreed upon facts" on this topic (PetBr: 22). But there is no reason to do so where, as here, Petitioner waived his right to a factfinding hearing and its attendant uncertainty in favor of an Agreed Statement of Facts that he found to be to his liking. To do otherwise would be to permit Petitioner to "have [his] cake and eat it too." *Matter of Jacqueline F*, 47 NY2d 215, 223 (1979). In any event, despite this Court's factfinding power in Commission proceedings (*see Matter of Sims*, 61 NY2d 349, 353 [1984]), it cannot on this record make the alternative factfinding Petitioner suggests, because – in the absence of a hearing, and the cross-examination that would have come with it – there simply is no record upon which this Court can find alternative facts. *See People v Kinchen*,

Petitioner's argument that his comments did not create the appearance of racial bias because he "accurately described Defendant Wood as 'Black' to [his] colleagues" (PetBr: 20, emphasis in original) is problematic for several reasons. First, the accuracy of the statement does nothing to diminish the specter of bias because, as discussed above, Mr. Wood's race was irrelevant. Additionally, this argument is telling for what it ignores. Petitioner did not simply describe Mr. Wood as "Black," but "exaggerated [Mr. Wood's] physical stature" by telling his co-judge that he had brandished his gun at a "big Black man," telling fellow magistrates that Mr. Wood was a "large Black man," and describing Mr. Wood to his Supervising Judge as 6'9" and "built like a football player," when in fact Mr. Wood stood about 6'0" tall and weighed around 165 pounds (Det: R18-20). Petitioner's repeated gratuitous inclusion of Mr. Wood's race into his stories of the gun incident and his exaggerations about Mr. Wood's physical stature created the impression that he drew his gun on Mr. Wood – at least in part – because Mr. Wood was Black.

Petitioner's contention that the majority "fail[ed] to consider . . . evidence rebutting racial discrimination" is meritless. His claim that the fact that he used a "lunch break" to reduce Mr. Wood's fine to community service and release him

60 NY2d 772, 773-74 (1983) (the fact that an issue is legally reviewable by the Court of Appeals "does not . . . dispense with the need for a factual record sufficient to permit appellate review").

from jail demonstrates he is not racially biased (PetBr: 17-18) is unsupported by the record (Det: 20-21). Without knowing why Petitioner did what he did, to ascribe any meaning or motivation to it is pure speculation, and thus impermissible. *See People v Ayala*, 75 NY2d 422, 432 (1990) (rejecting "inference [that] could not rationally have been drawn without resort to impermissible speculation"); *cf People v White*, 79 NY2d 900, 904 (1992) (rejecting jury instruction that "would have done no more than invite impermissible speculation as to the defendant's state of mind").

C. Petitioner committed additional aggravating misconduct by repeatedly boasting about the gun incident, further warranting the sanction of removal.

Petitioner further compounded his misconduct by boasting about brandishing his weapon at Mr. Wood on at least four separate occasions, demonstrating a disturbing lack of "insight into the gravity of his misconduct" (Det: R19). As the Commission majority held, "[r]ather than being remorseful about brandishing his gun without justification while on the bench, [Petitioner] appears to have been proud of his actions" (Det: R18-19).

As soon as Petitioner realized that Mr. Wood posed no threat to him or anyone else, he should have regretted having pulled a loaded gun on an unarmed litigant. Instead, Petitioner appeared to celebrate it, as he demonstrated each time he told the tale. While giving an interview for the "Carrying in the Courtroom" article, Petitioner cited the Wood incident as a positive usage of his gun, alongside

an out-of-court act of apparent vigilantism during which he brandished a gun at a man while attempting to recover a stolen car (ASF: R53-54, ASF Ex: R78). Petitioner showed the article to a co-judge and others around his courthouse, again recounting the gun incident in "a manner and tone" that bespoke "pride" (Det: R8; ASF: R55). Finally, Petitioner volunteered his story of the gun incident to a number of judges at conferences in 2016 and 2018. He mentioned the article during the 2016 conference, and at the 2018 conference, he added unsubstantiated details about how a police officer – who was purportedly present at the bench when he brandished his gun – had noted how quickly Petitioner had drawn his weapon (Det: R8-9). As the Commission held, that repeated boasting "compounded [Petitioner's] misconduct and exhibited a serious lack of judgment," further justifying the sanction of removal (Det: R18-19).

Petitioner now contends that he was "[n]ot boasting" in giving the interview or recounting the gun incident, but simply "felt a sense of pride in exercising his Second Amendment right . . . to defend himself and anyone else in his place of employment . . . from the threat of physical altercation by brandishing his pistol" (PetBr: 19-20).

That characterization is problematic for several reasons. For one thing, that Mr. Wood may have rushed forward when his case was called did not create any credible "threat of physical altercation," let alone a threat of deadly physical force

that would justify Petitioner in pulling his gun. Beyond that, while the Second Amendment certainly protects Petitioner's right to own and carry a gun, the question of "whether a particular actual use of a gun constitutes self-defense" is "left to criminal law and tort law, about which the Second Amendment is silent." *Calderone v City of Chicago*, 2019 WL 4450496 at *3 (ND Ill Sept 17, 2019), *aff'd* 979 F3d 1156, 1162 (7th Cir 2020) ("Carriage and use are separate and distinct interests under the Second Amendment"); *see also* Cynthia Lee, *Firearms and Initial Aggressors*, 101 NC L Rev 1, 14 (2022) ("The existence of a Second Amendment right to keep and bear arms in public for the purpose of self-defense, however, says nothing about whether any particular use of a firearm constitutes a justified use of force" or "act of self-defense"). Thus, Petitioner's current claim improperly conflates his Second Amendment right to carry his gun with his improper act of brandishing it at Mr. Wood.

D. Petitioner has conceded that he engaged in improper fundraising on Facebook while he knew he was being investigated for the gun incident, which creates yet additional grounds for the sanction of removal.

By itself, Petitioner's admittedly "improper" (PetBr: 34) engagement in fundraising activities benefitting himself and the Whitehall Elks Lodge would warrant public discipline. *See eg*, *Matter of Harris*, 72 NY2d 335, 337 (1988) (judge admonished for participating in an American Heart Association benefit); *Matter of Post*, 2011 Ann Rep 141 (Commn on Jud Conduct, Oct 12, 2010) (judge

admonished, in part, for personally participating in fund-raising activities on behalf of her son's sports teams). As the Commission determined, the fact that Petitioner engaged in such misconduct when he knew he was under investigation by the Commission for the gun incident indicates an insensitivity to his ethical obligations at a time when he "should have been particularly attentive to [them]" (Det: R21).

Thus, although Petitioner is correct that this category of fundraising misconduct typically "result[s] in no more than a censure" (PetBr: 31), the specific context of the misconduct here constitutes yet another aggravating factor as to the gun incident. Judicial misconduct is not considered in isolation when determining the appropriate sanction; rather, a given judge's violations of the Rules must be considered "in the aggregate." *Matter of Miller*, 35 NY3d 484, 490 (2020); *see Matter of O'Connor*, 32 NY3d 121, 128-29 (2018). Accordingly, in the overall context of this case, Petitioner's fundraising misconduct further supports a determination of removal.

Petitioner – like the dissent below – now complains that, even after he "gave every indication of full cooperation" with the gun-incident investigation, Commission staff "scour[ed] social media for additional charges" in order to find the Facebook fundraising posts at issue (PetBr: 32). But as the Commission found, "it was more than appropriate for the Commission's staff to review [Petitioner's] public social media posts to determine whether he had made any additional public

comments about the gun incident in the courtroom" (Det: R23). Once Commission staff found the fundraising Facebook posts, they presented that new information to the Commission, which "properly voted to authorize" the additional investigation. *Id.*

E. Petitioner's contention that his cited mitigating factors support a lesser sanction than removal is uncompelling.

In support of his request for a sanction no greater than censure, Petitioner contends that the Commission determination failed to consider myriad mitigating factors, including his cooperation with the Commission proceedings, his "unblemished record," his willingness to "reflect upon his conduct and acknowledge that displaying the pistol was improper," the fact that he stopped bringing his gun to court once his supervising judge spoke with him, and the fact that his inappropriate Facebook posts did not overtly invoke his judicial office (PetBr: 22-23, 37-38).

First, those factors largely demonstrate an absence of additional aggravating factors, rather than factors that affirmatively mitigate Petitioner's misconduct. *See Miller*, 35 NY3d at 486 (inability to recognize the seriousness of misconduct and failure to heed a prior warning); *O'Connor*, 32 NY3d at 129 (failure to cooperate with Commission); *Matter of Steinberg*, 51 NY2d 74, 81 (1980) (flaunting of judicial office versus "subtle persuasion which might naturally arise from

petitioner's title"). The mere absence of such aggravating factors does not make Petitioner's outrageous misconduct less egregious.

Petitioner also cites as mitigating the fact that his supervising judge was "satisfied," upon admonishing Petitioner, that the Wood incident was "an isolated single incident that would not reoccur" (PetBr: 23, quoting Dissent: R38). First, as the Commission majority pointed out, "the gun incident in the courtroom was not a 'single isolated' incident, because Petitioner – in giving the interview that underlay his cousin's online article – described at least two other incidents in which he displayed a gun in public (Det: R20; ASF: R54). Thus, Petitioner has demonstrated a pattern of displaying his guns, whatever his supervising judge may have thought. Yet even if Judge Hobbs was personally "satisfied" after counseling Petitioner, it is the Commission's unique constitutional authority to review and, where appropriate, render disciplinary determinations for misconduct committed by New York State judges.

Finally, Petitioner makes the unpersuasive argument that his entering into a stipulation was mitigating because it "obviated the need for a formal hearing" (PetBr: 38). While Petitioner had the right to test the Commission's proof at trial (Jud L § 44[4]), opting to stipulate *inter alia* spared him from cross-examination. That choice was strategic, not altruistic or deserving of leniency.

Petitioner's egregious misconduct, as illustrated in this record and the determination that he should be removed from judicial office, is unmitigated by his unavailing arguments to this Court.

* * *

"Judicial misconduct cases are, by their very nature, sui generis." *Blackburne*, 7 NY3d at 219-20. Indeed, Commission Counsel knows of no other instance in which a judge of the State of New York brandished a loaded firearm in court at a defendant. Although removal is not normally imposed for conduct that amounts to poor judgment or even extremely poor judgment, a single act that exceeds all measure of acceptable judicial misconduct warrants removal. *See id.* at 221. Such is the case with Petitioner's "dangerous actions" here. *See id.*

That is especially true here, inasmuch as Petitioner celebrated his misconduct by repeatedly boasting about it with racist remarks that "cast doubt on [his] ability to fairly judge all cases before him." *Schiff*, 83 NY2d at 693. And, at a time he should have been especially sensitive to his ethical obligations because he knew he was being investigated for misconduct, Petitioner committed yet additional misconduct by publicly fundraising for his Elks Lodge and lending the prestige of his judicial office to the Lodge's interests.

Viewed individually or in the aggregate (*Miller*, 35 NY3d at 490; *O'Connor*, 32 NY3d at 128-29), Petitioner's conduct prejudiced the administration of justice

and irreparably compromised his ability to preside as an impartial arbiter. This Court should accept the Commission's determination that he should be removed from the bench.

CONCLUSION

By reason of the foregoing, it is respectfully submitted that this Court should accept the Commission's determination that Petitioner engaged in judicial misconduct warranting removal from office.

Dated: March 15, 2023
Albany, New York

Respectfully submitted,

ROBERT H. TEMBECKJIAN
Administrator and Counsel to the
Commission on Judicial Conduct

By: _____

David Stromes
Litigation Counsel
Corning Tower, Suite 2301
Empire State Plaza
Albany, New York 12223

Of Counsel:

Edward Lindner, Esq.
Cathleen S. Cenci, Esq.
Denise Buckley, Esq.
S. Peter Pedrotty, Esq.

CERTIFICATION PURSUANT TO RULE 500.13(C)(1)

I certify that this brief was prepared using Microsoft Word and that the total word count for the body of the brief is 9,159 words.

_____
David Stromes