STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

ROBERT J. PUTORTI,

a Justice of the Whitehall Town Court and the
Whitehall Village Court, Washington County.

DETERMINATION

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Taa Grays, Esq., Vice Chair
Honorable Fernando M. Camacho
Jodie Corngold
Honorable John A. Falk
Honorable Angela M. Mazzarelli
Honorable Robert J. Miller
Marvin Ray Raskin, Esq.
Ronald J. Rosenberg, Esq.
Graham B. Seiter, Esq.
Akosua Garcia Yeboah

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and S. Peter Pedrotty, Of Counsel) for the Commission

Cerio Law Offices (by Michael D. Root) for Respondent.

Respondent, Robert J. Putorti, a Justice of the Whitehall Town Court and the Whitehall Village Court, Washington County, was served with a Formal Written Complaint ("Complaint") dated June 11, 2020, containing one charge. Charge I of the

Complaint alleged that in late 2015 or early 2016, inside the Whitehall Village Court, respondent brandished a loaded semi-automatic handgun at Brandon Wood ("Wood"), a defendant whose criminal case respondent was scheduled to hear that day. The Complaint further alleged that in late 2015, respondent gave an informal interview to his cousin, a journalism student, in which he described his practice of carrying a concealed firearm while presiding on the bench and stated that he had brandished his handgun in court at a defendant; that at an October 2018 meeting of the Washington County Magistrates Association, respondent, while seeking advice, told other judges that he had once brandished his handgun in the courthouse at a person he described as a "large Black man" and in February 2019, respondent was counseled by his supervising judge about brandishing his gun in court. Respondent filed a Verified Answer dated August 14, 2020.

Respondent was served with a Second Formal Written Complaint dated January 20, 2021 containing one charge. Charge II in the Second Formal Written Complaint alleged that from October 2019 to October 2020, respondent 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 ("Lodge"), and lent the prestige of his judicial office to those activities, by sharing and/or promoting fundraising posts on his personal Facebook page. Respondent filed a second Verified Answer dated March 8, 2021.

By orders dated October 6, 2020 and March 12, 2021, the Commission designated David M. Garber, Esq. as referee to hear and report proposed findings of fact and conclusions of law. On November 26, 2021, the Administrator, respondent's attorney and respondent entered into an Agreed Statement of Facts ("Agreed Statement") pursuant

to Section 44(5), of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts and requesting that briefing and oral argument be scheduled on the issue of sanction. On December 9, 2021, the Commission accepted the Agreed Statement and scheduled briefing and oral argument on sanction for February 3, 2022.

By letter dated January 4, 2022 from respondent's counsel, the Commission was advised that the parties waived oral argument. The parties submitted briefs to the Commission with respect to sanction. Commission counsel recommended the sanction of removal and respondent's counsel argued that a sanction no greater than censure be imposed. On February 3, 2022, the Commission considered the record of the proceedings and made the following findings of fact.

1. Respondent has been a Justice of the Whitehall Town Court, Washington County, since January 1, 2014. In June 2014, respondent 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. Respondent's current term as Whitehall Town Justice expires on December 31, 2025 and his term as Whitehall Village Justice expires on April 6, 2025. Respondent is not an attorney.

As to Charge I of the Formal Written Complaints

2. The Whitehall Village Court and Whitehall Town Court share a courtroom in the Whitehall Municipal Center, located at 57 Skenesborough Drive, Whitehall, New York, in Washington County. The Whitehall Village Police Department is also located in

the Whitehall Municipal Center. There is an entrance to the police station from the courtroom, several feet from respondent's bench.

3. At the time of the events described herein, although neither the Whitehall Village Court nor the Whitehall Town Court had any court officers, bailiffs or other security personnel, according to respondent, a police officer was present for the events described herein.

4. Since at least 2003, and thus at all times relevant herein, respondent has been licensed in New York State to carry a concealed firearm. Copies of respondent's licenses to carry firearms in New York State and other states are annexed as Exhibit 1 to the Agreed Statement.

5. At a judicial training course in December 2013, respondent was advised by one of the instructors that he could legally carry a concealed firearm at the bench.[1] His practice had been to have a concealed and loaded firearm, although with the chamber empty, with him at the bench while presiding over court proceedings.[2] Typically, while presiding, respondent attached the handgun via a magnet to the underside of the bench's desktop. It is not clear from the record if respondent was authorized to keep his gun under his bench with a magnet as opposed to concealing it on his person.

Background of Criminal Proceedings Against Brandon Wood

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[1] Opinion 06-51 of the Advisory Committee on Judicial Ethics 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 Governing Judicial Conduct and "there are no legal or administrative barriers that would preclude such possession."

[2] Respondent avers that it was his practice to keep the chamber empty, and the Administrator has no evidence to the contrary.

6. Brandon Wood is a Black man who, at the time of the events herein, was approximately 34 years old, was approximately six feet tall (6'0'') and weighed approximately 165 pounds.

7. On March 30, 2015, Mr. Wood was charged in the Whitehall Village Court with Attempted Assault in the First Degree, a felony; Criminal Mischief in the Third Degree, a felony; two counts of Menacing in the Second Degree, a misdemeanor; and Criminal Possession of a Weapon in the Fourth Degree, a misdemeanor. 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 vehicle.[3] The accusatory instruments and supporting deposition relating to those charges are annexed as Exhibit 2 to the Agreed Statement. Respondent presided over the charges and, as a result, was aware of the violent nature of the allegations against Mr. Wood.

8. On June 22, 2015, after the felony charges against Mr. Wood had been merged and dismissed on consent of the prosecution, Mr. Wood pled guilty, with the assistance of counsel and in satisfaction of all charges, to one count each of Menacing in the Second Degree and Criminal Possession of a Weapon in the Fourth Degree, both misdemeanors. Respondent sentenced Mr. Wood to a one-year conditional discharge and imposed fines and surcharges totaling $555. Respondent avers, and court records do not dispute, that Mr. Wood failed to pay the fine and surcharge and was placed in jail. Mr. Wood's wife told respondent that she and Mr. Wood could not afford the fine but could pay the

[3] Previously, on March 11, 2015, Mr. Wood was charged in the Whitehall Village Court with Unlicensed Operator, a traffic infraction.

surcharge. Respondent went to the courthouse/jail on his lunch hour from his other employment and reduced Mr. Wood's fine to community service and released Mr. Wood from jail.

9. In late 2015, Mr. Wood was scheduled to appear before respondent in the Whitehall Village Court, and he was present in the courthouse before the call of his case. He was not represented by counsel.

10. While Mr. Wood was on court premises, respondent brandished a gun at him, notwithstanding that respondent now agrees that Mr. Wood was not acting in a manner demonstrating deadly force. There were no other witnesses to this event.

11. Although respondent states that he subjectively feared for his safety when he brandished his gun at Mr. Wood, he now acknowledges that he had no reasonable basis to believe that Mr. Wood was about to use imminent deadly force against him or anyone else. In retrospect, respondent admits that he was not justified in brandishing his gun at Mr. Wood.

Respondent's Interview about the Courthouse Gun Incident

12. In fall 2015, respondent's cousin, Reba Putorti, was a journalism student at Hofstra University. Throughout the fall 2015 semester, Ms. Putorti and her classmates in a magazine production class wrote articles about firearms and firearm laws for an online magazine. As part of this assignment, Ms. Putorti asked respondent if he would agree to be interviewed for an article about his possession of numerous firearms and firearms licenses. Respondent agreed.

13. When he agreed to the interview, respondent believed the ensuing article

would be published only within Hofstra University, as part of Ms. Putorti's class.

14. During his interview with the journalism student:

A. Respondent described his practice of carrying a concealed firearm while presiding on the bench, and he stated that he once brandished his handgun at "someone" who came running up to him at the bench and to whom he said, "'woah, woah, woah, slow down.'" [4]

B. Respondent 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]

C. Respondent described a third instance in April 2015 in which police officers in Virginia observed him carrying a firearm in a convenience store at 3:00 AM but did not take action against him. Respondent avers that he was licensed to carry in Virginia and believes the only error on his part was that the handgun *may* have been visible on his waist to the officers in the convenience store.

15. The resulting article, entitled "Carrying in the courtroom," was published online in the *Long Island Report* on December 8, 2015 and remained viewable online as of the date of the Agreed Statement. A copy of the article is annexed as Exhibit 3 to the Agreed Statement.

16. The article, which respondent admits quotes him accurately, quoted

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[4] If called to the stand, neither Assistant District Attorney Devin Anderson nor Police Officer Joel Archambault would corroborate the version of events respondent gave to the journalism student, notwithstanding respondent's claim that they were both present at the time.

[5] If called to the stand, respondent would testify as follows: "In 2003 or 2004, respondent's elderly grandfather had a car stolen from his used car lot. When police notified the grandfather that they had located the vehicle, respondent went with his grandfather to retrieve it. Upon arriving at the stolen car, a man came out of the woods with a chainsaw and advanced toward respondent's grandfather. Respondent pulled out his gun and told the man, "This isn't worth you getting shot over a vehicle that you stole." The man retreated, and respondent and his grandfather retrieved the stolen car." The Commission's Administrator can neither verify nor dispute the veracity of this account.

respondent 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."

17. In early 2016, respondent showed the article to his former co-judge, Julie Eagan, and others around the courthouse. Respondent contemporaneously told Judge Eagan about having pulled a gun on an "agitated" "big Black man" when the man, whom respondent did not identify by name, approached him too quickly at the bench.[6] From respondent's manner and tone, Judge Eagan was under the impression that respondent was bragging about his actions and that he was expressing pride about being featured in the article. At a meeting of the Washington County Magistrates Association in 2016, Judge Eagan overheard respondent telling other judges in attendance about the article and the purported incident with the gun in the courtroom.

Respondent's Comments about the Gun Incident at a 2018 Meeting of Judges

18. On October 23, 2018, at a meeting of the Washington County Magistrates Association, while seeking advice as to security in the court, respondent told other judges in attendance, including his supervising judge, Glens Falls City Court Judge Gary Hobbs, that he had once brandished his handgun in the courthouse at a "large [B]lack man," whom he did not identify by name, after the man, a defendant, had passed the "stop line"

[6] There are no witnesses to this event as respondent described it to former Judge Eagan.

and came within a couple feet of respondent at the bench, while a police officer was also at the bench. Respondent told his fellow judges that the defendant said he just wanted to talk to respondent, and that the police officer joked with respondent about how quickly he had been able to pull the gun.[7] Respondent did not mention anything about the defendant's criminal record or violent propensity. Judge Hobbs' contemporaneous notes about respondent's comments at the meeting are annexed as Exhibit 4 to the Agreed Statement.

19. At a hearing before the referee in the disciplinary matter herein, respondent would testify that during the 2018 magistrates meeting, he recounted the courtroom incident to a small group of other judges during a discussion about courtroom security and that he was merely seeking advice from his supervising judge about what to do in the future under similar circumstances. Respondent would further testify that he referred to the defendant's race merely to describe him to the other judges.

The Supervising Judge's Counseling of Respondent over the Gun Incident

20. On October 25, 2018, after another judge expressed concern to Supervising Judge Hobbs about respondent's comments at the Magistrates Association meeting, Judge Hobbs had a telephone conversation with respondent about the gun incident.

21. Judge Hobbs' contemporaneous notes of his conversation with respondent are included in Exhibit 4 to the Agreed Statement. Respondent agrees that Judge Hobbs' notes accurately reflect what respondent told him in that conversation. Respondent also

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[7] Officer Archambault has no recollection of any such incident or comments.

agrees that, as noted below, some of what he told Judge Hobbs was different from what he had told his fellow Magistrates.

22. At Judge Hobbs' request, respondent repeated his account of the incident, which he said had occurred about three years prior.

A. Respondent advised Judge Hobbs of his practice of carrying a concealed weapon at the bench and stated that a "bullet is not in the chamber, but it takes [him] a split second to load."

B. Respondent told Judge Hobbs that the defendant – whom he 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."[8]

C. Respondent said nothing to Judge Hobbs about the defendant's criminal history or violent propensity.

D. Respondent said that the incident had occurred when he called the defendant's case and the defendant ran quickly to the bench, past a line where defendants are supposed to stand, and within two feet of respondent.

E. Respondent told Judge Hobbs a police officer was standing at the bench "for [respondent's] security." However, respondent said, the officer allowed the defendant to pass the line and go directly to the bench.

F. Respondent told Judge Hobbs that he "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" respondent. Respondent "said that he would talk to the defendant once he moved back behind the line," after which "[t]he defendant . . . moved back and [respondent] put his gun back under the bench."

23. Judge Hobbs advised respondent that he may not display his gun to a

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[8] As noted above, Mr. Wood is 6'0" tall and weighs approximately 165 pounds.

[9] This is contrary to respondent's telling the Commission that he made a "fanning motion" with the gun but did not point it at Mr. Wood or anyone else.

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 respondent feel uncomfortable or nervous is insufficient basis for respondent to display his gun.

24. On March 2, 2019, respondent signed a counseling memorandum, provided to him by Judge Hobbs, in which respondent agreed never to display, use or threaten to use a firearm in court unless he or someone else was facing "deadly physical force." A copy of the counseling memorandum is annexed as Exhibit 5 to the Agreed Statement.

Additional Factors as to Charge I

25. Respondent avers, and the Administrator has no information to the contrary, 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.

26. Respondent acknowledges that, even if his purpose in recounting the *Wood* incident with fellow judges was to discuss courthouse security with them and his intent in referring to the defendant's race was merely to describe him to the other judges, the defendant's race was immaterial to any such discussion, and his identification of Mr. Wood by race may have created the appearance of racial bias.

As to Charge II of the Formal Written Complaints

27. Respondent has been a member of the Whitehall Elks Lodge since 1992. Respondent has held various leadership positions in the Lodge since April 2017. On April 1, 2020, respondent was elected by the Lodge's members to the position of Exalted Ruler, the highest-level position within the Lodge.

28. It is generally known among the members of the Lodge that respondent is a judge.

29. Facebook is an internet social networking website and platform that *inter alia* allows users to post and share content on their own Facebook pages as well as on the Facebook pages of other users and on Facebook groups. Facebook users are responsible for managing the privacy settings associated with their accounts. At the option of the account holder, the content of one's Facebook page may be viewable online by the public or restricted to one's Facebook "Friends."

30. At all times relevant to Charge II, respondent maintained a Facebook account under the name "Robert Putorti Jr." Respondent's account does not mention his position as a judge or his affiliation with Whitehall Court anywhere. Respondent's occupation is listed as "Machinery Equipment Operator of Town of Whitehall." Respondent made his Facebook page viewable by the public.

31. From October 2019 to November 2020, respondent had over 1,300 Facebook "Friends," some of whom were aware he was a judge.

32. Respondent was Facebook "Friends" with, *inter alia*, the following individuals:

A. Whitehall Police Officer Bryan Greco;
B. Washington County District Attorney Tony Jordan;
C. Whitehall Police Officer Chris Kyne;
D. Whitehall Police Sergeant Richard LaChapelle;
E. Washington County Public Defender Michael Mercure; and
F. Washington County Assistant Public Defender Amanda Ross.

33. During the time relevant to Charge II, each of the six individuals named in paragraph 32 was aware that respondent was a New York State judge. None of those individuals attended the fundraiser for respondent and his family addressed in paragraphs 35 through 37 herein. Some of these individuals saw a Facebook post advertising the fundraiser for respondent but felt no pressure to attend due to respondent's position as a judge. Others did not see a Facebook post advertising the fundraiser or know about the event.

34. Respondent was also Facebook "Friends" with Whitehall Police Investigator Frank Hunt. Investigator Hunt is a member of the Lodge and was aware that respondent was a New York State judge. In his position with the Whitehall Police, Mr. Hunt investigates cases that may be prosecuted in respondent's court. Mr. Hunt would testify that he attended the fundraiser for respondent addressed in paragraphs 35 through 37 herein but could not recall how he learned about the event or whether he saw any Facebook posts about it. Mr. Hunt did not pay a fee to enter the fundraiser or donate any items to the event. He did, however, purchase raffle tickets.

35. On October 24, 2019, respondent 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 there would also be raffles for baskets and "large items,"

[10] A printout from the Facebook Help Center about "tagging" is annexed as Exhibit 6 to the Agreed Statement.

and reported injuries and medical expenses suffered by respondent 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!!" Copies of screenshots of this post are annexed as Exhibit 7 to the Agreed Statement. The post did not identify respondent as a judge, nor did it mention his position or affiliation with the Whitehall Court in any way. The post identified respondent as "Whitehall Elks Leading Knight and community friend to all..."

36. Because Ms. Putorti "tagged" respondent in her Spaghetti Dinner post, the post appeared on respondent's Facebook page, and thus was viewable to any member of the public who viewed respondent's page. Instead of deleting the post from his Facebook page or removing the tag, respondent wrote above the post, "I am very humbled by this, I hope to see as many people as I can. Thank you."

37. The November 9, 2019, Spaghetti Dinner benefit was attended by over 500 people and raised a net amount of approximately $9,400, which respondent received and/or which organizers of the event applied to respondent's medical expenses.

38. On July 20, 2020, respondent shared to his Facebook page a post by the Lodge advertising a "QUEEN OF HEARTS" drawing scheduled for July 25, 2020, and wrote, "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!"

A copy of a screenshot of this post is annexed as Exhibit 8 to the Agreed Statement. The event was for members of the Lodge only. It raised a net amount of approximately $40.

39. On August 8, 2020, respondent shared to his Facebook page a post by the Lodge advertising an "Elks BBQ" event scheduled for August 8, 2020, and wrote, "Come out and support our lodge, help us so we can give back to the people in the communities around us!" Copies of screenshots of this post are annexed as Exhibit 9 to the Agreed Statement. The event was a fundraiser for the Lodge and was open to the public. It was attended by approximately 213 people and raised a net amount of approximately $1,460.

40. On September 9, 2020, respondent shared to his Facebook page a post by the Lodge advertising a "Thirsty Thursday" event scheduled for September 10, 2020, and wrote, "Come out for some good food and help support the lodge!" A copy of the screenshot of this post is annexed as Exhibit 10 to the Agreed Statement. The event was for members of the Lodge only. It raised a net amount of approximately $97.

41. On September 11, 2020, respondent shared to his Facebook page a post by the Lodge advertising a "chicken BBQ" event scheduled for September 12, 2020, and wrote, "I hope everyone can attend our last chicken bbq for the season...." Copies of screenshots of this post are annexed as Exhibit 11 to the Agreed Statement. The event was a fundraiser for the Lodge and was open to the public. It was attended by approximately 239 people and raised a net amount of approximately $1,978.

42. On September 16, 2020, respondent shared to his Facebook page a post by the Lodge advertising a "THIRSTY THURSDAY" event scheduled for September 17, 2020, and wrote, "Something a little different tomorrow, come down and join us for dinner,

help support our lodge! We're doing much better, let's keep it going!!" Copies of screenshots of this post are annexed as Exhibit 12 to the Agreed Statement. The event was for members of the Lodge only. It raised a net amount of approximately $152.

43. On September 22, 2020, respondent shared to his Facebook page a post by the Lodge advertising a "Thirsty Thursday" event scheduled for September 24, 2020, and wrote, "It's my slow smoked pulled pork, hope you all can enjoy!" A copy of a screenshot of this post is annexed as Exhibit 13 to the Agreed Statement. The event was for members of the Lodge only. It raised a net amount of approximately $242.

44. On October 5, 2020, respondent shared to his Facebook page a post by the Lodge advertising a "Thirsty Thursday" event scheduled for October 8, 2020, and wrote, "Come join us Thursday, I'm making Hot and Sweet Sausage for everyone to enjoy! Please remember your masks and that all Covid-19 rules apply! Thanks for your support!" A copy of a screenshot of this post is annexed as Exhibit 14 to the Agreed Statement. The event was for members of the Lodge only. It raised a net amount of approximately $186.

45. Respondent's intent in sharing and promoting each of the Lodge's Facebook posts advertising its events identified in paragraphs 38 through 44 was to raise funds for the Lodge. 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 respondent 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.

Respondent changed his Facebook security setting to "private" prior to submitting his Verified Answer to the Second Formal Written Complaint.

46. An inquiry letter sent to respondent during the Commission's investigation of the allegations underlying this Charge and his written response thereto are annexed to the Agreed Statement as Exhibit 15 and Exhibit 16, respectively.

47. At the time of the events in Charge II, respondent was aware that the Commission was investigating the matters addressed in Charge I.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(3), 100.3(B)(4), 100.4(A)(1) and (2) and 100.4(C)(3)(b)(i) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause pursuant to Article VI, Section 22, subdivision (a) of the Constitution and Section 44(1) of the Judiciary Law. Charges I and II of the Formal Written Complaints are sustained insofar as they are consistent with the above findings and conclusions and respondent's misconduct is established.

Each judge is obligated to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and must observe high standards of conduct "so that the integrity and independence of the judiciary will be preserved." (Rules, §§100.1 and 100.2(A)) The Rules require each judge to "be patient, dignified and courteous to litigants" and to "perform judicial duties without bias or prejudice against or in favor of any person" and without manifesting in words or conduct bias based upon race. (Rules, §§ 100.3(B)(3) and (4)) Respondent engaged in highly inappropriate conduct when he brandished his loaded gun in the courtroom at a litigant.

Respondent acknowledged that his repeated mention of Mr. Wood's race when recounting the gun incident may have created the appearance of racial bias. In addition, respondent compounded his misconduct and exhibited a serious lack of judgment when he boasted about brandishing his gun in the courtroom.

While on the bench, respondent brandished his gun at Mr. Wood even though Mr. Wood did not pose an imminent threat to respondent or to anyone else. [11] There was no justification for respondent's conduct. A courtroom is no place for a judge to brandish or point a gun at a litigant.[12] Litigants appear in court for the safe and orderly resolution of matters impacting their lives. Judges who preside over such matters must be dispassionate arbiters in their courtrooms. "Self-control is an essential element of judicial temperament." *Matter of Allman*, 2006 NYSCJC Annual Report 83, 86. Brandishing his loaded gun in his courtroom at a litigant who was appearing before him was an extreme breach of judicial decorum which respondent then exacerbated by his subsequent conduct.

We are troubled by respondent's repeated description of Mr. Wood's race. In 2016, respondent told his former co-judge that he had brandished his gun at a "big Black

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[11] Respondent told judges at the 2018 Magistrates Association meeting and his supervising judge that a police officer was present at the time of the incident. According to the Agreed Statement, the police officer respondent identified as being present would not corroborate respondent's version of events as told to respondent's cousin and it was stipulated that there were no witnesses to respondent brandishing his gun. With respect to respondent's statement at the 2018 Magistrates Association meeting that the police officer present at the time of the gun incident joked with respondent about how quickly respondent had been able to pull his gun, it was stipulated that, "Officer Archambault has no recollection of any such incident or comments."

[12] Respondent told his supervising judge that he "pointed" his gun at the defendant.

man." He told his fellow judges at the October 2018 Washington County Magistrates Association meeting that he had brandished his gun at a "large Black man" and repeated that description to his supervising judge.[13] Moreover, respondent acknowledged that by identifying Mr. Wood by race, respondent may have created the appearance of racial bias. Such appearance, particularly in the context of respondent's extremely inappropriate action toward Mr. Wood, is wholly unacceptable for a member of the judiciary.

Significantly, respondent did not appear to have insight into the gravity of his misconduct. Rather than being remorseful about brandishing his gun without justification while on the bench, respondent appears to have been proud of his actions. On more than one occasion, he recounted the incident to his fellow judges. He also agreed to be interviewed by his cousin who published an article in which respondent described brandishing his gun in the courtroom. Respondent's former co-judge, with whom respondent discussed the incident and the article, believed that respondent was bragging about the gun incident. In addition, another judge at the October 2018 Washington County Magistrates Association meeting was sufficiently concerned about respondent's statements concerning the gun incident to contact respondent's supervising judge about the matter. Respondent appears to have been unable to recognize the serious impropriety of brandishing his gun while on the bench. By brandishing his loaded gun at a litigant, repeatedly mentioning the race of that litigant and bragging about the gun incident,

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[13] In the Agreed Statement, respondent stipulated that Mr. Wood was approximately 6'0" and weighed approximately 165 pounds. However, when he was questioned about the gun incident, respondent told his supervising judge that Mr. Wood was approximately 6'9" and "built like a football player."

respondent engaged in a pattern of behavior unbecoming a judge and undermined public confidence in the judiciary.[14]

Contrary to the dissent, the gun incident in the courtroom was not a "single isolated" incident. In addition to acknowledging that he improperly brandished his gun in the courtroom, when speaking with his cousin, respondent described another gun incident when he brandished his gun while he was attempting to recover a car reportedly stolen from his grandfather's car lot.

Contrary to our dissenting colleague's opinion, there was evidence of respondent's racial bias. Respondent repeatedly referred to Mr. Wood's race when it was not relevant. Respondent exaggerated Mr. Wood's physical stature when talking with his supervising judge. Significantly, the dissent ignores respondent's admission that he may have created the appearance of racial bias when he identified Mr. Wood by race.

The dissent argues that respondent was not racially biased because respondent went to the courthouse/jail on his lunch hour to reduce Mr. Wood's fine to community service and release him from jail. There is nothing in the record to indicate the date upon which this occurred or respondent's motive for these actions. Moreover, there is nothing in the record to indicate that the prosecution was given the opportunity to be heard or notified of respondent's action or told of the apparent *ex parte* conversation respondent

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[14] The dissent contends that public confidence in the judiciary could not have been undermined. Among other things, this claim ignores that respondent recounted the gun incident to his cousin who then published an article which described the courtroom gun incident. The article remained viewable to the public online from the date of publication in December 2015 to at least the date of the Agreed Statement in November 2021.

had with Mr. Wood's wife prior to going to the courthouse/jail. This may be additional evidence of misconduct by respondent. Nonetheless, as the record is unclear and the reasoning for respondent changing the sentence is not in the record, this event was not a factor in our opinion.

Respondent also improperly participated in fundraising for the Lodge. While judges are permitted to be officers of a "charitable, cultural, fraternal or civic organization not conducted for profit", judges "shall not personally participate in the solicitation of funds or other fund-raising activities" for such organizations. (Rules §100.4(C)(3)(b)(i)) In *Matter of McNulty,* 2008 NYSCJC Annual Report 177, 179, the Commission wrote, "[t]he rules are clear; the Advisory Committee on Judicial Ethics has warned judges for decades not to engage in fund-raising activities; and the Commission has addressed the subject in its annual reports." In violation of his ethical obligations, respondent improperly shared fundraising posts for the Lodge on his Facebook page on at least seven occasions. Respondent's Facebook posts were repetitive and not an isolated incident. In addition, respondent shared the improper posts after he knew that he was under investigation for violating his ethical responsibilities in connection with the courtroom gun incident. Accordingly, respondent violated his ethical responsibilities during a time when he should have been particularly attentive to those responsibilities.

Pursuant to Section 44(5) of the Judiciary Law, Section 7000.6(d) of the Commission's Operating Procedures and Rules ("Commission's Rules"), Section 3.9 of the Commission's Policy Manual and the explicit language in the stipulated Agreed Statement, this determination is based upon the record as set forth in the Agreed

Statement.[15] Contrary to the Judiciary Law, the Commission's Rules, the Policy Manual and the Agreed Statement, the dissent relies upon material outside the record including an Advisory Opinion by the Advisory Committee on Judicial Ethics ("Advisory Committee") which was obtained by respondent's supervising judge regarding how the supervising judge should respond to respondent's statements about the courtroom gun incident.[16] The dissent relies upon the Advisory Opinion to make factual findings.[17] In addition to the Advisory Opinion not being part of the record, there is no evidence before the Commission regarding what information respondent's supervising judge submitted to the Advisory Committee which issues opinions based upon the information provided to it. Moreover, the Advisory Opinion addressed the responsibilities of respondent's supervising judge, not respondent's conduct. The Commission is responsible for investigating judicial misconduct and taking appropriate action.

We are compelled to respond to the dissent's arguments regarding the investigations the Commission properly authorized into respondent's conduct in

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[15] The November 26, 2021 Agreed Statement to which the parties stipulated included the following statement, "the Commission shall make its determination upon the following facts, which shall constitute the *entire* record in lieu of a hearing." (emphasis added) In December 2021, the Commission accepted this Agreed Statement after having rejected a prior Agreed Statement the parties had submitted. In addition to stipulating to the facts in the Agreed Statement and stipulating that he violated the Rules, respondent waived oral argument before the Commission.

[16] The dissent also includes information from the Elks organization's website which is outside the record.

[17] For example, in the dissent's view, the Advisory Opinion established that respondent's supervising judge, his district administrative judge and the Advisory Committee ". . . all were satisfied that the incident did not raise questions about the respondent's fitness to continue on the bench . . .." The dissent does not include the Advisory Opinion's statement that, if the information provided to it by the supervising judge was accurate, the judge under his supervision had committed a "substantial violation" of the Rules Governing Judicial Conduct.

connection with the gun incident and subsequently into respondent's fundraising Facebook posts. The Commission properly voted to authorize both investigations as provided in Section 44(2) of the Judiciary Law, Section 7000.2 of the Commission's Rules and Section 2.1(E) of the Commission's Policy Manual.[18] Furthermore, it was more than appropriate for the Commission's staff to review respondent's public social media posts to determine whether he had made any additional public comments about the gun incident in the courtroom.[19]

It is well-settled that judges are held to higher standards of conduct than the general public. *Matter of Kuehnel,* 49 N.Y. 2d 465, 469 (1980) ("[s]tandards of conduct on a plane much higher than for those of society as a whole, must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved. A Judge must conduct his everyday affairs in a manner beyond reproach."); *Matter of Lonschein*, 50 N.Y.2d 569, 572 (1980) ("[m]embers of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved." (citation omitted)). Respondent has failed to meet the high standards of conduct required of members of the judiciary.

We are mindful that "removal, the ultimate sanction, should not be imposed for

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[18] The Commission's Policy Manual was updated in May 2022 and Section 2.1(F) is the relevant section in the current manual.

[19] Section 2.6(A) of the Commission's Policy Manual provides: "Investigations shall be limited to conduct reasonably related to the complaint. If, in the course of an investigation, Commission staff is made aware of clearly unrelated acts that may constitute judicial misconduct, such information should be reported to the Commission, which may authorize investigation of that conduct in a separate complaint."

misconduct that amounts simply to poor judgment or even extremely poor judgment, but should be reserved for truly egregious circumstances." *Matter of Mazzei*, 81 N.Y.2d 568, 572 (1993) (citations omitted) Here, without any justification and while on the bench, respondent engaged in the disturbing and dangerous act of brandishing his loaded weapon at a litigant in his courtroom. In recounting the incident, respondent then repeatedly referenced the litigant's race and boasted about brandishing his gun in the courtroom. Respondent has demonstrated that he lacks the appropriate judicial temperament. His actions irreparably undermined confidence in his ability to continue as a judge. Respondent also showed his lack of attention to his ethical obligations when he engaged in improper fundraising. Given the seriousness of his conduct and the totality of the evidence, we find respondent's misconduct to be egregious.

The dissent argues that removal is too severe because, in his view, respondent was unaware that his conduct was improper. Judges are required to know their ethical responsibilities and it is well-settled that ignorance is not a defense. *Matter of VonderHeide*, 72 N.Y.2d 658, 660 (1988) ("[w]e also reject the contention that the charges should not be sustained in view of petitioner's status as a nonlawyer and his lack of training. Ignorance and lack of competence do not excuse violations of ethical standards.") [20]

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[20] Moreover, the cases the dissent cites do not support a sanction more lenient than removal in this matter. For example, one of the cases the dissent cites, *Matter of Sgueglia*, 2013 NYSCJC Annual Report 304, involved, *inter alia*, the accidental discharge of the judge's gun in his chambers and the judge was censured. Here, respondent's actions in the gun incident were intentional, occurred while respondent was on the bench and involved a litigant.

The Court of Appeals has held that, "[t]he purpose of judicial disciplinary proceedings is to impose sanctions where needed to protect the bench from unfit incumbents." *Matter of Senzer,* 35 N.Y.3d 216, 219 (2020) (citations omitted) Through his egregious misconduct, respondent has demonstrated that he is unfit for judicial office.

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

Mr. Belluck, Ms. Grays, Judge Camacho, Ms. Corngold, Judge Falk, Judge Mazzarelli, Judge Miller, Mr. Raskin, Mr. Seiter and Ms. Yeboah concur.

Mr. Rosenberg dissents and files a separate opinion.

CERTIFICATION

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

Dated: September 9, 2022

Celia A. Zalmer, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

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

ROBERT J. PUTORTI,

a Justice of the Whitehall Town Court and
Whitehall Village Court, Washington County.

DISSENTING OPINION BY MR. ROSENBERG

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I respectfully dissent. The sanction of removal is unjust, unwarranted, and overly harsh for respondent's conduct. Based on the Agreed Statement of Facts (ASF), the appropriate sanction for both charges should be admonition, or at the very worst, censure. The single isolated courtroom incident at issue in Charge I that occurred in 2015, when the respondent briefly displayed a gun to a criminal defendant (who was previously sentenced by respondent in connection with a violent knife assault on two people) who rushed the bench and crossed over the "stop line" in the courtroom, constituted at worst, poor judgment. The majority's determination to remove respondent is inappropriately harsh and punitive. Indeed, the New York State Court of Appeals has held that an isolated incident which was the result of poor judgment or even extremely poor judgment is not grounds for removal. *Matter of Cunningham*, 57 N.Y.2d 270 (1982); *Matter of Ayres,* 30 N.Y.3d 59 (2017).

I begin by pointing out that this disciplinary proceeding is not the result of any complaint filed against the respondent. Mr. Wood, the criminal defendant that appeared before respondent in 2015, did not file a complaint. Judge Hobbs, the respondent's

supervising judge who was fully familiar with the matter and determined that no sanction or further action was appropriate, did not file a complaint or refer the matter to the Commission. The Advisory Commission on Judicial Ethics, which issued an opinion relating to this very matter, did not conclude that respondent's conduct warranted any discipline or referral to the Commission. Ironically, the reason this matter came to the Commission's attention was because the respondent *himself* sought advice from Supervising Judge Hobbs in 2018 during a Magistrates Association meeting regarding courtroom security and relayed the incident involving Mr. Wood to a small group of judges. That triggered Judge [redacted] to request and receive Ethics Opinion 18-165 on January 31, 2019 (the "Ethics Opinion")[1] which informed Judge [redacted] that if he was satisfied the matter was an isolated incident, and if he was satisfied that the respondent was counseled and had agreed that such conduct would not occur again, no further action needed to be taken. That is precisely what Judge [redacted] determined. Thus, [redacted] Judge [redacted], as well as the Advisory Committee on Judicial Ethics all were satisfied that the incident was an isolated single event that would not reoccur, all were satisfied that the incident did not raise questions about the respondent's fitness to continue on the bench and did not require any further investigation or sanction. Nevertheless, the Commission *sua sponte* commenced its own investigation, reached the opposite conclusion, and has erroneously determined to punitively remove respondent from the bench.

[1] Knowing that the Ethics Opinion demonstrates how wrong it is to remove respondent, the Majority erroneously contends I should not be permitted to take judicial notice of Ethics Opinion 18-165 even though it concerns *the same respondent and the same exact incident involved in this proceeding* because, in their erroneous opinion, it is purportedly "outside the record." At the same time, they hypocritically cite to Opinion 06-51 of the Advisory Committee on Judicial Ethics in the first footnote (OPN 4) of the Majority Opinion. In other words, they can cite to ethics opinions, but I cannot, even though Ethics Opinion 18-165 that I cite involves *the very same respondent and very same facts as are at issue herein.* In any event, as a matter of law, just as it is permissible to cite legal authority and court decisions, it is appropriate to take judicial notice of an Ethics Opinion, particularly one which involves *the same respondent and facts that are at issue in this proceeding.*

"The purpose of judicial disciplinary proceedings is 'not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents." *Matter of Duckman*, 92 N.Y.2d 141, 152 (1998). Here, the Majority appears to be single-mindedly resolved on imposing the harshest sanction of removal upon the respondent because they have predetermined that the white, gun-carrying male respondent (who unnecessarily but accurately described the defendant that appeared before him as Black) displayed the gun based on racial bias, even though the undisputed evidence in the record contradicts that unfounded conclusion. The best the Majority can muster to support their predetermined opinion is the fact that respondent, *years after the incident,* accurately described Mr. Wood to fellow Judges at a 2018 judicial conference as a "Black man," and/or a "large Black man," and days later described Mr. Wood to his Supervising Judge as being "built like a football player." Simply because some people may interpret such accurate and benign descriptions as giving the *appearance* of racial bias, is no basis to remove the respondent from the bench. It is simply wrong to punitively remove respondent merely because respondent accurately described Mr. Wood as being Black, particularly where, as here, the record contains overwhelming *undisputed* evidence which demonstrates that respondent was neither racist nor motivated by racial bias.[2]

To the contrary, proof that respondent is not racist or motivated by racial bias is conclusively established by the undisputed fact that *before* the isolated gun incident occurred in late 2015, and *after* respondent had sentenced Mr. Wood on two other criminal charges stemming from violent knife attacks to a $555 fine/surcharge and 1 year conditional discharge in June 2015, the respondent thereafter, at the urgent request of Mr.

[2] Merely describing a person by their race is not racist; describing a person as being "large" is not racist; and describing a person as being "built like a football player" is not insulting much less racist..

Wood's wife, went "on his lunch hour from his other employment," and without any legal, moral, or ethical obligation to do so, re-sentenced Mr. Wood to community service in order to effectuate Mr. Wood's immediate release from jail, upon learning from Mr. Wood's wife that Mr. Wood was being jailed for being unable to pay the $555 fine and surcharges that respondent originally imposed. (ASF §14). This is overwhelming proof that the respondent is not a racist. The Majority Opinion inexplicably *ignores this dispositive fact in the record,* stating "there is nothing in the record to indicate respondent's motive for these actions" and goes as far as to speculate that respondent may have actually done something improper by effectuating Mr. Woods' release from jail even though there is nothing in the record to support that speculation. (OPN, p. 21). The Majority then erroneously finds that "as the record is unclear and the reasoning for respondent changing the sentence is not in the record, **this event was not a factor in our opinion.**" (OPN, p. 21) (emphasis added).

In other words, this dispositive evidence *in the record* establishing that respondent is not racist and was not motivated by racial bias—evidenced by the undisputed fact that he went to the courthouse to release Mr. Wood from jail without any legal or moral duty to do so—was improperly *ignored* by the Majority. Moreover, and contrary to their findings, the ASF states quite clearly what the respondent's motive was—to get Mr. Woods released from jail:

> "8. On June 22, 2015. . .Mr. Wood pled guilty. . .Respondent sentenced Mr. Wood to a one-year conditional discharge and imposed fines and surcharges totaling $555. Respondent avers, and court records do not dispute, that Mr. Wood failed to pay the fine and surcharge and was placed in jail. Mr. Wood's wife told respondent that she and Mr. Wood could not afford the fine but could pay the surcharge. Respondent went to the courthouse/jail on his lunch hour from his other employment and reduced Mr. Wood's fine to community service and released Mr. Wood from jail." (ASF, §14)

The ASF plainly describes what respondent did, and why he did it, which was to get Mr. Wood released from jail when he was unable to pay the fine. The Majority improperly refuses to even *consider* this dispositive evidence in the record (which evidence destroys any suggestion that respondent was motivated by racial bias when he displayed the gun).

In addition, and contrary to the Majority Opinion's conclusion, respondent was immediately remorseful and recognized the impropriety of his conduct after being counseled by Supervising Judge Hobbs in October 2018 that his conduct was improper. After being so advised, respondent: 1) signed a counseling memorandum that Judge Hobbs provided him "in which respondent agreed never to display, use, or threaten to use a firearm in court unless he or someone else was facing 'deadly physical force.'" (ASF Ex. 5; ASF §30); and 2) respondent never again carried his gun into the courtroom after October 2018 despite the fact he had a right to do so. (ASF §32).

As to the respondent's Facebook activities at issue in Charge II, although some of the conduct was not proper, it does not warrant removal either, particularly since respondent has no prior disciplinary history.

DISCUSSION

Respondent has been Justice of the Whitehall Town Court, Washington County since January 1, 2014 and was recently re-elected for a term ending on December 31, 2025. He is also a Justice of the Whitehall Village Court, Washington County, since June 1, 2014 and his current term ends on April 6, 2025.

Respondent is a licensed gun owner in multiple states.[3] During his initial December 2013 judicial training course, Respondent was advised "he could legally carry a concealed firearm at the bench."[4] (ASF §11).

AS TO CHARGE I

On March 30, 2015, a criminal defendant by the name of Brandon Wood appeared before respondent with his counsel in connection with several serious violent felony and misdemeanor charges which accused Mr. Wood of committing violent felonious assaults on his wife and a man named Roger, "with intent to cause serious physical injury. . . to Roger ... by attempting to stab Roger in the throat with a knife . . ." (ASF § 13, Ex. 2) It further alleged that Mr. Wood "did intentionally place or attempt to place another person being that of Kayla M. in fear for her life by displaying a knife and attempted to slash Kayla M. with that knife." (ASF §13, Ex. 2)[5]

"On June 22, 2015...on consent of the prosecution,...Mr. Wood pled guilty [to reduced charges and was] sentenced by respondent to a one-year conditional discharge and imposed fines and surcharges totaling $555." (ASF §14) "Mr. Wood failed to pay the fine and surcharge and was placed in jail." (ASF §14)

Mr. Wood's wife (a victim of the violent incident which was the basis of the offenses Mr. Wood pled guilty to) thereafter "told Respondent that she and Mr. Wood could not afford the fine but could pay the surcharge." (ASF §14) Upon hearing this, and without

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[3] At all relevant times, respondent has been licensed in New York, Florida, New Hampshire, Virginia, Utah, and Connecticut. (ASF, Exhibit 1).

[4] Opinion 06-51 of the Advisory Committee on Judicial Ethics provides "there is no prohibition in the Rules Governing Judicial Conduct barring [a judge] from carrying a firearm while performing...duties on the bench."

[5] One of the victims (Roger) described Mr. Wood as "tall like 6-4." (ASF, Ex. 2)

having any legal, ethical, or moral obligation to do so, "Respondent went to the courthouse/jail on his lunch hour from his other employment and reduced Mr. Wood's fine to community service and released Mr. Wood from jail." (ASF §14)

"In late 2015, Mr. Wood was [again] scheduled to appear before Respondent" on new and different charges. (ASF § 15) During that appearance, Mr. Wood "ran quickly to the bench, past a line where defendants are supposed to stand, and within two feet of respondent." (ASF § 28D) As Mr. Wood approached the bench quickly, "[r]espondent. . .feared for his safety" and briefly "brandished his gun at Mr. Wood." (ASF §17)

Following the incident, Mr. Wood "moved back and respondent put his gun back under the bench." (ASF § 28(F)) "There were no other witnesses to this event" (ASF §16) and thus, no one else at any time saw the respondent briefly display his gun to Mr. Wood.

"At the time of the events described herein, neither the Whitehall Village Court nor the Whitehall Town Court had any court officers, bailiffs, or other security personnel, apart from the occasional presence of a police officer." (ASF §9)

Following this one isolated courtroom incident, respondent was interviewed by his cousin, a journalism student at Hofstra University, who was writing an article "about his possession of numerous firearms and firearm licenses." (ASF §18) During the interview "he stated that he once brandished his handgun at 'someone'[6] who came running up to him at the bench and to whom he said, 'woah, woah, woah, slow down.'" (ASF §20A)

Three years after the incident, on October 23, 2018 respondent attended the 2018 Magistrates Association meeting. During that meeting, he "recounted the courtroom incident to a small group of other judges [including his Supervising Judge, Judge Hobbs]. .

[6] Respondent did not refer to the fact that the "someone" was Black.

.during a discussion about courtroom security" to ask, "advice from his supervising judge about what to do in the future under similar circumstances." (ASF §25)

Following that meeting, Supervising Judge Hobbs called the respondent on October 25, 2018 to discuss the incident and counseled him as to why displaying the gun was inappropriate and improper. (ASF §26, Exhibit 4) The respondent immediately realized the serious nature of his lapse in judgment, fully cooperated with all of Judge Hobbs' advice, accepted counseling, and signed a memorandum acknowledging Judge Hobbs' advice and agreeing to comply with all the applicable rules. Notably, Judge Hobbs did not direct the respondent to cease bringing his gun into the courtroom (since the respondent was permitted to do so). Rather, Judge Hobbs' ultimate directive was that "the judge's firearm should remain concealed at all times while in the courtroom" and that he was to "never to display, use or threaten to use a firearm in court unless he or someone else was facing 'deadly physical force.'" (ASF Ex. 5; ASF §30) Nevertheless, without being told to do so, the respondent voluntarily ceased bringing his gun to the courtroom, evidencing how seriously he took the matter. (ASF §32).

The Supervising Judge's memorandum did not take issue with the respondent's description of Mr. Wood as a "Black man" who was "built like a football player," nor construe that description as evidence of racial bias, and only counseled the respondent about the use of a gun in the courtroom. (ASF, Exhibit 4) Moreover, and notably, neither Mr. Wood nor Supervising Judge Hobbs ever filed a complaint against respondent with the Commission.

The respondent's single lapse in judgment does not justify the drastic sanction of removal from the bench. "Removal is excessive where the misconduct amounts solely to poor judgment, even extremely poor judgment." *Matter of Skinner,* 91 N.Y.2d 142,144 (1997).

The Court of Appeals has recognized that "[r]emoval is an extreme sanction and ***should be imposed only in the event of truly egregious circumstances*** . . .removal should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment." *Matter of Cunningham*, 57 N.Y.2d 270, 275 (1982) (emphasis added). In *Cunningham*, the Court of Appeals reversed the Commission's determination to remove a judge from the bench, instead imposing the sanction of censure. *See also Matter of Kelso*, 61 N.Y.2d 82, 88, 459 N.E.2d 1276, 1279 (1984) (rejecting Commission's sanction of removal and instead imposing censure, holding "petitioner's conduct marred the integrity of the Bench, but it does not rise to a level where it must be concluded that petitioner can no longer serve effectively or that his continued services will be contrary to the best interests of the judiciary.").

Here, the Majority has not and is unable to articulate what "truly egregious circumstances" exist that warrant removal. An isolated incident from 2015 when the respondent was unaware that he could not display or "use or threaten to use a firearm in court unless he or someone else was facing 'deadly physical force," an interview given to respondent's cousin about gun ownership, and statements made three years later in 2018 during a discussion about security in the courthouse, coupled with respondent's *immediate* compliance and agreement with *all* the advice and directives of his Supervising Judge does not constitute "egregious" let alone "truly egregious" circumstances requiring removal. Indeed, the incident (which no-one else witnessed) would have never culminated in these proceedings but for the fact that the respondent sought advice from his Supervising Judge in 2018 regarding safety in the courtroom.

To be clear, there was no ethical rule, statute, advisory opinion, or court decision issued prior to the 2015 isolated courtroom incident (or after), which addressed when it is

appropriate for a Judge to display his firearm in court. Ignoring this material fact, the Majority Opinion erroneously determines that removal is appropriate for this one isolated courtroom incident, despite the fact that was no rule or opinion which set forth when displaying a firearm is impermissible in a situation where a known alleged violent defendant rushes towards the Judge past the "stop line" demarking the closest parties may get before the bench. The Majority's reliance on *Matter of VonderHeide*, 72 N.Y. 2d 658, 660 (1988)—which held "[i]gnorance and lack of competence does not excuse violations of ethical standards"—is simply inapplicable. In *VonderHeide,* a Town Justice was found to have "routinely sought out and interviewed witnesses outside of court and made judgments based on their unsworn ex parte communications; that he berated a teen-age boy whom he believed to be carrying an open container outside a restaurant and used intemperate language and threatened harsh treatment if the youth appeared in his court; that on one occasion he arraigned, accepted a guilty plea from, and sentenced a person appearing before him as a complaining witness in an unrelated matter although no accusatory instrument was filed and the person was never informed of the charges; that he failed to disqualify himself from hearing two criminal cases even though he was a witness to the events underlying the charges; and that as a condition to his agreement to accept a guilty plea from a teen-ager, petitioner, apparently acting in some self-appointed prosecutorial role, insisted that the teen-ager sign a statement implicating a third person in an alleged crime petitioner had heard about through private conversations." *Id.* at 659-60.

The multiple transgressions of well-established judicial ethics rules, statutes, and case law standards in *VonderHeide* were blatantly obvious and repeatedly violated by this intemperate Town Justice justifying his removal. *VonderHeide* provides no support for removal of Respondent for the isolated courtroom incident at issue in this case.

Nor is there any evidence of racial bias or prejudice; to the contrary, the undisputed evidence shows the respondent was not racially biased and that he went out of his way, on his own personal time, to release the same "Black man" he is accused of being biased against, from jail. If respondent was racially motivated, he would not have taken that action but would have left Mr. Wood in jail until Mr. Wood was able to pay the $555 fine.

The Commission has had at least three occasions to consider complaints involving firearms. In *Matter of Sgueglia,* 2013 NYSCJC Annual Report 304 (August 10, 2012), a judge who routinely brought his licensed firearm to the Courthouse and kept it in a drawer in chambers accidentally discharged the gun in chambers. Thankfully, no one was hurt. Following the incident, the judge stopped bringing his firearm to the courthouse. The Commission determined to impose censure and not removal. Notably, the Commission found the judge's decision to no longer bring his firearm to the courthouse as a mitigating factor.

In *Matter of Ciganek,* 2002 NYSCJC Annual Report 85, a justice intentionally and dangerously fired his handgun to scare away a wild turkey from a busy intersection with multiple people in the immediate area. The Commission found that the judge's actions violated the judicial rules, "were contrary to law, and showed a lack of good judgment and a notable disregard for the safety of bystanders and motorists. Firing a gun under such circumstances created a dangerous situation." The discipline imposed was admonition.[7]

In *Matter of Moskos* 2017 NYSCJC Annual Report 177 (October 3, 2016) the respondent willfully attempted to surreptitiously bring a concealed firearm into Otsego County-owned buildings despite his knowledge of a local law prohibiting possession of a

[7] Significantly, the Majority fails to explain how the intentional shooting of a gun in public, creating a "dangerous situation" in *Ciganek* only warranted admonition, but the respondent's brief display of a gun warrants removal.

firearm in a county-owned building by anyone other than law enforcement. The respondent's three willful attempts to violate that law spanned two years and yet the discipline imposed was admonition.

Respondent's conduct here, at best, was arguably on the same level as the conduct in *Matter of Sgueglia*, except that here, no gun was ever discharged. Similarly, a gun was actually discharged in *Ciganek*. Respondent's one isolated act was not committed in violation of any law (or established ethical rule), unlike the three attempted willful violations of law over 2 years in *Moskos*.

Moreover, there are mitigating factors which the Majority Opinion inexplicably failed to take into consideration. First, it is undisputed that respondent has not brought a gun into the courthouse since October 25, 2018, even though it is lawful for him to do so and that he did so voluntarily even though his own Supervising Judge did not make that a requirement. Second, respondent has had no prior disciplinary history since taking the bench in 2014 nor since the incidents alleged in this proceeding. Third, respondent has been fully cooperative with the Commission throughout its inquiry. Fourth, the respondent unhesitatingly signed the counseling Memorandum agreeing to abide by all the applicable judicial rules and to conduct himself accordingly. Fifth, the respondent continues to be a respected member of his community and was re-elected as both Town and Village Justice after the incident. Sixth, the respondent admitted, in retrospect and upon reflection, that his conduct in displaying the gun was improper.

There is one other important fact and that is Opinion 18-165 of the Advisory Committee of Judicial Ethics dated January 31, 2019, which I properly take judicial notice

of.[8] As previously mentioned, [redacted] Judge [redacted] requested that Ethics Opinion to ask whether he was obligated, under the Rules Governing Judicial Conduct, to report the gun incident to the Commission. The Advisory Committee concluded there was no need to report the incident to the Commission unless [redacted] Judge [redacted] himself thought it should be reported:

> "we believe the supervising judge 'is in the best position to assess [the respondent's] motivations and receptiveness to guidance about his/her ethical responsibilities going forward.' We note that the supervising judge is apparently satisfied that it was a one-time, isolated incident provoked by [the respondent's] concerns about his/her personal safety. Moreover, the supervising judge has, in consultation with the district administrative judge, counseled [the respondent] orally and in writing to impress upon him/her most emphatically that this conduct must never be repeated. As described, these steps appear to be reasonable and appropriate. Thus, if the supervising judge is satisfied that these steps have adequately addressed the situation, he/she need not take any further action."

Thus, [redacted] Judge [redacted], [redacted], as well as the Advisory Committee on Judicial Ethics all were satisfied that the incident was an isolated single event that would not reoccur, all were satisfied that the incident did not raise questions about the respondent's fitness to continue on the bench and did not require any further investigation or sanction.[9]

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[8] "Judicial notice may be taken by a court at any stage of the litigation, even on appeal." Caffrey v. N. Arrow Abstract & Settlement Servs., Inc., 160 A.D.3d 121, 127 (2d Dep't 2018).

[9] The Majority points out that the Ethics Opinion observed that if the information provided to it by the supervising judge was accurate, then the respondent had committed "a substantial violation of the Rules Governing Judicial Conduct." This portion of the Ethics Opinion is simply addressing the fact that the rules require that if a judge receives information indicating that another judge has committed a "substantial violation" of the Rules, the supervising judge is required to take "appropriate action." The supervising judge did so by seeking the Ethics Opinion, which concluded that there was no further basis for discipline and that the steps taken by the supervising judge were "reasonable and appropriate."

The Majority Opinion is also based on several flawed findings which are not supported by the record. First, it inaccurately concludes that respondent did not show any remorse, which they find was a "significant" factor in favor of removal:

> "Significantly, respondent did not appear to have insight into the gravity of his misconduct. Rather than being remorseful about brandishing his gun without justification while on the bench, respondent appears to have been proud of his actions. On more than one occasion, he recounted the incident to his fellow judges. He also agreed to be interviewed by his cousin . . . Respondent appears to have been unable to recognize the serious impropriety of brandishing his gun while on the bench." (OPN, p. 19,20).

One cannot be remorseful and contrite before one is told and first understands that one's conduct was not appropriate. Here, no one, including the Majority, has suggested that respondent displayed his gun to Mr. Wood *knowing at the time it was wrong to do so.* To the contrary, respondent clearly believed at the time (because he was advised it was lawful for him to carry a concealed weapon in the courtroom, consistent with Ethics Opinion 06-51) that his conduct did not violate the Rules Governing Judicial Conduct.[10] His 2016 statement to his co-judge, and his 2018 statement to the other judges were also made at a time when he was not yet aware that his conduct would be determined by Judge Hobbs to be improper. However, the *moment* he was so advised by Judge Hobbs on October 25, 2018, he *immediately* expressed remorse, agreed to comply with all the instructions Judge Hobbs gave him, unhesitatingly agreed to, and signed Judge Hobbs' counseling memorandum, and

[10] The Majority states that "Judges are required to know their ethical responsibilities and it is well-settled that ignorance is not a defense," citing to *Matter of VonderHeide*, 72 N.Y.2d 658 (1988). Notably, the respondent in *VonderHeide* had been accused with 5 charges of misconduct, including engaging in *ex parte* communications; the Commission voted 7-4 in favor of removal, with 4 members voting for censure. In upholding removal, the Court of Appeals noted that the respondent's conduct was not merely a lapse in judgment, but "a pattern of injudicious behavior and inappropriate actions." Here, respondent is guilty of a lapse of judgment, not a pattern of injudicious behavior.

even voluntarily stopped carrying his gun to the courtroom without being required or asked to do so.

The Majority also ignores the actual chronology of events to try to support their erroneous findings. Instead of accurately assessing the respondent's remorsefulness after October 25, 2018 when the respondent was first advised by Judge Hobbs that his conduct was inappropriate, the Majority improperly refers to events *before* October 25, 2018 to support their erroneous findings, even though that was a point in time when the respondent was not aware that his conduct was inappropriate. The Majority's flawed analysis thus illogically punishes the respondent for not being remorseful at a point in time when the respondent was unaware he had done anything wrong. The Majority's finding that respondent was not remorseful could only be true and supported by the record if the respondent continued to recount the incident *after October 25, 2018* when he first was advised of the impropriety of his conduct. There is no evidence in the record that respondent ever recounted the incident after October 25, 2018. To the contrary, the only evidence in the record shows that immediately after being advised by Judge Hobbs, he understood his conduct was wrong and even voluntarily ceased bringing his gun to the courtroom even though he was not required to do so.

Thus, and contrary to the Majority Opinion, respondent *was* remorseful, *had insight* into the gravity of his misconduct and *did recognize* the "serious impropriety of brandishing his gun while on the bench" upon being counseled by Supervising Judge Hobbs in October 2018.

Next, the Majority inaccurately finds that respondent compounded his misconduct by allegedly "bragging about the gun incident" which constituted a "pattern of behavior unbecoming a judge and undermined public confidence in the judiciary." This finding also

has no basis in the record. The Majority points to the fact that the respondent agreed to be interviewed by his cousin for an article about guns for her journalism class and answered her questions about his experiences with guns.[11] He did not ask to be interviewed nor is there anything in the article itself which remotely indicates he was "boasting" or "bragging" about any of his experiences with guns and with regard to the courtroom incident, respondent did not refer to Mr. Wood by name or describe him as a Black man. Moreover, he was interviewed at a time when he had no awareness that what he did was improper.

The Majority also points to the fact that in early 2016, respondent told his former co-Judge Julie Eagan about the incident and that she was "under the impression that Respondent was bragging about his actions." (ASF §23) The fact that she subjectively thought "respondent was bragging" is not evidence of respondent's wrongdoing, particularly as it occurred *before respondent understood* that his courtroom action was improper.

Finally, the Majority points to the fact that 3 years after the incident, the respondent "recounted the courtroom incident to a small group of other judges" at the 2018 Magistrates Association meeting "during a discussion about courtroom security" and that he was merely seeking advice from his supervising judge about what to do in the future under similar circumstances." (ASF §25) There is absolutely nothing in the record which supports the Majority's conclusion that respondent was "bragging" or "boasting." To the contrary, the record shows the respondent was seeking "advice from his supervising judge about what to do in the future under similar circumstances." (ASF §25) The notes of Supervising Judge

[11] The Majority's extended discussion of this article is unwarranted as it has nothing to do with Charge I. The fact that respondent is a gunowner and has had occasion to lawfully carry a gun in his personal life is irrelevant, as is the 2003/2004 incident they refer to which occurred 10 years before he ascended to the bench in which he displayed a gun to defend his late grandfather from a man who had a chainsaw and was advancing in a threatening manner towards his grandfather.

Hobbs (ASF, Exhibit 4) do not characterize the respondent's retelling of the incident as "boasting" or "bragging." Those are words chosen by the Commission, not Judge Hobbs.

The fact that respondent recounted the incident on two occasions is not conduct "unbecoming a judge" nor could it "undermine[] public confidence in the judiciary" because respondent only discussed the incident with a small group of his judicial colleagues in the context of a discussion about courtroom security.

As to the Majority's unsupported finding that respondent "*may have created the appearance* of racial bias," the fact is respondent did not utter any pejorative or derogatory slur in referring to Mr. Wood, but merely accurately described him as a "Black man" or a "big Black man" to his judicial colleagues. Nevertheless, the Majority claims these statements are evidence of racism (OPN, p.20). No support for such a contention is provided and there is none in the record.

In sharp contrast to the facts in this proceeding, cases where judges have been censured or removed for racist comments involved indisputable racial slurs of the highest order. In Matter of Agresta, 64 N.Y.2d 327, 329 (1985), the judge referred to a defendant before him as a "n****r in the woodpile." The Court of Appeals held:

> "Racial epithets, indefensible when uttered by a private citizen, are especially offensive when spoken by a judge. Whether or not he meant it as a racial slur, [petitioner's] use of the term 'n****r' in any context is indefensible. That he used the term in open court with black defendants before him and in obvious reference to a particular black person makes his conduct especially egregious." *Id.* at 330.

Notably, the judge in Agresta was censured, *not* removed. See also In re Mulroy, 94 N.Y.2d 652, 656 (2000) (judge removed for racial epithets, including referring to a crime victim as "just some old n****r bitch."); Matter of Cerbone, 61 N.Y.2d 93, 96 (1984) (threats and racial slurs warranted removal). In contrast to these cases where judges were removed

for indisputably using racial slurs and epithets, this respondent merely *accurately* described Mr. Wood as a "Black man." And yet the Majority essentially gives these benign statements the same weight as the vicious racial slurs in Mulroy and Cerbone.

To the extent there was any doubt that the isolated incident[12] was not racially motivated is the undisputed fact that a few months before the gun incident, after being advised that Mr. Wood was still in jail because he was unable to pay the fines, the ***"Respondent went to the courthouse/jail on his lunch hour from his other employment and reduced Mr. Wood's fine to community service and released Mr. Wood from jail."*** (ASF §14) (emphasis added). This voluntary act negates the Majority Opinion's unsupported inference of racial bias.

To this dispositive fact (which destroys the Majority's unsupported finding that respondent was racist), the Majority erroneously finds that "there is nothing in the record to indicate respondent's motive for these actions" and speculates that respondent may have done something improper by effectuating Mr. Woods' release from jail (OPN, p. 21). The Majority finds that "as the record is unclear and the reasoning for respondent changing the sentence is not in the record, this event was not a factor in our opinion." (Id.) The Majority's improper characterization of the record and their refusal to consider this compelling evidence is inexplicable and demonstrates that its true intent is to unfairly punish respondent and remove him from the bench.

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[12] The Majority claims the gun incident was not "an isolated incident," referring to another time that respondent displayed his gun almost *20 years ago before he was a judge* when "a man came out of the woods with a chainsaw and advanced toward respondent's [elderly] grandfather." (OPN, ¶14, n. 5). Their reliance on this incident further underscores that the decision to remove respondent is completely wrong and unsupported by the actual facts in the record. The fact that respondent lawfully showed his gun in 2003 or 2004 (which he had every right to do under the laws of New York State), some 11 years before he became a judge, is completely irrelevant and has nothing to do with respondent's fitness to serve as a judge.

The Majority then determines, without any proof in the record, in a self-serving and conclusory statement, that respondent "lacks the appropriate judicial temperament" and that his actions "irreparably undermined confidence in his ability to continue as a judge." There is no evidence in the record to support such conclusions.

In sum, the Majority's distortion of the respondent's statements and attempt to characterize them as racist or racial slurs, its refusal to consider the undisputed compelling evidence in respondent's favor (such as the respondent's voluntary act of releasing Mr. Wood from jail, and Judge Hobbs' determination that he was satisfied that the steps taken were sufficient and did not warrant discipline), and its reliance on an irrelevant incident from 2003 when respondent displayed a gun to stop a man with a chainsaw who was menacingly approaching his elderly grandfather that occurred some 11 years before the respondent even became a judge, all demonstrate that Majority Opinion is not only unsupported by the record, but is contradicted by it. Simply put, the Majority Opinion is contrary to the law which provides that removal is appropriate "***only in the event of truly egregious circumstances***" and that "removal should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment." *Matter of Cunningham*, 57 N.Y.2d at 275 (emphasis added).

The sanction of removal is excessive, unduly harsh, and improperly punitive and is unsupported by the record. A sanction of admonition or, at worst, censure is warranted.

AS TO CHARGE II

The Commission, having *sua sponte* authorized an investigation of respondent based on the isolated courtroom incident of Charge I, its staff then, *sua sponte*, did a thorough forensic investigation into respondent by scouring the Internet and other social media to see if there was any other conduct, they could charge respondent with. Their scouring resulted

in the Commission authorizing a formal investigation into respondent's personal Facebook page.

The Majority Opinion devotes only one paragraph at the bottom of page 21 to a discussion of Charge II, finding that respondent "improperly participated in fundraising" for the Elks Lodge, and that "[w]hile judges are permitted to be officers of a 'charitable, cultural, fraternal or civic organization not conducted for profit," judges shall not participate in the solicitation of funds or other fund-raising activities' for such organizations...[i]n violation of his ethical obligations, respondent improperly shared fundraising posts for the Lodge on his Facebook page on at least seven occasions."

Respondent has been a member of the charitable, not for profit, non-partisan, Whitehall Elks Lodge[13] since 1992 and has held various leadership positions in the Lodge since April 2017. In April 2020, he was elected "to the position of Exalted Ruler, the highest-level position within the Lodge." (ASF §35)

Respondent's "shared fundraising posts for the Lodge on his Facebook page on at least seven occasions" were improper but do not justify the punitive and excessively harsh sanction of removal. "Removal is excessive where the misconduct amounts solely to poor judgment, even extremely poor judgment." *Matter of Skinner,* 91 N.Y.2d at144; *Matter of Cunningham* 57 N.Y.2d at 275. In *Matter of Peck,* 2022 NYSCJC Annual Report 136 (March 19, 2021), the respondent Town Justice improperly posted two photographs of himself wearing a County Sheriff's uniform. The respondent in *Peck* also posted about his appearance at a "Back the Blue" event supporting law enforcement. Despite the fact that

[13] I take judicial/administrative notice that the Elks' mission statement on its website states that its mission is "To inculcate the principles of Charity, Justice, Brotherly Love and Fidelity, to recognize a belief in God; to promote the welfare and enhance the happiness of its Members; to quicken the spirit of American patriotism; to cultivate good fellowship...[and] serve the people and communities through benevolent programs."

the *Peck* respondent had previously been cautioned by the Commission for inappropriate Facebook posts, the Commission nevertheless determined that the appropriate sanction was admonition.

Here unlike *Matter of Peck, Whitmarsh,* 2017 NYSCJC Annual Report 266 (December 28, 2016), *Schmidt,* 2021 NYSCJC Annual Report 308 (November 3, 2020) and *VanWoeart,* 2021 NYSCJC Annual Report 329 (March 31, 2020), respondent did not post, share, or "like" anything that was political in nature, relating to a campaign, relating to a pending court matter, disparaging other elected officials, or identifying himself as a judge.

In summary, based on the undisputed facts and applicable legal authority, there is simply no justification to impose the punitively unjust and excessively harsh sanction of removing respondent from the bench. The appropriate discipline for Charges I and II is admonition, or at the very worst, censure, and I therefore respectfully and firmly dissent.

Dated: September 2, 2022

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New York State Commission on Judicial Conduct