STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

JAMES J. PIAMPIANO,

a Justice of the Supreme Court,
Monroe County.

- -

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Leslie G. Leach
Richard A. Stoloff, Esq.
Honorable David A. Weinstein
Akosua Garcia Yeboah

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel)
for the Commission

John F. Speranza for the Respondent

The respondent, James J. Piampiano, a Justice of the Supreme Court, Monroe County, was served with a Formal Written Complaint dated November 2, 2016, containing two charges. The Formal Written Complaint alleged that respondent made

prohibited public comments about a pending case and, in a post-trial proceeding, was discourteous to the prosecutor in denying his attempt to be heard.

On February 15, 2017, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On March 9, 2017, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Supreme Court, Monroe County, since January 1, 2016. His term expires on December 31, 2029. Respondent served previously as a Judge of the County Court, Monroe County, from January 1, 2011, to December 31, 2015, and as a Justice of the Henrietta Town Court, Monroe County, from January 1, 2008, to December 31, 2010. He was admitted to the practice of law in New York in 1978.

As to Charge I of the Formal Written Complaint:

2. As set forth below, on or about October 8, 2015, at a time when he was a candidate for election to the Supreme Court, respondent gave three separate media interviews during which he made prohibited public comments about *People v Charles J. Tan*, a pending murder case over which he was presiding in Monroe County Court.

3. In or about March 2015, respondent began presiding over *People v*

Charles J. Tan in Monroe County Court, a case in which the defendant was charged with one count of murder in the second degree (Penal Law §125.25[1]) for allegedly shooting his father at their family home in Pittsford, New York.

4. In September 2015 respondent was nominated to be a candidate for election to the New York State Supreme Court.

5. On or about October 8, 2015, after approximately eight days of jury deliberation in *People v Tan*, the following occurred:

A. Monroe County Assistant District Attorney William T. Gargan and Mr. Tan's lead counsel, James L. Nobles, consented to a mistrial in the matter.

B. Prior to ruling on the mistrial, respondent clarified with counsel and Mr. Tan that double jeopardy would not attach and that Mr. Tan would be subject to retrial upon the indictment.

C. Mr. Gargan stated that it was the People's intention to retry Mr. Tan.

D. Respondent granted the mistrial.

E. Respondent ordered the parties to appear before him on November 5, 2015.

6. On or about October 8, 2015, after the mistrial was declared, respondent was contacted by personnel from three media outlets: WHEC-TV, Channel 10, the NBC-affiliated television station in Rochester; WHAM-TV, Channel 13, the ABC-affiliated television station in Rochester; and the *Democrat & Chronicle*, a daily newspaper in Rochester. Respondent agreed to engage in one-on-one interviews about *People v Tan* in his chambers with reporters from each of the three media outlets.

7. On or about October 8, 2015, at approximately 4:00 PM, respondent met in his chambers with a reporter from WHEC-TV, Channel 10. The resulting

interview was recorded and portions of it were broadcast on October 8, 2015, and subsequently available on the television station's website at http://www.whec.com.

8. During the WHEC interview, respondent made public comments about the *Tan* case, including:

RESPONDENT: And, I told this jury, historically, this may be the longest serving jury that deliberated over that period of time here in Monroe County.

* * * *

REPORTER: *Why not sequester [the jury] earlier ... or make them stay late the first week?*

RESPONDENT: It just didn't seem that along those first three, four, five, seven days, that they were in a position to perhaps reach a verdict ... if they did stay into the early evening hours. And I think by virtue of not having reached a verdict, even into the eighth day, that bore that out.

REPORTER: *Anything in hindsight that you can reflect upon that you may have done differently?*

RESPONDENT: You know each case turns on its own facts and the law that's applicable to that case. The one thing that I think that, that's important is that I had a chance to talk to the jury at the conclusion of the case. And I tried to stress that they shouldn't feel bad about not having reached a verdict because what was expected of them was to follow all the rules of the court, listen to the evidence, apply the law, and work hard to try to come to a verdict. Nothing more could be asked of this jury.

9. On or about October 8, 2015, at approximately 4:30 PM, respondent met in his chambers with a reporter from WHAM-TV, Channel 13. The resulting interview was recorded and portions of it were broadcast on October 8, 2015, and

subsequently available on the television station's website at http://13wham.com/.

10. During the WHAM interview, respondent made public comments about the *Tan* case, including:

RESPONDENT: They probably got close to a verdict but, in the end, it just wasn't to be.

REPORTER: *Judge Piampiano says both sides agreed to throw in the towel, and for that matter, dismiss the jury.*

RESPONDENT: But after eight days, how far do you go? Do you go another two days, a week, a month?

REPORTER: *Prosecutors already say they plan to retry Charlie Tan, but Piampiano is in "wait-and-see" mode.*

RESPONDENT: I've asked the prosecutor to think through it, advise me on the 5th, and if there's to be a retrial, it would likely be in February or March of next year, not before.

* * * *

REPORTER: *The judge says the jury worked longer than any jury he's seen, but added the evidence presented left them with more questions than answers.*

RESPONDENT: Jurors don't get the evidence they want, they get the evidence they get. And then they have to sort through that and figure it out. (Unintelligible)...

REPORTER: *This jury didn't quite figure it out, but a new jury might get that chance. And the judge is optimistic that finding one without too much bias will be easy.*

RESPONDENT: Sometimes journalists, and judges, and lawyers think that the whole world revolves around this courthouse. I've met many people in the jury selection process, who are not "news junkies," if you will, and who have only peripherally heard about this matter, or other matters.

REPORTER: *As for Charlie Tan, Piampiano did not rule out the possible impact of his supporters or his side of the story.*

RESPONDENT: I'm not sure, Cody, that I can recall, in recent times, somebody being that sympathetic a figure.

11. On or about October 8, 2015, respondent met in his chambers with a reporter from the *Democrat & Chronicle*. The resulting interview was recorded and portions of it were posted on October 8, 2015, on the newspaper's website at http://www.democratandchronicle.com/. The audio portion of the interview was posted at the website https://soundcloud.com/democrat-and-chronicle/judge-james-piampiano-interview-oct-8-2015.

12. During the *Democrat & Chronicle* interview, respondent made public comments about the *Tan* case, including:

REPORTER: *Did any of [the jury] share any concerns with you regarding the trial?*

RESPONDENT: You know, I have a practice, and I think most judges do, not to discuss the merits of the case or particular issues of the trial, and in particular, in this type of case where it is still possibly ongoing.

* * * *

REPORTER: *Hearing that, do you, do you have any second thoughts about letting [the jury] go?*

RESPONDENT: The only way a trial can conclude, if not by verdict, is for the judge to evaluate the circumstances in the judge's discretion, and it's called "manifest necessity," where the judge looks at the number of issues in the case, the time the jury has spent deliberating, perhaps the nature of the notes that have come out, any Allen charges that were read, and then the judge making a

determination that perhaps enough is enough, and this is a group that's not likely to reach a verdict unanimously. That did not occur in this case. The second alternative or way that the matter can conclude by mistrial, by law, is that the court, the defense, and the prosecution all consent that a mistrial should be granted. That was a matter that was discussed extensively with the lawyers, and I was advised, extensively with Mr. Tan as well. And there was complete agreement between the lawyers that we had reached a point that it appeared that we were now at a point of diminishing returns, and I think that evaluation was based on the notes that had come out, the time--

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REPORTER: *One other question I have for you is about "accomplice liability," that charge.*

RESPONDENT: Yes.

REPORTER: *The prosecution has said -- I don't think I'm breaking any confidences saying this, he said this publicly -- that it was, you know, the, the one decision that the court made that he disagreed with. The accomplice liability was in his, the, the prosecution's bill of particulars, and it, but it wasn't allowed. I know why you made that decision; I was there that day. You said that the prosecution didn't provide enough evidence to suggest that there was a connection between the mother and son. Could you elaborate on your decision to, to do that, to make that decision, and, and any second thoughts on that front. Some jurors have indicated that had that been an option, there would have been a verdict.*

RESPONDENT: Certainly. I, I'm not at liberty to discuss the prosecutor's remarks or this case in particular, but I can share with you that with respect to accomplice liability, for the court to charge that, in any case where it's requested, there has to be a reasonable view of the evidence that two or more people are acting in concert

to accomplish the same goal, that they're acting with the same state of mind, and that there's some conduct, behavior or otherwise, from the evidence, that suggests that they're acting together and in concert. So, in any trial where a judge is asked to charge that, what the judge is going to be doing, as I did in this trial, is reflect on the evidence that was presented. Typically, I'll review my notes, take one last look at the law, and then listen to the arguments of both sides, and then reflect on whether or not there can be such a charge based on the evidence in that particular case.

* * * *

RESPONDENT: So, that, that would give you an overview of some background about that issue.

REPORTER: *And in this case you felt that there just wasn't, the evidence wasn't there?*

RESPONDENT: Based on my ruling, I think it's fair to say, and I think I can say, that after listening to both sides, I felt that, as a matter of law, I was not permitted or entitled to charge the jury to consider that relative to their deliberations.

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RESPONDENT: So, the protocol here is that likely that trial would stay with me, and my intention on November 5th, when the parties return, is to likely reschedule that trial for some time in February or March --

* * * *

REPORTER: *So, there's a possibility, anyway, that as of November 5th, there could be a dismissal of the charges? I, I, I, I --*

RESPONDENT: -- By way of the defense application, that is the relief they are looking for. So, the answer would be yes.

As to Charge II of the Formal Written Complaint:

13. On or about November 5, 2015, while presiding over a post-trial proceeding in *People v Charles J. Tan,* during which respondent granted the defense motion for a trial order of dismissal, respondent, as set forth below, failed to be patient, dignified and courteous when he denied Monroe County Assistant District Attorney William T. Gargan's attempt to be heard and threatened to have Mr. Gargan arrested if he spoke.

14. On or about October 8, 2015, after the parties in *People v Charles J. Tan* had consented to a mistrial following approximately eight days of jury deliberation on a single count of murder in the second degree (Penal Law §125.25[1]), respondent stated that he would adjourn the case for the prosecutor to consider whether the case would be retried. When defense counsel James L. Nobles moved for a trial order of dismissal, Monroe County Assistant District Attorney William T. Gargan opposed the motion and requested that respondent deny it. Respondent stated that he would reserve decision on the motion and would consider all prior arguments, and he scheduled the next appearance in the matter for November 5, 2015. Respondent directed that counsel "[p]lease come prepared with your schedule[s]," and stated that "the Court will also address the trial order of dismissal at that time."

15. On or about November 5, 2015, Mr. Gargan confirmed that the People intended to retry Mr. Tan for murder. Respondent thereafter asked both Mr. Nobles and Mr. Gargan whether they wished to "supplement ... or offer any further ... information" as to their positions concerning the defense motion for a trial order of

dismissal. Both attorneys declined respondent's offer.

16. Respondent then spoke uninterrupted for several minutes, explaining the function of a trial order of dismissal, the legal standard of review, and when a court may grant or deny a trial order of dismissal motion. Respondent stated that there were deficiencies in the People's proof, and he said: "The Court, therefore, is bound to conclude that the proof offered upon the trial of the matter failed to establish a prima facie case."

17. When respondent commented on the jury's inability to reach a verdict when "evaluating whether the evidence demonstrated beyond a reasonable doubt that the crime had been proven," the following exchange occurred:

> MR. GARGAN: Judge, may I briefly speak?
>
> RESPONDENT: No, you may not. If you speak I'm going to put you in handcuffs and put you in jail.

18. Respondent continued to read his decision but did not order Mr. Gargan held in handcuffs, incarcerate him or hold him in contempt.

Additional Factors

19. Respondent has been cooperative with the Commission throughout its inquiry.

20. Respondent has familiarized himself with numerous Commission determinations in which judges were reprimanded for making prohibited public comments about pending or impending cases, such as *Matter of Douglas E. McKeon*, in which a Supreme Court Justice was censured for *inter alia* commenting on pending cases

in television interviews, and *Matter of Patrick J. McGrath*, in which a County Court Judge was admonished for commenting on a pending case in a television interview. Respondent now more fully appreciates his obligation to refrain from commenting publicly about any pending or impending proceeding, and he pledges to abide faithfully to this obligation in the future.

21. Respondent has familiarized himself with numerous Commission determinations in which judges were reprimanded for displays of discourtesy in the courtroom. He now more fully appreciates his obligation to be patient and courteous to all with whom he deals in an official capacity, and he pledges to abide faithfully to this obligation in the future.

22. In his nine years on the bench, respondent has not been previously disciplined for judicial misconduct. He regrets his failure to abide by the Rules in these matters and pledges to conduct himself in accordance with the Rules for the remainder of his tenure as a judge.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(3) and 100.3(B)(8) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

It is improper for a judge to make "any public comment about a pending or

impending proceeding" (Rule 100.3[B][8]). As the Commission has stated, this ethical prohibition "is clear and unequivocal," and, consequently, "[i]t is wrong for a judge 'to make any public comment, no matter how minor, to a newspaper reporter or to anyone else, about a case pending before him'" (*Matter of McKeon*, 1999 NYSCJC Annual Report 117, 120 [citing *Matter of Fromer*, 1985 NYSCJC Annual Report 135, 137]). Respondent's comments during a series of press interviews about a murder case in which he had granted a mistrial were inconsistent with this standard, which "makes no exception ... for explanations of a judge's 'decision-making' process" (*Matter of O'Brien*, 2000 NYSCJC Annual Report 135, 137; *see also Matter of McGrath*, 2005 NYSCJC Annual Report 181).

Although respondent's comments indicate that he was aware of the ethical prohibition (at one point he stated, "I'm not at liberty to discuss the prosecutor's remarks or this case in particular") and he was also aware that there would be further proceedings in the case, including a potential re-trial, he granted three one-on-one media interviews in which he proceeded to discuss the case at length. While he often responded to the reporters' questions about the *Tan* case with general statements about procedures and the legal system, he should have recognized that any statements he made in that context would be understood as pertaining to *Tan* and therefore were problematic. His statements, however, went well beyond general explanations of the law. He discussed legal issues in the case (including his denial of a request for an accomplice charge), and he provided a description of his interactions with the jury and his sense of the jury's deliberations. Especially troubling is his description of the defendant as a "sympathetic"

figure. Even if viewed in the context of the reporter's question about the "possible impact" of the defendant's "supporters," his comment could convey an appearance that respondent viewed the defendant sympathetically, raising doubts about his impartiality and thus undermining public confidence in the impartial administration of justice. This is especially so since the case was still before him and since, a month later, he granted the defense motion for a trial order of dismissal. The fact that respondent made these statements in media interviews at a time when he was a candidate for election to Supreme Court raises a question as to whether his public comments were motivated by political concerns. *See Matter of Dillon*, 2003 NYSCJC Annual Report 101. It is a judge's duty to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Rule 100.2[A]).

It was also improper for respondent, in a post-trial proceeding a month later, to threaten to have the prosecutor placed in handcuffs and put in jail when the attorney asked to speak as respondent was announcing his decision on the defense motion to dismiss. (The record indicates that respondent had previously afforded the prosecutor an opportunity to be heard on the motion.) By asking to speak, the prosecutor was simply doing his job, and even if respondent believed that the attorney was interrupting or speaking out of turn, his response was a substantial overreaction to the attorney's conduct. While a judge has discretion to punish "contumacious" conduct in order to preserve order and decorum, "the awesome power of summary contempt" should be imposed only in "exceptional and necessitous circumstances" (*see* 22 NYCRR §604.2[a][1], [c]; *Matter of Van Slyke,* 2007 NYSCJC Annual Report 151). The fact that

respondent did not act on his threat does not excuse his conduct since baseless threats against an attorney are inconsistent with a judge's obligation to be "patient, dignified and courteous" to lawyers and others with whom the judge deals in an official capacity (Rules, §100.3[B][3]; *Matter of Gary*, 2017 NYSCJC Annual Report 134).

In accepting the jointly recommended sanction, we note that respondent has admitted that his conduct was inconsistent with the ethical standards and has pledged to conduct himself in accordance with the Rules for the remainder of his tenure as a judge.

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

Mr. Harding, Judge Acosta, Mr. Cohen, Ms. Corngold, Mr. Emery, Judge Klonick, Judge Leach, Mr. Stoloff, Judge Weinstein and Ms. Yeboah concur.

Mr. Belluck was not present.

CERTIFICATION

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

Dated: March 13, 2017

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