

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

DETERMINATION

KATHY WACHTMAN,

a Justice of the Huron Town Court,
Wayne County.

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Jodie Corngold
Honorable John A. Falk
Taa Grays, Esq.
Honorable Leslie G. Leach
Honorable Angela M. Mazzarelli
Honorable Robert J. Miller
Marvin Ray Raskin, Esq.
Richard A. Stoloff, Esq.
Akosua Garcia Yeboah

APPEARANCES:

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

Douglas M. Jablonski for respondent

Respondent, Kathy Wachtman, a Justice of the Huron Town Court, Wayne
County, was served with a Formal Written Complaint dated November 28, 2018,
containing one charge. The Formal Written Complaint alleged that after denying defense

counsel's request to adjourn a preliminary hearing based on his actual engagement in another court, respondent held the proceeding in the attorney's absence and failed to advise the defendant of his rights.

On January 15, 2019, 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 January 31, 2019, the Commission accepted the Agreed Statement and made the following determination:

1. Respondent has been a Justice of the Huron Town Court, Wayne County, since April 2013. Her current term expires on December 31, 2021. Respondent is not an attorney.
2. As set forth below, on April 26, 2017, while presiding over *People v Tysean Harris*, respondent denied defense counsel's request to adjourn the defendant's preliminary hearing on drug and traffic charges, notwithstanding that defense counsel had an actual engagement in another court; conducted the preliminary hearing in the absence of counsel; and failed to advise Mr. Harris of his rights as required by law. During the preliminary hearing, prior to giving Mr. Harris an opportunity to cross-examine the prosecution's witnesses, respondent found reasonable cause to believe that he had committed a felony.

3. On April 23, 2017, Tysean Harris was arrested and charged with Criminal Possession of a Controlled Substance in the 5th Degree, a class D felony, in violation of Penal Law Section 220.06(5); Operating Without Insurance, in violation of Vehicle and Traffic Law (VTL) Section 319(1); No/Inadequate Plate Lamps, in violation of VTL Section 375(2)(a)(4); and Visibility/Distorted Broken Glass (Front Windshield), in violation of VTL Section 375(22).

4. Mr. Harris appeared before respondent for arraignment on April 24, 2017, at 4:00 AM. When Mr. Harris advised that he was represented by James L. Riotto II, respondent gave him an opportunity to contact Mr. Riotto, who was unavailable. Respondent continued the matter and committed Mr. Harris to jail without bail since Mr. Harris had two prior felony convictions.

5. Mr. Harris re-appeared before respondent at 4:00 PM, represented by Daniel Masny, who was counsel to Mr. Riotto's office. Mr. Masny waived reading of the charges and entered a not guilty plea on Mr. Harris' behalf.

6. Respondent scheduled a preliminary hearing for April 28, 2017, at 10:00 AM, and faxed and mailed the notice of the preliminary hearing to Mr. Riotto and the Wayne County District Attorney's Office.

7. On April 25, 2017, respondent rescheduled the preliminary hearing to April 26, 2017, at 3:00 PM.

8. On April 26, 2017, prior to 10:00 AM, Mr. Riotto telephoned the court, spoke to a court clerk and requested an adjournment. Mr. Riotto also notified

Wayne County Assistant District Attorney (ADA) Timothy Chapman that he would request an adjournment. Mr. Riotto had made no prior requests for an adjournment.

9. ADA Chapman objected to an adjournment on the basis that the prosecution's witnesses had been subpoenaed for the hearing and the defendant's transportation had been arranged from the jail.

10. At approximately 11:20 AM on April 26, 2017, Mr. Riotto faxed a letter to respondent requesting an adjournment of the preliminary hearing and stating that he was required to appear in federal court at the same time for a sentencing proceeding.

11. At approximately 11:30 AM, respondent faxed a letter to Mr. Riotto denying his request for an adjournment on the basis that the "[t]he People" were "still planning to move forward with Mr. Harris' preliminary hearing," witnesses were prepared to appear, and Mr. Harris' transportation had been scheduled from jail. At approximately 11:40 AM, respondent faxed the letter she had sent to Mr. Riotto to ADA Chapman.

12. At approximately 12:30 PM, Mr. Riotto faxed a letter to respondent, objecting to respondent's denial of his request for an adjournment. Mr. Riotto noted that Criminal Procedure Law (CPL) Section 180.80(1) permits a preliminary hearing to be heard more than 120 hours after a defendant is held in custody if the delay is due to the defendant's request. Mr. Riotto also cited United States Supreme Court precedent holding that defendants have a constitutional right to be represented by counsel at a preliminary hearing and asked that his letter be made part of the official court record of the proceeding.

13. At approximately 3:00 PM on April 26, 2017, respondent presided over the preliminary hearing in *People v Tysean Harris*. Respondent did not place Mr. Riotto's written objection to her decision to deny his request for an adjournment on the record and did not inform Mr. Harris that his counsel would not be present.

14. Notwithstanding the provisions of CPL Sections 180.10(3) and 180.10(3)(a), respondent did not inform Mr. Harris of his right to counsel and the right to an adjournment to obtain counsel.

15. Notwithstanding the provisions of CPL Section 180.10(5), respondent did not make any inquiry as to whether Mr. Harris wished to proceed without counsel or understood the significance of proceeding without counsel.

16. During the proceeding, notwithstanding the provisions of CPL Sections 180.60(6) and 180.60(7), respondent did not inform Mr. Harris of his right to testify on his own behalf, to call witnesses and to cross-examine each of the prosecution witnesses.

17. After respondent made a finding that there was reasonable cause to believe that the defendant committed a felony, Mr. Harris asked if he could question the witnesses and respondent belatedly permitted him to do so.

18. After the preliminary hearing, respondent remanded Mr. Harris to the Wayne County Jail.

19. On May 30, 2017, Wayne County Acting District Attorney Christopher Bokelman sent a letter to the Huron Town Court, offering a plea of guilty to

a reduced charge, Criminal Possession of a Controlled Substance in the 7th Degree, on condition of time served in full satisfaction of all pending Penal Law and VTL charges.

20. On June 12, 2017, Mr. Harris pled guilty to the reduced charge of Criminal Possession of a Controlled Substance 7th Degree, a class A misdemeanor, in violation of Penal Law Section 220.03, in satisfaction of all Penal Law and VTL charges. Respondent sentenced Mr. Harris to time served, *i.e.* 50 days, and a \$205 surcharge.

Additional Factors

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

22. Respondent now recognizes and appreciates that a judge must ensure that the due process rights of defendants are accorded before decisions are rendered, including the right to have one's counsel present at all critical stages of a proceeding.

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(A), 100.3(B)(1), 100.3(B)(4) and 100.3(B)(6) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

The Court of Appeals has stated that the right to counsel at every stage of criminal proceedings "may be the most basic of all" constitutional rights and that at a preliminary hearing, where a prosecutor must present proof of every element of the crime

charged, the right to counsel “is of constitutional dimension” (*People v Hodge*, 53 NY2d 313, 317, 320 [1981]). According a defendant the opportunity to exercise the right to counsel is one of a judge’s most important responsibilities since “[t]he right to counsel, in practical respects, remains absolutely fundamental to the protection of a defendant’s other substantive rights” (*Matter of Bauer*, 3 NY3d 158, 164 [2004]). In *People v Harris*, respondent’s denial of defense counsel’s request for an adjournment of the preliminary hearing, despite being advised of the attorney’s actual engagement in federal court, deprived the defendant of this fundamental right at a critical stage of the criminal proceedings against him.

In *Hodge*, where the Court reversed a defendant’s conviction because the preliminary hearing was held notwithstanding his lawyer’s unexplained failure to appear, the Court noted that a preliminary hearing has many important functions, but “above all, early screening of unjustifiable and unprovable charges against the innocent”; moreover, the privileges of subpoena power and the opportunity for cross-examination at a preliminary hearing may ultimately “make the difference between conviction and exoneration” (*supra*, 53 NY2d at 318, 319). Thus, the Court stated, “it is hardly surprising that the Supreme Court has ruled that a preliminary hearing is ‘a “critical stage” of the State’s criminal process,’ thus triggering the United States Constitution’s guarantee that a defendant be afforded ‘the guiding hand of counsel’ (*Coleman v Alabama*, 399 U.S. 1, 9)” (*Id* at 318).

In view of the defendant’s “absolute right to counsel” at such a proceeding (*Id* at 317[n.]), respondent’s denial of defense counsel’s request for an adjournment of the

preliminary hearing in the *Harris* case is inexcusable, particularly in the circumstances presented. As the stipulated facts show, the defendant’s lawyer was given only one day’s notice of the rescheduled hearing date, after respondent had moved up the date by two days without explanation, and the attorney promptly requested an adjournment and informed respondent that he was required to appear at a sentencing proceeding in federal court at the same time. In denying his request – explaining that “[t]he People” were “still planning to move forward,” witnesses were prepared to appear, and the defendant’s transportation from jail had been arranged – respondent appears to have relied solely on the prosecutor’s opposition to the application, which, on the facts presented, conveys the appearance of bias (*see* Rules, §100.3[B][4]). Even after the defendant’s lawyer sent a letter to the court waiving any objection to a delay¹ and arguing that proceeding with the hearing would violate his client’s constitutional right to counsel, citing a United States Supreme Court case holding that a defendant has a constitutional right to be represented by counsel at a preliminary hearing, respondent ignored the lawyer’s objections and held the hearing in his absence a few hours later. By doing so, respondent deprived the defendant of his right “to have the assistance of an attorney at every stage of the legal proceedings against him” (*People v Cunningham*, 49 NY2d 203, 207 [1980]) and violated her ethical responsibility to “accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law” (Rules, §100.3[B][6]). As a judge for four years at the time of these events, respondent should

¹ A defendant in custody must be released if the preliminary hearing is not held within 120 hours, unless the defendant requests or consents to the delay (CPL §180.80[1]).

have recognized the significance of her obligation to protect the defendant's fundamental rights.

Respondent also made a number of errors during the hearing that gave the appearance that she was biased against the defendant. Although she knew that he was represented by counsel, she failed to inform the defendant at the outset of the proceeding that the lawyer was unavailable and that she had denied his request for an adjournment; nor did she advise the defendant that he had a right to counsel at the proceeding and to an adjournment to obtain counsel, or that he had a right to cross-examine the prosecution witness and to testify on his own behalf. She announced her finding of probable cause immediately after the prosecution witnesses had testified, without affording the defendant an opportunity to question them; she belatedly permitted him to question the witnesses only after he asked if he could do so. After the proceeding, the defendant, having been deprived of constitutional and statutory rights, remained in custody for almost two months before pleading guilty to a reduced charge, when respondent sentenced him to time served.

It is the responsibility of every judge, whether a lawyer or non-lawyer, to be faithful to the law and maintain professional competence in it and to ensure that every defendant, especially one who is facing a loss of liberty, is afforded the full panoply of due process rights, including the right to have counsel present at every critical stage of a proceeding (Rules, §§100.2[A], 100.3[B][1]). *See Matter of Hise*, 2003 NYSCJC Annual Report 125 (judge's mishandling of a case in which he convicted a defendant without a trial or guilty plea and sentenced him to jail "shows basic ignorance of fundamental legal

principles and warrants public discipline”); *see also, e.g., Matter of Prince*, 2014 NYSCJC Annual Report 184 (judge “violated basic tenets of fairness in the administration of justice” at an arraignment by failing advise defendant of his right to assigned counsel and by making statements that appeared to prejudge the case); *Matter of Pemrick*, 2000 NYSCJC Annual Report 131 (“Even if not intentional, a series of legal errors indicates inattention to proper procedure and neglect of judicial duty”).

In accepting the jointly recommended sanction of censure, we have taken into consideration that respondent’s misconduct appears to be limited to a single case and that respondent now appreciates that a judge must ensure that before decisions are rendered, defendants are accorded due process. We trust that respondent has learned from this experience and in the future will act in accordance with her obligation to follow constitutional and statutory mandates and abide by the Rules Governing Judicial Conduct.

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

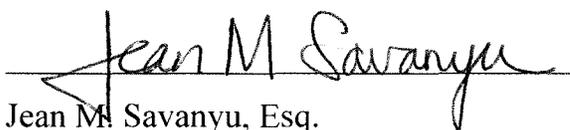
Mr. Belluck, Mr. Harding, Ms. Corngold, Judge Falk, Ms. Grays, Judge Leach, Judge Mazzairelli, Judge Miller, Mr. Raskin and Mr. Stoloff concur.

Ms. Yeboah was not present.

CERTIFICATION

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

Dated: February 7, 2019

A handwritten signature in black ink that reads "Jean M. Savanyu". The signature is written in a cursive style and is positioned above a horizontal line.

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