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

LAURA D. BLACKBURNE,

a Justice of the Supreme Court,
Queens County.

- -

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Alan J. Pope, Esq., Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Thomas A. Klonick
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Alan W. Friedberg and Jennifer Tsai, Of Counsel)
for the Commission

Richard Godosky and David M. Godosky for the Respondent

The respondent, Laura D. Blackburne, a justice of the Supreme Court, Queens County, was served with a Formal Written Complaint dated August 5, 2004,

containing one charge. Respondent filed a verified answer dated September 10, 2004.

By Order dated September 14, 2004, the Commission designated Honorable Ernst H. Rosenberger as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 30 and December 1, 2004, in New York City. The referee filed a report on August 23, 2005.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of removal, and respondent's counsel recommended a sanction no greater than censure. On September 30, 2005, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Supreme Court, Queens County, since 2000. Prior to that, from 1996 through 1999, she served as a judge of the Civil Court of the City of New York.

2. On June 10, 2004, respondent was presiding over cases in the Drug Treatment Court, Queens County, where she had served for several months. There were approximately 25 cases on the calendar that day. One of the cases involved Derek Sterling, a defendant charged with selling drugs who had been enrolled in a treatment program since early 2003.

3. Treatment Court proceedings are available as an alternative to incarceration to defendants who are charged with a non-violent felony and have a history of addiction. In such proceedings in Queens County, the defendant pleads guilty to a

felony and sentencing is deferred while the defendant is enrolled in a treatment program; upon successful completion of the program, the plea is withdrawn and the charge is dismissed. The defendant is required to appear in court on a regular basis so that the treatment can be monitored.

4. On June 10, 2004, at around 10:00 A.M., Detective Leonard Devlin arrived at the courthouse for the purpose of arresting Mr. Sterling on charges of robbery and assault, unrelated to the case on respondent's calendar.

5. Detective Devlin told a court officer, Sergeant Richard Peterson, that he was there to question Mr. Sterling in connection with a robbery. As a result, the sergeant believed that the detective was going to take Mr. Sterling into custody. Sergeant Peterson referred the detective to Jeffrey Martinez, a representative from Treatment Alternatives for a Safer Community ("TASC"). Sergeant Peterson and Mr. Martinez explained to the detective that Mr. Sterling was in a residential treatment program in Queens and provided the location of the residence, which the detective wrote down. The assistant district attorney ("ADA"), Sharon Scott Brooking, was also notified.

6. Thereafter, the detective waited outside the public entrance to respondent's courtroom in order to arrest Mr. Sterling after his case was concluded. It was the accepted protocol that the police not arrest a defendant at the court until the calendar call of the defendant's case was finished.

7. Sergeant Peterson went to see respondent in chambers and informed her that a detective was in the courtroom to question Mr. Sterling in connection with a

robbery.

8. Respondent told Sergeant Peterson that the defendant's attorney had to be notified and that the detective should not discuss anything with Mr. Sterling until the defendant's attorney was present. A short while later, respondent told Sergeant Peterson to advise the detective that the defendant's attorney was coming and that the detective should not speak to the defendant.

9. Mr. Sterling's assigned counsel, Joseph Justiz, was unavailable; a substitute was contacted but was also unavailable; ultimately, Warren M. Silverman, a court-appointed 18-B attorney, was notified to appear on behalf of Mr. Sterling.

10. After the calendar call began, Mr. Sterling left the courtroom twice for brief periods and passed Detective Devlin, who was in the hallway.

11. Respondent told Sergeant Peterson to arrange for Mr. Silverman and Detective Devlin to speak together. When Mr. Silverman arrived, he spoke to Detective Devlin in the hallway. Mr. Silverman asked the detective if he wanted to speak to Mr. Sterling "as a subject or as a witness." The detective indicated "subject." Mr. Silverman informed the detective that Mr. Sterling declined to speak to the detective, was represented by counsel and should not be questioned without counsel. Mr. Silverman gave the detective his card. The detective replied, "Then he is going to the 106th," referring to his precinct. Mr. Silverman asked the detective if he intended to arrest Mr. Sterling, and the detective said "yes." Mr. Silverman asked what the charges concerned, and the detective declined to say. Mr. Silverman spoke briefly with the defendant.

12. In the courtroom, respondent called Mr. Silverman to a sidebar and had a private conversation with him. Mr. Silverman told respondent that the detective had indicated that he was going to arrest Mr. Sterling. Respondent asked what crimes would be charged, and Mr. Silverman said that the detective did not tell him that information. Respondent then said that she was going to have Mr. Sterling taken out of the courtroom and out of the building through a side entrance.

13. Respondent called Sergeant Peterson to the bench and directed him to take Mr. Sterling "out the back stairwell" at the end of the calendar call. The back area is a secure hallway used by judges, jurors and court staff, and has a stairwell that leads from the third floor to the first floor, to the judges' parking lot. Sergeant Peterson was "stunned" by the instruction and did not reply.

14. Sergeant Peterson was concerned because he felt he could get in trouble for either following or not following respondent's instruction. He discussed the matter with another court officer and with ADA Sharon Scott Brooking. The sergeant asked the ADA whether following respondent's direction would be considered an obstruction of justice.

15. Sergeant Peterson approached respondent again, stated that he was "uneasy" about her directive and asked respondent to speak to the ADA.

16. Respondent summoned ADA Scott Brooking to the bench. The prosecutor told respondent that taking the defendant out the back would not be appropriate and that defendants should be arrested at court, not at the treatment programs,

since defendants were encouraged to feel safe at the programs. Respondent responded that she was insulted that the detective, whose actual intention was to make an arrest, had entered the courtroom under the "ruse" of questioning Mr. Sterling.

17. On the record, in open court but outside the presence of the detective, respondent accused Detective Devlin of coming to court under the "ruse" of wanting to ask questions when, in fact, he intended to arrest the defendant. Out of anger, respondent ordered that Mr. Sterling be escorted out of the court through a private exit in order to avoid arrest. The record of the proceeding states as follows:

> THE COURT: Good afternoon, Mr. Silverman, and thanks again for standing up on behalf of Mr. Justiz.
>
> MR. SILVERMAN: My pleasure.
>
> MR. MARTINEZ: Your Honor, we have a good update from the program. He also tested negative for all substances at the TASC office.
>
> THE COURT: Mr. Sterling, I don't know what else is going on. That's why I asked Mr. Silverman to be here to represent you. I understand that there is a detective on the premises who has some reason to believe that he ought to arrest you. I'm not going into that. That's not before me at this time.
>
> It is my hope that, whatever the issue is, it's not something that's going to effect your ability to continue in this program.
>
> I have directed that you be escorted out of the building by Sgt. Peterson because I -- and I'm putting this on the record -- specifically, I resent the fact that a detective came to this court under the ruse of wanting to ask questions when, in fact he had it in his head that he wanted to arrest you. If there is a basis for him arresting you, he will have to present that in the form of a warrant.

> And it may occur at your program. I'm not saying it won't. But what I am saying to you is that if you go back to your program and you do everything you are supposed to do at your program, if they appear with a legitimate warrant for your arrest then you follow that. I'm not trying to keep you from being arrested. I'm trying to keep you from being arrested today in my courtroom based on obvious misrepresentation on the part of the detective.
>
> You have your opportunity to speak to Mr. Silverman and I'm sure Mr. Silverman will convey to Mr. Justiz what's going on so that you will be appropriately represented if you are, in fact, arrested at the program.
>
> MR. SILVERMAN: Judge, if I may, for the record, I have spoken to the detective. I gave him my card and indicated to him that Mr. Sterling is represented by Mr. Justiz. I have spoken to Mr. Sterling and he has indicated that he is following my advice to adhere to his Fifth Amendment rights and not to speak to the police. And I've instructed the police detective should there be an arrest in the future that he is not to question Mr. Sterling in the absence of his attorney.
>
> THE COURT: And, Mr. Sterling, that advice works as long as you keep your mouth shut. Once you start talking you are basically waiving your right to be represented by counsel.
>
> All right. The next court date on this case for Mr. Sterling will be July 15th.

18. Respondent was annoyed and angry because she believed, based on the information presented to her, that Detective Devlin had given two different versions of his intentions. Respondent never saw Detective Devlin that day or questioned him about the matter. There is no indication in the record that Detective Devlin acted improperly.

19. When the proceeding ended, Sergeant Peterson approached

respondent, again related that he felt uneasy, and expressed his concern that her direction amounted to an obstruction of justice. Respondent interrupted him and, while starting to stand up at the bench, stated that he had been given a direction and that if he did not take Mr. Sterling out through the back exit, she would do it herself. Sergeant Peterson replied that he would do it. Sergeant Peterson concluded that he, rather than respondent, should escort the defendant since he did not want to compromise respondent's safety. Sergeant Peterson then escorted Mr. Sterling out the side doorway, through the secure hallway and stairwell, and out the door to the parking lot.

20. When Detective Devlin learned that Mr. Sterling had left through a back exit, he hurriedly left through the front door to try to locate him but was unable to do so.

21. After escorting Mr. Sterling from the courthouse, Sergeant Peterson went to the security office, where he met with his captain and informed him that he was going to prepare an "unusual occurrence report." Sergeant Peterson submitted several reports memorializing the event.

22. Mr. Sterling was arrested the following day at the treatment center and was taken into custody. Bail was set at $50,000. The charges against him were ultimately dismissed.

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) and 100.3(B)(1) of the Rules Governing Judicial Conduct 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. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Abdicating the proper role of a judge, respondent directed a court officer to escort a defendant out of the courthouse through a non-public, back stairway in order to elude a police detective who was waiting to effect a lawful arrest. In doing so, respondent inexplicably ignored several alarms that were raised by experienced court personnel, including the prosecutor and court officer, and persisted in directing the officer to comply with her improper order. Respondent's conduct not only compromised the safety of others, but severely damaged public confidence in her impartiality and ability to administer the law she is sworn to protect.

The salient facts, as set forth in the above findings, are largely uncontested; only respondent's motivation is in dispute. Having concluded that the detective had come to the court under a "ruse" of wanting only to question the defendant, respondent determined to thwart the arrest at the courthouse by arranging for the defendant to leave through a private exit with a court officer escort. While respondent asserts that she was motivated by a desire to protect the perception of the integrity and independence of the court from being tainted by the so-called "ruse," it seems clear that her hasty conclusion that the detective acted improperly was based upon secondhand information that was at best incomplete.

Although the detective apparently told a court officer that he wanted to

question the defendant, that officer and other court personnel readily understood that "question" meant "arrest." Respondent, without seeking to question the detective himself, concluded that a subterfuge had occurred. In any event, respondent's ill-conceived actions were entirely unjustified by the perceived "ruse," as she herself has conceded.

We agree with the conclusion of the referee, a respected former jurist, that respondent's actions arose out of anger and annoyance toward the police (Rep. 12). From the moment she learned that the police wanted to question the defendant, respondent made considerable efforts to protect the defendant's interests and to keep the detective away from him. She arranged for the defendant's lawyer to come to court, and she told the court officer to advise the detective not to speak to the defendant until the attorney arrived. Even after the attorney had arrived and advised the defendant of his rights, respondent admonished the defendant not to speak to the police without his attorney ("[k]eep your mouth shut"). Respondent's actions provide a context for her decision to have the defendant escorted out the back door of the courthouse (a decision she initially confided to the defendant's attorney in a private meeting at the bench).

It is ironic that after accusing the detective in open court of a "ruse," respondent employed a devious maneuver to whisk the defendant out of the courtroom and out of the detective's grasp. Her behavior not only violated her duty as a judge to act in a manner that reflects respect for the law she is duty-bound to uphold, but set a reprehensible example for court officers and other court personnel who were aware of

what she was doing. She also created an enormous conflict for the court officer under her command, who was understandably hesitant to comply with her directive, concerned that doing so might constitute an obstruction of justice. It is striking that respondent failed to recognize the impropriety of her directive, which was readily apparent to court personnel; it is more striking that even when the court officer and prosecutor expressed their concerns to respondent, she failed to reconsider her plan.

We are unpersuaded by respondent's contention that the special nature of the Treatment Court, where trust and accountability between the court and its "clients" are of paramount importance, in any way mitigates or explains her conduct. We are mindful of the unique dynamics of Treatment Court proceedings, its laudable goals and record of success (*see* Resp. Ex. C and D), and we note respondent's testimony that the court should be viewed as a "safe haven" by defendants (Ref. Ex. 1, p. 67). Nonetheless, we fail to see how public confidence in the court is advanced when a judge actively helps a defendant to avoid arrest by sneaking him out the back door. Respondent's behavior in this case far exceeded the norm of acceptable conduct by any judge in any court.

The repercussions of respondent's conduct were considerable. A suspect facing charges of robbery and assault was permitted to walk through a highly restricted area escorted by a single court officer, and then was allowed to avoid imminent arrest and remained at liberty for another 24 hours, until arrested by police. The fact that Mr. Sterling was ultimately arrested without incident, and that the charges against him were later dismissed, should not inure to respondent's credit; despite her testimony that she

"fully expected" that Mr. Sterling would return to the treatment center (Tr. 168), she obviously had no way of knowing what would occur once he left the court. The incident itself, which understandably became widely known throughout the courthouse, brought the judiciary into disrepute.

Not until respondent learned later that day that her actions had created a "hullabaloo" throughout the courthouse did she recognize that her conduct was improper (Oral argument, p. 58). Although respondent has expressed regret and remorse for her actions, we note that the referee, after hearing her testimony, concluded that respondent lacked forthrightness at the hearing and sought to minimize her responsibility (Rep. 7). Moreover, as the Court of Appeals has stated with respect to contrition, in some instances "no amount of it will override inexcusable conduct." *Matter of Bauer*, 3 NY3d 158, 165 (2004).

As reflected by respondent's admission of wrongdoing and her request for a disciplinary sanction no greater than censure, it is apparent that the sole issue is whether respondent's misconduct was so egregious that the ultimate sanction of removal is warranted. We conclude that respondent's behavior was such a gross deviation from the proper role of a judge that it justifies the sanction of removal, notwithstanding her lengthy career of public service, her previously unblemished record on the bench, and the testimony of distinguished witnesses, including public officials and members of the judiciary, as to her character and reputation. Comparable conduct by an attorney, court staff or any officer of the court would certainly subject the individual to the severest

sanctions. For a judge, whose enormous powers and commensurate responsibilities require the judge to be held to the highest standards of behavior, it is simply intolerable.

We recognize that removal is not normally to be imposed for conduct that amounts to poor judgment, even extremely poor judgment. *Matter of Sims v. Comm. on Judicial Conduct*, 61 NY2d 349, 356 (1984); *Matter of Shilling v. Comm. on Judicial Conduct,* 51 NY2d 397, 403 (1980). This is especially so where, as in this case, the conduct was not venal or abusive but rather consists of a single episode of aberrant behavior.

We believe that respondent's conduct was not simply an egregious error in judgment, but an act that transcended the boundaries of acceptable judicial behavior. She placed herself above the law she is sworn to uphold and abused the power of her office, utilizing court personnel and court facilities to accomplish her goal of thwarting a lawful arrest. We need not determine whether her conduct was unlawful (*see* Penal Law §195.00 [Official Misconduct]; §195.05 [Obstructing Governmental Administration]; §205.50 [Hindering Prosecution]) since, manifestly, behavior that even raises such questions is inconsistent with the role of a judge and brings the judiciary into disrepute. *See, Matter of Backal v. Comm. on Judicial Conduct*, 87 NY2d 1 (1995); *Matter of Gibbons v. Comm. on Judicial Conduct*, 98 NY2d 448 (2002). Difficult as it may be to impose a sanction that marks the end of any judicial career, we conclude that the sanction of removal is appropriate.

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

Mr. Goldman, Ms. DiPirro, Mr. Felder, Ms. Hernandez, Judge Klonick, Judge Luciano, Judge Peters and Judge Ruderman concur.

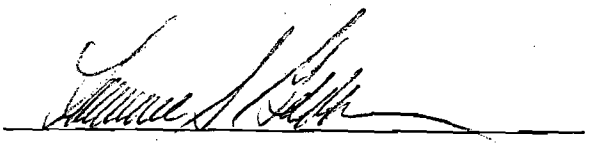
Mr. Coffey and Mr. Emery dissent only as to the sanction and vote that the appropriate sanction is censure.

Mr. Pope was not present.

CERTIFICATION

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

Dated: November 18, 2005



Lawrence S. Goldman, Esq., Chair
New York State
Commission on Judicial Conduct

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CONCURRING OPINION
BY MS. HERNANDEZ,
IN WHICH JUDGE
PETERS JOINS

I concur that respondent's serious misconduct warrants a severe sanction. It is a judge's responsibility to abide by proper procedures, to follow the law the judge is sworn to administer, and to respect the roles of others involved in the administration of justice in our system. Respondent clearly violated those standards.

In concluding that removal, rather than censure, is the appropriate sanction, I have considered several factors. Respondent placed herself above the law and failed to respect the roles of others within the framework of our justice system. She obstructed the detective from performing his duty, which was to make a lawful arrest at the court. She placed the court officer who was under her command in an awkward position by directing that he take the defendant out through the judges' private entrance, thus causing him to be deeply concerned that following her directive might constitute a crime. Her total lack of consideration in that regard is unacceptable.

In addition, it is incomprehensible to me that respondent ignored the concerns expressed by experienced court personnel, including the prosecutor and court officer. I find it inexplicable that when the court officer told her, in two separate conversations, that he was uneasy about her directive and even said that he was concerned about whether it would be an obstruction of justice, she did not think to reconsider her decision.

On a personal level, the decision to remove respondent is extremely difficult, especially in light of her long career of public service and her unblemished record as a judge. I take into consideration that respondent has been a role model for women of color. I also believe that respondent was genuinely trying to protect the interests of a defendant who, as she testified, she "believed at the time needed protecting" (Ref. Ex. 1, p. 67). However, it is clear to me that in doing so, she crossed over the line and became not just the defendant's advocate, but an adversary of the police. That is completely inconsistent with the role of a judge in our system of justice.

Accordingly, I respectfully concur that respondent should be removed.

Dated: November 18, 2005

Christina Hernandez

Christina Hernandez, M.S.W., Member
New York State
Commission on Judicial Conduct

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DISSENTING OPINION
BY MR. COFFEY

The decision reached by the majority in this matter is unprecedented and I believe unwarranted. The mistake made by the respondent, while wrong and while sanctionable, was in all respects a classic case of an error of judgment, which we as a Commission historically have been very cautious in criticizing. For a single error of judgment, in the absence of a breach of trust, to result in removal from office is unduly harsh.

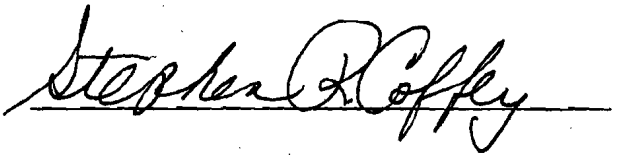
It is indisputable that the respondent's action was based on what she in part felt was a ruse perpetrated by an arresting officer. While this does not condone her action, it should not be the basis of removal from office. Unfortunately, the majority does so even though the respondent acted in her official capacity in open court, has an absolutely unblemished judicial record, has a character so exemplary that an impressive array of witnesses testified in her defense, and acted with no malice, with no hope of personal

gain, and not out of any personal vindictiveness. While her decision was admittedly wrong, the record reflects that her motive, in large part, was essentially to protect what she perceived to be the rights of the defendant. In addition, within hours of her order, she recognized her mistake, and long before she was charged by the Commission with misconduct, freely acknowledged her culpability, a position which she has consistently and persistently adhered to throughout this entire process.

I recognize the concerns of the majority and acknowledge the gravity of the respondent's error. But our goal in establishing an appropriate punishment for an offense is to examine the entire constellation of factors and circumstances in a case while searching for a just result. Even though the majority views her act as egregious, it does not, at least in my view, pay proper deference to the actor herself. This is particularly unfortunate since, in the ten years that I have served on this Commission, I cannot recall a single instance where we have voted to remove another judge who made a basic error in judgment and who has come before us with the extensive and compelling mitigating factors that are present in this record.

I do not find the respondent unfit, unethical, or lacking in judicial temperament. Rather, under the circumstances, I find her merely human. As I result, I respectfully dissent.

Dated: November 18, 2005



Stephen R. Coffey, Esq., Member
New York State
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DISSENTING OPINION
BY MR. EMERY

The removal of Justice Laura Blackburne[1] is both unprecedented and unfair. It is unprecedented because, until this case, neither this Commission nor the Court of Appeals has ever removed a judge based on a single event of misconduct, no matter how egregious, unless the misconduct was based upon breach of trust, venal conduct, moral turpitude or personal gain for the judge. It is unfair because this Commission is imposing career capital punishment upon an experienced, highly-respected and accomplished jurist, with an unblemished disciplinary history, who, indisputably, is unlikely to engage in this type of misconduct again.

[1] Justice Blackburne was a member of the board of the New York Civil Liberties Union where I was employed during the mid-1980s. I have never had any personal contact with her and my professional contact was limited to observing her as board member. When I informed the Commission, staff and respondent's counsel of these facts, there was no objection to my participation. I have independently concluded that there is no reason to recuse myself.

I

A survey of the applicable precedent makes the first point. As the Commission's majority decision accurately states:

> [R]emoval is not normally to be imposed for conduct that amounts to poor judgment, even extremely poor judgment. (Citations omitted). This is especially so where, as in this case, the conduct was not venal or abusive but rather consists of a single episode of aberrant behavior. (Majority decision, pp. 12-13)

This description of the applicable law reflects the heretofore unwavering holdings of both the Commission and the Court of Appeals. I do not see any basis in this record or in the majority decision to deviate from these principles in this case.

The Commission staff in urging respondent's removal relies virtually exclusively on *Matter of Gibbons*, 98 NY2d 448 (2002), in which a judge issued a search warrant and then immediately told his ex-boss at his ex-law firm that an ex-client was about to be searched. But for the restraint of the judge's ex-boss, this warning would have allowed the ex-client to avoid the surprise appropriate for a search pursuant to a warrant. Moreover, the judge made numerous attempts to reach his former boss, and each such occasion was an act of misconduct. Commission counsel characterizes *Gibbons* as the equivalent of Justice Blackburne's misconduct—facilitating the ability of a defendant to avoid arrest in drug court because she was angry at the arresting officer—based on the assertion, accepted in *Gibbons*, that the judge was motivated by his anger at his former client, rather than venal intent.

But it is plain that *Gibbons* is quite different. In *Gibbons*, the judge was, at a minimum, engaging in an inappropriate relationship with his former firm, no matter what his motivation. Moreover, the appearance was that he was currying favor with his ex-colleagues. The Court of Appeals aptly described Gibbons' conduct in contacting his ex-law firm as a "serious breach of trust" (*Id.* at 450). In this case, there is no contention, nor is there even an appearance, that respondent had any special relationship with anyone, or was motivated by personal gain or favoritism.

Had Justice Blackburne had a relationship with the defendant, other than as a litigant before her, I would unhesitatingly vote for her removal. Rather, her misconduct was a serious misjudgment motivated by her angry reaction to a police officer who she believed had attempted to deceive her. Additionally, Justice Blackburne had a misconceived, but good faith, view of the best way to maintain the trust between the judge and the defendant which she viewed as critical to the success of her specialized Drug Treatment Court, namely, to delay the arrest she felt was a product of the detective's ruse (*See* Majority decision, pp. 9-10). Finally, Justice Blackburne's on-the-record explanation for her actions (Majority decision, pp. 6-7) demonstrates her good faith beyond cavil. Respondent plainly acted openly and forthrightly in pursuing her misguided course of action. Thus, unlike *Gibbons*, Justice Blackburne's misconduct was a serious misjudgment that cannot fairly be characterized as a "serious breach of trust." She was, in fact, attempting to uphold the "trust" reposited in her office.

In order to support her removal, the Commission is, therefore, forced to adopt the unprecedented position that Justice Blackburne's misconduct, absent any

breach of trust, inappropriate relationship or advantage to her, is so "egregious" that neither her good faith nor mitigating circumstances will be considered. In the majority's view, her conduct "transcended the boundaries of acceptable judicial behavior" (Majority decision, p. 13). Notably, during the argument before the Commission, staff counsel refused to answer the hypothetical question of whether it would be appropriate to remove the judge if she had reasonably believed that the police officer was about to beat the defendant (Oral argument, p.12). As I view the majority decision, it relies on a similarly ostrich-like position.

While I agree in the abstract that certain extreme misconduct may be so "egregious" as to warrant removal notwithstanding a judge's good faith intent, the Commission and Court of Appeals precedents make clear that this is not such a case. The facts in *Blackburne* are undisputed: the judge's motive was a selfless attempt to uphold the "legal system [s]he was duty-bound to protect and administer" (*Matter of Gibbons*, *supra* at 450) even if her attempt betrayed "extremely poor judgment." Given that the Court's basic command to us is that removal "is not normally to be imposed for poor judgment, even extremely poor judgment" (*Matter of Sims v. Comm. on Judicial Conduct*, 61 NY2d 349, 356 [1984]), a review of the applicable single-incident misconduct cases plainly demonstrates that removal is not proper in this case.

The Commission and the Court of Appeals have imposed removal based on a single incident when there has been some aspect of the conduct that was, or appeared to be, venal. *Matter of Molnar*, 1989 Annual Report 115 (sexual favor solicited); *Matter of Scacchetti*, 56 NY2d 980 (1982) (bribe solicited); *Matter of Reedy*, 64 NY2d 299 (1985)

(attempt to fix son's ticket by a judge with a prior history of misconduct); *Matter of Levine*, 74 NY2d 294 (1989) (*ex parte* promise to political leader to adjourn a case and lying to the FBI); *Matter of Heburn,* 84 NY2d 168 (1994) (falsely subscribed designating petitions); *Matter of Benjamin*, 77 NY2d 296 (1991) (sexual assault); *Matter of Stiggins*, 2001 Annual Report 123 (conviction for abuse of an incompetent person); *Matter of Westcott*, 2004 Annual Report 160 (conviction for sexual relations with a mentally disabled person); *Matter of Brownell*, 2005 Annual Report 129 (issuing a court check to pay a judgment after mishandling the case). Similarly, we have not tolerated overt racism. *Matter of Bloodgood*, 1982 Annual Report 69 (reference to a Jewish defendant as "kikie" in a letter on court stationery); *Matter of Cerbone*, 61 NY2d 93 (1984) (racial epithets threatening African-Americans if they ever appeared in judge's court). Finally, in a context arguably not properly characterized as a single incident, we have found abandonment of judicial duties to be cause for removal. *Matter of Fiore*, 2006 Annual Report __ (judge left for a job in Iraq). Thus, along with *Matter of Gibbons*, this is the sum total of the single-incident removal cases that I have found.

By contrast, there are at least three cases in which we have censured, rather than removed, judges for single-incident misconduct that was more egregious than that of Justice Blackburne. In *Matter of Friess*, 1982 Annual Report 109, a highly publicized case, the judge released a murder defendant into his own custody, took her to his home overnight (although with no ulterior sexual motive) and provided her with counsel for a subsequent court appearance. The Commission stated that Judge Friess "exhibited extraordinarily poor judgment and a serious misunderstanding of the role of a judge in

our legal system...diminish[ing] public confidence [and] bring[ing] the judiciary into disrepute." In that case, the Commission concluded that the judge's "capacity to serve and regain public confidence had not been irreparably harmed."

In *Matter of Mills*, 2005 Annual Report 185, a majority of the Commission censured a judge who held an acquitted, unrepresented defendant in an isolation cell for five days, during which he doctored his contempt order to cover up the illegal basis for the punishment. In addition, in another incident before the Commission at the same time, Judge Mills jailed a litigant's father after the judge overheard him use an expletive in a courthouse parking lot. Notwithstanding the Commission's characterization of Mills' misconduct as a "travesty of justice," he remains a judge to this day.

Finally, the result in *Matter of Dusen,* 2005 Annual Report 155, is particularly instructive. In *Dusen* we censured the judge after he arranged the release of an incarcerated defendant by knowingly issuing an illegal court order and fabricating a conviction in order to facilitate his deportation. Dusen's misuse of his judicial authority to pervert the result in a particular case in order to accomplish what the judge believed was the best outcome was, in my view, a "serious breach of trust" and abuse of authority more "egregious" than that engaged in by Justice Blackburne.

Dusen raises the question of what Justice Blackburne's sanction would have been if she had facilitated an illegal arrest rather than frustrated a proper arrest. Apparently, the majority's view is that frustrating a proper arrest is more "egregious" than facilitating an illegal conviction and deportation. This stands logic on its head, for

the consequences to the deported defendant are so profound compared with the short delay of a proper arrest.

In the end, the essential point is that before this case, neither this Commission nor the Court of Appeals has ever removed a judge in a single-incident misconduct case for acts that were not venal or did not constitute a "serious breach of trust." Justice Blackburne's misconduct was neither; rather, it was a misguided attempt to protect the sanctity of her court and uphold her oath of office.

II

Removal of Justice Blackburne is also unfair for an additional reason: she has had a lengthy career of public service and a ten year career as a jurist marred only by her "aberrant" misjudgment in this case (Majority decision, p. 13).

Given that the Court of Appeals directs the Commission to mete out discipline "not [as] punishment but ... to safeguard the Bench from unfit incumbents" (*Matter of Reeves*, 63 NY2d 105, 111 [1984], citing *Matter of Waltemade*, 37 NY2d [a],[111]), it is error to remove Justice Blackburne based on this single incident of misconduct that is unlikely to be repeated.

Respondent's accomplished career as a judge and the testimony of seven eminent witnesses at respondent's hearing make it unequivocally clear that Justice Blackburne is the furthest thing from an "unfit incumbent." Not only has she served as a judge with an unblemished disciplinary record since 1995, but she has also continued to serve without incident since June 2004, when this misconduct occurred.

Particularly impressive to me is the list of those who testified on her behalf—John Carro, Basil Paterson, Milton Mollen, Seymour Boyers, Steven Fisher, David Dinkins and Charles Rangel. Each of these people has known respondent for years. Several served with her on boards; Justice Fisher is one of her supervisors and selected her for the Drug Treatment Court; Mayor Dinkins appointed her to chair the New York City Housing Authority; and Justice Mollen appointed her to the Second Department Committee on Character and Fitness. Particularly notable is the fact that Justice Fisher urges her retention even after this misconduct, when it was he who entrusted her with the Drug Treatment Court assignment.

This is no ordinary collection of character witnesses. None of these eminent and accomplished jurists and leaders would vouch for Justice Blackburne in the face of her clear misconduct unless each believed it was aberrant and that it was in the public interest for her to remain on the bench. Loyalty or personal relationship, in my view, could not distort the recommendations and predictions of any of these esteemed witnesses.

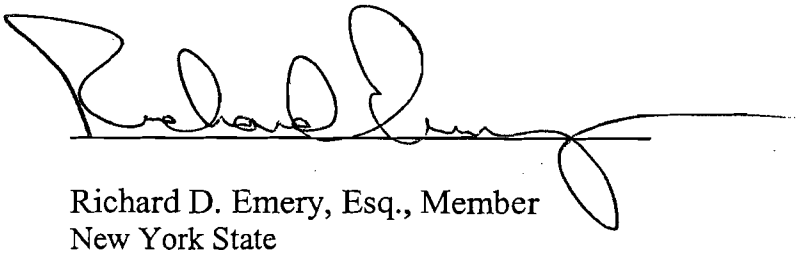
Finally, of utmost importance to the proper result in this case is the undisputed prognostication that Justice Blackburne will not engage in this type of behavior again: the majority concedes that respondent's behavior was "aberrant" (Majority decision, p. 13) and Commission counsel concedes that her behavior is unlikely to be repeated (Oral argument, p. 69). In my view, these concessions, along with the assessments of the eminent character witnesses and the evidence of Justice Blackburne's accomplishments and continuing service, render the majority's sanction a violation of our

mandate to limit removal to "unfit incumbents" (*Matter of Reeves, supra*). Plainly, Justice Blackburne's distinguished career does not have to be extinguished to protect the public or the judiciary in the future.

No doubt the majority's decision is driven by its understandable sense of outrage at the shocking nature of Justice Blackburne's aberrant action. But this is just the sort of case where, because her actions were aberrant, we are mandated to consider more factors than the misconduct alone. This is a case where all the circumstances relating to the misconduct, as well as a judge's past and likely future contributions, should bear on the sanction decision. Justice Blackburne has made significant contributions and has much more to contribute. Regrettably, the majority's choice to exclude these crucial factors in the analysis is both legally and equitably wrong.

For these reasons, I dissent and vote to censure Justice Blackburne.

Dated: November 18, 2005



Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct