D-66-12
(072095)

SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

DOCKET NO.: ACJC 2011-173

IN THE MATTER OF LOUIS M.J. DiLEO, FORMER JUDGE OF THE MUNICIPAL COURT	**PRESENTMENT**

The Advisory Committee on Judicial Conduct (the "Committee") hereby presents to the Supreme Court its Findings and Recommendation in this matter in accordance with Rule 2:15-15(a) of the New Jersey Court Rules. The Committee's Findings demonstrate that the charges set forth in the Formal Complaint against Louis M.J. DiLeo, former Judge of the Municipal Court of the City of Linden ("Respondent"), have been proven by clear and convincing evidence. The Committee recommends that Respondent be publicly reprimanded.

On October 24, 2011, the Committee issued a Formal Complaint in this matter, which accused Respondent of denying two defendants appearing before him their constitutional right to counsel, depriving those same defendants of their due process rights during their trial, and committing multiple procedural errors when sentencing those defendants in violation of Canons

1, 2A and 3A(1) of the Code of Judicial Conduct. Respondent filed an Answer to the Complaint on December 5, 2011 in which he admitted certain factual allegations of the Formal Complaint and denied others.

The Committee conducted a Formal Hearing in this matter on December 12, 2012. Respondent appeared with counsel and offered testimony in his defense. The Presenter and Respondent offered exhibits, which were admitted into evidence. See P-1 through P-9; see also R-1.

After carefully reviewing all of the evidence, the Committee made factual determinations, supported by clear and convincing evidence, which form the basis for its Findings and Recommendation.

I. FINDINGS

A. Factual and Procedural Background

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1981. At all times relevant to this matter, and for a total of approximately ten years, Respondent served as a judge in the City of Linden Municipal Court, a position he no longer holds. 1T28-23 to T29-4; 1T36-7-9; 1T81-10-13.[1]

[1] "1T" refers to the transcript of the Formal Hearing held on December 12, 2012.

On February 3, 2011, the grievant in this matter, Michael P. Rubas, Esq., filed a complaint with the Committee against Respondent wherein he accused Respondent of judicial misconduct while presiding over the matter of State v. Anthony Kirkland and Wendell Kirkland, Warrant Nos. W-2009-00874, W-2009-00875, W-2009-00876, and W-2009-00877 (the "Kirkland matter"), in the Linden Municipal Court. P-1. Mr. Rubas is familiar with the Kirkland matter by virtue of his representation of defendant Wendell Kirkland, pro bono, in the municipal appeal of that matter, which was pending when Mr. Rubas filed his grievance with the Committee.[2] Ibid. In his grievance, Mr. Rubas accused Respondent of exhibiting bias against the Kirkland defendants during the trial of the Kirkland matter and of committing numerous legal and procedural errors while presiding over that trial, which, when "taken as a whole," demonstrated "a blatant and pervasive disregard of the Court Rules and statutory authority." Ibid.

On February 8, 2011, prior to the resolution of the municipal appeal and during the Committee's consideration of Mr. Rubas's grievance, the Union County Prosecutor's Office advised the Union County Superior Court that the "State agree[d] that the procedures used in the municipal court violated defendants'

[2] Mr. Rubas was assigned by the Union County Superior Court to represent Wendell Kirkland. P-1

due process rights" and requested that the Kirkland defendants' convictions "be vacated and the matter remanded, perhaps to a different municipal court." P-2 at ACJC057.

Shortly thereafter, on March 4, 2011, the municipal appeal of the Kirkland matter was decided at a trial de novo by the Union County Superior Court. P-7; R. 7:31-1; R. 3:23-8(a). In an oral opinion, the court found reversible error in several material respects, including, among other things, a denial of the Kirkland defendants' constitutional right to counsel and a deprivation of their due process rights. Id. The court remanded the matter to the Elizabeth Municipal Court for a new trial. Id.

On March 7, 2011, the Mayor of the City of Linden, Richard J. Gerbounka, filed a grievance with the Committee about Respondent's handling of the Kirkland matter. P-2. In his grievance letter, Mayor Gerbounka stated, "it is embarrassing to have a Municipal Judge with 8 years experience disregard defendants [sic] 5th amendment [sic] rights of due process and resort to 'Third World Justice.'" Id.

The Committee conducted an investigation into Mr. Rubas's allegations, which included, inter alia, a review of the Union County Superior Court's decision on the municipal appeal. This judicial ethics matter followed.

1. Uncontested Facts

The salient facts under consideration in this judicial disciplinary matter are undisputed and a matter of record. On April 12, 2010, Respondent presided over the arraignments of the defendants in the Kirkland matter on the following charges: theft by unlawful taking of five lug nuts; attempted theft by unlawful taking of the tire to which the lug nuts were attached; possession of burglary tools (e.g. a hydraulic floor jack and a lug wrench); and possession of 50 grams or less of marijuana that was allegedly found on the floor of the car in which the defendants were riding at the time of their arrests. P-4 at 2T2-1 to 2T4-25.[3] These charges were initially reviewed by the Union County Prosecutor's Office following the Kirklands' arrests on October 4, 2009, and were downgraded from indictable offenses to disorderly persons offenses and referred to the Linden Municipal Court. P-4 at 2T5-1-6; see also P-3 at p.4, ¶8.

During their arraignments, Respondent advised Messrs. Kirkland of the charges against them and of the possible consequences each faced if convicted, which included possible

[3] "2T" refers to the transcript of Anthony Kirkland's and Wendell Kirkland's arraignments before Respondent in the Kirkland matter on April 12, 2010, which is designated as P-4 in the record.

jail sentences. Id. at 2T2-1 to 2T6-1. Respondent also reviewed with Messrs. Kirkland their rights, including their right to an attorney and the appointment of a public defender if they were indigent. Id. at 2T6-1-7. Both Anthony and Wendell Kirkland advised Respondent that they wished to retain private counsel to represent them. Id. at 2T6-14-24; 2T8-13 to 2T9-7. Respondent advised Messrs. Kirkland that they had until May 3, 2010 to retain counsel and that by electing to retain private counsel they had waived their right to the appointment of a public defender. Ibid.

Thereafter, on May 3, 2010, Respondent presided over a conference in the Kirkland matter at which both Anthony and Wendell Kirkland appeared pro se. P-5. When Respondent asked the Kirkland defendants if they had retained counsel, Anthony Kirkland's response was inaudible. Id. at 3T3-13-17.[4] Wendell Kirkland, however, said "Just give me the public defender." Id. at 3T2-13-23. Respondent told both defendants that they had "waived the public defender" and he scheduled the matter to be tried on May 12, 2010. Id. at 3T3-1-25.

Exactly one month after arraigning the Kirkland defendants on the disorderly persons charges, Respondent presided over the trial of the Kirkland matter on May 12, 2010, which began at 9:13

[4] "3T" refers to the transcript of the conference in the Kirkland matter on May 3, 2010, which is designated as P-5 in the record.

p.m. and concluded at 10:05 p.m. P-6 at 4T41-3-10.[5] Respondent, having determined that the Kirkland defendants had "waived the public defender," conducted the trial in the absence of defense counsel. P-5 at 3T2-22 to 3T3-24; P-6. In addition, Respondent permitted the trial to proceed that evening in the absence of the municipal prosecutor. P-6. There is no indication in the trial transcript or elsewhere in this record that Respondent made any attempt to locate the municipal prosecutor prior to proceeding with the trial that evening, despite the fact that the municipal prosecutor, Nicholas P. Scutari, Esq., was in the courthouse for that court session, though not in the courtroom. P-2 at ACJC 060. As a consequence, the only individuals to participate in the trial that evening were Respondent, the arresting police officer and the Kirkland defendants. P-6.

There being no prosecutor in the courtroom to prosecute the Kirkland matter on behalf of the State, Respondent conducted the direct examination of the arresting officer and thereafter permitted Anthony and Wendell Kirkland to cross-examine the officer. P-6 at 4T3-1 to 4T10-19. At the conclusion of the officer's testimony, Respondent, inexplicably, asked the officer if he had any "other witnesses" to "produce" or evidence to present to which the officer responded, "There's no evidence

[5] "4T" refers to the transcript of the trial in the Kirkland matter on May 12, 2010, which is designated as P-6 in the record.

here." Id. at 4T10-20 to 4T11-4. Finding no further evidence, Respondent asked the officer if he intended to "rest" his case to which the officer responded, "Yes." Id. at 4T11-5-7.

Following the officer's testimony, Respondent permitted the defendants an opportunity to present any witnesses in their defense. Id. at 4T11-8-10. Although both defendants had witnesses they wished to present, none of those witnesses were present in the courtroom that evening. Id. at 4T11-11 to 4T12-8. Finding there to be no witnesses for the defense, Respondent advised the Kirkland defendants of their Fifth Amendment privilege against self incrimination and provided each of them an opportunity to testify in their own defense, after which he invited the arresting officer to cross-examine them. Id. at 4T12-5 to 4T25-8. At the conclusion of the officer's cross-examination, Respondent questioned Anthony Kirkland at length about his conduct on the evening of his arrest and, thereafter, questioned the arresting officer again about the events surrounding the arrests of both defendants. Id. at 4T25-18 to 4T29-24.

Respondent ultimately found both defendants guilty on all charges. Id. at 4T30-21 to 4T34-7. He sentenced Wendell

Kirkland to 180 days in the county jail, "day for day,"[6] three consecutive one-year probationary terms, and fines totaling $2,700.00, exclusive of penalties and costs. Id. at 4T34-21 to 4T36-16. Respondent sentenced Anthony Kirkland, whom he believed to be "the person who facilitated this crime," to two "day for day" consecutive 180 day jail terms and three consecutive one-year probationary terms. Id. at 4T36-17 to 4T38-6. Respondent also imposed the maximum fines permitted for each offense, totaling $3,100.00, exclusive of penalties and costs. Ibid. Wendell and Anthony Kirkland were taken into custody immediately and each served 124 days in jail for these disorderly persons offenses. P-8; P-9.

The Kirkland defendants successfully appealed their municipal court convictions to the Union County Superior Court, which found them indigent and assigned counsel to represent them. P-7 at 5T11-8-10.[7] The Honorable Scott J. Moynihan, J.S.C. of the Union County Superior Court presided over the appeal. P-7. On March 4, 2011, Judge Moynihan found defendants not guilty of the possession of marijuana charge, and remanded the remaining

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[6] "In common parlance, [the] phrase 'day for day' once meant that a defendant had to serve the full sentence imposed," i.e. defendant was ineligible for parole. P-7 at 5T21-14-17.

[7] "5T" refers to the transcript of the decision on appeal in the Kirkland matter, dated March 4, 2011, which is designated as P-7 in the record.

charges against the defendants to the Elizabeth Municipal Court for a new trial. Id.

In his oral opinion, Judge Moynihan characterized the trial of the Kirkland matter as a "perversion of justice" and cited multiple instances in which Respondent violated the defendants' constitutional rights. Id. Specifically, Judge Moynihan condemned Respondent's denial of defendants' request for a public defender as the "most glaring error" in the trial necessitating a remand of the Kirkland matter for a new trial before a different jurist. Id. at 5T7-13 to 5T8-5. Judge Moynihan rejected outright Respondent's determination that the defendants had waived their right to a public defender when they indicated at their arraignments their desire to retain private counsel, finding that:

> Neither defendant waived his right to a public defender. They elected on April 12 to retain a private attorney. Although the municipal court judge never explored the reasons why the defendants did not secure the services of private counsel when they returned to court on May 3, there is no indication that they knowingly waived their right to appointed counsel. They wanted a public defender on May 3. The fact that they tried to secure private counsel . . . does not amount to a knowing, voluntary waiver of their right to have a lawyer represent them in a trial that resulted in county jail sentences for each defendant.

Id. at 5T9-22 to 5T10-8. Judge Moynihan concluded that Respondent had "forced [the] defendants to go to trial pro se." Id. at 5T10-20-21.

Likewise, Judge Moynihan criticized Respondent's actions in questioning the arresting officer and Anthony Kirkland during the trial, finding such actions deprived the defendants of their due process rights and further necessitated a remand of the Kirkland matter for a new trial before a different jurist. Id. at 5T11-18-20. In this regard, Judge Moynihan determined that Respondent "pointedly cross-examine[d] witnesses" and, in so doing, behaved like a prosecutor, "especially since he [then] used the testimony which he elicited" to find the defendants incredible. Id. at 5T16-15-19. Judge Moynihan concluded that in doing so, Respondent "deviated from the standards of impartiality" and "transformed the role of the court from a neutral and detached magistrate and evoked the specter of the backwater 'judge, jury and executioner' figure that has never had any place in American jurisprudence. The court's intervention deprived both defendants of their due process rights." Id. at 5T16-19 to 5T17-2.

The "perversion of justice" in the Kirkland trial was compounded, according to Judge Moynihan, by Respondent's decision to allow the arresting officer to cross-examine the defendants: "There is no authority for allowing a non-attorney to participate in a trial as the State's sole representative, especially where

no attorney is present and engaged in the proceedings." 5T17-3-5; 5T17-20-23.

Judge Moynihan also noted several procedural errors committed by Respondent during sentencing. Id. at 5T20-2-7. These errors included the following: (a) Respondent's failure to "set forth his findings as to the . . . applicable aggravating and mitigating factors" he considered when sentencing the defendants as required by N.J.S.A. 2C:44-1 and Rule 7:9-1(b); (b) Respondent's imposition of consecutive sentences without providing the requisite basis [internal citation omitted]; (c) Respondent's imposition of a period of parole ineligibility in a case where such a sanction is not authorized by law; (d) Respondent's imprisonment of the defendants for a term in excess of 90 days as a condition of probation on a disorderly persons offense in violation of N.J.S.A. 2C:43-2b(2) and 2C:45-1e; (e) Respondent's failure to consider the defendants' eligibility for release on parole when sentencing the defendants as required by N.J.S.A. 2C:44-1c(2); (f) Respondent's imposition of the maximum fines against Antony Kirkland without first determining each defendant's ability to pay as required by N.J.S.A. 2C:44-2c; (g) Respondent's failure to provide Anthony Kirkland with an opportunity to allocute before sentencing in violation of Rule 7:9-1(a); and (h) Respondent's failure to advise each defendant

of his appeal rights in violation of Rule 7:14-1(c). Id. at 5T20-8 to 5T23-8.

On April 21, 2011, the Elizabeth Municipal Court to which the Kirkland matter was remanded accepted the guilty pleas of the Kirkland defendants to a single downgraded charge of a breach of the peace, which is an ordinance violation. P-3 at Exhibit L" at 6T4-8 to 6T5-9.[8] The fines associated with that ordinance violation were waived as a consequence of the "history" of the Kirkland matter and court costs totaling thirty-three dollars were imposed against each defendant. Ibid.

2. Respondent's Written Comments

Respondent was initially questioned by the Committee about his handling of the Kirkland matter by letter dated April 15, 2011. In his letter of response, dated August 11, 2011, Respondent offered several excuses for his mishandling of the Kirkland matter, including a claim that the number of court sessions in the Linden Municipal Court at that time, i.e. two evening sessions and one daytime session, was insufficient to allow Respondent adequate time to address, appropriately, the court's "overwhelming" docket. P-3; see also R-1. This situation was rectified, according to Respondent, with the

[8] "6T" refers to the transcript of the plea in the Kirkland matter entered on April 12, 2011 in the Elizabeth Municipal Court, which is attached as "Exhibit L" to Presenter's Exhibit P-3.

passage of Resolution #2011-215 on June 21, 2011, which increased the number of court sessions from three to eight per week and provided for additional part-time municipal court judges, prosecutors and public defenders on a per diem basis. P-3 at "Exhibit A."

In respect of a defendant's constitutional right to counsel generally and the circumstances of the Kirkland matter specifically, Respondent assured the Committee that he understands that "the right to apply to the Court for representation by the Public Defender is a constitutional right."[9] P-3 at p.10. He claimed, however, that at the time he proceeded with the trial, he believed the Kirkland defendants had effectively waived their right to a public defender and that their subsequent request for one on May 3, 2010 was nothing more than a stall tactic. Id. at p. 7. In addition, Respondent stated that he felt compelled to proceed with the Kirkland matter given the fact that it was "categorized," seemingly by the Administrative Office of the Courts, as an "old case[]." Id. As such, Respondent was concerned that "any further delay" could "jeopard[ize]" the Kirkland defendants' "right to a speedy trial." Id. Having read Judge Moynihan's decision, Respondent assured the Committee he has "corrected [his] procedures . . . .

[9] Respondent is apparently referring in this statement to a criminal defendant's Sixth Amendment right to counsel.

Now any time a litigant asks for a Public Defender, he or she will be granted [one], without regard as to whether or not they previously waived that right, and regardless of the Court's perception of the basis for the request." P-3 at p. 10. He further stated that Judge Moynihan's decision made it "clear" to him that "in all [such] instances, the trial should and must be adjourned, despite the age of the case or of the backlog status." Ibid.

Similarly, Respondent acknowledged reading Judge Moynihan's decision as it pertains to sentencing and claimed to have "implemented" Judge Moynihan's comments in his own sentencing procedures. P-3 at p 11. Respondent characterized the sentencing issues in the Kirkland matter as "unfortunate" and promised the Committee that they "would not reoccur." Ibid.

Respondent did not address directly the impropriety of his decision to proceed in the absence of the prosecutor, except to say that by the time the trial started, i.e. 9:13 p.m., the "Prosecutor had already left Court for the evening." Id. at p. 9. Respondent did not recall the prosecutor notifying him before leaving the courthouse. Ibid. He disclaimed, however, any "intent" to prosecute the Kirkland matter, stating it was merely his goal to "move the Court's backlog [sic] cases and calendar along." Id. at pp. 9-10. For that reason, Respondent claimed he asked the witnesses "a number of questions." Ibid.

With regard to Mr. Rubas's grievance, Respondent initially questioned Mr. Rubas's motives in filing a grievance against him, implying that Mr. Rubas's sole motivation was to gain an advantage in an anticipated civil suit to be filed on behalf of the Kirkland defendants. Id. at p. 11. When addressing Mr. Rubas's actual allegations, Respondent denied harboring any bias against the Kirkland defendants and expressed, in great detail, his overall concerns in respect of the increased incidents of theft in the City of Linden at that time. Id. at pp. 11-14. He further stated that though he was wrong, Respondent "believe[d]" he was "trying [his] best to remain faithful to the law." Id. at p. 17.

Respondent affirmed that he had been "guided by Judge Moynihan's opinion" and had "taken the necessary steps to see to it that this situation would not reoccur." Id. at p. 18.

3. Formal Hearing

Respondent was the only witness to testify at the hearing. Though he reiterated many of the same points he had made in his written comments to the Committee, Respondent inexplicably disavowed having read Judge Moynihan's decision, attacked its accuracy and at points appeared to disclaim any responsibility for his actions in the Kirkland matter. 1T43-1 to 1T44-22; 1T75-25 to 1T76-5; 1T76-17-23. Throughout his testimony, Respondent denied or assigned blame to others, i.e. the

Municipal Prosecutor, the Grievant, the Assistant Union County Prosecutor on the appeal, and his court staff for the conduct at issue here. 1T36-19 to 1T43-1 to 1T45-6.

For instance, while conceding that proceeding without a prosecutor in the Kirkland matter was inappropriate and is no longer his practice, Respondent, nonetheless, blamed the Municipal Prosecutor for his decision to proceed in that manner. Respondent claimed that during this time period the Municipal Prosecutor had developed a practice of leaving court without Respondent's knowledge or permission. 1T36-19 to 1T37-15. As a consequence, Respondent testified that *he* had developed a practice of adjudicating matters without a prosecutor, including contested matters, when the matter at issue was considered "old," i.e. older than six-months, and the prosecutor was not present in the courthouse. 1T39-8-22. In those circumstances, Respondent believed the "prosecutor [had] waiv[ed]" his opportunity to present the case and had placed that burden on the police officer. 1T40-13-19.

Respondent further asserted that "Judge Moynihan was misled" by the Grievant in this matter and, as a consequence, arrived at an "erroneous" decision in respect of the Kirkland defendants' waiver of counsel. 1T43-1 to 1T44-22. Specifically, Respondent accused the Grievant of failing to provide Judge Moynihan with all of the transcripts in the Kirkland matter, in particular

those containing Respondent's opening statement at the start of each court session and those concerning the Kirkland defendants' prior two appearances before Respondent. Id. Having been provided with an incomplete record, Judge Moynihan was essentially duped, according to Respondent, into the erroneous conclusion that Respondent had failed "to advise the Kirkland defendants of their right to counsel." Ibid. Respondent's position in this regard is incongruous with the record in this matter. Judge Moynihan's oral opinion indicates, clearly, that in rendering his decision he reviewed the transcripts of the Kirkland defendants' *three* court appearances before Respondent, i.e. the transcripts of April 12, 2010, May 3, 2010, and May 12, 2010. As part of that decision, Judge Moynihan determined that Respondent *deprived* the Kirkland defendants of their right to counsel, not that he failed to *advise* them of that right. P-7 at 5T7-13-16.

Similarly, Respondent disagreed with Judge Moynihan's decision, which he again characterized as uninformed and incorrect, concerning the impropriety of Respondent's questioning of the police officer and his cross-examination of the Kirkland defendants. 1T76-17 to 1T78-8. Respondent explained the he questioned the police officer and allowed the police officer to cross-examine the defendants because he viewed the absence of the prosecutor "as akin to a pro se presentation"

by the police officer and he was "trying to be fair" to both sides. 1T83-15-21.

In addition, Respondent called the Assistant Union County Prosecutor on the appeal "lazy" when she advised Judge Moynihan that the procedures Respondent utilized during the Kirkland matter violated the defendants' due process rights and their convictions should be vacated and the matter remanded. 1T87-5 to 1T89-1. Respondent again contended that the Assistant Prosecutor did not review all of the evidence in the municipal court record and presumably had she done so her decision on the appeal and that of Judge Moynihan would have been different. Id. Respondent did not produce any evidence to substantiate this contention and none exists in the record before the Committee.

On the issue of sentencing, Respondent testified that his use of the word "consecutive" rather than "concurrent" was a "mistake borne out of being absolutely exhausted" and one which he had made on other occasions. 1T50-5-14. On those other occasions, Respondent claimed his "staff" would confirm Respondent's intent to use the word "consecutive" instead of "concurrent," which purportedly did not happen in this instance. Ibid.

B. Analysis

The burden of proof in judicial disciplinary matters is clear-and-convincing. Rule 2:15-15(a). Clear and convincing evidence is that which "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence, so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue." In re Seaman, 133 N.J. 67, 74 (1993) (citations and internal quotations omitted).

The Formal Complaint in this matter charges Respondent with violating Canons 1, 2A and 3A(1) of the Code of Judicial Conduct in three material respects: (1) denying the defendants in the Kirkland matter their constitutional right to counsel; (2) depriving them of their due process rights during trial; and (3) committing multiple procedural errors during sentencing. We find, based on our review of the significant evidence in the record, that, with the exception of Respondent's procedural errors when sentencing the Kirkland defendants, these violations have been proven by clear and convincing evidence and, consequently, that Respondent is subject to discipline. Though Respondent was found to have committed several procedural errors when sentencing the Kirkland defendants, we find, as set forth

more fully below, that those errors did not impugn the integrity and impartiality of the judiciary or the judicial process generally so as to constitute a violation of Canons 1, 2A or 3A(1).

Respondent is charged with the duty to abide by and enforce the provisions of the Code of Judicial Conduct. R. 1:18 ("It shall be the duty of every judge to abide by and to enforce the provisions of the Rules of Professional Conduct, the Code of Judicial Conduct and the provisions of R. 1:15 and R. 1:17."). Canon 1 of the Code of Judicial Conduct requires judges to maintain high standards of conduct so that the integrity and independence of the Judiciary are preserved. Canon 2A directs that judges conduct themselves in a manner that promotes public confidence in the integrity and impartiality of the Judiciary. The commentary to Canon 2 provides that judges "must avoid all impropriety and appearance of impropriety and must expect to be the subject of constant public scrutiny." As recognized by our Supreme Court, adherence to this principle is of the utmost importance, especially in our municipal courts where the greatest numbers of people are exposed to the judicial system. In re Santini, 126 N.J. 291, 298 (1991); see also In re Murray, 92 N.J. 567, 571 (1983); In re Hardt, 72 N.J. 160, 166-167 (1977).

Canon 3 of the Code of Judicial Conduct provides generally that judges should "perform the duties of judicial office impartially and diligently." In this regard, Canon 3A(1) maintains that a "judge should be faithful to the law and maintain professional competence in it."

This case presents an issue of first impression in New Jersey, namely under what circumstances may a judge's legal error constitute grounds for a finding of judicial misconduct. In our consideration of this issue, we are mindful of the potential harm to judicial independence when imposing discipline for such errors. Judicial independence is the very foundation of our legal system and is recognized in Canon 1 of the Code of Judicial Conduct, which provides that "an independent and honorable judiciary is indispensable to justice in our society." We are equally mindful of the principle enunciated in other jurisdictions that judicial independence is not intended to protect "from discipline those judges whose disregard for the law in their legal rulings detrimentally affects the public's regard of the judiciary." In re Quirk, 705 So. 2d 172, 178 (La. 1997); see also McBryde v. Committee to Review Circuit Conduct and Disability Orders, 264 F.3d 52, 65 (D.C. Cir. 2001).

Indeed courts in other jurisdictions have disciplined judges whose disregard for the law in their legal rulings has had a detrimental effect on the public's perceptions of the

integrity and impartiality of the Judiciary. See, e.g., Committee on Judicial Performance v. Wells, 794 So. 2d 1030 (Miss. 2001)(imposing a public reprimand against a judge for convicting a defendant based on affidavits alone); Committee on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000)(imposing a public reprimand and fine for, among other misconduct, sentencing a defendant under the wrong statute and failing to correct the error).

While Canon 3A(1) of New Jersey's Code of Judicial Conduct requires a judge to "be faithful to the law and maintain professional competence in it," a judge's mere legal error does not "normally" subject that judge to charges of judicial misconduct. In re Thomson, 100 N.J. 108, 118-119 (1985)(finding that a judge's failure to advise a defendant of his right to counsel, swear in the witnesses, and explain to defendant the reasons for his sentence, though serious transgressions, were the result of a unique set of circumstances for which judicial discipline would be inappropriate).

Neither the canons of the Code of Judicial Conduct nor the case law in this State applying those canons has delineated a standard by which to determine when reversible legal error constitutes misconduct under Canon 3A(1) specifically or Canons 1 and 2A generally. We are guided, however, by the standard enunciated by the Supreme Judicial Court of Maine in In re

Benoit, 487 A.2d 1158 (Me. 1985). In that case, the court adopted the following objective standard for determining when judicial conduct constitutes a violation of Canon 3A(1) and by extension Canon 2A: would a "reasonably prudent and competent judge" consider the conduct "obviously and seriously wrong in all the circumstances." Id. at 1162-1163; see also In re Quirk, supra, 705 So. 2d at 178 (adopting egregious legal error as one of the exceptions to the general rule that legal error is not subject to judicial discipline, stating that even a single instance of serious legal error, especially one involving the denial of basic fundamental rights, may constitute judicial misconduct).

Applying that objective standard to this case, we conclude that a reasonably prudent and competent judge would consider Respondent's conduct in the Kirkland matter obviously and seriously wrong in all circumstances, as did Judge Moynihan. Respondent's substantial and pervasive departure from the well established procedures for the conduct of trials in the Kirkland matter was so beyond the pale of what any reasonably prudent judge would consider appropriate and constitutes an assault on the integrity and impartiality of the judiciary in violation of the Code of Judicial Conduct.

Our analysis is necessarily informed by Judge Moynihan's decision, on de novo review, of the municipal appeal in the

Kirkland matter. Indeed, the facts on which Judge Moynihan found reversible legal error are the same facts on which we find conduct in violation of the canons of the Code of Judicial Conduct. Accord In re Laster, 274 N.W.2d 742, 745 (Mich. 1979)(stating that "[j]udicial conduct creating the need for disciplinary action can grow from the same root as judicial conduct creating potential appellate review . . . .").

A review of Judge Moynihan's decision as well as the transcripts of the defendants' several appearances before Respondent reveal glaring deficiencies in the process afforded the Kirkland defendants. A mere month after the Union County Prosecutor's Office downgraded the charges against the Kirkland defendants to disorderly persons offenses and referred the matter to the Linden Municipal Court, Respondent forced the Kirkland defendants to trial, pro se, and, in the absence of the Municipal Prosecutor, abdicated his judicial function and assumed the role of prosecutor. Respondent even cast the arresting police officer in the role of the State's representative in complete contravention of the court rules and established case law. Such conduct, by any measure, is a "perversion of justice" for which judicial discipline is required.

"The polestar of our Canons of Judicial Conduct is to maintain judicial integrity and the public's confidence in that

integrity." In re Samay, 166 N.J. 25, 43 (2001) (citations omitted); see also Canon 1 and Canon 3 of the Code of Judicial Conduct. Accordingly, judges are constrained to conduct all court proceedings in a manner that "will maintain public confidence in the integrity and impartiality of the judiciary." In re Sadofski, 98 N.J. 434, 441 (1985). Indeed, judges are the ultimate authority in a courtroom and are responsible for assuring "the existence of procedures and protocols that will inspire public confidence in the courtroom as a place of justice." In re Bozarth, 127 N.J. 271, 281-282 (1992). Respondent's conduct in the Kirkland matter fell far short of this high standard.

Our Supreme Court has recognized a judge's prerogative to question witnesses. State v. Taffaro, 195 N.J. 442 (2008). The Court in Taffaro acknowledged the propriety of a judge's questioning of a witness "to clarify . . . testimony" or "to help elicit facts" from "a witness . . . in severe distress." Id. at 450 - 451 (internal citations omitted); see also N.J.R.E 614 (permitting a judge to question witnesses "in accordance with the law and subject to the right of a party to make a timely objection."). As previously noted by our Supreme Court, however, "There is a point at which the judge may cross that fine line that separates advocacy from impartiality. When that occurs there may be substantial prejudice to the rights of one

of the litigants." Village of Ridgewood v. Sreel Investment Corp., 28 N.J. 121, 132 (1958).

Respondent crossed that "fine line" and became an advocate for the State in the Kirkland matter. In so doing, he not only denied the Kirkland defendants their due process, but he impugned the integrity and impartiality of the Judiciary and ignored applicable law in violation of Canons 1, 2A and 3A(1) of the Code of Judicial Conduct. See State v. Avena, 281 N.J. Super. 327 (1995) (citing Figueroa Ruiz v. Delgado, 359 F.2d 718, 719, 721-22 (1st Cir. 1966) ("Where the judge's questioning of the witnesses is done in a prosecutorial role, alternating with his role as judge, it denies the accused due process.")). As described by Judge Moynihan, Respondent "questioned the only State's witness, the arresting officer," "pointedly cross-examined" defendant Anthony Kirkland and then "used the testimony which he elicited in finding the defendants" incredible. P-7 at 5T12-10-12; 5T16-15-19. In so doing, Respondent "deviated from the standards of impartiality" to which he is bound and "acted as [the] prosecutor." Id. at 5T16-17-21. He "transformed the role of the court from a neutral and detached magistrate and evoked the specter of the backwater 'judge, jury and executioner' figure that has never had anyplace in American jurisprudence." Id. at 5T16-21-25.

To add to the impropriety, Respondent permitted the arresting police officer to cross-examine the defendants and treated the officer as the State's sole representative. When asked his reasons for doing so, Respondent, a judge with approximately ten years of experience in municipal court matters and a member of the bar for thirty-one years, displayed a shocking misunderstanding of the basic precepts of trial procedure. He viewed the absence of the prosecutor "as akin to a pro se presentation" by the police officer and claimed he was "trying to be fair" to both sides. 1T83-15-21.

As noted by Judge Moynihan, "[t]here is no authority for allowing a non-attorney to participate in a trial as the State's sole representative, especially where no attorney is present and engaged in the proceedings." P-7 at 5T17-20-23. To the contrary, Rule 7:8-7(b) "limits the State's representation in municipal court actions to the municipal prosecutor, municipal attorney, Attorney General, county prosecutor or county counsel, and to a private prosecutor who comports with the requirements of the Rule and who is approved by the Court." Id. at 5T17-14-19. See State v. Hishmeh, 266 N.J. Super. 162 (App. Div. 1993) (finding that the court rules do not permit a police officer who appears as the State's witness to cross-examine the defendant). Such obvious irregularities in the conduct of the Kirkland trial raise serious concerns about Respondent's judgment and legal

acumen, and inevitably undermine the public's confidence in the integrity and impartiality of the judiciary as evidenced by Mr. Rubas's grievance to this Committee and the coverage Respondent's conduct received in the local press. P-1; see also P-2 at ACJC 058.

Finally, in what Judge Moynihan described as "[t]he most glaring error" Respondent deprived defendants of their right to counsel. P-7 at 5T7-13-14. As recognized by our Supreme Court, the right to counsel is one of the "few constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." State v. McCloskey, 90 N.J. 18, 30 (1982) (citing Gideon v. Wainwright, 372 U.S. 335 (1963). The Court has explained that:

> The importance of counsel in an accusatorial system such as ours is well recognized. If the matter has any complexities, the untrained defendant is in no position to defend himself and, even where there are no complexities, his lack of legal representation may place him at a disadvantage.

Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971).

The record in this matter reveals unquestionably that defendants were "at an obvious disadvantage" when representing themselves before Respondent. P-7 at 5T8-6-7. As elucidated by Judge Moynihan, the Kirkland defendants did not know to object to hearsay testimony, were unskilled in determining the viability of a motion to suppress evidence or a motion to

dismiss the marijuana charge, were without sufficient knowledge of how to secure the testimony of their co-defendant Jesus Gonzalez who accepted a plea deal prior to trial, and did not know how to "investigate Anthony Kirkland's claim that Gonzalez" admitted to the arresting police officer that the marijuana was his. Id. at 5T8-6 to 5T9-16.

Respondent deprived these defendants of their right to counsel and placed them at an obvious disadvantage despite the absence of a knowing and voluntary waiver of that right as is legally required, and in the face of possible incarceration. The Kirkland defendants did not choose to proceed pro se but rather advised Respondent on April 12, 2010 of their desire to retain private counsel. Although defendants failed to do so, they did not, as Judge Moynihan determined, knowingly waive their right to appointed counsel. P-7 at 5T9-22 to 5T10-3. To the contrary, they "wanted a public defender on May 3. The fact that they tried to secure private counsel . . . does not amount to a knowing, voluntary waiver of their right to have a lawyer represent them in a trial that resulted in county jail sentences for each defendant." Id. at 5T10-3-8. In "forc[ing] these defendants to go to trial pro se," in complete disregard of their right to counsel, Respondent flouted his judicial obligation to ensure that the process is fair, failed to comply with the law and impugned the integrity of the Judiciary in

violation of Canons 1, 2A and 3A(1) of the Code of Judicial Conduct.

Judge Moynihan's review, de novo, of Respondent's gross failure to comply with the law and his utter disregard for the rights of the defendants, as well as the basic tenets of due process, does not suffice to cure the harm to the Judiciary's integrity and impartiality. The goal of judicial discipline differs profoundly from that of the appellate process. Judicial discipline seeks to preserve and protect the public's confidence in the integrity and independence of the Judiciary. In re Seaman, supra, 133 N.J. at 96 (1993) (citing In re Coruzzi, 95 N.J. 557, 579 (1984)). Appellate review seeks to redress errors of fact or law that prejudice the rights of a party. While the appellate process has addressed the harm inflicted on the Kirkland defendants as a consequence of Respondent's conduct, it has not addressed the harm inflicted on the integrity and impartiality of the Judiciary, which may only be addressed by our system of judicial discipline.

In respect of the procedural errors committed by Respondent during sentencing to which Judge Moynihan makes reference in his March opinion, we find such errors do not rise to the level of judicial misconduct, but rather are appropriately left to the confines of the appellate process.

Finally, we reject in the main Respondent's reliance on a heavy court docket as justification for his absolute disregard of appropriate procedures and the fundamental rights of defendants, especially when, as here, the defendants faced a consequence of magnitude. It is axiomatic that a court's concern over judicial "backlog" should never trump a defendant's constitutional rights.

Having concluded that Respondent violated the canons of the Code of Judicial Conduct, the sole issue remaining is the appropriate quantum of discipline. "The single overriding rationale behind our system of judicial discipline is the preservation of public confidence in the integrity and the independence of the judiciary." In re Seaman, supra, 133 N.J. at 96 (1993) (citing In re Coruzzi, 95 N.J. 557, 579 (1984)). Consequently, the "primary concern in determining discipline is . . . not the punishment of the judge, but rather to 'restore and maintain the dignity and honor of the position and to protect the public from future excesses.'" In re Williams, 169 N.J. 264, 275 (2001) (citing In re Buchanan, 100 Wn.2d 396, 669 P.2d 1248, 1250 (Wash. 1983)).

Determining discipline in a judicial disciplinary matter "requires more than establishing some instance or instances of unethical conduct." In re Seaman, supra, 133 N.J. at 98. (citation omitted). It requires "'a more searching and

expansive inquiry . . . carefully scrutiniz[ing] the substantive offenses that constitute the core of respondent's misconduct, the underlying facts, and the surrounding circumstances in determining the nature and extent of discipline.'" Id. (quoting In re Collester, 126 N.J. 468, 472 (1992)); see also In re Mathesius, 188 N.J. 496 (2006).

Relevant to this inquiry is a review of both the aggravating and mitigating factors that may accompany judicial misconduct. In re Seaman, supra, 133 N.J. at 98-100 (citations omitted). The aggravating factors considered by the Court when determining the gravity of judicial misconduct include the extent to which the misconduct demonstrates a lack of integrity and probity, a lack of independence or impartiality, misuse of judicial authority, and whether the conduct has been repeated or has harmed others. Id. at 98-99 (citations omitted).

Factors considered in mitigation include the length and quality of the judge's tenure in office, the judge's sincere commitment to overcoming the fault, the judge's remorse and attempts at apology or reparations to the victim, and whether the inappropriate behavior is susceptible to modification. See In re Subryan, 187 N.J. 139, 154 (2006) (citations omitted).

Respondent's misconduct in this matter is serious and its consequences significant both for the Kirkland defendants who lost their liberty for 124 days and the Judiciary whose

integrity and impartiality was severely impugned. Respondent's distortion of the judicial process to advance his interests of judicial expediency over the fundamental rights of the defendants is offensive and alarming.

In determining the appropriate quantum of discipline for such egregious misconduct, we are cognizant of several aggravating factors. First, the misconduct at issue demonstrates a significant lack of judgment and integrity on the part of Respondent, and seriously undermines the public's confidence in Respondent's ability to serve as a municipal court judge. Such conduct inevitably harms the integrity of the judicial process, undermines public confidence in the justice system and seriously prejudices the proper administration of justice. As evidenced by the sharp rebuke Respondent received from Judge Moynihan, as well as Mr. Rubas's grievance and the Assistant Prosecutor's acknowledgment of Respondent's denial of defendants' due process rights, Respondent's integrity and that of the Linden Municipal Court have been severely tarnished.

Second, we are mindful of the harm inflicted on the defendants in this matter, each of whom served 124 days in jail without having received the benefit of a full and fair hearing before a neutral magistrate to which they were entitled. Imprisonment, even for one day, is a significant judicial act that should not be undertaken lightly. See In re Daniels, 118

N.J. 51, 65 (1990) ("No one can deny that the loss of liberty, next to the loss of life, is the greatest deprivation that a free citizen may suffer. In addition, imprisonment poses an extraordinary threat to the person who is imprisoned, both of violence in the prison setting . . . and the unknown and unanticipated reaction of the prisoner."). We are equally mindful of the harm to the judicial process generally when either side is deprived of the opportunity to present their case as occurred here.

Finally, while this is the first judicial misconduct complaint filed against Respondent, it involves several breaches of proper conduct while Respondent was performing his judicial duties. Indeed, Respondent's perversion of justice, though confined to a single case, was significant and is deserving of discipline. See In re Mattera, 34 N.J. 259, 266 (1961) ("a single act of misconduct may offend the public interest in a number of areas and call for an appropriate remedy as to each hurt. This may require removal from public office. . . ."); Accord Venezia v. Robinson, 16 F.3d 209 (7th Cir. 1994) and the Radcliff, Order (Ill. Cts. Comm'n Aug. 23, 2001) (Illinois Courts Commission suspended a judge for three months, without pay, for the way in which he conducted a single hearing in a single case).

In respect of any mitigating factors that may bear on the quantum of discipline in this matter, the Committee is left perplexed by Respondent's seemingly divergent positions. On the one hand, Respondent acknowledges in his written comments to the Committee that he has read and appreciates the impropriety of his actions in the Kirkland matter as set forth, in detail, in Judge Moynihan's decision of March 2011, and assures the Committee that he has "taken the necessary steps to see to it that this situation [does] not reoccur." P-3 at p. 18.

On the other hand, Respondent disavowed having read Judge Moynihan's decision while testifying at the hearing in this matter, attacked its accuracy and at points disclaimed responsibility for his actions. 1T43-1 to 1T44-22; 1T75-25 to 1T76-5; 1T76-17-23. Rather than acknowledge his improprieties, Respondent felt it appropriate to ascribe blame for those improprieties to the Municipal Prosecutor, the Grievant, the Assistant Prosecutor and court staff. 1T36-19 to 1T43-1 to 1T45-6. Respondent cannot avoid his obligations under the canons of the Code of Judicial Conduct by misplacing those responsibilities on others. His efforts to do so in this case suggest both a lack of appreciation for his judicial obligations under the Code of Judicial Conduct and an inability to conform his conduct to the high standards of conduct expected of judges.

We, nonetheless, credit as a mitigating factor Respondent's indication both in his written comments to this Committee and when testifying at the Formal Hearing that, prior to leaving his judicial post, he took the steps necessary to avoid repeating this misconduct.

II. RECOMMENDATION

The Committee recommends that Respondent be publicly reprimanded for the conduct at issue in this matter. This recommendation takes into account the egregiousness of Respondent's conduct in proceeding with a trial in the absence of a prosecutor, abdicating his duties as a jurist and assuming the role of prosecutor, permitting the arresting police officer to act as the State's representative in violation of established procedures, denying the defendants their fundamental right to counsel, and depriving them of the due process protections to which they are entitled. Such conduct greatly contravened Respondent's obligation to perform the duties of his judicial office impartially and with integrity, and undermined the proper administration of justice. We are concerned about the potential damage done to the judiciary's reputation as a body of integrity and impartiality as a result of Respondent's actions.

Our recommendation also considers Respondent's conduct at the Formal Hearing in this matter, which we find to be an aggravating factor. Throughout the hearing, Respondent mislaid

the blame for his judicial misconduct on the Municipal Prosecutor, the Assistant Prosecutor and the Grievant in this matter. Additionally, he expressed a misunderstanding of his responsibilities as a jurist and the fundamental rights of litigants in our adversarial system.

Accordingly, for all of these reasons, the Committee respectfully recommends that Respondent be publicly reprimanded for the conduct at issue in this matter.

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

January 16, 2013 By: Alan B. Handler

Alan B. Handler, Chair