

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 09-219

Complainant: No. 1370010259A

Judge: No. 1370010259B

ORDER

The commission reviewed the complaint filed in this matter and found no evidence of ethical misconduct on the part of the judge. The complaint is dismissed pursuant to Rules 16(a) and 23.

Dated: December 17, 2009.

FOR THE COMMISSION

/s/ Keith Stott
Executive Director

Copies of this order were mailed to the complainant and the judge on December 17, 2009.

This order may not be used as a basis for disqualification of a judge.

CJC 09-219

COMPLAINT AGAINST A JUDGE

Your name: _____

Judge's name: _____

Date: 8-19-09

Instructions: Describe in your own words what the judge did that you believe constitutes misconduct. Please provide all of the important names, dates, times and places related to your complaint. You can use this form or plain paper of the same size to explain your complaint, and you may attach additional pages. Do not write on the back of any page. You may attach copies of any documents you believe will help us understand your complaint.

A. This Complaint alleges that Maricopa County Superior Court Judge acted illegally and with judicial activism. Here are the facts.

On 7/25/2006, in case # CR2005- (State v. _____), Judge _____ instructed the jury to return only "one verdict" (See attached Exhibit "A") — not two or three verdicts — out of the 3 Counts of the Lesser Included, against the Defendant,

As per Judge _____ instructions, it was not within the jury's authority to find Mr. _____ guilty of all 3 Counts of the Lesser Included, or even 2 out of the three Counts. If the jury was to find Mr. _____ guilty, at all, they were instructed to limit their verdict to one, and only one, of the 3 Counts of the Lesser Included against Mr. _____ Those Lesser Included Counts were:

- (1) Attempted Sexual Assault;
- (2) Attempted Sexual Abuse; or
- (3) Misdemeanor Assault.

The jury misunderstood the Judge's instructions — as he had anticipated they might (See Exhibit "A") — to limit any "Guilty" verdict to only one of the 3 Counts of the Lesser Included. As a result of their misunderstanding, the jury erroneously rendered two verdicts of "Guilty" instead of just one verdict. The jury found Mr. _____ guilty of (a) Attempted Sexual Abuse, and (b) Misdemeanor Assault.

Judge _____ then corrected the jury's error by nullifying one of their verdicts (See Exhibit "C2" and Exhibit "B").

The inherent problem here, however, is that Judge not the jury, made the selection as to which verdict to nullify, and therefore, by default, which verdict the Defendant would be found guilty of.

The Judge should not have made that selection, or used "verdict nullification" as the method by which to ultimately arrive at "one verdict." The Judge should have returned the jury to deliberations and instructed the jurors to select one verdict between the choices of: (a) Attempted Sexual Abuse, or (b) Misdemeanor Assault. He did not do that. Instead, he took it upon himself to make that decision, thus depriving the jury of its legal authority and responsibility to do so as per *Blakely v. Washington*.

By selecting to "nullify" the verdict against the Lesser Count of Misdemeanor Assault (instead of Attempted Sexual Abuse), Judge unlawfully condemned Mr. to the more serious of the two Counts, when perhaps, if the jury had been allowed to decide, the jurors may have selected the least serious of the Counts to which to affix guilt.

In fact, once the jury foreman, signed the verdict form for Misdemeanor Assault (Exhibit "B"), it became binding by law because it is, as Judge said, "the ultimate form" (See Exhibit "A") for the Lesser Included Offense.

This Complaint, ultimately, alleges that Judge acted illegally and with judicial activism when he made the decision

to select the Count of "Attempted Sexual Abuse" as the default verdict over "Misdemeanor Assault," instead of allowing the jury to make that selection, or an alternative.

B. On January 13, 2009, the Defendant filed a Rule 32 (ARCFR) Petition for Post Conviction Relief (based on new evidence) asking Judge to recognize and correct his, above described, illegal sentencing of the Defendant. To this date, Judge has not ruled, addressed, or even acknowledged the Defendant's Rule 32 Petition. This failure by Judge is a violation of Article 6 § 21 of the Arizona Constitution, which reads:

"Every matter submitted to a Judge of the superior court for his decision shall be decided within 60 days from the date of the submission thereof."

RESPECTFULLY Submitted this 19th day of August, 2009.

X