

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 21-163

Judge: Deborah Bernini

Complainant: Eric W. Kessler

ORDER

The Complainant alleged a superior court judge made an improper comment on a pending matter, prejudged a witness' credibility, failed to recuse after publicly praising the witness' character, and made disparaging comments about defense counsel.

Pima County Superior Court Judge Deborah Bernini authored a letter to the editor of the *Arizona Daily Star* in which she defended an attorney, Rick Unklesbay, from what she perceived as unfair attacks from the newly elected Pima County Attorney, Laura Conover. Mr. Unklesbay had previously worked as a prosecutor for the Pima County Attorney's Office. The letter vouched for the professionalism and integrity of Mr. Unklesbay. Judge Bernini signed the letter using her judicial title. The *Arizona Daily Star* published the letter on April 28, 2021, and the letter is easily found today using a simple internet search.

At the time Judge Bernini authored this letter, she was presiding over a criminal matter, *State v. Clements*, Pima County Superior Court Case No. CR20183978. This matter was being prosecuted by the Pima County Attorney's Office. While Mr. Unklesbay never was the assigned prosecutor in the *Clements* matter, he had previously testified as a witness at a hearing on October 13, 2020, which related to the voluntariness of Mr. Clements' statements to law enforcement. Mr. Clements' attorney alleges that Mr. Unklesbay would be a witness at Mr. Clements' trial. After the letter to the editor was published, the defense requested that Judge Bernini disqualify from hearing Mr. Clements' trial, however, Judge Bernini failed to do so, and upon information and belief, remains assigned to the case at present.

The Commission found that Judge Bernini's conduct as described above violated the following Code provisions:

- Rule 1.2 (Promoting Confidence in the Judiciary) states, "A judge shall act at all times in a manner that promotes public confidence in the independence,

integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”

- Rule 1.3 (Avoiding Abuse of the Prestige of Judicial Office): “A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”
- Rule 2.2 (Impartiality and Fairness): “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”
- Rule 2.3(A) (Bias, Prejudice, and Harassment): “A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”
- Rule 2.10(A) (Judicial Statements): “A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.”
- Rule 2.11(A) (Disqualification): A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned . . .”

At the time that Judge Bernini wrote the letter, she knew that Mr. Unklesbay was a witness in a criminal case that was currently pending before her. While Judge Bernini argues in her response that there was no issue regarding Mr. Unklesbay’s credibility with this testimony and that he may not be called as a witness at trial, Mr. Clements’ criminal cases are pending, and Judge Bernini publicly opined on Mr. Unklesbay professionalism and integrity, and acted as an advocate on Mr. Unklesbay’s behalf in an attack on his character. This gives a perception that Judge Bernini is biased in favor of this witness. Additionally, there is a perception that Judge Bernini might be biased against the Pima County Attorney’s Office because of Ms. Conover’s attacks on Mr. Unklesbay. Additionally, by acting as an advocate in defending a witness’s character and reputation, Judge Bernini has made a public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter that is pending. Finally, Judge Bernini’s actions in authoring the letter and advocating for Mr. Unklesbay’s character cause her impartiality to reasonably be questioned. The Commission recognizes that another judge did not find grounds to grant a change of judge for cause pursuant to Rule 10.1, Ariz.R.Crim.Pro., however, those findings are not dispositive as to the disqualification requirements of the Code.

The Commission did not find clear and convincing evidence to support the remainder of the allegations of the complaint.

Accordingly, Judge Deborah Bernini is hereby publicly reprimanded for the conduct described above and pursuant to Commission Rule 17(a). The record in this case, consisting of the complaint, the judicial officer's response, and this order shall be made public as required by Commission Rule 9(a).

Commission members Christopher P. Staring and Barbara Brown did not participate in the consideration of this matter.

Dated: March 21, 2022

FOR THE COMMISSION

/s/ Louis Frank Dominguez

Hon. Louis Frank Dominguez

Commission Chair

Copies of this order were distributed to all appropriate persons on March 21, 2022.

CONFIDENTIAL

Arizona Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, Arizona 85007

FOR OFFICE USE ONLY

2021-163

COMPLAINT AGAINST A JUDGE

Name: Eric W. Kessler, Esq. **Judge's Name:** Deborah Bernini

Instructions: Use this form or plain paper of the same size to file a complaint. Describe in your own words what you believe the judge did that constitutes judicial misconduct. Be specific and list all of the names, dates, times, and places that will help the commission understand your concerns. Additional pages may be attached along with copies (not originals) of relevant court documents. Please complete one side of the paper only, and keep a copy of the complaint for your records.

1. Judge Bernini authored a letter to the editor that was published in the Arizona Daily Star on April 28, 2021 concerning a material witness in the pending murder trial of Christopher Clements, which is assigned to Judge Bernini. The letter was signed by Judge Bernini as an "Arizona Superior Court Judge" and heaped praise on a former prosecutor that is a material witness in the Clements case. Having expressed her bias in favor of this witness and stated that the witness' honesty, credibility and integrity are beyond reproach, Judge Bernini should have recused herself. (Ethics Rule 2.11) In fact, since she has held these beliefs for a long time, Judge Bernini should not have presided over a critical pretrial evidentiary hearing at which this witness testified. This witness is expected to testify at trial.

2. Judge Bernini made false and misleading statements on the record and to reporters covering the proceedings in her trial attributing dilatory conduct to the defense team. Judge Bernini knew that her statements were false. The defense team was help up to ridicule and humiliation by these untrue statements.

Please see the details of each of the above allegations in the accompanying Motion to Remove Judge for Cause, which was filed 05/05/2021 with the Pima County Superior Court Presiding Judge.

CONFIDENTIAL

Arizona Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, Arizona 85007

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2021-163

COMPLAINT AGAINST A JUDGE

Name: Eric W. Kessler, Esq.

Judge's Name: Deborah Bernini

Instructions: Use this form or plain paper of the same size to file a complaint. Describe in your own words what you believe the judge did that constitutes judicial misconduct. Be specific and list all of the names, dates, times, and places that will help the commission understand your concerns. Additional pages may be attached along with copies (not originals) of relevant court documents. Please complete one side of the paper only, and keep a copy of the complaint for your records.

1 **KESSLER LAW GROUP**
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9 (520) 459-1340
Joseph.DiRoberto@icloud.com

10 *Attorneys for Defendant Christopher Clements*

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
12
13 **IN AND FOR THE COUNTY OF PIMA**

14 STATE OF ARIZONA,) Case No. CR20183978-001
15)
16 Plaintiff,)
17 vs.) **MOTION FOR CHANGE**
18) **OF JUDGE FOR CAUSE**
19 CHRISTOPHER M. CLEMENTS,)
20)
21 Defendant.) (Hon. Judge Bernini, Div. 12)
22)

23 Defendant Mr. Clements, through counsel, and pursuant to Rule 10.1, A.R.Cr.P.,
24 moves the Court for its Order removing the Judge assigned to this case, the Hon. Deborah
25 Bernini, for cause.

26 Rule 10.1 permits removing a Judge for cause if it is shown that the assigned Judge's
"interest or prejudice would prevent a fair and impartial hearing or trial."

1 **Factual Background:**

2 **1. Violation of the Arizona Code of Judicial Conduct**

3 On October 13, 2020, the Court conducted an evidentiary hearing on the State's
4 Voluntariness Motion regarding numerous statements made in 2017 by Mr. Clements to
5 various law enforcement personnel, including FBI agents. Deputy County Attorney, Rick
6 Unklesbay, was a critical witness at that hearing, as his testimony went directly to whether
7 law enforcement had induced Mr. Clements into making statements about his knowledge
8 regarding Victim I.C. through coercion and false promises. Mr. Unklesbay was working
9 for the Pima County Prosecutor's Office when these negotiations took place between Mr.
10 Clements and law enforcement leading to certain agreements and concessions that the
11 defense contends unlawfully and unconstitutionally induced Mr. Clements to make
12 statements about Victim I.C. Mr. Unklesbay led those negotiations on behalf of the
13 prosecution.
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17 The Court took the matter under advisement, after which the Court ruled in the
18 State's favor. In so ruling, the Court accepted Mr. Unklesbay's testimony as credible,
19 despite documented, objective evidence, at least in defense counsels' opinions, that Mr.
20 Unklesbay was less than candid with his testimony.
21

22 At trial, Mr. Unklesbay will once again be called to testify before the jury on key
23 issues surrounding Mr. Clements' decision to divulge information to the FBI and TPD,
24 which ultimately was used against Mr. Clements in Grand Jury proceedings to secure an
25 indictment for the kidnapping and murder of Victim I.C. (Counts 1-3).
26

1 In an unrelated controversy involving Mr. Unklesbay and the County Attorney
2 Elect, Laura Conover, Judge Bernini took issue with political matters within the Pima
3 County Attorney's Office. In an astonishing act of poor judgment by Judge Bernini, she
4 wrote a "letter to the editor" to the Arizona Daily Star, which published the letter on April
5 28, 2021. A copy of that publication is attached hereto as Exhibit "A."

7 Judge Bernini wrote the following:

8 Enough. The unfounded and inaccurate character attacks on
9 retired Deputy County Attorney Rick Unklesbay need to stop.
10 I have been an attorney since 1981 and a Superior Court Judge
11 for 27 years.

12 In all that time, I have found Unklesbay to be one of the most
13 honest, ethical, talented and compassionate attorneys to try a
14 case in Pima County Superior Court.

15 My colleagues, current and retired, would all agree, as would
16 the victims, victim's families, court personnel and defense
17 lawyers who have shared a courtroom with him.

18 He has been a beacon of professionalism and integrity
19 throughout his long career and never wavered in the goal of
20 seeking justice. In my opinion, he has no peer.

21 The newly elected Pima County Attorney would have served
22 her office and this community well had she found a way to keep
23 Unklesbay on her staff instead of the odd and inexplicable
24 decision to disparage him at every turn.

25 As I said, enough, Ms. Conover, enough.

26 Signed: Deborah Bernini, Judge, Arizona Superior Court.

1 **Legal Argument:**

2 Rule 10.1(a) entitles a party to change the Judge if that party shows the Judge's
3 prejudice would prevent a fair and impartial hearing or trial.

4 Bias and prejudice typically mean a hostile feeling or spirit of ill-will, or undue
5 friendship or favoritism toward one of the parties. *State v. Myers*, 117 Ariz. 79, 86, 570
6 P.2d 1252, 1259 (1977). Judicial bias or prejudice ordinarily must arise from an
7 extrajudicial source and not from what the judge has done in her participation in the case.
8
9 *State v. Emanuel*, 159 Ariz. 464, 469, 768 P.2d 196, 201 (App.1989).

10
11 Mr. Unklesbay played a significant role in developing the evidence used in the case
12 against Mr. Clements as to Counts 1-3 of the Indictment. Mr. Unklesbay's testimony at a
13 pretrial hearing was crucial. He will also testify before the jury when this case goes to trial.

14
15 Judge Bernini has inexplicably announced to the world that she, and all her
16 colleagues (i.e., other Pima County Superior Court Judges) hold Mr. Unklesbay in such
17 high regard as to find him beyond reproach. In fact, Mr. Unklesbay apparently "has no
18 peer" according to Judge Bernini. This is the same Judge who weighed Mr. Unklesbay's
19 testimony at the voluntariness hearing against the evidence provided by the defense. This
20 is also the same Judge who will preside over Mr. Unklesbay's testimony before the jury,
21 many of whom may have read Judge Bernini's editorial and understood it for what it is;
22 namely, that in Judge Bernini's Court, Mr. Unklesbay's testimony is golden and not subject
23 to question.
24

25
26 Without question, Judge Bernini's comments show she made up her mind as to the

1 truth and accuracy of any testimony given by Mr. Unklesbay before the October 13, 2020
2 hearing began and evidence was presented by Mr. Unklesbay, or by the defense to
3 contradict his testimony and impeach his testimony, and that any such evidence presented
4 by the defense was and will be summarily disregarded by Judge Bernini as “unfounded and
5 inaccurate character attacks.” It further shows how she will view any testimony by Mr.
6 Unklesbay going forward in this case regardless of what evidence is presented by the
7 defense, as that evidence too will be summarily disregarded as “unfounded and inaccurate
8 attacks” on a man who “has no peers.” Perhaps even worse, she has effectively instructed
9 potential jurors at trial that they too should disregard and reject any attempts to contradict
10 or impeach Mr. Unklesbay, and that his testimony should be accepted as true and accurate
11 without a second thought regardless of any evidence presented by the defense.
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15 Cheerleading for Mr. Unklesbay’s benefit was not just directed at a material witness.
16 Until very recently, My Unklesbay has been either Chief Deputy or its equivalent in the
17 Pima County Attorney’s Office for many years, including the time he worked on Mr.
18 Clements’ case. It is not unreasonable to expect Judge Bernini to harbor similar biases in
19 favor of other prosecutors or the prosecutor’s office in general.
20

21 What makes Judge Bernini’s letter even more problematic is that she attributes these
22 same prejudices to “my colleagues, current and retired, [who] would all agree...” That
23 sweeping statement suggests Mr. Clements cannot get a fair trial in Pima County because
24 the entire bench favors Mr. Unklesbay.
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26 The preamble to Supreme Court Rule 81 (Judicial Ethics) includes the following:

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An independent, fair, and impartial judiciary is indispensable to our system of justice....

Judges should maintain the dignity of judicial office at all times, and avoid both the impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

Judge Bernini appears to have violated several judicial ethics rules. For example, Rule 2.10(A) states: "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court...."

Likewise, Rule 2.11(A) places a duty on a Judge to disqualify herself under the circumstances that Judge Bernini has created in this case. Rule 2.11(A) provides: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: ... (5) The judge, while a judge or judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy."

By violating those two ethical standards, Judge Bernini has also violated judicial ethical rules 1.2, 2.2, 2.3, 2.4(c) and 2.11(A)(2)(d) (regarding material witnesses).

Since Judge Bernini has not disqualified herself as required under Rule 2.11, she should be removed for cause.

1 **2. Prejudicial Disparagement of Defense Counsel in Public Proceedings**

2 Judge Bernini conducted a status conference on February 17, 2021. A copy of the
3 minute order for that hearing is attached as Exhibit “B.” Prior to that hearing, trial had
4 been set for July 27, 2021, although the Court had granted Mr. Clements’ Motion to Sever
5 Counts, which meant that the indictment would be tried as four separate trials.
6

7 During the February 17 hearing, it was discussed and agreed between the parties
8 and Judge Bernini that, due primarily to COVID-19 concerns, trial preparations were
9 delayed, and the July 27 trial date was unrealistic. Judge Bernini also inquired of the State
10 which of the four trials would go first, and the prosecutors indicated that the State had not
11 yet made that decision. The Court vacated the July 27 trial at the February 17 status hearing
12 and did not set a new trial date. Instead, Judge Bernini set a status conference for May 3
13 to discuss a realistic trial date, and for the State to determine which trial would proceed
14 first.
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17 Pretrial motions were also discussed at that hearing, and the Court ordered pretrial
18 motions be filed by March 22. No further orders were entered regarding responses and
19 replies to those motions. Hearing dates for those motions were set for April 14-16.
20

21 Attached as Exhibit “C” is a table of Mr. Clements’ Pretrial Motions by description,
22 as well as the filing date for each motion. In total, Mr. Clements filed twelve (12) pretrial
23 motions, all on or before March 22.¹
24

25 _____
26 ¹ Defendant filed a First Amended Motion re Photographs on March 24 merely to correct
a typographical error. However, the original of that motion was timely filed on March 22.

1 The State also timely filed its pretrial motions, and it was in those motions that the
2 State first gave notice that it intended to proceed first on Counts 4 and 5 of the Indictment.

3 When the parties convened on April 14, 2021 for a hearing that was apparently live-
4 streamed to the public, Judge Bernini began the hearing with an unwarranted and false
5 commentary about alleged dilatory conduct by the defense, identifying Mr. Kessler by
6 name, including filing motions late, that allegedly caused the July 27 trial to be delayed.

7
8 Specifically, Judge Bernini stated:

9
10 When I set the trial date, and Mr. Kessler, I'm looking at you
11 and your co-counsel, when the trial date was set in this matter
12 it was not aspirational. It was done with the idea that it really
13 was a trial date and I expected things to be timely filed.

14 The covid situation has put all of us in situations that have
15 made some of the normal practice and the way we would
16 normally conduct ourselves in this kind of case or any case
17 difficult but the late filings won't be tolerated after this.

18 If we're going to set trial dates when we get to that point either
19 today or tomorrow at the end of the hearings those are real trial
20 dates. And I thought that our summer trial date was real and the
21 late filings and the things that are being provided to me at the
22 last minute I'm going to end up from this point forward simply
23 striking of my own volition.

24 If you can't get a motion or an exhibit to me in time I don't mind
25 putting in long hours but I'm not going to do it because counsel
26 are filing things late and the late filings have been really
annoying. So it's not going to happen again after today.

(Exhibit "D," Transcript of April 14, 2021, 3:24 - 4:20).

 Not surprisingly, the defense was blindsided by this public dressing down by Judge
Bernini. Judge Bernini's disparaging comments amounted to an accusation that the defense

1 had not filed its pretrial motions on time, and that the trial would have to be continued
2 because of defense counsels' failure to timely file motions. Not only were these comments
3 said in the presence of everyone in the courtroom, which included TV and print reporters,
4 but Judge Bernini announced that these proceedings were being live-streamed.²
5

6 These comments gave the impression that Judge Bernini was biased against the
7 defense; but the Judge's accusations were also false and misleading to the public. The trial
8 date had been vacated in the February 17, 2021 status conference, with no new trial date
9 set, due in part to the State not having decided which of the four cases to try first, and the
10 Judge scheduled a hearing for May 3, 2021 to discuss setting a realistic trial date. Moving
11 the trial date from July 27 had nothing to do with any alleged late pretrial motions.
12 Moreover, all of Mr. Clements' pretrial motions were filed on or before the date set by the
13 Court!³
14
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16 By Judge Bernini publicly scolding the defense for causing trial to be delayed –
17 which was in fact not delayed by the defense but instead by the Court's orders two months
18 prior – and admonishing the defense that it had filed pretrial motions late, which despite
19 being false, the Court found to be “really annoying” (Transcript, 4:18-19), the Court gave
20 a very clear impression that she disfavors (i.e. is prejudiced against) the defense and/or
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22

23 ² The defense was unaware of the live-streaming, having been given no notice or
24 opportunity to be heard. In a previous ruling, Judge Bernini prohibited live-streaming on
25 Defendant's objection.

26 ³ The Court did not set a date for responses or replies, so both the State and the defense
filed responses and replies within the time frames provided in the Rules of Criminal
Procedure.

1 both defense counsel. More troubling is that Judge Bernini's accusations against the
2 defense were demonstrably false, and she knew they were false when she made them. This
3 conduct clearly violates many of the same judicial ethics rules cited above, plus others.

4
5 Mr. Clements' attorneys did not previously seek to remove Judge Bernini for cause
6 for her comments preceding the April 14 hearing, as Judge Bernini routinely makes unkind
7 and disrespectful comments towards lead counsel Mr. Kessler on an ongoing basis. (*See*
8 Affidavits of Joseph DiRoberto and Eric W. Kessler). The basis for the jabs at Mr. Kessler
9 appear to be a distaste Judge Bernini has for "anything north of the Gila River" (i.e.,
10 Maricopa County) as Judge Bernini has been heard to say during these proceedings. Mr.
11 Kessler practices primarily in Maricopa County. Mr. Kessler has not observed Judge
12 Bernini ever treat a member of the prosecution team, or any of their witnesses, other than
13 with the utmost kindness and respect.
14
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16 It was when Judge Bernini thought it was a good idea to write a letter to the editor
17 singing the praises of prosecutor and material witness Rick Unklesbay that the defense
18 could not sit idly by and allow this charade to continue.

19
20 Mr. Clements was facing the death penalty for two separate murders in the
21 indictment. The State recently withdrew its intent to seek the death penalty, but Mr.
22 Clements still faces life imprisonment. He is entitled to a fair trial, and that begins with an
23 impartial Judge. Judge Bernini has shown herself to be (1) partial in favor of one of the
24 prosecutors, who is also a material witness, and (2) prejudiced against the defense by
25 holding defense counsel up to public ridicule and scorn based upon a false narrative. Judge
26

1 Bernini shirked her responsibility under Rule 2.11(A)(5) by not recusing herself when she
2 commented publicly about Mr. Unklesbay. Judge Bernini needs to be removed from this
3 case by the Presiding Judge. Further, it would be prudent to ensure that the new Judge not
4 share the feelings expressed by Judge Bernini in her editorial – since Judge Bernini was
5 not content to just give her own views; she instead attributed those same views to all of her
6 other colleagues.
7

8 RESPECTFULLY SUBMITTED this May 5, 2021.

9
10 _____/EWK/
11 Eric W. Kessler, Esq.
12 Attorney for Christopher Clements

13 Copy of the foregoing emailed
14 this May 5, 2021 to:

15 The Hon. Kyle A. Bryson
16 Presiding Superior Court Judge

17 Hon. Judge Bernini, Div. 12
18 Pima County Superior Court

19 Tracy Miller, Esq., Deputy County Attorney
20 Chris Ward, Esq., Deputy County Attorney
21 Pima County Attorney's Office

22 Joseph DiRoberto, Esq.
23 Co-Counsel for Defendant Christopher Clements

24 Defendant Christopher Clements
25 Fourth Avenue Jail
26 Maricopa County

By: Ana Lena Ramirez.

Exhibit "A"

112 DAILY STAR 04-26-2021

Enough is enough

Enough. The unprovoked and inaccurate character attacks on retired Deputy County Attorney Rick Unkeby need to stop. I have been an attorney since 1981 and a Superior Court judge for 27 years.

In all that time, I have found Unkeby to be one of the most honest, ethical, talented and accomplished attorneys I ever knew in Pima County Superior Court.

My colleagues, current and retired, would all agree, as would the victims, victim's families, court personnel and defense lawyers who have shared a courtroom with him.

He has been a beacon of professionalism and integrity throughout his long career and never wavered in the face of seeking justice. In my opinion, he has no peer.

The newly elected Pima County Attorney would have served her office and the community well had she found a way to treat Unkeby on her staff instead of the odd and inexplicable decision to disparage him at every turn.

As I said, enough. Mr. Donow, enough.

Deborah Barnard, Judge,
Arizona Superior Court

Continued

Exhibit "B"

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. DEBORAH BERNINI

CASE NO. CR20183978-001

COURT REPORTER: Maria Haro
Courtroom - 575

DATE: February 17, 2021

STATE OF ARIZONA

Teresa (Tracy) A Miller, Esq. and
Christopher A. Ward, Esq. (appearing
telephonically)
Counsel for State

VS.

CHRISTOPHER CLEMENTS (-001)
Defendant

Joseph P. DiRoberto, Esq. and
Eric W. Kessler, Esq. (appearing telephonically)
Counsel for Defendant

JOHN V. DOE
Other

Daniel H. Cooper, Esq., also appearing for
Gary F. Spector, Esq.
Counsel for Other

MINUTE ENTRY

DEFENDANT'S MOTION TO CONTINUE HEARING RE MOTIONS

Defendant not present, in custody.

The Court and counsel confer regarding the issues in this matter, including but not limited to, the necessity of resetting the hearings currently scheduled regarding pending motions and the deadlines for submission of said motions.

There being no objections,

IT IS ORDERED that the hearings re pending Motions currently set for March 18-22, 2021 are reset to April 14-16, 2021, at 10:30 a.m. each day, in Division 12. Estimated time for each day's hearing is five (5) hours.

Upon request of the State and there being no objection,

IT IS ORDERED that all pending motions shall be filed by no later than March 22, 2021.

If the Defendant wishes his presence to be waived for the purposes of the Motions hearings, Mr. Kessler is directed to file a signed affidavit within six (6) business days of today's date.

B. Miller
Deputy Clerk

MINUTE ENTRY

Page 2

Date: February 17, 2021

Case No.: CR20183978-001

IT IS ORDERED that the trial currently scheduled to begin July 27, 2021, in Division 12, is VACATED.

IT IS ORDERED that a Status Conference re Trial Date(s) is set on May 3, 2021, at 10:30 a.m., in Division 12. A conference bridge will be set up for any party that wishes to appear at this hearing telephonically.

If the Defendant is not present for the Status Conference regarding the new trial dates, he shall file a signed acknowledgment of trial date and Rule 8 waiver within ten (10) business days following that hearing.

cc: Hon. Deborah Bernini
Christopher A. Ward, Esq.
Daniel H. Cooper, Esq.
Eric W. Kessler, Esq.
Gary F. Spector, Esq.
Joseph P. DiRoberto, Esq.
Teresa (Tracy) A Miller, Esq.
Pretrial Services

B. Miller
Deputy Clerk

Exhibit "C"

Clements Motion	
Name of Motion:	Date of Filing:
First Amended Defendant's Motion in Limine: Re Photographs	3/24/2021
Motion for Change of Venue Due to Excessive Prejudicial Pre-Trial Publicity (Presumed Prejudice)	3/22/2021
Motion to Preclude State from Impeaching Defendant with Remote Prior Felony Convictions	3/22/2021
Motion to Suppress Evidence Obtained by the State Pursuant to "Live Tracking" the Defendant's Cell Phone Without a Search	3/22/2021
Motion to Preclude Death as Possible Punishment on Issues Previously Resolved	3/22/2021
Defendant's Motion in Limine: Re Photographs	3/22/2021
Defendant's Motion in Limine: Re "Nexus" or Causation	3/19/2021
Motion to Dismiss Death by Lethal Injection	3/19/2021
Motion to Strike Death Penalty; Cruel and Unusual Punishment; Violation of Customary International Law and Jus Cogens	3/19/2021
Motion to Prohibit Instructing Jury Pool or Petit Jurors that Petit Jurors are Required to Weigh Mitigating and Aggravating Circumstances	3/19/2021
Motion to Find Arizona's Death Penalty Statute Unconstitutional, as Violating Furman v. Georgia	3/17/2021
Defendant's Motion in Limine to Preclude the State from Asking Questions or Making Argument Related to Any Aggravator Not Alleged or Part of this Trial	3/16/2021
Defendant's Motion to Declare Arizona's Death Penalty Scheme Unconstitutional	3/16/2021

Exhibit “D”

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,)	
)	
Plaintiff,)	Pima County
)	No. CR20183978-001
VS.)	
)	
CHRISTOPHER MATTHEW CLEMENTS (001),)	
)	
Defendant.)	
)	
-----)	

BEFORE THE HONORABLE DEBORAH BERNINI
Judge of the Superior Court
Division 12

PARTIAL TRANSCRIPT OF PROCEEDINGS
(Motion Hearing)
APRIL 14, 2021
TUCSON, ARIZONA

REPORTED BY: Martin W. Bouley, RDR
Official Certified Reporter # 50321

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APPEARANCES:

OFFICE OF THE PIMA COUNTY ATTORNEY

By Mr. Christopher A. Ward
and Ms. Teresa (Tracy) Miller
Representing the Plaintiff

KESSLER LAW GROUP

By Mr. Eric W. Kessler
and

LAW OFFICE OF JOSEPH P. DIROBERTO

By Mr. Joseph P. DiRoberto
Representing the Defendant

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(Partial transcript of proceedings.)

(10:30 a.m.)

THE COURT: This is the matter of the State of Arizona versus Christopher Clements. It is our cause number 20183978.

Parties announce, please.

MS. MILLER: Good morning, Your Honor. Tracy Miller and Chris Ward appearing on behalf of the state.

And we do have several victims' family members present for both of the victims in this case as well as counsel for the Celis family is also present.

THE COURT: Okay. Thank you.

MR. KESSLER: Good morning, Judge. Eric Kessler and Joe DiRoberto for Mr. Clements. He is present, in custody.

THE COURT: All right. Good morning again. Good morning, Mr. Clements.

THE DEFENDANT: Good morning.

THE COURT: So a comment and then I'm going to tell you what I think we're going forward on and please correct me if things have changed since I last had contact with counsel through email but I only want to say this once.

When I set the trial date, and Mr. Kessler, I'm looking at you and your co-counsel, when the trial date

1 was set in this matter it was not aspirational. It was
2 done with the idea that it really was a trial date and I
3 expected things to be timely filed.

4 The covid situation has put all of us in
5 situations that have made some of the normal practice and
6 the way we would normally conduct ourselves in this kind
7 of case or any case difficult but the late filings won't
8 be tolerated after this.

9 If we're going to set trial dates when we get to
10 that point either today or tomorrow at the end of the
11 hearings those are real trial dates. And I thought that
12 our summer trial date was real and the late filings and
13 the things that are being provided to me at the last
14 minute I'm going to end up from this point forward simply
15 striking of my own volition.

16 If you can't get a motion or an exhibit to me in
17 time I don't mind putting in long hours but I'm not going
18 to do it because counsel are filing things late and the
19 late filings have been really annoying. So it's not
20 going to happen again after today.

21 In terms of what we're going forward on my
22 understanding is that we're going to be doing a motion to
23 suppress and that's the one we're going to be taking
24 testimony; is that correct?

25 MR. WARD: Yes, Your Honor.

1 THE COURT: All right. So that's the one I'm
2 going to want to start with because I want to get the
3 witnesses on and off in case they have other things they
4 want to do.

5 Then there's the motion regarding impeaching the
6 defendant with priors. There's the motion for change of
7 venue and there's a motion regarding the use of
8 photographs by the state at trial.

9 The matters that I understand are going to be
10 heard at another date are all motions to determine
11 admissibility of other act evidence, all of it. We were
12 going to try to do some of it this week but that's all
13 being moved by agreement of the parties.

14 Other motions in limine to preclude the state
15 from asking certain questions and a number of other
16 matters that were related to the death penalty, I think
17 there were eight or nine other motions that my judicial
18 assistant provided everybody with a list of what was not
19 going forward today because the death notice has been
20 taken off the table by the state.

21 So the ones I think we're going forward and the
22 ones that need to be reset are simply the motion
23 regarding other act evidence and there was -- oh, and the
24 third-party culpability.

25 So those are going to get reset but we all have

1 an understanding of what we're going to do today; is that
2 correct?

3 MR. WARD: Yes, Your Honor.

4 MS. MILLER: Yes, Judge.

5 THE COURT: So I've read everything. I reviewed
6 everything. But there was a disk that was delivered late
7 yesterday afternoon. I did not have a chance to review
8 that. But if that's something that's going to be
9 referred to by the parties and I need to review it at
10 some point for purposes of making rulings in this matter
11 obviously I will do that.

12 And in terms of exhibits that were sent over to
13 be marked are the exhibit numbers the same as what I
14 looked at when I was preparing for today's hearing
15 because there was lots of them?

16 MR. WARD: Actually, Judge, in terms of -- in
17 terms of the motion to suppress witnesses, which is
18 Detective Flores and Detective Cheek, I only have three
19 exhibits that I've just handed in today so I'm not sure
20 how they've been marked though.

21 THE COURT: Okay. All right. I just -- I'll
22 keep track. Most of them I think were related to the 404
23 evidence.

24 MS. MILLER: That's what I was going to say,
25 Judge. Most of the exhibits that we've -- that the state

1 provided were 404 nature exhibits so that's going to be
2 the extent. We did do a notice of filing that
3 encapsulates what it is that we've provided to the Court
4 with respect to those exhibits.

5 THE COURT: Okay. All right. So does the state
6 need to put anything on the record before we go forward
7 on the motion to suppress?

8 MR. WARD: No, Your Honor.

9 THE COURT: Does the defense need to put
10 anything on the record before we go forward on the motion
11 to suppress?

12 MR. KESSLER: The only issue, Judge, is the
13 recording that was delivered to your office yesterday. I
14 have the flash drive of that recording with me to be
15 marked today.

16 THE COURT: Okay.

17 MR. KESSLER: That's all I have.

18 THE COURT: Okay.

19 MR. KESSLER: But as far as our exhibits to our
20 various motions that will be heard today those have all
21 been provided to you and I think the exhibit numbers
22 correspond with what you have.

23 THE COURT: I'll keep good notes but it would be
24 helpful if that's how it turns out but I'm not counting
25 on it.

1 All right. Does the state need to make any
2 opening remarks before the first witness is called?

3 MR. WARD: Ah, I don't believe so, Judge.

4 THE COURT: All right. Do you need make any
5 opening remarks, Mr. Kessler?

6 MR. KESSLER: No, Your Honor.

7 THE COURT: All right. Call your first
8 witness.

9 (End of requested hearing excerpt.)

10 (10:36 a.m.)

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13 *Attorneys for Defendant Christopher Clements*

14 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

15 **IN AND FOR THE COUNTY OF PIMA**

16 STATE OF ARIZONA,)

17 Plaintiff,)

18 vs.)

19 CHRISTOPHER M. CLEMENTS,)

20 Defendant.)

Case No. CR20183978-001

**AFFIDAVIT OF ERIC W. KESSLER,
ESQ. IN SUPPORT OF MOTION
TO REMOVE JUDGE FOR CAUSE**

(Hon. Judge Bernini, Div. 12)

21 ERIC W. KESSLER, upon his oath, deposes and says:

- 22 1. That he is an attorney licensed to practice law in the state of Arizona and has
- 23 continually practiced law in Arizona for 38 years commencing 1983;
- 24 2. That his practice has focused primarily upon Capital defense litigation for at
- 25 least the last 25 years;
- 26 3. That he has represented in the capacity of lead counsel, a minimum of 25

- 1 individuals charged with Capital murder, since 1995;
- 2 4. That he has tried to completion approximately seven Capital murder cases as
- 3 lead counsel;
- 4
- 5 5. That he was assigned as lead counsel in this matter in October 2018, along with
- 6 second chair Joseph DiRoberto of Tucson, Arizona;
- 7
- 8 6. That he has read the foregoing Motion to Remove Judge for Cause, is familiar
- 9 with the contents thereof, and believes the same to be true and accurate in all
- 10 respects;
- 11
- 12 7. That he has read the Affidavit of Joseph DiRoberto, is familiar with the
- 13 contents thereof, and believes the contents of that affidavit to be true and
- 14 correct;
- 15
- 16 8. That since his initial appearance in this matter in late 2018 he has witnessed
- 17 and been the brunt of disrespectful, threatening, and critical remarks by the
- 18 Honorable Deborah Bernini, often phrased by the Judge in such a manner as to
- 19 be directed to legal proceedings in Maricopa County in general;
- 20
- 21 9. That on April 14, 2021 Judge Bernini made unfounded, false, and misleading
- 22 statements in open court and in the presence of print and television media,
- 23 designed to criticize, ridicule, and humiliate counsel as well as co-counsel
- 24 Joseph DiRoberto;
- 25
- 26 10. That in October 2020, Deputy County Attorney Rick Unklesbay testified as a
- material witness before Judge Bernini in this case, in connection with the

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State's Motion for Voluntariness Findings;

11. Mr. Unklesbay will also testify in the trial of this matter, whether called by the State or the Defense;

12. That on April 28, 2021 counsel became aware of a "letter to the editor" signed by Judge Bernini in which Judge Bernini praised Mr. Unklesbay profusely, indicating Mr. Unklesbay's integrity is beyond reproach and that Mr. Unklesbay "has no peer."

13. That had counsel been aware that Judge Bernini harbored such favorable biases in favor of Mr. Unklesbay when Mr. Unklesbay testified at the voluntariness hearing in October 2020, counsel would have requested that Judge Bernini recuse herself to avoid having a Judge consider Mr. Unklesbay's testimony in anything other than a fair and impartial manner;

14. That based on the contents of the letter to the editor, counsel believes that Mr. Clements cannot receive a fair trial given Judge Bernini's published praise of Mr. Unklesbay;

15. That during the course of these proceedings dating back to October 2018, counsel has not heard nor witnessed Judge Bernini treat any member of the prosecution team with anything resembling the negative prejudice she has shown defense counsel.

16. Further, Affiant sayeth not.

Dated this date: May 5th, 2021.

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Eric W. Kessler, Capital Attorney

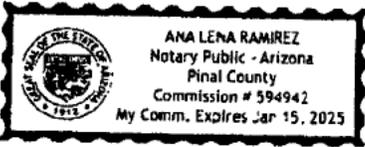
For Defendant Christopher Clements

SUBSCRIBED AND SWORN TO before me this 5th day of May, 2021, by Eric
W. Kessler.

Notary Public

My Commission Expires:

January 15, 2025



AFFIDAVIT OF JOSEPH P. DiROBERTO

STATE OF ARIZONA)
) ss.
County of Maricopa)

I, **Joseph P. DiRoberto**, do make the following statements under penalty of perjury:

1. I am an attorney duly licensed to practice law in the State of Arizona.
2. I have been a criminal defense lawyer in Arizona for the past 35 years.
3. I am certified as a specialist in criminal law by the Arizona State Bar's Board of Legal Specialization. I was initially certified in 1991 and have recertified every 5 years since then.
4. On October 18, 2018, I was assigned by the Pima County Office of Court Appointed Counsel (OCAC) to represent Christopher Clements as co-counsel in the capital murder case of **State of Arizona v. Christopher Matthew Clements, Case No. CR2018003978-001** in Pima County Superior Court. **Eric W. Kessler, Esq.**, from Scottsdale, Arizona was assigned to be lead counsel.
5. Mr. Clements' case was assigned to the Honorable Deborah Bernini, Judge of Pima County Superior Court, Division 12.
6. I recall that at our first appearance in the fall of 2018 at a status conference, Judge Bernini gave a stern warning directly to Mr. Kessler to

the effect that the courts in Pima County are different than in Maricopa County because “We don’t take 5 years to try a death penalty case.” That statement was not in response to anything Mr. Kessler said or did. Mr. Kessler respectfully listened to the Judge but said nothing in response in order not to provoke further animosity from Judge Bernini.

7. Judge Bernini also warned Mr. Kessler that she would not tolerate the filing of boilerplate/frivolous pleadings and motions in this death penalty case. (I thought that this was odd because due to changes in the law, particularly in death penalty litigation, issues raised in pre-trial motions that appear frivolous can later become critical on appeal and in post-conviction relief proceedings if not presented and ruled upon by the trial court, ex. *Ring v. Arizona*, 536 U.S. 584 (2002)). Mr. Kessler had yet to file any substantive motions; the Judge was not referring to any particular motion; and Mr. Kessler simply listened to the Judge’s admonitions and said nothing in response, again trying to avoid any confrontation with the Judge.
8. I also recall at one of the initial hearings in this case, Judge Bernini called Mr. Kessler and me to the bench prior to the start of the hearing. We both approached the bench together. Mr. Kessler had to walk behind the court reporter who was seated several feet in front of the bench, in order to

reach the bench. At this point, Judge Bernini told Mr. Kessler in a threatening tone, "Don't you ever walk behind my court reporter again, ever!" I was stunned by the Judge's obvious hostility towards Mr. Kessler that was totally unprovoked. Mr. Kessler respectfully withdrew and found a different path to the bench. Mr. Kessler did not respond to the Judge's threat.

9. For the past two and a half years, it has appeared to me that Judge Bernini has been openly hostile to Mr. Kessler because he is not a local attorney and practices law in Maricopa County as lead counsel in capital cases.
10. The Court's treatment of Mr. Kessler concerned me, especially after he had agreed to travel from Scottsdale to represent Mr. Clements as lead counsel in this case because no death penalty qualified attorneys in Pima County were willing or able to take this case.
11. Before the hearing on April 14, 2021, the Court openly blamed Mr. Kessler for having to continue the trial because of "late filings of pleadings and exhibits." The Court did not have to continue the trial date(s) because of any action or inaction by Mr. Kessler, and it was inappropriate and unfair to humiliate Mr. Kessler and the defense in this manner.

12. At no time have I witnessed Judge Bernini treat any member of the Pima County Attorney's Office in the same manner as I have described the Judge's treatment of Mr. Kessler and the defense team in this Affidavit.

13. Further, Affiant sayeth not.

Dated this date: May 4, 2021

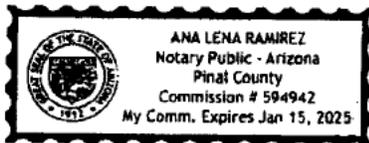
Joseph P. DiRoberto, Co-Counsel
For Defendant Christopher Clements

SUBSCRIBED AND SWORN TO before me this 4th day of May, 2021, by
Joseph DiRoberto.

Notary Public

My Commission Expires:

January 15, 2025



ARIZONA SUPERIOR COURT
Pima County
110 West Congress
Tucson, Arizona 85701

Resp (Bernini)
2021-163

NOV 08 2021

(520) 724-3113

Fax (520) 724-3141

Hon. Deborah Bernini
Division 12

November 5, 2021

Commission on Judicial Conduct
1501 West Washington Street, Suite 229
Phoenix, AZ 85007

Re: Case No. 21 – 163

Dear Judge Dominguez and Members of the Commission on Judicial Conduct:

Thank you for the opportunity to respond to Mr. Kessler's complaint. I am including a brief summary of the relevant history as I think it is important to understand what underlies the complaint.

Mr. Kessler was appointed on October 11, 2018, to represent Defendant Christopher Clements in a capital case involving the homicides of two young girls, State v. Christopher Clements, CR20183978-001. The indictment also included charges of possessing child pornography and burglary of a residence. The death notice was not filed until February 8, 2019, but it was understood that the Pima County Attorney intended to seek the death penalty. Although not on the Pima County list of attorneys qualified to handle capital litigation, Mr. Kessler was selected by the Pima County Office of Court Appointed Counsel after prior counsel determined that Mr. Clements' civil lawsuit against Pima County was a personal conflict and the Office of Court Appointed Counsel then decided that it would also be a conflict for any defense lawyer practicing in Pima County. Mr. Kessler was unknown to me and to the best of my knowledge had not previously appeared in Pima County Superior Court.

RELEVANT DATES AND FILINGS

There were multiple trial settings. The first trial date was set at a Pretrial Conference on October 14, 2019, and by agreement of the parties was delayed until February 23, 2021. I was concerned about the sixteen-month delay as I anticipated motions to continue no matter when the trial date was set, but admonished everyone that I considered it to be a firm trial date and was not inclined to grant additional continuances without good cause. At a status conference on October 13, 2020, a second trial date was set: July 27, 2021. Defense counsel moved to continue that trial date in a motion heard February 17, 2021, and that request was granted. The new date was then continued after I granted a Motion to Sever on December 17, 2020, that split the case into four separate trials. The new dates were January 11, 2022, for victim M.G. and

February 22, 2022, for victim I.C. The State was still seeking the death penalty as to both.

On October 7, 2019, the State filed a Motion to Admit Defendant's Statements as Voluntary pursuant to A.R.S. Section 13-3998. Because of requests for additional time to respond and in order to accommodate counsel's schedule, the hearing on this motion did not take place until October 12, 2020 and my ruling issued November 23, 2020.

Because of the severance ordered on December 17, 2020, the State was prompted to request a 404 hearing to determine the admissibility of other acts it wished to use at each of the now separate trials. The Motion to Determine Admissibility of Other Act Evidence pursuant to Rule 404(b) and (c) was filed on March 22, 2021. A hearing was originally set for April 14 and 15, 2021. Then it was moved to June 9 and 10, 2021. Those dates were vacated because of the filing of the Motion for Change of Judge for Cause. Once Judge Lee ruled, the matter was again set October 12, 13 and 14, 2021, and then reset once again to October 26, 27, and 28, 2021.

The death notice was withdrawn on April 7, 2021. Mr. Kessler then filed a motion to withdraw as counsel of record after he learned that he would no longer be compensated at the rate paid for capital representation. That motion was denied.

MOTION FOR CHANGE OF JUDGE FOR CAUSE / RULES 2.2 and 2.3

The Motion for Change of Judge for Cause caught me by surprise. Not only does the record reflect that all counsel were always treated with respect, but I actually thought I was being somewhat deferential to Mr. Kessler as I suspected he was either ill or having a personal issue that affected his court appearances for at least the first two years of the case. He was softspoken and seemed frail and took advantage of appearing telephonically at a number of hearings. The only hearing at which he spoke forcefully was on the Motion to Sever, which was ironic as I had planned to grant that request before it was even filed. It heartened me, however, that he seemed to have more energy and commented to staff that he did a nice job. On other occasions, however, he often appeared distracted and made repeated requests for additional time to respond to motions or to reset hearings and every single request was granted even though all hearings were set after multiple emails with my JAA who was instructed by me to accommodate his requested dates. I have attached a copy of Judge Lee's Under Advisement Ruling on the Notice of Change of Judge for Cause as he outlines the many delays in more detail and I do not wish to make that the focus of my response. (See, Exhibit 1, Under Advisement Ruling on Defendant's Motion for Change of Judge for Cause).

In my forty years as a lawyer and a judge I have handled all aspects of a capital case as a public defender, a private attorney, a judge on pre-Ring cases and a judge on post-Ring cases so I understand that delay is part of the arsenal of a defense lawyer in a death penalty case. No one wants to rush a client to his death. But something else seemed to be going on. I do not wish to be critical of Mr. Kessler. That is not the

purpose of my response. But he shared a list of all the motions he filed to support his assertion that he was always working diligently and any suggestion that he caused an unnecessary delay was an unwarranted personal assault. The record does not support this and I ask the committee to find otherwise.

I had reason for concern. In a death penalty case, everything gets litigated, but the three most important issues in the case were raised either late or not at all. I knew in the first few months on the case that a motion to sever the two homicides and the pornography counts had to be addressed. If granted, it would result in the indictment being split into four separate trials and would affect trial dates and rulings on 404 acts and other important issues. As the months wore on and the February 23, 2021, trial date approached with no motion being filed, I feared I would have to grant a severance of counts *sua sponte* in order to protect the Defendant. I had even consulted with several colleagues about the best way to do that without inserting a legal issue regarding counsel into the case. The motion was eventually filed but it was so close to the February 23, 2021, trial date that while my ruling issued December 17th, it still forced the February trial date to be vacated. The other two motions I anticipated but were never filed was a Motion to Suppress the Defendant's six lengthy statements to the FBI on voluntariness grounds that are the basis of the State's case in the homicide of IC, and a request for a Chronis hearing. The record reflects that a Chronis hearing was never requested or even discussed before the death notice was withdrawn on April 7, 2021, despite multiple trial settings. That gave me pause. I continued to worry about Mr. Kessler's stamina and ability to adequately defend his client.

The hearing at which he claims I "disparaged" him in front of his client took place on April 14, 2021. It was supposed to be the three-day hearing on State's intent to use 404(b) and (c) acts and it had been reset multiple times at counsel's request. Finding three days on everyone's calendar, including the two attorneys who represent the victims' families, was not an easy task and the hearing had to be concluded before the trial date that was then set on July 27. There was an additional complication caused by the fact that the Defendant was incarcerated in the Maricopa County Jail awaiting resolution of unrelated felony charges and he had to be writted by the State for any hearing we held in my courtroom and a writ takes a minimum of 30 days to process. Late on Friday afternoon, April 9, 2021, Mr. Kessler filed a notice of his intent to call an expert witness at the 404(b) hearing. I did not receive a copy of the Notice until Monday, April 12th. It was obvious that the last-minute filing would result in the three-day hearing being continued once again and would possibility jeopardize the trial date and that is exactly what happened. At the hearing I told everyone I was not pleased with the need to reset the hearing because of the late filing and Mr. Kessler did not appear to be paying attention while I did so. He was shuffling papers and looking everywhere but at me. I then made it clear that I was speaking directly to him regarding the late notice that was forcing a continuance. A portion of my comments is contained in the complaint, but I am asking that the committee listen to the actual exchange. At the hearing on the Motion for Change of Judge for Cause, the State admitted an audio

disk of every hearing conducted in my courtroom from October 14, 2019, until April 14, 2021, which included the first and last hearings at which Mr. Kessler has taken umbrage. It doesn't appear that anyone listened to the audio at the hearing before Judge Lee or at the Court of Appeals, but I had a copy made and it is attached as Exhibit 2 as support for my position that counsel was never treated improperly. My voice was not raised and my comments were not a harangue. The actual audio from that hearing and those that preceded it belie counsel's claim he was singled out for stern and aggressive mistreatment at any time during the pendency of the case. I am known for running a tight courtroom, but it is my hope that stern warnings to counsel about missed deadlines and inexcusable delay are not now the basis of a finding of judicial misconduct.

THE ISSUE OF RECUSAL / RULE 2.11

Defense counsel suggests that I should have recused once I realized a witness was being called whom I held in high regard. If that were the rule, I would have to recuse in thousands of my cases. I have been a trial judge for almost 28 years. I have tried over seven hundred jury trials. For five years I handled all Rule 11 motions for the entire county. The same lawyers, doctors, experts, law enforcement officers and litigants have appeared before me repeatedly thousands of times. Tucson is still (on its good days) a very small town. Those of us who have practiced law here take pride in the feeling of community that has defined the practice of law in Pima County, no matter what side you are on or what type of law you practice. We all know each other, and attorneys appear repeatedly in front of the same judges week after week, month after month, and year after year. The practice of law relies as much on our reputations as persons of integrity as it does how smart you are and how hard you work. I hold many attorneys in high regard, and it has never affected my factual or legal findings. It simply makes my job more pleasant.

It never occurred to me that having Rick Unklesbay testify at a hearing on a motion where his role was limited to authenticating a faxed note and two letters that promised dismissal of a forfeiture action and possible dismissal of an unrelated burglary case pending in Pima County Superior Court warranted my recusal and I have not changed my mind since defense counsel raised the issue for the first time in a Motion for Change of Judge for Cause. Had he asked me to recuse, I would not have done so, but I think I may have been able to assuage his concern had he brought it to my attention. While I have known Mr. Unklesbay professionally for 40 years, we are not social or personal friends. Our contact has been limited to the courthouse and occasionally at events at the law school, all related to professional matters. When Mr. Kessler indicated that he was calling Mr. Unklesbay as a witness at the hearing on the State's motion, it was unexpected. He was never disclosed as a witness in the case by either side and his role was minimal. At most, he served as a fungible, foundational witness for an exchange between Mr. Clements and the County Attorney's Office. His credibility didn't matter as no one was contesting what was on the scribbled note that was faxed

between Clements and the FBI agents on one side and Mr. Unklesbay on the other and my ruling was not in any way based on his testimony. And it is important to note that he was NOT called at a Motion to Suppress filed by Mr. Kessler. A motion challenging the admissibility of the Defendant's many statements to the FBI was never filed by his attorneys. Mr. Unklesbay was called during the State's Motion to Determine Admissibility of Defendant's Statements which was filed prophylactically to avoid an issue on appeal. Had the State not filed the motion, it is doubtful that Mr. Unklesbay would ever have been called to testify. Even now, the State has indicated that they will stipulate to any necessary foundation to the faxed exchange and the letters that eventually were issued regarding the County Attorney's position on Mr. Clements demands. Mr. Kessler has declined that offer, which is his right.

THE LETTER TO THE EDITOR / RULES 1.2, 1.3, 2.10

The letter to the Arizona Daily Star, while being used to have me removed from this case, has nothing to do with my ability to fairly and impartially preside over Mr. Clements' trials. The letter did not reference Mr. Clements, his cases, or his attorneys. In fact, it did not relate to any of my currently assigned cases or to those I have presided over in the past and so I do not believe that it can be viewed as a statement on a pending case. As for the claim that it may impact the ability of the Defendant to obtain a fair jury, I am at a loss. The letter is not a comment on the criminal justice system or any specific criminal matter, but an admiring statement about a decent public servant. As for tainting a potential jury pool, I think it matters that it appeared in a newspaper and not on social media, as that truly lessens the likelihood that it was seen or had any impact on the few who may have read it. I can attest from having empaneled so many juries that (sadly) there are very few of us left who take and read our local paper. And for those few, it will have been published almost a year prior to the trial for the murder of I.C., which is the only trial of the four at which defense counsel claims he wishes to call Mr. Unklesbay as a witness.

Still, I understand why the letter gave this Commission pause. I used my name and job title in a very public and deliberate way to praise another. But please know that I have done that hundreds of times before. In lectures to students at the law school where I have taught for over 30 years, at County and State Bar seminars where I have lectured on ethics and professionalism, and at Supreme Court sponsored events, I have very publicly and repeatedly mentioned the following names: Gerald Maltz, Barry Davis, John Iurino, Brian Metcalf, Michael Piccareta, Bruce McDonald, Rick Rollman, and Rick Unklesbay. For those of you who have not practiced in Pima County, the list contains a plaintiff's attorney, an insurance defense attorney, two business law litigators, a public defender, a criminal defense lawyer, and a prosecutor. For years, in my role as a judge, I have told lawyers that these attorneys are the gold standard in terms of ethics, professionalism, work ethic, decency and talent and that they should be not just admired, but emulated. And all of those attorneys continued to appear before me despite those public accolades.

I acknowledge, however, that my letter went further than to just express admiration. I included a plea to the County Attorney to cease making derogatory comments about Mr. Unklesbay. It was prompted by a series of ugly and disparaging press releases and newspaper articles that sometimes suggested and occasionally stated outright that a former prosecutor who had served this community honorably and with distinction for over 40 years was incompetent and dishonest. I do not exaggerate when I say that the entire bench was aghast. The articles were a frequent topic of conversation at the courthouse and among lawyers and staff who had knowledge of the truth. That said, I am aware that as a judicial officer I am not permitted to use my office or title in any way that may benefit me personally or may harm or help another. I am to avoid even the appearance of impropriety, and I am to remain apolitical and removed from the fray at all times. I can assure you that I have never used my office to benefit myself and or to intentionally harm another. I go out of my way to refrain from telling anyone that I am a judge and people I have known for years are shocked to later learn what I do for a living – which they learn by chance when called for jury duty or when they see me on the news on television. It has been hard, however, these many years to refrain from speaking out in situations where someone in a more powerful position uses his or her influence to take advantage of or to disparage another and where “alternative facts” are bandied about by someone who has the attention of the press and has no shame in using it to harm another. I felt compelled to speak out because no one was challenging what was being said and harm was being done to a good and decent man. It is my nature to defend the defenseless. It is the very reason I became an attorney. I chose to do so in a letter that was intended to overcome what I saw as a great and undeserved harm to another, not to gain any personal advantage.

No one in all Pima County, including my colleagues and the entire Pima County bar, filed a judicial complaint against me. The source and timing of the sole complaint begs a few questions, but in the end it was and is my responsibility to uphold the integrity of the office I have been so fortunate to fill. I am horrified that this Committee may feel that I failed to do so. But I ask that the Commission please take into consideration that I have been a diligent and hardworking public servant for almost 28 years. While I have made mistakes throughout those years, it was never out of spite or meanness, but truly in the pursuit of doing the right thing. I leave this in your hands.

Sincerely,

Deborah Bernini
Judge, Pima County Superior Court

DB:jr

Attachments (2)

EXHIBIT ONE

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. KENNETH LEE

CASE NO. CR20183978

DATE: June 21, 2021

STATE OF ARIZONA
Plaintiff,

vs.

CHRISTOPHER CLEMENTS (-001)
Defendant

UNDER ADVISEMENT RULING

**IN CHAMBERS: DEFENDANT'S MOTION FOR CHANGE OF JUDGE FOR CAUSE; STATE'S
RESPONSE THERETO; DEFENDANT'S REPLY:**

The Defendant has filed a Motion for Change of Judge for Cause. The Court has reviewed the briefs and attachments filed in connection with the Motion, the arguments of counsel at the June 15, 2021 hearing, and the Court file. The Defendant argues that a letter the assigned Judge submitted to a local newspaper, that was printed in the paper on April 28, 2021, and the Judge's comments at a hearing on April 14, 2021 demonstrate an interest or prejudice that would prevent a fair and impartial hearing or trial. The Motion is made pursuant to Rule 10.1, Arizona Rules of Criminal Procedure.

In order to meet the requirements of Rule 10.1, a Defendant must show, by a preponderance of the evidence, "that a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge." Ariz. R. Crim. P. 10.1(b). Further, the moving party must overcome a strong presumption that trial judges are "free of bias and prejudice." *State v. Medina*, 193 Ariz. 504, 510, 975 P.2d 94, 100 (1999) (quoting *State v. Rossi*, 154 Ariz. 245, 247, 741, P.2d 1223, 1225 (1987)). In addition, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for bias or partiality motion unless the display a deep-seated favoritism or antagonism that would make fair judgment impossible." *State v. Ramsey*, 211 Ariz. 529, 541-42, 1124 P.3d 756, 768-69 (App. 2005) (quoting *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997)). Finally, a judge's capacity for fairness and impartiality shall not be questioned by "mere speculation, suspicion, apprehension, or imagination." *Id.* (quoting *Rossie*, 154 Ariz. At 248, 741 P.2d at 1226).

April 28, 2021 Letter

Debbie Sipos
Judicial Administrative Assistant

UNDER ADVISEMENT RULING

On April 28, 2021, the Arizona Daily Star printed a letter submitted by the assigned Judge in this case. In the letter, the Judge was critical of the Pima County Attorney for what the Judge considered “unfounded and inaccurate character attacks on retired Deputy County Attorney, Rick Unklesbay.” The Judge then gave favorable opinions of Mr. Unklesbay and commented that the newly elected County Attorney would have served Pima County better by retaining his services rather than attacking him and allowing him to leave the office. No comments or references were made about this case, Defense Counsel, or the Defendant.

Mr. Unklesbay has never been the assigned prosecutor in this case. Mr. Unklesbay’s involvement was limited to negotiating with the Defendant, via correspondence, about the Defendant giving certain information to the State in exchange for the dismissal of unrelated charges pending in Pima County, dismissing a forfeiture action in relation to the Defendant’s vehicle, and contacting the Maricopa County Attorney’s Office regarding the Defendant’s release conditions in unrelated charges pending in Maricopa County. Mr. Unklesbay had no verbal communications with the Defendant. His communications with the Defendant, before the Defendant took law enforcement officers to the I.C.’s body location, were comprised of two written correspondence with the Defendant. The Defendant was negotiating with the State against his counsel’s advice. The State will seek to use the Defendant’s statements against him at trial. The issue Mr. Unklesbay is involved with is the voluntariness of the Defendant’s statements.

The State moved to have a pretrial determination that the Defendant’s statements were voluntary and could be used at trial. After an evidentiary hearing that included the testimony of Mr. Unklesbay regarding his involvement, the Court ruled in favor of the State on November 23, 2020. This was prior to the new County Attorney taking office in January 2021.

The Defendant argues that the April 28, 2021 letter from the Judge would be known to the jury and would sway the jury’s evaluation of Mr. Unklesbay’s testimony. The voluntariness of a Defendant’s statement is a question for the jury and the jury will be instructed that it is not to consider such statements unless the State proves beyond a reasonable doubt that the Defendant made the statements voluntarily. Here, the only direct communication between Mr. Unklesbay and the Defendant were two written letters. Other than authenticating that the letters were written by him and that they are true and accurate copies, there is little for Mr. Unklesbay to testify about. The letters reflect in total what Mr. Unklesbay communicated to the Defendant. The State has already indicated it has no intention of calling Mr. Unklesbay at trial, as the letters speak for themselves.

It will be the Defendant’s decision to place Mr. Unklesbay before the jury to judge his testimony and credibility. The Judge will not be ruling on his credibility or making any comments regarding his credibility.

Debbie Sipos

Judicial Administrative Assistant

UNDER ADVISEMENT RULING

His credibility will be judged by the jury alone.

The trial of this matter is set for February 2022. The letter to the Editor was published on April 28, 2021. This case is a complex one and will be subject to pretrial publicity. Counsel for all parties will have the opportunity to question prospective jurors during voir dire to determine if they are aware of this letter or other matters brought up in the media. The letter will not preclude the Defendant from having a fair and impartial hearing, as the jurors can be adequately screened.

The letter itself does not demonstrate any interest, bias, or prejudice by the Judge against the Defendant or his counsel. The letter makes no reference to this case, the Defendant, or his counsel. The letter is critical of the State, not the Defendant. The letter makes reference to character attacks by the County Attorney on Mr. Unklesbay, which could call into question his credibility. On its face, the letter may arguably reflect a potential bias or prejudice against the County Attorney, but not the Defendant or his counsel. It is mere speculation that the assigned Judge's opinion of Mr. Unklesbay, who is retired and whose only involvement at trial will be at the behest of the Defendant, will somehow prevent the Defendant from receiving a fair and impartial trial. There is no basis for removing the assigned Judge based on the April 28, 2021 letter.

Disparagement of Counsel

The second ground argued by the Defendant to justify a change of judge for cause is the assigned Judge's comments at the beginning of the April 14, 2021 hearing. At the hearing, the Judge informed counsel for both sides that when a trial date is set in that division, it is intended to be a real and firm trial date. She indicated that her expectation is that motions and other requests be timely filed with a view to having the case be ready by that trial date. The Judge stated that the trial dates that would be set during that hearing would be real trial dates. She believed that the trial date of July 27, 2021 was a real trial date when it was set but, in light of the motion practice, it no longer was. Hence, the need to set new trial dates. In making these comments, the Judge singled out defense counsel with a single statement:

“When I set the trial date, and Mr. Kessler, I'm looking at you and your co-counsel, when trial date was set in this matter it was not aspirational. It was done with the idea that it really was a trial date and I expected things to be filed timely. (TR 4/14/2021 at page 3-4).”

Defense counsel complains these comments were not warranted, given that at the prior February 17, 2021 status conference, the trial date of July 27, 2021 had been vacated. Defense Counsel goes on to argue that their motions were timely filed by or before the deadline to file motions of March 22, 2021. Both Defense Counsel submitted affidavits that the Judge has been stern and aggressive toward them in the past. Thus,

Debbie Sipos

Judicial Administrative Assistant

UNDER ADVISEMENT RULING

Defense Counsel argues the Judge is biased against them and should be removed.

Rule 10.1 requires that a party file a motion for change of judge within 10 days after discovery that grounds exist. The instant motion was filed by Defense Counsel May 5, 2021. The complained of comments were made at a hearing on April 14, 2021. As to the comment by the Judge as a basis for removal, the request is untimely. Defense counsel argues implicitly that the cumulative record of the April 28, 2021 letter and of the prior comments justify removal and this Court should consider the prior record in making its evaluation.

In reviewing the Court record the Defense Counsel highlights, one would think the July 27, 2021 trial was the first trial date. Further, he appears to represent that March 22, 2021 was the first motions deadline. A full review of the record demonstrates this is not the case.

The first trial date was set at a Status Conference on October 19, 2019. At that Status Conference, a trial date was set for February 23, 2021, some 16 months away. This trial date was vacated at the oral argument for the State's motion on the voluntariness of the Defendant's statements that occurred on October 13, 2020 and after discussions with counsel during the hearing. The February 23, 2021 trial date was vacated, and a new trial date of July 27, 2021 was set. The July 27, 2021 trial was vacated at a Status Conference before the Court on February 17, 2021. The third trial date for this case was set at the April 14, 2021 hearing.

A review of the record further reveals that the deadline of March 22, 2021 for the filing of motions was itself a continuance from a prior deadline. At a prior status conference before the Court on January 11, 2021, the Court set deadlines for both the State and the Defendant to file substantive motions by February 11, 2021 and set a three-day hearing for March 18-22, 2021 to hear those motions. On February 3, 2021, Defense Counsel filed a motion to continue the March hearing because he was unaware of a scheduling conflict he had. The next day the parties submitted a stipulation to vacate the February 11, 2021 deadline and to set a new motions deadline at the February 17, 2021 status conference. It was at this status conference that the March 22, 2021 motion deadline was set, the trial date of July 27, 2021 vacated, and another status conference for setting a new trial date was set.

A further review of the Court file reveals multiple motions in the case were continued at Defense Counsel's request that led to the continuance of the trial dates. A prime example of this is the State's Motion regarding the voluntariness of the Defendant's statements. The State filed its Motion on October 7, 2019. After four extensions of time requested by Defense Counsel, the Response was filed on March 12, 2020. The State filed its Reply on March 27, 2020. On April 3, 2020, the Court set the evidentiary hearing on the Motion for June 23, 2020. After one stipulation to continue and two requests from Defense Counsel to continue the

Debbie Sipos

Judicial Administrative Assistant

EXHIBIT TWO

Resp Exh 2 - Hrngs CD
21-163
11/8/21



STATE V. CLEMENTS
CR20183978-001
JUDGE BERNINI

STAP

CD-R

Resp Exh 2 -
Hrngs CD
21-163
11/8/21

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ARIZONA SUPERIOR COURT
Pima County
110 West Congress
Tucson, Arizona 85701

Judge MR
2021-163
MAR 30 2022
(520) 724-3113
Fax (520) 724-3141

Hon. Deborah Bernini
Division 12

March 25, 2022

Commission on Judicial Conduct
1501 West Washington Street, Suite 229
Phoenix, AZ 85007

Re: Motion for Reconsideration in Case No. 21-163

Dear Judge Dominguez and Member of the Commission on Judicial Conduct:

I received your order on March 23rd regarding the complaint filed against me by attorney Eric Kessler. I am not requesting a hearing. But by way of this letter I am asking two things.

First, I am asking that the factual record be corrected on page one of your findings. The Order states on page one, "After the letter to the editor was published, the defense requested that Judge Bernini disqualify from hearing Mr. Clements's trial, however, Judge Bernini failed to do so . . ." I was never asked to recuse or disqualify myself from the case. In fact the letter to the editor has never been mentioned by Mr. Kessler, formally or informally, and I was never asked to recuse, on or off the record. The first I learned that that he thought the letter was an issue for his client was when I read about it in the Motion for Change of Judge for Cause. That is why I stated on page two of my response to the judicial complaint that "The Motion for Change of Judge for Cause caught me by surprise." Had I been asked to recuse and refused to do so, the motion would have most definitely not have caught me by surprise.

My second request is that the Commission reconsider making the reprimand and Mr. Kessler's complaint public. I am aware of Commission Rule 9(a), but I believe the Commission has the discretion to waive that portion of the Rule. The Commission should know that as of today's date I have recused on both homicide trials and all other matters pertaining to Mr. Clements' cases pending in Pima County Superior Court. In addition, after reflecting on the Commission's findings and order, I decided it was no longer appropriate for me to sit as a Superior Court Judge and submitted my resignation to the Governor this date as well. This was not how I thought my work as a judge would conclude after 28 years, but the conduct for which I am being punished is as serious as one could imagine. The Commission is entitled to know that I recognize that and am willing to accept the harshest of consequences. But if the complaint and your order are released to the public in 15 days, it will have a direct and negative affect on Mr. Clements' ability to receive a fair trial due to the publicity it will most definitely generate. His first trial date is set for April 26. His second is set for May 24. Both have had

Page Two
March 25, 2022
Case No. 21-163

significant media coverage and will continue to do so, but I can imagine the media frenzy that will result from my being taken off the case at the direction of the Commission on Judicial Conduct because of an ethical issue I created regarding a potential witness in the second trial. I suspect Mr. Kessler recognizes that issue as well as he just filed a motion to seal his Motion for Change of Judge for Cause, which is almost identical to his Judicial Conduct Complaint, and sealing one document will serve no purpose if the other is released to the public.

If the goal of the reprimand is to punish and deter future misconduct, I submit that my actions were arguably singular, there is no expectation of it being repeated, and no other judge is likely to engage in similar conduct. There is nothing to deter. And the self-sanction of resigning my position should serve as both my punishment and a guarantee that I will not engage in such conduct in the future as well. I accept the reprimand. I just ask that it not be made public.

Thank you for your consideration.

Sincerely,

Deborah Bernini
Judge, Arizona Superior Court

A copy of this Order was delivered on March 30, 2022, via electronic mail, to:

Hon. Deborah Bernini
Pima County Superior Court
dbernini@sc.pima.gov

Respondent

April P. Elliott
aelliott@courts.az.gov

Disciplinary Counsel

By: /s/ Kim Welch
Kim Welch, Commission Clerk

April P. Elliott (Bar # 016701)
Executive Director / Acting Disciplinary Counsel
Arizona Commission on Judicial Conduct
1501 West Washington Street, Suite 229
Phoenix, AZ 85007
Telephone: (602) 452-3200
Email: *aelliott@courts.az.gov*

STATE OF ARIZONA
COMMISSION ON JUDICIAL CONDUCT

Inquiry concerning)	
)	Case No. 21-163
Judge Deborah Bernini)	
Pima County Superior Court)	RESPONSE TO JUDGE'S
State of Arizona)	MOTION FOR
)	RECONSIDERATION
Respondent)	
)	

On March 21, 2022, the Commission on Judicial Conduct (Commission) publicly reprimanded Judge Deborah Bernini (Respondent) for violations of the Arizona Code of Judicial Conduct (Code). Respondent timely filed a Motion for Reconsideration on March 30, 2022. Undersigned submits this response pursuant to Commission Rule 23(b), respectfully requesting that the Commission deny the motion.

THE FACTUAL RECORD OF THE REPRIMAND ORDER IS CORRECT

Respondent challenges the factual record of the reprimand order, specifically the last sentence of paragraph three of the order, which states:

After the letter to the editor was published, the defense requested that Judge Bernini disqualify from hearing Mr. Clements' trial, however, Judge Bernini failed to do so, and upon information and belief, remains assigned to the case at present.

Respondent claims that she “was never asked to recuse or disqualify [her]self from the case,” and that the motion for change of judge filed by defense counsel “caught [her] by surprise.” By filing the motion for change of judge for cause, defense counsel was requesting that Judge Bernini be disqualified from the matter. Undersigned believes the language is factually accurate.

GOOD CAUSE EXISTS FOR THE IMPOSITION OF THE PUBLIC REPRIMAND

Respondent requests that the Commission reconsider making the reprimand public, citing to Commission Rule 9(a). She states that she has recused from all of Mr. Clements’ underlying matters, and she has submitted her resignation to the Governor. Further, Respondent believes that the publicity of the reprimand will affect Mr. Clements’ ability to have a fair trial. She asserts that her “self-sanction of resigning [her] position should serve as both [her] punishment and a guarantee that [she] will not engage in such conduct in the future as well.”

The Commission Rules Do Not Provide for a Confidential Reprimand

Respondent’s request must be denied; the Commission Rules do not provide for confidential reprimands. Prior to 2006, the Commission’s rules permitted a reprimand to be public or private, however, now a reprimand can only be public. The relief Respondent requests cannot be granted on reconsideration.

Mr. Clements’ Fair Trial is Not Diminished by Issuance of a Reprimand

It is unknown how much publicity the Commission’s reprimand of Respondent will attract. But, even if the reprimand receives considerable publicity, the criminal justice system has safeguards in place to manage this potential issue. All possible

jurors will be questioned regarding any knowledge they may have about Mr. Clements' case, including Respondent's letter to the editor and this reprimand. Should a potential juror with such knowledge state he or she cannot be fair and impartial, such juror will be struck for cause.¹ Respondent presents no evidence that the reprimand itself will directly and negatively impact Mr. Clements' ability to have a fair trial.

Good Cause Exists for the Commission to Uphold its Reprimand

Out of an abundance of caution, Disciplinary Counsel interprets Respondent's request, which cannot otherwise be granted under the Commission Rules, as a request to dismiss the complaint with a private comment, which would be confidential. The Commission should deny this request where good cause exists to uphold the reprimand, despite Respondent's subsequent recusal and resignation. The Commission does not impose public discipline lightly. The Commission considered all relevant information and found that Respondent had violated the Code for the conduct set forth in the reprimand order.

Factors Supporting a Sanction

The Scope section of the Code sets forth several factors for the Commission to consider in determining whether a sanction is appropriate in a particular case. These factors are the seriousness of the transgressions, the facts and circumstances existing at the time of the transgression, the extent of any pattern of improper activity or

¹ There has been a tremendous amount of pretrial publicity involving Mr. Clements' case in the media, primarily due to the facts of the underlying murders. Therefore, Disciplinary Counsel presumes there will be considerable *voir dire* on pretrial publicity, the Commission's actions notwithstanding.

previous violations, and the effect of the improper activity upon the judicial system or others. On balance, these factors support the issuance of the reprimand.

The reprimand addresses Respondent's public conduct in authoring a letter to the editor using her judicial title that improperly vouched for the character of a former prosecutor, who also happened to be a witness in Mr. Clements' case. The public must have confidence in the independence, integrity, and impartiality of the judiciary, and the improper vouching gave the appearance that Respondent was biased in favor of this witness and/or biased against the newly elected county attorney for her alleged attacks on Mr. Unklesbay. Thus, the transgressions are serious.

In CJC Case No. 05-005, Respondent received an admonishment for voluntarily submitting a personal letter regarding the character of an employee at a termination hearing. An admonishment is a sanction that is no longer available under the Commission's rules, and was considered an informal private sanction.² Undersigned finds this discipline relevant because it related to similar conduct, thus potentially showing a pattern of improper activity by Respondent in this regard.

Finally, the imposition of the public reprimand comports with the principles of Commission Rule 5 (Purpose of Judicial Discipline). That rule states:

The purpose of the judicial discipline and incapacity system is to protect the public and to maintain high standards for the judiciary and the administration of justice. Any disciplinary remedy or sanction imposed shall be sufficient to restore and maintain the dignity and honor of the position and to protect the public by assuring that the judge will refrain from similar acts of misconduct in the future.

² If the Commission leaves the public reprimand in place and orders this response to be part of the public record, undersigned will request a protective order for those portions of this response that address Respondent's prior private discipline.

Here, the nature of the misconduct was public. The harm caused, in part, was to the public's perception of the judiciary and trust in the institution. Issuing public discipline in response to underlying public misconduct helps restore dignity and honor to the judiciary. Further, the public nature of the reprimand allows other members of the judiciary to learn from the misconduct that warranted the reprimand. This opportunity, which helps protect the public generally, is lost if the Commission's resolution is confidential. Respondent errs by assuming the purpose of the reprimand is to punish her; it is not. The purpose is to restore and maintain the dignity and honor of the position and to protect the public. The reprimand is the best way to achieve those ends.

Aggravating and Mitigating Factors

Rule 19 of the Commission Rules sets forth ten aggravating and mitigating factors for the Commission to also consider.

Nature, Extent and Frequency of the Misconduct: Respondent's conduct in this case was the one-time letter to the editor. However, the letter did cause the defense to act, including filing a motion for change of judge for cause, as well as this judicial complaint. Respondent has prior private discipline for improper character vouching, although that was sixteen years earlier. This gives slightly more weight to this being an aggravating factor.

Judge's Experience and Length of Service on the Bench: Respondent has served as a judicial officer for approximately twenty-eight years and should be well-versed on the Code. Undersigned deems this an aggravating factor.

Whether the Conduct Occurred in the Judge's Official Capacity or Private Life:

The conduct occurred in Respondent's official capacity, however, undersigned does not deem this factor applicable to his case.

Nature and Extent to Which the Acts of Misconduct Injured Other Persons or Respect for the Judiciary: The conduct affected Mr. Clements' rights to due process, and the public nature of the letter impacted the public perception and respect for the judiciary. This is an aggravating factor.

Whether and to What Extent the Judge Exploited his or her Position for Improper Purposes: Respondent used her judicial title and position to improperly vouch for the professionalism and integrity of a former prosecutor, who happened to be a witness in a criminal case pending before her. This is an aggravating factor.

Whether the Judge has Recognized and Acknowledged the Wrongful Nature of the Conduct and Manifested an Effort to Change or Reform the Conduct: Respondent acknowledged her misconduct in submitting the letter. This is a mitigating factor.

Whether There Has Been Prior Disciplinary Action Concerning the Judge, and if so, its Remoteness and Relevance to the Present Proceeding: As noted, Respondent previously received a private reprimand in CJC Case No. 05-005 that also involved character vouching. Although this is fairly remote, it did involve similar conduct. The Commission mitigated that matter from a public reprimand to a private admonishment based on Respondent's expressed remorse. In her response in CJC Case No. 05-005, Respondent stated:

I can offer no defense and feel only shame for behaving as I did. After eleven years on the bench and a total of 24 years as an attorney you

would think that I would know better than to act so rashly and out of emotion rather than respect for the rules.

Staff believes this gives slightly more weight to be an aggravating factor.

Whether the Judge Complied with Prior Discipline or Requested and Complied with a Formal Ethics Advisory Opinion: Undersigned does not deem this factor as applicable.

Whether the Judge Cooperated Fully and Honestly with the Commission in the Proceeding: Undersigned believes Respondent has cooperated fully and honestly. This is a mitigating factor.

Whether the Judge was Suffering from Personal or Emotional Problems, or from Physical or Mental Disability or Impairment at the Time of the Misconduct: This was not raised as a defense by Respondent, and undersigned does not deem this factor applicable to this case.

While the aggravating factors outweigh the mitigating factors numerically, the Commission is free to assign whatever weight it chooses to the factors. Given the nature of the conduct, Respondent's experience, Respondent's prior disciplinary history, and the injury to the public perception of the judiciary, undersigned argues that the overall balance is in favor of upholding the sanction.

CONCLUSION

Based on the foregoing, undersigned recommends that the Commission deny Respondent's Motion for Reconsideration and affirm the imposition of the public reprimand issued on March 21, 2022.

///

Dated this 11th day of April, 2022.

COMMISSION ON JUDICIAL CONDUCT

April P. Elliott
Executive Director / Acting Disciplinary Counsel

A copy of this pleading was mailed on April 11, 2022, to Respondent, at:

Hon. Deborah Bernini
Pima County Superior Court
110 W. Congress
Tucson, AZ 85701

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 21-163

Judge: Deborah Bernini

Complainant: Eric W. Kessler

**ORDER DENYING RESPONDENT JUDGE'S MOTION FOR
RECONSIDERATION / ORDER DENYING COMPLAINANT'S REQUEST
FOR DISCRETIONARY DISCLOSURE / ORDER GRANTING
DISCIPLINARY COUNSEL'S REQUEST FOR A PROTECTIVE ORDER
REGARDING PORTIONS OF THE RESPONSE TO THE MOTION FOR
RECONSIDERATION**

The respondent judicial officer filed a Motion for Reconsideration of the Commission's reprimand decision as set forth in its previous order. Pursuant to Commission Policy 23, disciplinary counsel was requested to file a response to the motion, and did so.

On May 5, 2022, the Commission denied the Motion for Reconsideration. The Commission found that the language of the reprimand order is factually accurate. Additionally, the Commission's Rules do not currently provide for a confidential reprimand. As provided in Commission Policy 23, the respondent judicial officer's Motion for Reconsideration, disciplinary counsel's response, and this Order denying the Motion for Reconsideration shall be made a part of the record that is posted to the Commission's website with the other public documents (the Complaint, the judicial officer's response, and the Reprimand Order).

As the record in this matter will be made public and posted to the Commission's website, the Commission denied as moot the complainant's Request for Discretionary Disclosure of the Judge's Response.

Further, the Commission granted disciplinary counsel's Request for a Protective Order regarding Portions of the Response to the Motion for Reconsideration. Specifically, the portions of that response discussing Judge Bernini's prior private discipline with the Commission shall be redacted from the public record in this matter.

...

Commission members Denise K. Aguilar and Christopher P. Staring did not participate in the consideration of this matter.

Dated: May 24, 2022

FOR THE COMMISSION

/s/ Louis Frank Dominguez
Hon. Louis Frank Dominguez
Commission Chair

Copies of this order were distributed to all appropriate persons on May 24, 2022.