To Be Argued By:
Nathaniel V. Riley, Esq.
Time Requested: 15 Minutes

DOCKET NO.: JCR 2022-00010

Court of Appeals
Of the
State of New York

IN THE MATTER OF THE PROCEEDING PURSUANT TO SECTION 44, SUBDIVISION 4, OF THE JUDICIARY LAW IN RELATION TO

THE HON. ROBERT J. PUTORTI, A JUSTICE OF THE WHITEHALL TOWN COURT AND THE WHITEHALL VILLAGE COURT, WASHINGTON COUNTY,
Petitioner,

V

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,
Respondent.

PETITIONER'S BRIEF

Nathaniel V. Riley, Esq.
Cerio Law Offices, PLLC
Attorneys for Petitioner
407 S. Warren St., Suite 5
Syracuse, New York 13202
Tel.: (315) 422-8769
Fax: (315) 476-8002

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1. Did Justice Putorti's conduct warrant removal for discourteous conduct or racial bias where his cooperation with Commission on Judicial Conduct resulted in an agreed statement of facts that he brandished his pistol toward a "Black man" facing serous violent felony offenses that rushed the bench past the "stop line" and re-told the event to a reporter and other members of the judiciary?

Answer below: The Commission on Judicial Conduct issued a determination, over a dissenting member, removing Justice Putorti from the bench.

2. Did Justice Putorti's conduct warrant removal where fundraisers created by third parties either "tagged" Justice Putorti's Facebook profile, or were shared by him, related to raising money for the Elks Lodge or his recuperation from a motorcycle accident, and the Commission on Judicial Conduct did not consider several mitigating factors?

Answer below: The Commission on Judicial Conduct issued a determination, over a dissenting member, removing Justice Putorti from the bench.

PRELIMINARY JURISDICTIONAL STATEMENT

Petitioner, the Honorable Town Justice Robert J. Putorti ("Justice Putorti"), requests this Court's review of the determination of the New York State Commission on Judicial Conduct ("CJC"), dated September 9, 2022, that removed him from the office of Town Justice of Whitehall Town Court, Washington County, New York, over the dissent of one of its members (Record for Review ["R."] 1, 25, 26).

On June 11, 2020, the CJC issued a formal written complaint (R. 162) against Justice Putorti relating to an incident on or about "2015 or early 2016" in which he "brandished" a legally owned and licensed firearm before an unarmed defendant, Mr. Brandon Wood ("Defendant Wood"), appearing before Justice Putorti in a criminal matter (R. 4–6, 49) ("Charge I") or the "Wood Matter" or "Wood Incident"). During the course of the CJC's investigation into Charge I, it inquired about social media posts on Facebook.com, that lead it to file a second formal written complaint for lending the prestige of his office to comment upon, share, and / or promote fundraisers for (1) Justice Putorti and his family following his motorcycle accident, raising "approximately $9,400" on or

about November 9, 2019; and (2) the Whitehall Elks Lodge ("Elks Lodge") raising, on seven (7) separate occasions during 2020, "approximately" $40, $1,460, $97, $1,978, $152, $242, and $186, respectively, for a total benefit to the Elks Lodge of roughly $4,155 (R. 147–50, 176–79) ("Charge II" or the "Facebook Fundraising").

Following verified answers to both charges, CJC, upon consent, consolidated the matters before a referee (R. 49, 202–03). Thereafter, the parties stipulated to an Agreed Statement of Facts (R. 49–66 ["ASF"]) containing 16 exhibits (R. 67–159), thereby obviating the need for a hearing (R. 206). During the pendency of this matter, Justice Putorti was re-elected to serve as Town and Village Justices for Whitehall, with terms expiring in 2025 (R. 3, 37).

On October 11, 2022, Justice Putorti timely filed within 30 days of receipt of CJC's Decision his request for review (Judiciary Law § 44[7]; CPLR 2103[b][2], [c]; General Construction Law § 20). This Court thereafter entered a briefing schedule, and upon the consent of the parties, extended the deadline for filing the record for review and brief to January 27, 2023. The issues and questions presented were preserved by

the parties in their submissions before the CJC, as detailed more fully *infra* (R. 207–28, 257–65). Accordingly, this Court has jurisdiction to consider this matter and grant the relief requested (Judiciary Law § 44[7]–[9]).

In an order dated October 21, 2022, this Court also suspended Justice Putorti, with pay, pending the outcome of this request for review, which now follows.

STATEMENT OF FACTS

Justice Putorti currently holds, and at all times relevant to this matter held, carry or conceal-carry gun or pistol permits in this State and several other States, including Virginia (R. 4, 68–69; *see also* R. 86, 170 [attestation]). In 2013, Justice Putorti was advised, during judicial training, that he could carry what the ASF variously describes as a "handgun," "firearm," "pistol," or "gun" (Charge I of the CJC referred to it a "semi-automatic handgun") (hereinafter "pistol") while serving as a Town or Village Justice (R. 49–51).

As to Charge I, in late 2015 Justice Putorti gave an interview to his cousin, Reba Putorti, then a journalism student, in which he stated he pulled his pistol "was when I was on duty as a judge and someone came running up the bench" (R. 6–7, 49, 54, 78). She published the article online (*id.*). The incident involved Defendant Wood, a six-foot tall Black man (R. 5, 51 [ASF ¶ 12]), who appeared before Justice Putorti on serious violent felony charges involving his wife and another man, which included Attempted Assault in the First Degree (Penal Law §§ 110.00, 120.10) for attempting to stab the other man with a knife (R. 71, 73);

Defendant Wood's later plea before Justice Putorti to lesser misdemeanor charges satisfied the felony charges (R. 51–52). During one of his appearances, Justice Putorti "brandished" his pistol toward Defendant Wood at a time when Defendant Wood did not demonstrate deadly force (R. 52) and rushed toward the bench past the "stop line" for litigants (R. 55 [¶ 24], 83).

Justice Putorti, whose full cooperation with the CJC's investigation resulted in the ASF (and thereby obviated the need for a formal hearing), admitted he lacked adequate justification for displaying the pistol toward Defendant Wood (R. 52–53). Justice Putorti further detailed for the CJC during his interview that he brandished the weapon on two other occasions, once nearly a decade before he became a judge, and another time in 2015 in Virginia, however, neither of these other incidents became the focal point of the CJC's investigation or proposed removal (R. 7, n. 5, 53–54). Justice Putorti mentioned the Wood Matter to other members of the judiciary both in 2016 and 2018 (R. 8–9, 53–55). While the details of the Wood Matter remain in dispute, the essential facts remain that Justice Putorti admitted that he relayed to other

magistrates that he brandished the pistol in the direction of a large Black man in his courtroom while presiding over his case (R. 10, 28, 42, 54). Following a judicial conference in 2018, his supervising judge, Glen Falls City Court Judge Gary Hobbs, admonished Justice Putorti (R. 55, 58), in a formal memorandum signed by them both and dated March 2, 2019 (R. 86), that while he may carry a pistol, he should not brandish the pistol without justification, i.e. must not unholster it unless compelled to do so to protect himself, or another person, from imminent deadly physical force (R. 58, 86, 170).

In a separate memorandum to file, dated October 25, 2018, Judge Hobbs wrote that he inquired of the CJC whether judicial ethics rules mandated that he file a complaint regarding the Wood Matter, but that CJC counsel advised he was not required to file a report (R. 83–84). It appears that Judge Hobbs' communications with CJC prompted Advisory Opinion 18-165 regarding the Wood Matter, which concluded that Judge Hobbs "must take 'appropriate action'" regarding the incident and that filing the counseling memorandum sufficed in this "one-time, isolated

incident" and that Judge Hobbs need not formally report to or file a complaint with CJC (R. 159D–159E).

Justice Putorti considered the matter closed, and since that time voluntarily relinquished his lawful right to carry or possess the pistol while on duty by not carrying any pistol or gun into his courtroom while presiding (R. 11, 59). However, in early 2019 the CJC opened this matter (R. 159A) and more than a year later, on June 11, 2020, served the Formal Written Complaint (R. 160–65).

During the course of its investigation into the Wood Matter (*see, e.g.,* R. 65 [ASF ¶ 55]), and roughly five (5) months after filing Formal Written Charge I, the CJC inquired about the Facebook Fundraising, initiated its complaint into that matter (R. 173A) and later served the Second Formal Complaint regarding the personal donations and donations to the Elks Lodge (R. 176–79). The Facebook page for "Robert Putorti Jr" identified his title and employer as "Machinery Equipment Operator at Town of Whitehall" (R. 30, 182). It did not identify him as a judge (R. 62 [ASF ¶ 43]).

The spaghetti dinner fundraiser for "Robert Putorti Jr" tagged that Facebook profile, yet was not created by Justice Putorti or at his direction, and was instead organized by Justice Putorti's sister, Kristy Putorti (R. 13, 60–62, [ASF ¶ 43], 123, 147 [No. 4.b.]). While many Facebook friends of the "Robert Putorti Jr" included lawyers, law enforcement officers, public defenders, and prosecutors that knew "Robert Putorti Jr" to be a judge, these individuals either did not attend the event or felt no pressure to attend the event, with many unaware of it (*id.*). Only Investigator Frank Hunt of the Whitehall Police attended the event, which charged him no entry fee, however, he did purchase raffle tickets (R. 61). Again, neither the Facebook profile, nor the post tagging the "Robert Putorti Jr" profile, mentioned his status as a judge, however the profile did post a message that he felt "humbled" by the fundraiser and that he "hope[d]" to see "as many people" as possible attend the event (R. 30, 62). The Facebook post created by his sister further recognized that he "sustained multiple fractures" following a "motorcycle accident," with many members of the community posting "Bobby" well-wishes and a speedy recovery (R. 100–03, 182–85).

For the remaining Facebook posts benefitting the Elks Lodge, throughout 2020, the "Robert Putorti Jr" profile "shared" the events created by the "Whitehall Elks Lodge #1491" Facebook Profile (R. 14–15 62–64). The shared posts asked those viewing the page for their "support" to bring in "revenue" to the Elks Lodge or imploring them to attend the events, some of which were private and others of which were open to the general public (*id*.).

Justice Putorti answered several interrogatories from the CJC regarding the Facebook posts that were admitted to the Agreed Statement of Facts (R. 123–30 [questions], 147–59 [answers with attachments]). Justice Putorti acknowledged using the Facebook profile for personal use only, that he belonged to the Elks Lodge for 28 years at that time, that he held the position of Exalted Ruler at that time, and that his Facebook profile remained publicly accessible (R. 123–25, 147–50). As for the personal fundraiser following his motorcycle accident, Justice Putorti averred that he was hospitalized for 34 days before his transfer to home care, did not preside over cases during a roughly four-and-a-half month period following the accident, and that the accident

resulted in him losing his job with the Whitehall Highway Department (and a disability that further prevented him from driving a school bus) (*id.*). His sister and Michael Rocque "held" the proceeds from the event to pay his medical bills, consisting of $1,000 insurance deductibles per hospital, among other costs (*id.*). He further provided receipts or other documentation showing the fundraising efforts for his personal recuperation or medical expenses and the Elks Lodge-related Facebook Fundraising posts (R. 124–26, 148–150). He believed his actions consistent with the Rules Governing Judicial Conduct because, in part, of the "long history in Whitehall of local justices being Exalted Leaders for the Lodge" (R. 129, 150).

ARGUMENT

POINT I: brandishing his pistol, and accurately re-telling the event in a publication and to other members of the judiciary as regaining control of his courtroom from a "Black man" facing serous violent felony offenses that rushed the bench past the "stop line," did not warrant removal of Justice Putorti for discourteous conduct or racial bias.

A. Introduction

According to a recent national survey of judges, slightly more than 1 in 4 (26%), admit to carrying a gun (*see* National Judicial College, *Our Survey: 1 in 4 Judges Carries a Gun* [September 21, 2017], available at https://www.judges.org/news-and-info/1-in-4/ [last visited January 26, 2023]). Many of the judges admit doing so out of fear for their own safety following high profile acts of violence against members of the judiciary for doing little more than carrying out their judicial duties (*id.*). Justice Putorti was among them in subjectively fearing an altercation (R. 52 [¶ 17], 217).

According to the initiatory documents below that include the Advisory Committee on Judicial Ethics, the Rules Governing Judicial Conduct contain "no prohibition" that would "bar[] [a judge] from carrying a firearm while performing . . . duties on the bench" and advised

judges to carry "your firearm concealed and safeguarded on your person" (Advisory Comm on Jud Ethics Op 06-51 [2006], available at https://www.nycourts.gov/ipjudicialethicsopinions/06-51.htm] [last visited January 23, 2023]). Nevertheless, according to the most recent guidance, when acting in their official capacity presiding over a courtroom, a magistrate's act of brandishing such a weapon should not occur absent facts supporting the affirmative defense of justification, i.e. a subjectively and objectively reasonable fear of imminent deadly force (Advisory Comm on Jud Ethics Op 18-65 [2019]; *Compare* R. 159B–159E ["judge believes it to be necessary to defend [him/her]self or someone else from what [he/she] reasonably believes to be the use or imminent use of deadly physical force by such individual')"] *with* Penal Law § 35.15). To hold otherwise would result in the member of the judiciary failing in their ethical duty to "be patient, dignified and courteous" to the litigants before them (22 NYCRR § 100.3[B][3]), thereby undermining the public confidence in the judiciary to "respect and comply with the law" (22 NYCRR § 100.2[A]) and remain "patient, dignified and courteous" (22 NYCRR § 100.3[B][3]) to all appearing before them (R. 159D; *see* 22

NYCRR § 100 [Rules of the Chief Administrator of the Courts Governing Judicial Conduct] [hereinafter "Rules Governing Judicial Conduct"]).

For the many reasons expressed herein and in the excellent dissenting opinion of Mr. Rosenberg, Esq., below (R. 26–46), this Court should reverse the CJC's decision, reinstate Justice Putorti, and enter no sanction, an admonition or, "at the very worst, censure" of Justice Putorti (R. 46). As to Count I, the ethics guidelines, as interpreted by the decision below, conflate a judge's ethical obligations of courteousness with the penal law's justification affirmative defense, ignore evidence discounting any racial animus, and otherwise draw inferences or conclusions unsupported in the record.

B. Standard of Review

The CJC "may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his or her duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice" (NY Const. Art. VI, §22; *see also* Judiciary Law § 44[1]). The purpose of judicial disciplinary proceedings "is not

punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents" (*Matter of Waltemade*, 1975 NY LEXIS 2421 [Judiciary Court 1975]; *see also Matter of Allman*, 2006 Annual Report 83, available at https://cjc.ny.gov/Publications/AnnualReports/nyscjc.2006annualreport.pdf [last visited January 23, 2023]). The Court of Appeals has "repeatedly noted that removal is the ultimate sanction and should be imposed only in the event of truly egregious circumstances" (*In re Kiley*, 74 NY2d 364, 369 [1989]; *see also Matter of Steinberg*, 51 NY2d 74, 83 [1980] ["removal should not be imposed absent truly egregious circumstances"]). "Removal is excessive where the misconduct amounts solely to poor judgment, even extremely poor judgment" (*In re Skinner*, 91 NY2d 142, 144 [1997]; *see also In re Kiley*, 74 NY2d at 369–70; *Matter of Cunningham*, 57 NY2d 270, 275 [1982]). Overturning the will of the people to remove duly elected judges in this State requires a careful, case-by-case analysis of "[w]hether a judge's behavior crosses the line of what constitutes 'truly egregious' conduct . . . judicial misconduct cases are, by their very nature, *sui generis*" (*Matter of Ayres*, 30 NY3d 59, 64 [2017]). While this Court

considers mitigating factors, it has "specifically rejected 'any numerical yardstick for determining unfitness' . . . in rare cases 'no amount of [mitigation] will override inexcusable conduct' . . . sufficient to restore the public's trust in the judge's ability to faithfully execute his or her duties" (*Matter of Restaino (State Commn. on Jud. Conduct)*, 10 NY3d 577, 590 [2008] [removing judge who remanded to jail scores of criminal defendants in prison without sufficient cause]).

C. The Wood Incident did not result in Justice Putorti Engaging in Anything More than Gaining Control of his Courtroom, did not demonstrate a failure to be patient, dignified and courteous, and lacked any racial motivation in either brandishing the pistol or re-telling of the incident to others

The CJC removed Justice Putorti from office because (1) his brandishing of the loaded pistol, (a) constituted impatient, undignified or discourteous behavior toward Defendant Wood, (b) recounting the incident to members of the judiciary or public included Defendant Wood's race, which created an appearance of racial bias, and (c) his recounting the experience to others could be construed as boasting that exhibits a serious lack of judgment (R. 17–18). The CJC further ruled the brandishing of a gun in the courtroom, without adequate justification,

demonstrated a lack of self-control (R. 18).

The CJC's decision on Charge I relies upon few cases or rules, however, it clearly misplaces its reliance upon *Matter of Allman (supra)* wherein the judge improperly sought to question a criminal defendant directly, then physically restrained a legal aid attorney objecting, and yelled at the attorney, which resulted in mere *censure* (R. 258). Here, by contrast, the CJC's *removal* for brandishing a weapon does not demonstrate a lack of self-control in that Justice Putorti did not physical restrain anyone, yell, or discharge (or even rack a round into) the pistol, all of which have been dispositive factors in more factually analogous cases detailed below (*infra* Point I.D.).

The more troubling aspect of this charge for the CJC was Justice Putorti's apparent pride in re-telling the Wood Incident to several members of the judiciary (R. 19–21). Following sentencing, Defendant Wood could not afford his fines and was accordingly arrested or otherwise remanded to the local jail (R. 52). The parties stipulated below that Justice Putorti accepted the (apparently unsolicited) statement from Defendant Wood's wife that her husband did not pay the fines because he

could not afford them (R. 51–52 [ASF ¶ 14]). Rather than accept evidence rebutting any racial motivation, the CJC suggests, without basis in the record (or law) that reducing Defendant Wood's fine to community service and releasing him from jail, an act Justice Putorti performed while on his lunch break from his other job (R. 20, 51–52 [ASF ¶ 14]) and which unquestionably benefitted Defendant Wood tremendously, may have constituted "apparent *ex parte* conversation" with Defendant Wood's wife (R. 20–21). The decision below then acknowledges that these further details are "unclear" in the record and therefore should not "factor" into the analysis at all (*id.*). The CJC openly acknowledged its failure to consider this stipulated into evidence rebutting racial discrimination, and thereby rebutting any appearance of racially motivated decision-making or the appearance of racial bias and on this basis alone this Court should decline to affirm Justice Putorti's removal (*see, e.g., In re Kiley*, 74 NY2d at 368 ["evidence adduced by the Commission fails to sustain a lack of candor charge"]; *Matter of Miller*, 35 NY3d 484, 489 [2020] ["well settled that '[n]either the Commission nor this Court is bound to accept the Referee's findings'"]; *In re Sims*, 61 NY2d 349, 353 [1984] ["While we

give due deference to the commission's determination we are obliged to review the correctness of all its findings and conclusions"]); R. 43 [Dissent, Mr. Rosenberg]).

The record belies any notion that Justice Putorti, in retelling the events, boasted of the racial aspects of the Wood Incident, but instead, perhaps over-enthusiastically, felt a sense of pride in exercising his Second Amendment right (*see NY State Rifle & Pistol Assn. v Bruen*, ___US___ , ___, 142 S Ct 2111, 2122 [June 23, 2022], citing *McDonald v City of Chicago*, 561 US 742, 750 [2010]) to defend himself and anyone else in his place of employment (his courtroom) from the threat of physical altercation by brandishing his pistol (R. 79–80). Indeed, his quotes in the article published by his cousin certainly focused upon his pride of gun ownership and licensure in many States (*id.*). Dissenting member Mr. Rosenberg certainly recognized that the article had nothing to do with race and did not describe the defendant's race, a key factor one would expect if the incident were racially motivated or give any hint or appearance of racial bias (R. 40–41). Yet the CJC's decision took his boasting of brandishing the gun in front of a Black man, Defendant Wood

(R. 19–21), as racial animus despite the record revealing *he accurately described* Defendant Wood as "Black" to other colleagues on the beach, even if his memory at times ascribed to him a much larger stature (R. 51 [ASF ¶ 12]). The record here is more (or at least equally) susceptible to innocent, non-biased interpretations of Justice Putorti's pride surrounding the Wood Incident, and this Court should take the innocent interpretation that he either enthusiastically exercised his Second Amendment right or that he sought guidance from colleagues on how he should handle unruly violent offenders in his courtroom (*supra In re Kiley*, 74 NY2d at 368; *Matter of Miller*, 35 NY3d at 489; R. 262–63). This Court should carefully consider this evidence rebutting any notion of racial animus, or countering any notion of discrimination, before affirming the extreme remedy of removal of the duly elected Justice Putorti, whose lawful conduct in Charge I does not constitute the type of "truly egregious circumstances" meriting removal (*see, e.g., In re Cunningham*, 57 NY2d at 275; *In re Kiley*, 74 NY2d at 370).

The CJC's concern, under the Rules Governing Judicial Conduct, that Justice Putorti's comments may undermine the public confidence in

the judiciary to "respect and comply with the law" (22 NYCRR § 100.2[A]) seems contradicted by his re-election, after the incident, to serve until 2025 (R. 3, 37). The decision of the CJC states, repeatedly, that Justice Putorti "acknowledged" that interjecting Defendant Wood's race in his re-telling of the Wood Matter "may have created the appearance of racial bias" (R. 19, 26; 59 [¶ 33]); however, this acknowledgment that his conduct "may have" given rise to the appearance of racial bias does not constitute an admission of the same. The CJC simply refused to consider that pride of gun ownership, and not any racial motivation, prompted the judge to re-tell the tale to other members of the judiciary, who, it should be noted, apparently did not report racial bias but only their concern for the use of the weapon in the courtroom (*supra*). As noted by Dissenting colleague Mr. Rosenberg, the CJC, and this Court, have typically only sustained removal in cases involving the appearance of racial bias where unmistakable racial epithets or slurs revealed overt, direct evidence of discriminatory animus, and even then this Court has merely censured judges referring to litigants as "n****r in the woodpile" (*see Matter of Agresta*, 64 NY2d 327, 329 [1985]; *Cf. Matter of Cerbone*, 61 NY2d 93, 96

[1984]).

Accordingly, this Court should reconsider the agreed upon facts and reject the CJC's removal and institute no worse than a censure, as Mr. Rosenberg below suggested (R. 46) and as this Court has done in the past (*see In re Skinner*, 91 NY2d at 143 [CJC removal rejected by this Court where the judge heard a criminal case without informing the People of the court date, thereafter dismissed the case, and then in another unrelated criminal case failed to apprise a defendant of his right to counsel and sentencing him to jail for passing a bad check]).

Relatedly, the Commission utterly fails to consider mitigating factors, such as Justice Putorti's cooperation with the investigations into both the Wood Incident and Facebook Fundraising, his unblemished record, his willingness to reconsider and reflect upon his conduct and acknowledge that displaying the pistol was improper (although not worthy of removal) in that "the *moment* he was so advised by Judge Hobbs" it was improper to brandish the pistol, "he *immediately* expressed remorse" signed the written admonishment / counseling memorandum, and "voluntarily stopped carrying his gun to the court room" without

anyone asking him to do so (R. 37, 39–40 [emphasis in original]). The CJC fails to consider that Judge Hobbs, upon admonishing Justice Putorti, and the advisory committee on judicial ethics "were all satisfied" that this remained "an isolated single event that would not reoccur" (R. 38). Indeed, the initiatory documents even suggest as much in that Judge Hobbs was not obligated to take the matter further (R. 159B–159E). Instead, the CJC majority below admonished Justice Putorti for failing to recognize the gravity of his conduct, but at that time (i.e. before Judge Hobbs' admonishment on October 25, 2018) Justice Putorti had every reason to think he acted appropriately in that his judicial training and properly obtained gun/pistol license led him to reasonably believe he could carry his pistol in the courtroom for the protection of himself and others (R. 40).

D. This Court should reject CJC's *per se* rule that a judge cannot brandish a weapon absent facts supporting the legal defense of justification given that precedent involving firearms has resulted in no more than a censure

Precedent simply does not support the *per se* rule from Advisory Opinion 18-65 (2019) (R. 159B–159E) that something akin to facts supporting an affirmative defense of justification must exist present for

a sitting judge to remove their pistol from its holster (*see* Penal Law § 35.15; *In re Y.K.*, 87 NY2d 430, 433 [1996]). The language of Advisory Opinion 18-65 (2019), which resulted from Judge Hobbs seeking CJC's guidance, unquestionably borrows language from New York's law on justification to suggest that a judge unholstering a lawfully possessed pistol must face the threat of imminent deadly force (*see* Penal Law § 35.15; *In re Y.K.*, 87 NY2d at 433). This rule simply discounts the realities many judges without adequate courtroom security face, their reasonable apprehension of assault or other non-lethal force, and their exercise of their lawful rights under the Second Amendment to protect themselves in their homes and businesses (*supra* Point I.A.). Moreover, the justification analysis involving deadly force has no bearing where, as here, neither party suffered any injury, because Justice Putorti, according to the stipulated and uncontradicted ASF, brandished the pistol at him with no further altercation occurring in the incident not witnessed by anyone else (R. 49, 52 [¶ ¶ 5, 16]). The following re-telling of the Wood Incident by Justice Putorti to others may have been pertinent to the (unfounded) charge of racial bias, however, it lacked any bearing

upon what occurred that day, which was Justice Putorti simply "brandishing" the pistol to regain control and security of the courtroom (*id.*).

From a policy perspective, the *per se* rule will require supervising or other judge's with oversight or administrative roles to hold quasi-trials, likely without the benefit of sworn testimony, to determine whether a colleague lawfully carrying their pistol in the courtroom (*see* Advisory Comm on Jud Ethics Op 06-51 [2006]) held sufficient justification, both reasonable and subjective, to brandish the weapon upon the threat of someone in attendance (*see* Penal Law § 35.15; *In re Y.K.*, 87 NY2d at 433) in order to satisfy the analysis called for by Advisory Opinion 18-65 (2019). This seems unnecessary given that in this and many circumstances no deadly force was used, i.e. no firearm will be discharged. This *per se* rule seems untenable and requires careful consideration from this Court to provide guidance to judges exercising their Second Amendment rights in dangerous and threatening circumstances, often at night, and those supervising or administrative

judges overseeing their conduct.

The Commission has previously admonished, rather than removed, a judge *who recklessly discharged a firearm at turkeys* near a busy intersection, at rush hour, with other motorists and bystanders nearby (*Matter of Ciganek*, Ops State Comm. Jud. Conduct [March 29, 2001], available at https://cjc.ny.gov/Determinations/C/Ciganek.Thomas.A.2001.03.29.DET.pdf [last visited January 26, 2023]). The CJC has relied upon the *Ciganek* precedent in finding other cases that resulted in criminal charges against the judge warranted only an admonition (*Matter of Pautz*, Ops State Comm. Jud. Conduct [March 30, 2004] [judge harassed or engaged in a series of annoying acts" toward former lover, but only admonished following dismissal of criminal charges], available at https://cjc.ny.gov/Determinations/P/Pautz.Scott.J.2004.03.30.DET.pdf [last visited January 23, 2023]).

In *Matter of Sgueglia* (2013 Annual Report 304 [August 10, 2012] available at https://cjc.ny.gov/Publications/AnnualReports/nyscjc.2013annualreport.

pdf [last visited January 23, 2023]), the judge brought licensed firearms (a Glock Automatic 9mm and a .38 caliber Smith and Wesson revolver) into the courthouse (in part because he had been "directly threatened by individuals on two occasions"). His honor kept the firearms in chambers, where he *accidentally discharged one of them in chambers*, and the CJC only censured him (*id.*). Additional decisions of the CJC resulted in no more than admonishment for judges intentionally and repeatedly bringing concealed firearms into County-owned buildings prohibiting gun possession (*see Matter of Moskos*, 2017 Annual Report 177 [October 3, 2016] available at https://cjc.ny.gov/Publications/AnnualReports/nyscjc.2017annualreport.pdf [last visited January 23, 2023]).

These decisions, and *Ciganek* and *Sgueglia* in particular, plainly show that (1) improper use of legally owned firearms results in typically no more than censure, and (2) justification has no place in the disciplinary analysis when determining whether or what penalty is warranted for removing the pistol from the holster (i.e. for not discharging it). For the reasons expressed in Mr. Rosenberg's dissenting

opinion, the Court failed to consider these cases or principles when adjudicating this matter (R. 37).

Justice Putorti fully recognizes that the privilege of holding judicial office requires that he comport himself with higher ethical standards than your average citizen; that he must conduct himself in a manner beyond reproach, with an eye toward the exacting standards of public scrutiny reserved for member of the judiciary (*In re Lonschein*, 50 NY2d 569, 572 [1980], citing *Kuehnel v State Com. on Jud. Conduct*, 49 NY2d 465, 469 [1980]). Upon learning from Judge Hobbs (contrary to his prior training) that carrying and displaying a weapon are completely different acts for sitting judges, Justice Putorti fulfilled those higher ethical obligations by acknowledging his error, expressing remorse, and voluntarily relinquishing his right to carry the pistol in the face of the threats so many members of the judiciary routinely face. His appeal is worthy of this Court's consideration and ultimately his reinstatement will serve those higher ideals.

E. Conclusion

For the foregoing reasons, Judge Putorti's conducted amounted to no more than poor judgment, in a split-second decision, based upon outdated information, and he respectfully requests this Court reject the sanction of removal, reinstate him, and either enter no sanction, an admonition or, "at the very worst, censure" (R. 46; *see* Judiciary Law § 44[9]; *In re Kiley*, 74 NY2d at 371).

POINT II: fundraisers created by third parties that either "tagged" Justice Putorti's Facebook profile, or were shared by him, did not warrant his removal from the bench, and the Commission on Judicial Conduct's failure to consider several mitigating factors further militate that no more than censure was appropriate in this circumstance where the public has not lost faith in Justice Putorti's ability to fulfill the trust placed in him by his community.

A. Introduction

The CJC's Determination below offers scant analysis regarding the personal or Elks Lodge fundraising consisting of Facebook posts (*supra* Statement of Facts), authored by others, that either tagged Justice Putorti or were shared by Justice Putorti (R. 2, 21). In its single paragraph of analysis (R. 21), the CJC concluded that the posts amounted to fundraising for the Elks Lodge, that Justice Putorti either shared or allowed himself to be tagged in the posts while under investigation for Charge I, and allowed them to remain publicly accessible during the CJC's investigation (R. 12, 14, 16, 21, 23). The Determination later defends its decision to investigate Justice Putorti's Facebook Fundraising because it followed its own protocols for authorizing that second investigation and "it was more than appropriate for the Commission's staff to review [Justice Putorti's] public social media posts to determine

whether he had made any additional public comments" about the Wood Incident (R. 23).

Dissenting member Mr. Rosenberg saw the genesis of the investigation quite differently and opined that the CJC's staff "sua sponte" conducted a "forensic investigation . . . by scouring" into Justice Putorti's "Internet and other social media" for "any other conduct they could charge" (R. 44–45). Upon surveying the remarkably similar precedent before the CJC in which fundraising or political activity for third parties resulted in no more than censure, Mr. Rosenberg concluded that Justice Putorti's shared or tagged posts that did not identify "himself as a judge," warranted no more than censure, and that the facts and applicable legal authority did not justify "the punitively unjust and excessively harsh sanction of removing" him from the bench (R. 45–46).

B. Standard of Review

This Court applies the same analysis to its review of both Charges I and II (*supra* Point I.B.).

C. The genesis of the second charge and mitigating circumstances that include Justice Putorti's full cooperation

On November 10, 2020, the CJC initiated its second complaint, now looking into the Facebook Fundraising (R. 173A), and later formally charged Justice Putorti with allowing the posts to remain viewable to the public "notwithstanding" that the CJC notified him of its investigation on or about November 12, 2020 (R. 179 [¶ 20). Mr. Rosenberg correctly admonished his colleagues for scouring social media for additional charges when he gave every indication of full cooperation (*supra* Point II.A.).

While the determination below did not use the phrase "lack of candor" it certainly contains the implicit suggestion that Justice Putorti did something wrong in remaining transparent and allowing investigators to extract this information, and then voluntarily providing CJC the financial and attendance records it may not have obtained without his cooperation, which subsequently became incorporated into the ASF (R. 65 [¶ 54]; 147–50). The CJC defended its position as reasonable because the posts remained publicly accessible (R. 12, 14, 16,

21, 23). Justice Putorti asserts no claim of a reasonable expectation of privacy, and transparently invited the CJC's review of these materials and cooperated by providing his forthright explanation for them (R. 65 [¶ 54]; 147–50). Nevertheless, the Facebook posts either "remain public" and subject him to discipline, or Justice Putorti alters his privacy settings on Facebook and he's then undermining the investigation and subject to a lack of candor charge.

This is the type of catch-22 the Court of Appeals has specifically admonished the CJC to avoid creating: "Judges facing misconduct investigations are in the unenviable position of having to choose between speaking with Commission representatives and refusing to speak. If they choose the latter course, they risk being charged with 'failure to cooperate' as an aggravating factor . . . On the other hand, if they cooperate by speaking to Commission investigators or testifying at their own hearings, they run the risk of provoking 'lack of candor' charges . . . result is both undesirable and unnecessary" (*In re Kiley*, 74 NY2d at 370–71). Further, as related to Charge I, to the extent that his re-telling of the Wood Matter varied, such "discrepancies" even under oath are "not

necessarily reflect[ive of] dishonesty or evasiveness" (*In re Skinner*, 91 NY2d at 144 [reducing penalty from removal or censure]) and thus any suggestion otherwise from the CJC's Determination should be rejected by this Court upon its review of the ASF and record.

Nevertheless, as to the substance of the Facebook Fundraising, Justice Putorti does not deny that fundraising, as a judge, for third party candidates or even nonprofit causes is improper (*see, e.g., In re Harris*, 72 NY2d 335, 337 [1988] [judge admonished for assisting in efforts raising money for the American Heart Association]; 22 NYCRR § 100.4[C][3][b][iv]). Previous cases involving online or other fundraising by judges abound in which the penalty for such poor judgment fell far short of removal from office (*id.*; R. 45–46 [Mr. Rosenberg, dissenting]; R. 223–25). Moreover, additional decisions involving judges overtly lending the prestige of their office to political organizations or causes online similarly have involved penalties far short of removal from office (*see Matter of Peck*, Ops State Comm. Jud. Conduct [March 19, 2021] [judge attending and posting on Facebook messages sympathizing with "Back the Blue" events only admonished despite previous admonishment for

same conduct], available at https://cjc.ny.gov/Determinations/P/Peck.John.R.2021.03.19.DET.PDF [last visited January 24, 2023]; *Matter of Schmidt*, Ops State Comm. Jud. Conduct [November 3, 2020] [sharing memes of President Bill Clinton having killed Jeffrey Epstein, Red Flag laws, gun control, and Nazi book burning], available at https://cjc.ny.gov/Determinations/S/Schmidt.Robert.H.2020.11.03.DET.pdf [last visited January 24, 2023]; *Matter of VanWoeart*, Ops State Comm. Jud. Conduct [March 31, 2020] [upon an agreed statement of facts, the judge stipulated that her official campaign page liked or posted about other candidates on the ballot calling them "Dirt Bag" or "Sh*t Head" among other conduct online, resulting in only a censure], available at https://cjc.ny.gov/determinations/V/VanWoeart.Michelle.A.2012.08.20.DET.pdf [last visited January 24, 2023]; *Matter of Whitmarsh*, Ops State Comm. Jud. Conduct [December 28, 2016] [Facebook posts and "likes" of posts critical of other town justices or attorneys received admonition only], available at https://cjc.ny.gov/Determinations/W/Whitmarsh.Lisa.J.2016.12.28.DET.

pdf [last visited January 24, 2023]).

Moreover, much like Charge I, the CJC Determination below utterly failed to consider mitigating circumstances (or its own precedent) in reaching the conclusion that it must *remove* Justice Putorti (R. 44–46 [Mr. Rosenberg, dissenting]).

First, as to Charge II, Justice Putorti's full cooperation yielded the names of potential attendees, donors, amounts of donations, and much more information that was not publicly available on Facebook when he answered the CJC's written inquiries that the parties later stipulated to as part of the ASF (R. 123–30 [questions], 147–59 [answers with attachments]; *supra* Statement of Facts). As a result, it is uncontested in the ASF that Justice Putorti did not handle the funds from the spaghetti fundraiser, which apparently went directly to his sister and Michael Rocque who "held" the proceeds from the event to pay medical bills consisting of $1,000 insurance deductibles following his severe motorcycle accident (*id.*). Moreover, it is further uncontested that the Facebook profile for "Robert Putorti Jr" remained a personal account that does not identify him as a judge or in any way associated with the

judiciary, and thereby does not overtly lend his title or prestige of office to any fundraising effort (R. 62 [ASF ¶ 43]; R. 123–25, 147–50). Justice Putorti did not create the posts, which were authored by others, such as the Elks Lodge or family members, and he only allowed himself to be tagged in them or shared their posts encouraging, but not requiring, citizens and members of the legal community to attend (R. 123–25, 147–50; *supra* Statement of Facts). Arguably, the Facebook profile's sharing of the Elks Lodge events created by members of the Lodge is more akin to a judge being identified on fundraiser letterhead as a member of the board of the organization with no direct solicitation of funds (22 NYCRR § 100.4[C][3][b][iv]). Finally, the majority of the Elks Lodge posts appeared to be private events for Elks Lodge members only (*id.*), thereby further reducing the appearance of any impropriety or likelihood that it will impact the general public's faith in the judiciary (*see generally* 22 NYCRR § 100.2[A], [D]).

Second, as to Count I, the CJC failed to consider mitigation evidence as to the lack of racial bias, Justice Putorti's good faith belief from his training and pistol licensure that he could carry and brandish

his pistol, his voluntarily relinquishing his Second Amendment rights after Judge Hobbs' admonishment, and other factors were addressed above (*supra* Point I) and by Dissenting member Mr. Rosenberg's opinion (R. 37, 39–40).

Finally, as to both charges, Justice Putorti entered into an agreed statement of facts that obviated the need for formal hearing (R. 47, 48, 66) and included the waiver of otherwise valid defenses. His cooperation avoided CJC's duty to gather evidence, through subpoenas or conducting further discovery, in its effort to meet its burden to prove its case (R. 65). He did not attempt to have his cousin remove or retract the report regarding the Wood Matter, nor did he remove or take down the Facebook posts, and did not alter his privacy settings until the time of filing his Answer to the Second Formal Written Complaint, all in an effort to reduce any appearance of impropriety and thereby demonstrate transparency and candor (R. 54, 64–65 [ASF ¶ ¶ 21, 53]). The CJC received no complaint from Defendant Wood or other people at the time of the Wood Incident, nor any complaint from any attorney, law enforcement officer, or member of the community aware of Wood Incident

or the Facebook Fundraising, and Justice Putorti enjoys an otherwise unblemished record prior to these near simultaneously filed complaints (*see In re Skinner*, 91 NY2d at 143). In cases where the respondent engaged in conduct as egregious as intervening in a case on his son's behalf, this Court determined a censure appropriate given cooperation, an otherwise clean record, and other mitigating circumstances (*see, e.g., Matter of Edwards*, 67 NY2d 153, 154–55 [1986]). Similarly, in *Kiley*, CJC recommended removal for a judge who sought lenient treatment for criminal defendants by engaging in *ex parte* communications to effectuate same, and further charged lack of candor during the CJC's investigation, yet this Court found removal unwarranted for what amounted to "poor judgment or even extremely poor judgment" given the absence of "venality, selfish or dishonorable purpose" (74 NY2d at 366–70; *see also In re Kelso*, 61 NY2d 82, 87–88 [1984] [reducing removal to censure where, among other mitigating factors, depression fueled the judge's decision, in his private practice, to lie to a client about status of litigation, and offer $10,000 for the client to withdraw a grievance]).

Accordingly, the foregoing mitigation factors the CJC failed to

explicitly consider, combined with Justice Putorti's cooperation, reflection upon his conduct and reformation of same, and the absence of venality, selfishness, or dishonorable purpose, all militate in favor of reducing the penalty from removal to censure or a lesser punishment this Court deems, in its discretion, appropriate under the circumstances (*see, e.g., Matter of Angelo D'arrigo*, Ops State Comm. Jud. Conduct [June 25, 1981], available at https://cjc.ny.gov/Determinations/D/Darrigo.Angelo.1981.06.25.DET.pdf [last visited January 23, 2023]). Finally, Justice Putorti's reforming his conduct, acknowledging his role in both Charges, fully cooperating in CJC's investigations, and his subsequent re–election all suggest that the public has not lost faith in the judiciary in this instance so as to warrant removal for what amounts to lapses in judgment (*In re Raab,* 100 NY2d 305, 315–17 [2003] [sustaining censure for judge engaging in political activity, including improper campaign contributions, noting that the Court considered the public's confidence and the First Amendment rights of the judge in carefully meting out the appropriate sanction to protect public's confidence in the judiciary that allowed the judge to continue to

serve after cooperating with CJC by, *inter alia*, entering into an agreed statement of facts]; *Matter of Hart*, 7 NY3d 1, 9 [2006] [sustaining censure where judge abused contempt power and recognizing "public confidence" was weighed as one of many factors]; *Cf. Matter of Senzer*, 35 NY3d 216, 219 [2020] [sustaining removal yet recognizing the Court "must also consider the effect of the misconduct 'upon public confidence in [the Judge's] character and judicial temperament'"]).

D. Conclusion

For the foregoing reasons, Judge Putorti respectfully requests this Court, for sums even as nominal as these, issue the same admonishment or censure that previous judges have received for matters involving fundraising for other election campaigns or non-profits where he did not overtly lend the prestige of his office to those endeavors. Moreover, the mitigating circumstances that the Determination below failed to consider, further warrant this Court reject the sanction of removal, reinstate Justice Putorti, and either enter no sanction, an admonition or, "at the very worst, censure" (R. 46; *see* Judiciary Law § 44[9]; *In re Kiley*, 74 NY2d at 371).

CONCLUSION

WHEREFORE, for the reasons set forth in Points I and II, Judge Putorti respectfully requests this Court reject the sanction of removal, reinstate him, and enter no sanction, an admonition or, at worst, censure. Alternatively, Judge Putorti prays this Court order such further relief as it deems just and proper.

Dated: January 26, 2023

Respectfully submitted,

Nathaniel V. Riley, Esq.
CERIO LAW OFFICES, PLLC
Attorneys for Petitioner
407 S. Warren St., Suite 5
Syracuse, New York 13202
Tel.: (315) 422-8769
Fax: (315) 476-8002
Email: Nate@ceriolawoffices.com

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Respectfully submitted,

Nathaniel V. Riley, Esq.
CERIO LAW OFFICES, PLLC
Attorneys for Petitioner
407 S. Warren St., Suite 5
Syracuse, New York 13202
Tel.: (315) 422-8769
Fax: (315) 476-8002
Email: [redacted]