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 REPLY 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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PRELIMINARY STATEMENT

Justice Putorti appeals from 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). The CJC reached the determination upon the Agreed Statement of Facts ("ASF"), with exhibits, submitted by the parties below (R. 48–66 [ASF], 67–159 [exhibits]). On or about January 26, 2023, Justice Putorti perfected his appeal and served his brief upon the CJC (Appellant's Brief ["PetBr"]).

The CJC requested, with the consent of the undersigned, an extension of time to file and serve their response. On or about March 15, 2023, the CJC electronically served upon the undersigned their response (Respondent's Brief ["ResBr"]). With the consent of the CJC, the undersigned requested, and this Court granted, an extension of time to file this reply.

As more fully argued below, Justice Putorti now replies to CJC's contentions that: (1) brandishing a weapon warrants automatic removal in itself; (2) that use of the description of Mr. Wood's race as "black" and

variously characterizing his stature amounted to racial bias; (3) Justice Putorti "boasted" about the Wood incident to others on four occasions constituting further evidence of racial bias; and (4) sharing Facebook posts about fundraising efforts by other individuals further warrants his removal.

STATEMENT OF FACTS

Justice Putorti reasserts and relies upon the statement of facts submitted in Appellant's Brief. Any material omissions or misstatements of fact are addressed in the context of the relevant argument below.

ARGUMENT

REPLY TO RESPONDENT'S POINTS A–C: BRANDISHING THE GUN DOES NOT WARRANT REMOVAL, AND ACCURATELY DESCRIBING THE LITIGANT BEFORE HIM AS "BLACK" DESPITE THE MISSTATEMENT OF HIS STATURE, DOES NOT AMOUNT TO RACIAL BIAS, EVEN WHERE HE REPEATED THE DESCRIPTION TO OTHER JURISTS WHEN SEEKING THEIR ADVICE OR DURING A FORMAL INQUIRY

A. *Brandishing a gun, without discharging it, should not, in itself, result in removal from the bench*

The CJC describes brandishing a firearm without discharging it as "shocking" and "egregious" such that it compels removal (ResBr 22). However, when confronting judges charged with firing a round into a crowded street (*Matter of Ciganek*, 2002 Ann Rep 85, Ops State Comm. Jud. Conduct [March 29, 2001]) or discharging it in an occupied courthouse (*Matter of Sgueglia*, 2013 Ann Rep 304, Ops State Comm. Jud. Conduct [August 10, 2012]), even the CJC, bound by and applying this Court's "truly egregious circumstances" standard (*see, e.g., In re Kiley*, 74 NY2d 364, 369 [1989]), found that neither constituted egregious conduct to warrant removal of either judge who remained at the bench

thereafter. The CJC argues that this conduct is "unprecedented" and thus warrants the harshest possible sanction of removal (ResBr 27–28). However, in doing so, the CJC simply ignores its own cases involving more egregious conduct subjecting others to imminent harm that nevertheless resulted in those members of the judiciary remaining on the bench (*supra*).

Thus, it would seem that act of brandishing or possessing a loaded firearm that fired no bullet is not "inimical" to core American legal system values (ResBr 24) as defined by the CJC's prior decisions permitting judges to discharging firearms to keep their jobs (*supra*; *see also generally* Fla Stat Ann § 790.061 [exemption for judges for carrying firearms]). If concern for public safety, the sanctity of the courtroom, or the "dangerous" act of brandishing a firearm (PetBr 25) remained paramount, one would expect removal of those judges who not only tarnished that legacy but, unlike Justice Putorti who did not pull the trigger, jeopardized human lives in the community and in the courthouse by dangerously discharging their weapons.

For this point, the CJC relies upon *Matter of Kuehnel*, however, its facts easily distinguish itself from this matter in which Justice Putorti

engaged in no violence or use of racial epithets (49 NY2d 465, 468, 470 [1980] [judge removed for "two frenzied displays of overt physical violence, as well as repeated outbursts involving outrageous verbal abuse and virulent racism"]). In *Kuehnel*, this Court affirmed removal of a judge, who, without evidence supporting any wrongdoing, had police arrest four young people, then, while under arrest, "struck one of [the arrested youths], age 13, in the back of the head" and another "in the face, causing his nose to bleed" before later extracting a settlement and general release from one of the victims for a mere $100 (*id.*).

Moreover, similar to countless New York State courthouses routinely secured by armed Sheriff's Deputies and other law enforcement carrying lethal weapons, Justice Putorti simply secured his courtroom in the absence of anyone else to do so (R. 6, 52 [ASF ¶ ¶ 15–17 ["no other witnesses to this event"]). The CJC cherry picks (ResBr 25) the record for instances in which Justice Putorti purportedly stated to his presiding judge, Judge Hobbs (R. 57, 83), or other judges at a judicial conference in 2018 (R. 55), that an officer (presumably Officer Archambault) was present and able to secure the courtroom (because he was presumably armed) and that neither the officer nor Justice Putorti viewed Mr. Wood

"as a threat" (ResBr 25). Only one portion of the ASF addresses what happened on that date involving Mr. Wood, and it makes no mention of any officer by stating succinctly "no other witnesses" existed (R. 52). Other portions of the ASF relay purported hearsay statements of Justice Putorti to third parties that were not tested by cross-examination nor admitted by the parties (R. 53–58 [summarizing "respondent's interview" with his cousin, his "comments about the gun incident" to fellow jurists, and Judge Hobbs' "counseling of Respondent"]). While those statements remain pertinent to the racial animus analysis (*infra*), only one section of the AFC related to what occurred that day, and it is undisputed that "no witnesses" were there and thus the purported police officer (who had his own credibility issues) should receive no weight before this Court. It is perfectly acceptable for the CJC to make arguments or draw inferences from the ASF, but it's quite another to contort the facts to fit their argument, which this Court should accordingly reject.

Finally, the CJC's argument that Justice Putorti, on this Charge I, faced more egregious conduct than discourteous behavior lacks merit (Pet Br 24). The CJC charged Justice Putorti with failing to adhere to rules requiring patience, dignified conduct, and acting "courteous to litigants"

(R. 17, 58). Indeed, AO 18-165 specifically analyzed these rules for courteousness when considering this dispute (R. 159D, citing 22 NYCRR § 100.3[b][3]). Thus, the CJC overstates their case when they insist that Justice Putorti, in citing to the very rules he's accused of violating (PetBr 13) does not appreciate the "gravamen" of this inquiry (ResBr 24).

The CJC argues, for the first time, that Justice Putorti's conduct amounted to a misdemeanor crime of menacing in the second degree (Penal Law § 120.14[1] ["menacing-2"]) because absent a "dire threat" pointing a loaded weapon could not be justified (ResBr 25–27, citing *People v Perry*, 19 NY3d 70, 73 [2012]). The CJC is incorrect (*see People v Magliato*, 68 NY2d 24, 29 [1986]) and its argument only further demonstrates the infirmity of OP 18-165.

The *Perry* Court confronted a criminal possession of a weapon ("CPW") in the second-degree charge involving defendant's threatening statements to the victim in which, during his tussle with the victim, he took out a gun (*id.* at 72). The Court reasoned that, under Penal Law § 35.05(2), no statement or other evidence from the defendant met the subjective portion of the test for a justification defense to a potential lesser-included offense of menacing second because "defendant never said

that he was afraid, during their encounter, that Baker would kill him, or even that he believed that Baker had a weapon" (*id*. at 73 [defendant argued that the jury should have received a lesser-included charge for CPW fourth, but the court rejected that argument because the defendant, by showing the victim the gun, sought to "scare him" and thereby committed menacing-2 and no reasonable view of the facts entitled him to a justification defense because, critically, he "never said that he was afraid"]). The *Perry* Court thus did not squarely confront justification and thus its pronouncements amount to little more than dicta (*see People v Quiles*, 74 Misc 3d 953, 959 [Sup Ct, Bronx County 2022]), but *Perry* remains inapplicable where Justice Putorti did subjectively fear for his safety (R. 52). In a criminal matter on these facts, justification would apply here even to a menacing charge (*see, e.g., People v Ellis*, 233 AD2d 692, 693 [3d Dept 1996], citing *Magliato*, 68 NY2d at 29). The *Ellis* defendant did not intend to use the deadly force, a knife, by swinging at approaching assailants (*id.*), just as Justice Putorti did not rack a round into the chamber at the approaching Mr. Wood (R. 4, 10, 50–51, 56 [ASF ¶ ¶ 11, 28(A)], 83, 159C [no bullet in chamber]).

Nevertheless, the point made by Justice Putorti's topside brief remains that justification analysis, without the benefit of a factually developed record, provides an ill-fitting analytic framework for supervising judges to apply when their subordinate judges display firearms and thus AO 18-165 should be reconsidered (PetBr 23–25). As the foregoing demonstrates, the subjective and objective elements of justification would require supervising judges to hold trials on the matter where potential criminal charges could result, and thus places supervising judges in near impossible positions.

Nevertheless, assuming the justification analysis called for under AO 18-165 (R. 159B–159E) was correctly applied here to the brandishing of a weapon in this circumstance, it directed that the "supervising judge 'is in the best position to assess [[Justice Putorti's]] motivation and receptiveness to guidance" (R. 159E). Justice Putorti satisfied Judge Hobbs that this remained a "one-time, isolated incident" stemming from Justice Putorti's "concerns about . . . personal safety" (*id.*). Judge Hobbs noted no concerns for further incidents, nor of racial bias, and according to his personal notes and written admonishment considered the matter closed by advising Justice Putorti to simply install a table between the

stop line and the bench "to create a buffer" between him and litigants (R. 10, 83–84, 86).

B. *Justice Purtorti exhibited no racial animus or bia*s

Justice Putorti does not deny the various characterizations contained in the record and ASF of his description to third parties (his cousin, other judges) of Mr. Wood, but notes that accurately describing the man he confronted as "Black" does not amount to racial bias because this Court's precedent, which the CJC's brief ignores, held censure an appropriate punishment for judges using racial epithets (PetBr 21, citing *Matter of Agresta*, 64 NY2d 327, 329 [1985]; *Matter of Cerbone*, 61 NY2d 93, 96 [1984]). The re-telling of the event, years after it occurred in 2015, that attributed to Mr. Wood various statures, in no way sought to add details to "somehow aggravate[] the event" and the CJC's suggestion to the contrary amounts to little more than speculation (ResBr 29, 31, 32).

The acknowledgment of Justice Putorti, in the ASF, that the description of Mr. Wood's race "*may have* created the appearance of racial bias" (R. 59 [ASF ¶ 33] [emphasis added]) does not constitute an admission of the racial bias (*see generally Bruni v City of NY*, 2 NY3d 319, 327 [2004] [definition and difference in acknowledgments versus

admissions]). Justice Putorti did not concede the central issue in this case (whether his conduct constituted racial bias) and instead took notice of the possibility of that interpretation and left it to the CJC (and now this Court) to determine the issue (*id.*). To hold otherwise would mean that simply signing an agreed statement of facts containing acknowledgements reduces the CJC process to mere formalism, which could not be what the legislature or courts meant in permitting the parties to enter into such a document (Judicial Law § 44[5]). The CJC does not meet its burden with a mere ASF containing acknowledgments (*see generally In re Mogil*, 88 NY2d 749, 752 [1996] [CJC's burden to prove its case, through circumstantial or direct evidence, by a preponderance of the evidence]; *In re Seiffert*, 65 NY2d 278, 280 [1985] [applying preponderance rather than clear and convincing standard]).

Indeed, racial bias remained one of the central issues for the CJC to confront upon this record, which, as detailed in the dissent below (R. 42–43) and Petitioner's brief, it failed to do by (a) ignoring mitigating evidence or evidence rebutting discriminatory bias, such as Justice Putorti releasing Mr. Wood from jail when he failed to pay his fines and *sua sponte* reducing his sentence (an act one would not expect from

someone exhibiting racial bias) (PetBr 18–19; R. 51–52 [ASF ¶ 14]; *see also* R. 36 [dissent]); (b) failing to recognize that the article published by his cousin, which purportedly constituted bragging about the incident, failed to mention race (R. 78–79); and (c) failing to recognize that his presiding judge, Judge Hobbs, in his counseling memorandum made no mention of racial bias as a concern (R. 83–84, 86).

The majority below chose not to speculate about the "motive" for Justice Putorti committing this judicial act of grace in releasing Mr. Wood (R. 20), despite it plainly rebutting any allegation of racial bias. However, without support in the record for racial animus (i.e. no admission from Justice Putorti of racial animus or live testimony from which it could discern the same), the majority below enthusiastically ascribed racial motive to his use of "Black" or describing the size of Mr. Wood (R. 18–19). Justice Putorti's consistent use of the word "Black" is not racially charged and does not provide direct (or circumstantial) proof of racial animus like a racial epithet would provide (*supra Agresta*, 64 NY2d at 329). The CJC, while citing to inapposite criminal cases, engages in precisely the type of speculation it asks this Court to avoid when it ascribes to Justice Putorti's accurate and consistent use of the word

"Black" or his stature (ResBr 32 ["[w]ithout knowing why Petitioner did what he did, to ascribe any meaning or motivation to it is pure speculation and thus impermissible"]). The ASF contains no direct or circumstantial evidence in Justice Putorti's past, nor in the Wood incident or others, that remotely demonstrates racial animus and this Court should reject such conjecture and determine that the CJC failed to meet its burden by a preponderance of the evidence.

The CJC contends that it may not freshly consider the ASF or other facts in the record to draw any conclusion other than affirmance (ResBr ResBr at 30, n. 15). Justice Putorti does not seek for this Court to make new factual findings, but only points out that examining these same facts in the ASF lead the majority and dissent below to come to diametrically opposed conclusions, and this Court's decisions support it drawing its own inferences and conclusions from the ASF (PetBr 18–19 citing *Matter of Miller*, 35 NY3d 484, 489 [2020]; R. 43).

Moreover, the CJC's appeal to criminal cases involving the exception to the general rule that this Court may not review matters in the absence of preservation (i.e. permitting review of certain unpreserved constitutional issues) are unavailing (*People v Kinchen*, 60 NY2d 772, 774

[1983], citing *People v Charleston*, 54 NY2d 622, 623 [1981] [J. Gabrielli, concurring] [noting the difference between and inadequate record on appeal and the defendant's waiver of his right to counsel by entering a plea]). Here, an adequate record exists, and to the extent it does not, the CJC failed to meet its burden in supplying facts to support its charges (*Cf. In re Mogil*, 88 NY2d at 752; *In re Seiffert*, 65 NY2d at 280).

Our society should root out racism in all forms, and the Constitution demands that our judges should not exhibit an ounce of racial bias or animus. However, the term "Black" to describe the African American Mr. Wood remains an accurate description of him that was neither gratuitous nor offered with racial undertones or the wink-and-a-nod the CJC now suggests. Indeed, the Courts of this country, when directly confronting issues of racial discrimination, animus, bias (conscious or unconscious) refer to the African American race as "black" (*see, e.g., People v Johnson*, 197 AD3d 61, 73 [3d Dept 2021] [confronting racist ideologies surrounding "black people"]; *People v Boone*, 30 NY3d 521, 529 [2017] [case making cross-racial identification jury charges mandatory and referring to the defendant and others as "black"]; *Flowers v Mississippi*, ___US___ , ___, 139 S Ct 2228, 2235 [2019] [analyzing the

"black" prospective jurors for *Batson* violations]). Providing an accurate account of race as "black," even when supported by the inaccurate description of stature, without more, cannot be deemed racial bias.

The easily distinguishable authority relied upon by the CJC does not support a finding of removal here because each involved much more than an accurate description of a litigant (ResBr 29–30). Unlike Justice Putorti, in *Pennington* the CJC removed a judge referring to a litigant's race generally as "colored people" (which is undoubtedly egregiously racially charged and harkens back to segregation in a way that "Black" does not) and overruled an objection by stating that the absence of "Negro or a n***** " in the question meant it was not "racial" (2006 Ann Rep 224, 225 [September 7, 2005] [removing him where he also brought a young woman to his home following her arraignment and his record included prior discipline]). Certainly, Justice Putorti's case is unlike the facts encountered by this Court in *Schiff* where the judge "recalled a time when it was safe for young women to walk the streets 'before the blacks and Puerto Ricans moved here'" (*In re Schiff*, 83 NY2d 689, 692 [1994] [removing the judge for also settling a "personal vendetta" by granting a motion and failing to accurately account for "records and dockets of

dispositions of over 600 criminal cases" and an unexplained surplus of $22,000 in court account]). The unmistakable inference from such a remark is that "blacks and Puerto Ricans" are dangerous and make the streets unsafe (*id.*). Justice Putorti made no such inference in accurately describing Mr. Wood's race.

Relatedly, Justice Putorti takes no issue with the standard for judges, articulated in *Duckman*, that the "perception of impartiality is as important as actual impartiality" (*In re Duckman*, 92 NY2d 141, 151–52, 154 [1998] [judge involved had a long history of bias against prosecutors, dismissing criminal cases, deriding them repeatedly in remarks from the bench, including bias against a partially disabled prosecutor he told to "stand up" properly, bias against women he found "too sexy," and bias against African American women]). Justice Putorti met that standard here through, *inter alia*, Judge Hobbs' memorandum that did not counsel Justice Putorti on racial bias despite the investigation into the matter including Justice Putorti's description of Mr. Wood as "black" (R. 83–84, 86; *see also* R. 33 [dissent]).

This Court should conclude that, upon this evidence, the CJC simply did not meet its burden to show by a preponderance of the

evidence that Justice Putorti acted in a manner that lacked courteousness or constituted the other misconduct he faced (*supra*). The dissent below, confronting the same ASF, elegantly reached the conclusion that the Wood incident (or Facebook Fundraising) did not warrant removal (R. 34 ["[m]ajority . . . unable to articulate what 'truly egregious circumstances' . . . warrant removal . . . isolated incident from 2015 . . . coupled with respondent's immediate compliance and agreement with all the advice and directives of his Supervising Judge does not constitute 'egregious' let alone 'truly egregious' circumstances"]).

C. *The CJC's argument and finding below of "boasting" to support racial animus amounts to conjecture on this record*

The CJC retreads much the same arguments regarding justification and the Second Amendment (*supra*). Justice Putorti recognizes the difference between use and carriage and argued above that this use was justified, even against a hypothetical menacing-2 charge (*supra*). He further contended that the analytic framework of OP 06-151 should be reconsidered in these circumstances where no criminal charge or harm resulted from brandishing the weapon (*supra*).

The CJC insists that Justice Putorti repeated the Wood incident on four occasions (ResBr 32–33), but not all of them could fairly be characterized as voluntary boasting. He sought the "advice" of colleagues at a judicial convention about how to handle any future incident similar to the Wood matter (R. 11 [¶ 26], 27, 32–33, 41, 55 [ASF ¶ 25]) and then stated it again during a formal investigation by his supervising judge, Judge Hobbs (R. 83–84, 86). Again, his mentioning of it to his cousin publishing the article is certainly more susceptible to an innocent inference or interpretation that he felt pride in his Second Amendment right given that the article (and Judge Hobbs' formal admonishment) made no mention of race, and this Court should adopt that innocent interpretation rather than adopt the conjecture the CJC offers.

REPLY TO RESPONDENT'S POINTS D & E: CHARGE II REMAINS UNSUPPORTED AND DOES NOT WARRANT THE EXTREME REMEDY OF REMOVAL FROM OFFICE WHERE MANY PRIOR DECISIONS RESULTED IN ADMONISHMENT AND JUSTICE PUTORTI'S COOPERATION WITH THE INVESTIGATION AND MITIGATING FACTORS SUPPORT NO MORE THAN CENSURE OR ADMONISHMENT

The parties agree as to the facts and ethical standards (*see, e.g., In re Harris*, 72 NY2d 335, 337 [1988]), but dispute whether Justice Putorti's candid disclosure of financial irregularities should result in his removal from office where many past decisions resulted in a lesser admonishment or censure (*see* PetBr 34–36 [collecting cases]). The CJC spends almost no effort discounting that precedent or other legal authority that Justice Putorti's private events were more akin to a judge being identified on letterhead (PetBr 37, citing 22 NYCRR § 100.4[C][3][b][iv]).

Indeed, Charge II would not have been possible without Justice Putorti answering interrogatories regarding the fundraisers alluded to on Facebook (R. 123–30 [questions], 147–59 [answers with attachments]). It remains 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.*). Thus, the CJC's citation to authority involving a failure to cooperate with the investigation are inapposite (*see Matter of O'Connor*, 32 NY3d 121, 125 [2018]).

The CJC does repeatedly mention that Justice Putorti engaged in prior acts of brandishing his weapon, which it characterizes as "vigilantism" or a "pattern of displaying his guns" (ResBr 33, 37). Prior to the 2015 Wood incident, (a) one of those incidents occurred *more than a decade prior*, in 2003 or 2004, in an effort to defend another person from a third party *threatening them both with a chainsaw* and resulted in no criminal charge against him ; and (b) the other occurred in Virginia in 2015 and did not involve him brandishing his weapon which *remained on his hip* (R. 7, n. 5, 53–54 [ASF ¶ 20[C] [weapon "visible on his waist" while in a "convenience store", which is, apparently, in accordance with the law of Virginia, where he is licensed to carry]). Thus, neither incident would have any bearing upon his official capacity as a New York judge.

CONCLUSION

WHEREFORE, for the reasons set forth above, and in Points I and II of Appellant's Brief, 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: April 12, 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: [redacted]

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The foregoing reply brief was prepared by computer using word processing software (Microsoft Word Professional Plus 2016) and Century Schoolbook, 14-point font with double spacing. According to the word processing software, it contains 4,010 words (less than the 7,000 word limit for reply briefs), exclusive of the caption, signature block, cover, table of contents, table of citations/authorities, proof of service, this certification, or any addendum.

Dated: April 12, 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