STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

ROBERT J. PUTORTI, JR.,

a Justice of the Whitehall Town Court and,
Whitehall Village Court, Washington County.

REPLY MEMORANDUM TO RESPONDENT'S BRIEF

ROBERT H. TEMBECKJIAN, ESQ.
Counsel to the State
Commission on Judicial Conduct
Corning Tower Suite 2301
Empire State Plaza
Albany, New York 12223
(518) 453-4600

Of Counsel:
Cathleen S. Cenci, Esq.
Edward Lindner, Esq.
S. Peter Pedrotty, Esq.
David P. Stromes, Esq.
Denise Buckley, Esq.

PRELIMINARY STATEMENT

In his brief, Respondent acknowledges again that he was unjustified in brandishing a loaded handgun at an unarmed defendant in the courthouse, but argues that such conduct does not constitute "egregious" misconduct warranting his removal. In the course of making that argument, Respondent contends that there are no aggravating factors surrounding this misconduct, but he completely fails to account for the fact that he repeatedly boasted about the incident and made racially charged comments while doing so. Further, when Respondent ultimately was called upon to justify his dangerous and reckless conduct in pulling the gun, he again harped on the defendant's race, and embellished the defendant's actions and physical stature. Given that record, Respondent's conduct far outstrips a momentary and innocent lapse in judgment, and instead reveals a judge who recklessly brandished a gun at a defendant in the courthouse where Respondent served and thereafter contemptibly glorified the fact that he pulled a gun on a "[B]lack man." ASF ¶¶ 23, 24, 28[B]; Ex 4.[1]

Respondent's claim that he has an otherwise unblemished record is undermined by the fact that he engaged in improper fundraising activities on behalf of himself and the Whitehall Elks Lodge, when he knew he was under investigation by the Commission for the firearms incident and after he had been served with formal charges for that incident.

For the totality of that misconduct, Respondent should be removed from office.

[1] References to "Comm Br" are to the Commission Counsel's Brief. References to "Resp Br" are to Respondent's Brief. References to "ASF" are to the Agreed Statement of Facts. References to "Ex" are to exhibits to the Agreed Statement of Facts.

ARGUMENT

POINT I

RESPONDENT COMMITTED TRULY EGREGIOUS MISCONDUCT BY BRANDISHING A LOADED FIREARM AT AN UNARMED DEFENDANT IN THE COURTHOUSE WHERE RESPONDENT SERVED, SUBSEQUENTLY BOASTING ABOUT THE INCIDENT, AND REPEATEDLY EMPHASIZING THE DEFENDANT'S RACE IN THE COURSE OF SUCH BOASTING.

Respondent's outrageous act – unjustifiably brandishing a loaded handgun at an unarmed defendant in the courthouse where he served – fatally impairs his ability to continue serving on the bench. *See Matter of Kuehnel*, 49 NY2d 465, 469 (1980). The Commission should reject Respondent's argument that his behavior was not "truly egregious" and warrants only a public Admonition (Resp Br 7, 9, 12, 14).

Respondent's assertion that he pulled his gun on Wood out of subjective fear for his life (Resp Br 8, 12) is utterly unsupported by the record, which is devoid of any actions by Wood that reasonably could have caused such fear. By Respondent's own account, Wood merely approached the bench "quickly" – because Respondent had called his case – passed a line on the floor, and came within a couple feet of the bench (ASF ¶¶23, 24, 28[D]; Ex 4). Wood was not armed, nor did he act violently or in a manner indicative of an intent to use deadly physical force against Respondent or anyone else (ASF ¶¶16-17).

For the first time in his brief, Respondent now implies that he was fearful of Wood because Wood "had been accused of attempting to kill someone" in the past (Resp Br 8). This contention is fanciful. That Respondent neglected to mention this allegation during his boasts about the incident or while attempting to explain his conduct to Judge Hobbs,

his supervising judge, casts doubt on such a contention. Significantly, not once did Respondent mention a fear arising from a prior accusation against Wood: not in the interview he gave for the article; not when speaking with his former co-judge, Julie Eagan; not when addressing his fellow judges at the 2018 magistrates meeting; and not when attempting to justify his actions to Judge Hobbs. These repeated omissions suggest that the allegation against Wood was not a factor in Respondent's mind when he pulled his gun, and he cannot re-write history now to rely on it as justification for his extreme and dangerous overreaction.

To the extent Respondent was genuinely fearful of Wood, Respondent's accounts of the incident make clear that his fear stemmed from the color of Wood's skin – *i.e.,* the fact that Wood was Black. Certainly, Wood's race was not a legitimate reason for Respondent to fear for his life and pull a loaded gun. Yet, that is the impression Respondent created by repeatedly emphasizing Wood's skin color when recounting the incident. Indeed, aside from Wood's physical stature – which Respondent greatly exaggerated when describing Wood by saying that he was 6'9" tall and "built like a football player" (ASF ¶28[B]), when in fact he is 6'0' tall and 165 pounds (ASF ¶12) – Wood's skin color was the sole "surrounding circumstance[ ]" (Resp Br 8) Respondent mentioned when boasting or speaking about having pulled his gun in court. And, Respondent's substantial exaggeration of Wood's size likewise suggests a post-hoc rationalization for his conduct when later recounting the tale of the incident.

Moreover, as Respondent accurately notes (Resp Br 8-9), none of the "multiple people" present at the time (Resp Br 9) recalled Wood rushing up to the bench in such a

manner as Respondent claimed it caused him to fear for his life. Even the police officer "standing at the bench for [Respondent's] security" (ASF ¶28[E]) and who supposedly joked about how quickly Respondent drew his gun (ASF ¶¶24), did not recall any such incident (ASF ¶24 n7).

Respondent asks the Commission to find his act of pulling the loaded gun to be considered a momentary "lapse in judgment" for which he should merely be admonished (Resp Br 7, 13). This claim, too, should be rejected, as it is belied by the record in two respects. First, Respondent himself says he previously brandished a gun, supposedly when retrieving a stolen car with his grandfather (ASF ¶20[B]; Ex 3). Second, had Respondent truly regretted his behavior, he might have evinced a tone of regret rather than boastful glory in recounting the episode for an online student publication and to an audience of fellow judges (*see* Comm Br 19-22). The self-glorification of his conduct contradicts his argument that there are no aggravating factors in this case (Resp Br 12). To make matters worse, in telling and retelling his yarn, Respondent repeatedly and consistently invoked race, emphasizing that Wood was a "Black man" (ASF ¶¶23, 24, 28[B]) – a circumstance his brief entirely ignores but which is at least as damaging to public confidence in his judicial integrity and the impartiality of the judiciary as his brandishing of the weapon itself.

POINT II

RESPONDENT'S CLAIM OF AN UNBLEMISHED RECORD IS UNDERMINED BY THE FACT THAT HE ENGAGED IN IMPROPER FUNDRAISING ACTIVITIES WHILE KNOWING HE WAS BEING INVESTIGATED AND CHARGED FOR THE GUN INCIDENT.

Respondent's claim that he has an unblemished record (Resp Br 13) is undermined by the fact that he committed additional misconduct by engaging in improper fundraising activities while he knew he was under investigation for the gun incident. Instead of being especially mindful of his ethical responsibilities while already under scrutiny, Respondent posted seven of his improper Facebook solicitations after having been formally charged by the Commission with misconduct in June 2020 for the gun incident. In the aggregate, the misconduct and the aggravating factors support Respondent's removal. *Matter of Miller*, 35 NY3d 484, 490 (2020); *see Matter of O'Connor*, 32 NY3d 121, 128-29 (2018).

It is not mitigating, as Respondent argues (Resp Br 14, 17, 18), that his Facebook solicitations did not mention his judicial office. Because Respondent is well known as a judge by his Facebook friends and fellow Elks Lodge members, his Facebook posts unavoidably created the appearance that he lent the prestige of judicial office to advance his own private interests and those of the Elks Lodge (ASF ¶¶41-53).[2] "No matter how worthy the cause, judges must avoid such conduct since any involvement by a judge in fund-raising can have a considerable coercive effect." *Matter of Post*, 2011 Ann Rep

[2] Respondent's argument that he did not lend the prestige of judicial office to his Facebook posts (Resp Br 14, 18) conflicts with his admission in the Agreed Statement of Facts that his conduct violated Section 100.2(C) of the Rules Governing Judicial Conduct. *See* ASF ¶56.

141, 146 (Commn on Jud Conduct, October 12, 2010). On or off the bench, and even in cyberspace, a judge is "cloaked figuratively, with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others." *Matter of Kuehnel*, 49 NY2d 465, 469 (1980); *see also Matter of Whitmarsh*, 2017 Ann Rep 266, 274-75 (December 28, 2016). Thus, Respondent's contentions as to this charge should be rejected.

CONCLUSION

By reason of the foregoing, and as more fully explicated in Commission Counsel's memorandum, it is respectfully submitted that the Commission should render a determination that Respondent should be removed from office.

Dated: January 25, 2022
Albany, New York

Respectfully submitted,

ROBERT H. TEMBECKJIAN
Administrator and Counsel to the
Commission on Judicial Conduct

By: _____

S. Peter Pedrotty, Esq.
Senior Attorney
Corning Tower, Suite 2301
Empire State Plaza
Albany, New York 12223
(518) 453-4600

Of Counsel:
Cathleen S. Cenci, Esq.
Edward Lindner, Esq.
Denise Buckley, Esq.
David P. Stromes, Esq.