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,

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

RESPONDENT'S
REPLY BRIEF

RESPONDENT'S MEMORANDUM IN REPLY TO COMISSION COUNSEL'S BRIEF

PRELIMINARY STATEMENT

It is respectfully submitted that the Commission should reject Counsel to the Commission's recommendation to remove Respondent from office. Counsel to the Commission not only exaggerated facts regarding the incidents at issue and cited irrelevant caselaw, but completely ignored all mitigating factors in rendering their recommendation. Respondent understands the seriousness of the incident, however, under all circumstances, a lesser sanction is warranted.

THE RECORD IS DEVOID OF ANY FACTS BEYOND POOR JUDGMENT, WHICH DOES NOT WARRANT REMOVAL

Counsel to the Commission argues that Respondent's conduct in brandishing a gun at a defendant was so "egregious" and "dangerous" that it warrants removal (Counsel to the Commission's Brief [hereinafter, "Comm. Br."], pg. 16), yet, not a single person in the courtroom at the time of the incident even noticed that this even happened. How egregious and dangerous

can something be that nobody even notices? Moreover, the Respondent did not handle the fun in a manner which could have caused any actual harm.

Not surprisingly, Counsel to the Commission cannot point to a single case where a judge has been removed for brandishing a handgun in a courtroom. Instead, they point to a judge who came off the bench and physically confronted an attorney by grabbing his arms (*Matter of Allman*), and another judge who left the bench and was on the verge of initiating an actual physical confrontation with a defendant (*Matter of Carter*). (Comm. Br., pg. 17). Counsel to the Commission desperately attempts to compare the conduct of those two judges who came off of the bench, sought out an attorney and a defendant, and physically confronted them, to Respondent's conduct where he never left the bench and reacted in defense to a defendant's conduct. In a split-second decision, Respondent brandished a handgun to the defendant, with the chamber empty, for his personal protection and the protection of others in the courtroom. There is a major difference between the two judges who **initiated** a confrontation and Respondent's **defensive** conduct. Notably, those two judges were censured.

Interestingly, Counsel to the Commission claims "egregious" and "dangerous" conduct warrants removal; however, the Commission **ADMONISHED** a judge for **SHOOTING a gun near a busy intersection at rush hour with a notable disregard for the safety of motorists and bystanders, in clear violation of the law, and creating a reckless and dangerous situation**. (Respondent's Brief [hereinafter, "Resp. Br."], pg. 11; *Matter of Ciganek*). Reading the above case facts, one might think the case took place during the early 1900s, yet it was 2001 when the judge was admonished for firing off his gun on an open street subjecting many people to the possibility of severe injury or even death. Here, Respondent either fanned the gun or pointed it,

we do not know because there are no witnesses, but, importantly, Respondent did not even have a bullet in the chamber. Counsel to the Commission cannot conceivably argue the instant matter is worse or even on par with the *Matter of Ciganek* (admonished).

Counsel to the Commission also points to *Matter of Keuhnel* in an attempt to show Respondent's conduct is inexcusable. (Comm. Br., pgs. 17-18). The facts in that case are drastically different. The judge in *Keuhnel* walked out of a tavern and physically assaulted four youths he thought had broken glass in the parking lot, and he physically struck at least two in the face. *Matter of Keuhnel*, 49, NY2d 465 (1980). Here, Respondent did not initiate the conduct; he was acting in self-defense for what he thought at the time was an immediate threat, and he did not, nor could he, have caused physical harm to anyone in the manner in which he brandished the gun in his attempt to stop the defendant's sudden and dangerous behavior, Given the agreed upon facts in this case, there was no breach of accepted judiciary norms, but was a response to subjective threat that nobody noticed.

Again, at most, Respondent's conduct amounts solely to poor judgment, even extremely poor judgment, which the Court of Appeals has repeatedly held does not warrant removal. (Resp. Br., Point I (A) pgs. 7-11; *Matter of Skinner*; *Matter of Kiley*; *Matter of Cunningham; Matter of Edwards*). The record is devoid of any aggravating factors, such as personal profit, vindictiveness, ill-will, selfish or dishonest purpose, or any personal gain. Contrarily, the record is filled with mitigating factors warranting a less severe sanction.

MITIGATING FACTORS MUST BE CONSIDERED

Counsel to the Commission completely fails to recognize or even mention the mitigating factors relevant in the Commission's consideration of the appropriate sanction.

The record established Respondent, a non-attorney, has had an otherwise unblemished judicial career since 2014. It was the Respondent's own candor and honesty, willingness to learn from past mistakes, and commitment to make safe and appropriate choices in his position, which led to this case even being brought to light in the first place. There have been no prior or subsequent complaints about his judicial conduct (other than the charges herein). Notably, Respondent has been cooperative and contrite throughout the Commission's inquiry. Respondent fully participated in Judge Hobbs' investigation and made his own decision to stop carrying his handgun to court ever since. Respondent has recognized and admitted his conduct was improper. Respondent has learned from this one-time poor judgment decision. At most, the misconduct was an isolated lapse in judgment, a single incident, an aberration, in an otherwise unblemished record, and removal is not appropriate. (Resp. Br., pg. 13).

<u>RESPONDENT'S IDENTIFICATION OF THE DEFENDANT WAS NOT RACIST</u>

Counsel to the Commission's attempt to interpret Respondent's identification of the approaching defendant as a "Black man" to be racist should be rejected. Counsel to the Commission's own cases show the drastic difference between a racist comment and an identifier.

Counsel to the Commission erroneously attempts to correlate the instant matter to two cases involving racist comments made by judges. First, in the *Matter of Schiff*, the judge was *removed* for stating that "he recalled a time when it was safe for young women to walk the streets 'before the blacks and Puerto Ricans moved here.'" (Comm. Br., pg. 21). Further, in the *Matter of Jensen*, the judge was *censured* for stating "Oh, it's been a rough day – all those blacks in here" after presiding over proceedings involving three Black defendants. (Comm. Br., pg. 21). Are we really equating the above comments to Respondent's identification of the defendant in this case? It is

unfathomable how Respondent's comment that the defendant who approached him while he subjectively feared for his life was "large" and a "Black man" can even conceivably be compared to the judges in *Schiff* and *Jensen* whose comments were overtly racist. Neither of those judges were even arguably referring to the defendant's race for identification purposes, or any other legitimate, nonderogatory purpose for that matter. The two matters Counsel to the Commission hinge their argument on are entirely differentiated from the facts at issue and should be used, instead, to show how Respondent's comment was **not** racial in nature.

The judges in those above cases were not commenting for the purpose of identification, but for an obvious racial bias. It is common practice, especially in law enforcement, to identify defendants by gender, age, race, sex, etc. In recalling the incident, he was clearly describing every detail he could including the defendant's size (large), sex (man) and race (Black). Counsel to the Commission's groundless hypothetical that Respondent would not have identified defendant as a "large white man" had he been white is an unfair accusation. (Comm. Br., pg. 20). What Respondent may or may not say had the facts been different is irrelevant and is an unfair attempt to undermine Respondent's plausible explanation. The agreed statement of facts show Respondent referred to defendant's race merely to describe him when recounting the incident, however, he realizes that race was immaterial, and his identification as such *may have created the appearance of racial bias*. *See* SF ¶33. Let us not forget, Respondent went to the courthouse during his lunch hour from his other employment to reduce <u>this very defendant's</u> (Mr. Wood) fine to community service so he could be released from jail when defendant's wife said they could not afford the fine. *See* SF ¶14. It would be contradictory, taking Counsel for the Commission's argument, for this "racist" to go out of his way to help a "Black man." Evidently, Respondent's comment was not

racist, nor could it plausibly be compared to the other judges referenced by Counsel to the Commission. Thus, Counsel to the Commission's suggestion that Respondent's comments were racist should be ignored entirely.

RESPONDENT NEVER BOASTED OR BRAGGED ABOUT THE INCIDENT

First, Counsel to the Commission's attempt to show Respondent reveled in the incident by giving an interview wherein he recounted two other incidents is a red herring. (Comm. Br., pg. 19). First, Respondent helped his grandfather recover a stolen vehicle and brandished his gun, which he carried legally, to a man who confronted him with a chainsaw. This was in 2003 or 2004, roughly a decade before he became a judge. Second, Respondent was legally carrying his gun while in a convenience store when he was traveling back home from Virginia. *See* SF ¶20. Neither of the above scenarios in the Respondent's personal life were "incidents" at all, nor was his conduct illegal. Counsel to the Commission's reference to such is purely an attempt to show a pattern of Respondent improperly brandishing his gun; however, there is no such pattern.

Respondent never bragged or boasted about the incident as counsel suggests but was seeking advice on how to handle similar situations in the courtroom. Counsel to the Commission wrongfully states the facts in claiming Respondent boasted to Judge Eagan about the incident. (Comm. Br., pg. 19). Judge Eagan was under the *impression* that Respondent was bragging, this does not mean he was in fact bragging. Judge Eagan based her assumption on Respondent's manner and tone, without ever stating what the manner and tone were that lead her to such a conclusion. *See* SF ¶23. The facts do not show Respondent bragged or boasted about the incident.

Further, nowhere in the agreed facts does it state Respondent "emphasized" that defendant was a "large Black man"? (Comm. Br., pg. 20). Counsel to the Commission cites to the Agreed

Statement of Facts at ¶24 and Exhibit 4, however, the undersigned urges the Commission to review those cites because it does not state there or anywhere else in the record, that Respondent ever "emphasized" any part of recounting the incident, let alone his identification of the defendant.

In fact, Respondent was *seeking advice* from fellow judges, including the supervising judge, as to security in the courtroom. *See* SF ¶¶24, 35. The record is completely devoid of any evidence showing Respondent bragged, boasted, or emphasized the incident.

Respondent only received a complaint nearly three years after the incident, not from the defendant, the security officer, the assistant district attorney, or anyone else present in the courtroom, but because he was *seeking advice* from fellow judges about what to do in similar situations. In essence, Respondent is being punished for his efforts in becoming a better judge. Punishing a judge based solely upon his own statements when seeking advice will negatively impact how, and more importantly, *whether*, other judges seek help and advice on preferred behavior and conduct in the courtroom. The fear of being punished will outweigh the benefit that judges receive in recounting their past incidents, and would almost certainly cause less than truthful recounts of incident by them. The judiciary system would be negatively impacted by hindering the goal of filling the Bench with competent judges fit for chambers.

RESPONDENT'S SOCIAL MEDIA USE DOES NOT WARRANT REMOVAL

The Commission has repeatedly determined that the appropriate sanction for similar and even more severe conduct in connection with the use of social media is to admonish.

Counsel to the Commission suggests Respondent's social media use, when considered in the aggregate with his brandishing of a gun incident, warrants removal. (Comm. Br., pg. 23). Counsel to the Commission's reliance on *Matter of Miller* and *Matter of O'Connor* is misplaced.

In the *Matter of Miller*, the judge showed a pattern of misconduct, was unable to recognize the seriousness of his misconduct, and his failure to heed a prior warning were considered aggravating factors. *Matter of Miller*, 35 NY3d 484 (2020). In *Matter of O'Connor*, the judge showed a pattern of engaging in inappropriate behavior while in court and engaged in the conduct within a year of receiving a censure for other misconduct. *Matter of O'Connor*, 32 NY3d 121 (2018). The above cases are differentiated from the instant facts in that Respondent has not been previously disciplined for any conduct, nor did he ignore any prior warnings. Once he received a letter advising his social media use was being investigated, he immediately stopped any similar activity and changed his settings to be more aware of his social media imprint. Further, Respondent has not shown a pattern of any misconduct like the above judges. Respondent was involved in a one-time incident during court and was then investigated for social media use nearly five years later. At most, there are two completely separate incidents over the course of his over seven-year judicial career.

Counsel to the Commission again ignores any mitigating factors when discussing Respondent's social media use. Respondent has not only been cooperative and contrite in the Commission's investigation, but he has recognized the posts as being impermissible and has refrained from any similar conduct. Respondent has shown his commitment to being more circumspect in his use of social media. (Resp. Br., pgs. 14-18); *Matter of Peck; Matter of Schmidt; Matter of VanWoeart*.

Given the substance and nature of the posts, as well as the several mitigating factors, Respondent's social media use is not an aggravating factor, and removal is not warranted.

RESPONDENT SHOULD NOT BE REMOVED FROM OFFICE

Respondent's behavior does not show a pattern of misconduct, nor does it demonstrate his unfitness for judicial office warranting his removal. Rather, Respondent's misconduct, although serious, is a limited lapse in judgment for which he acknowledged was improper. Respondent's sincere and commendable behavior since the misconduct should not be ignored.

Counsel to the Commission is not able to point to a single case where a judge was removed for similar conduct. However, both parties have referenced judicial misconduct cases where the sanction was to admonish or censure a judge for more extreme, more dangerous, and more shocking misconduct. The record is devoid of aggravating factors, although is abundant with mitigating factors warranting a less severe sanction.

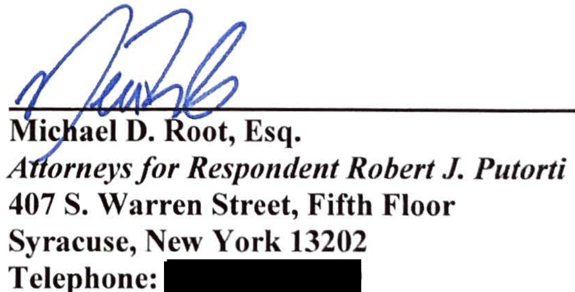
CONCLUSION

By reason of the foregoing, and as more fully set forth in Respondent's Memorandum, it is respectfully submitted that the Commission render a determination that Respondent's misconduct does not warrant removal, and to render a sanction that Respondent be censored or admonished.

Dated: January 25, 2022
Syracuse, New York

Respectfully submitted,

CERIO LAW OFFICES

By: 

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