To be Argued by:
ROBERT F. JULIAN, ESQ.
(Time Requested: 15 minutes)

JCR-2018-00004

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

LETICIA D. ASTACIO,

a Judge of the Rochester City Court, Monroe County.

BRIEF FOR PETITIONER

ROBERT F. JULIAN, P.C.
Robert F. Julian, Esq.
Attorney for Petitioner
2037 Genesee Street
Utica, New York 13501-5951
Tel.: (315) 797-5610
Fax: (315) 292-2037

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QUESTIONS PRESENTED

QUESTION I: Was the Commission Proceeding unfair?

Answer: Yes, during the proceeding, highly prejudicial information was introduced that was not part of the evidence, and the rules of evidence were violated resulting in a toxic environment in which Petitioner could not effectively argue for mitigation or demonstrate remorse.

QUESTION II: Did the Petitioner acknowledge that her conduct was inappropriate?

Answer: Yes. Petitioner Astacio sufficiently acknowledged each of the charges against her, her inappropriate conduct, and acknowledged that she should be disciplined?

QUESTION III: Should Petitioner Judge Astacio be censured?

Answer: Yes. Petitioner Astacio should be censured and not removed as her conduct while inappropriate at the time does not rise to the level that warrants a removal.

STATEMENT OF FACTS

BACKGROUND

The Petitioner, Honorable Leticia Astacio, was born on [redacted]/81. She is 37 years old. She is divorced and has two unemancipated children. Judge Astacio graduated from West Irondequoit High School, Monroe Community College, University of Buffalo as an undergraduate, and received graduate degrees from the University of Buffalo Law School and School of Social Work. (R-375) Historically, Judge Astacio had a difficult upbringing and overcame many hurdles to achieve her college and legal education. (R – 344-345)

Petitioner was admitted to the New York State Bar. Her professional work history prior to election to the City Court Bench is: Monroe County Legal Assistance Center, Monroe County District Attorney's Office, Domestic Violence Bureau and her own private practice commencing in 2011. (R-376-380)

In 2014, Petitioner ran in a primary for Rochester City Court Judge and even though she was not the party's designated candidate, she won the primary defeating two other candidates, a career Monroe County Prosecutor who was a Bureau Chief and an Assistant Public Defender. (R – 382-383) Petitioner was elected to the Rochester City Court in November 2014, and took office in January, 2015. (R – 383-384)

CHARGE I AND CHARGE II

THE NIGHT BEFORE THE ARREST

The Petitioner consumed "at most" approximately one half bottle of wine on February 12, 2016 before 12:00 a.m. the evening prior to her arrest. (R - 615)

THE ARREST

Petitioner awoke at about 7:00 a.m. on February 13, 2016. It was a Saturday. (R - 385) She was to preside over Saturday morning arraignments at 9:30 a.m. at Rochester City Court. (R - 387) Judge Astacio planned to attend the Elmgrove YMCA work out class at 8:00 a.m. (R - 386) Wearing workout clothing, she entered her car and commenced driving to the Y. (R - 386) The weather was bad and the roadway was ice covered. (R - 389) Her vehicle struck something, either ice or debris, in the roadway as she traveled to the YMCA, and likely struck the median in the roadway. (R - 388) She sustained a flat tire to her observation. (R- 388, 455) She pulled her vehicle over to the side of the roadway on Route 490. (R - 388)

Petitioner called her friend Christian Catalano who is an attorney in Rochester, and asked him to help her change her tire sometime after 7:00 in the morning. (R - 389) She was waiting for him in her car at the side of the road when Trooper Kowalski pulled behind her vehicle at 7:54 a.m. (R- 134, 396)

When Trooper Kowalski approached, or when he was at the car, she rolled her car window down. (R – 390-91) Trooper Kowalski observed 2 flat tires and damage to the vehicle on the left side. (R - 135) Both windows were down according to Trooper Kowalski. (R - 136) Petitioner denies that both windows were down and testified she rolled her driver's window down as Trooper Kowalski approached. (R - 391) The State Police record does not reflect that both windows were down. (R – 654-665)

Trooper Kowalski asked Petitioner to exit the vehicle. (R - 391) He asked Petitioner where she was coming from, and "I said my house", and he said where are you headed to, and I said "Well, I have to go do arraignments at 9:30". (R - 396) At that point, she knew she could not make her 8:00 a.m. workout class. (R - 396)

The Referee and the Commission found that the Petitioner's statement at the roadside, "I'm going to City Court to do arraignments at 9:30 this morning" did not violate any of the rules. (Ref Rep. R - 1409, Determination R – 11-12) The Referee found that the other statements Petitioner is alleged to have made in Charge I and Charge II did violate the rules.

According to Petitioner, the exchange was as follows in the roadway:

- Trooper Kowalski told her she had a fruity smell. (R - 392)
- Then he told her she smelled of alcohol. (R - 392)

- He asked her if she had consumed alcohol that morning, and she said no. (R - 392)
- He pointed out 2 flat tires to her.
- He asked her for her driver's license, and she said she didn't bring any identification as she was going to the gym. (R - 393)
- He asked her to get in his car, and she said no. (R - 393)
- "He told me he was placing me under arrest and I didn't have a choice." (R - 393)
- When he said she was under arrest for DUI, and they discussed probable cause, the Judge asked him to call troopers who do DWIs because you're making a big mistake and it's going to have a larger consequence for me then it would normally, and I'd rather you called someone who does know what they are doing. (R - 401)
- Petitioner and the trooper had an argument about whether or not he had probable cause to arrest her culminating in his telling her she "could get in his car or I could resist arrest". (R - 402)
- The conversation lasted about 2 minutes on the road. (R - 395) It ended with her arrest at 8:00 a.m. (R - 407)

According to Petitioner the following occurred once she entered the Trooper vehicle:

- She entered his car. (R - 394)
- Once in his car, Trooper Kowalski asked if she had an accident with her car and if she had been drinking. In response, she said she didn't drink at 7:00 a.m. (R - 394)
- At about the time she entered the car, Christian Catalano appeared on the scene and remained in his car. (R - 404)
- Trooper Kowalski asked "when is the last time you were drinking? Were you drinking last night", and the Judge said "I've drank in my lifetime, I'm not going to have this discussion with you." (R – 395, 402) (For context R – 402-417)
- Before she said the above, Trooper Kowalski asked "upwards of 10 times, were you drinking? No. When were you drinking? Were you in an accident", just constantly. (R - 403)
- He said he smelled alcohol. She said again, I'm chewing gum, this is ridiculous. He rolled down the window and said "spit your gum out", which she did. (R - 394)

- She was asked to do a Standardized Field Sobriety Tests. She advised him there were certain tests she could not do as she had a brain injury.
- The report of Dr. Anstadt, an expert retained by the Office of Court Administration to examine Judge Astacio, confirmed the Judge's representation of a brain injury stating: "She can do a heel toe walk successfully, but with some mild difficulty, most likely related to her Chiari malformation which has otherwise been very well corrected by cervical spine surgery." (R – 1116)
- Trooper Kowalski told her "how could you be a Judge if you have a brain injury". "How would you make decisions on people's cases and about people's lives?" (R - 406) She described him as scoffing at the notion of a Judge with a brain injury. (R – 607-612)
- Trooper Kowalski persisted in asking her to take the standardized field test.
- The Petitioner showed him her scar and said you don't know what you are doing, you can't ask me to take the Standardized Field Sobriety Test if I have a brain injury. (R – 405-406)
- She also told him "I'm already under arrest you can't use the test to develop additional probable cause", but she agreed to take non-

standardized tests of alphabet and counting which she passed. (R - 406)

- There was no formal advisement of Petitioner at 8:43 that she was under arrest contrary to police records. (R – 407-08)
- She advised Trooper Kowalski of *Mapp v. Ohio* when he then asked her to take a pre-screen test. "You can't arrest me all day, I don't have to sit on the roadside with you forever. You're delaying me, we're done here. Arrest me, I need to go to work." (R - 407)
- Trooper Kowalski wanted her to do an alco sensor, he spoke with Mr. Catalano after she declined and he represented to Catalano and Petitioner if she took the test successfully she would be unarrested. (R - 408, Ex. 25, R - 781) Other Troopers had to deliver the test to Trooper Kowalski. Petitioner attempted the test 3 or 4 times. Trooper Kowalski told her the test was high and that she was under arrest and that they were going to the station. (R - 409)
- There is no independent record of the test result, other than Trooper Kowalski's recollection. (R - 161)
- Petitioner became angry and was crying. (R - 409)

- She acknowledged that she uttered the words in 12 A of the Formal Written Complaint as follows: "A" "I don't have to talk to you. You're making me feel uncomfortable". (R - 410) (For context R – 402-417, R – 607-612)
- She acknowledged the she said 12 B of the Formal Written Complaint as follows: "I don't feel comfortable in this car". (R - 411) (For context R – 402-417, 607-612)
- She acknowledged she said 12 C of the Formal Written Complaint, which was part of a monologue where she said "I don't know what else you might do to me. For all I know you could shoot me." (R - 411) (For context R – 402-417, 607-612)
- She acknowledged utilizing the language that was in paragraph 13 of the Formal Written Complaint, but not to Trooper Dolan. The language is: "No he doesn't. He can just go and mind his own fucking business." (R - 412) (For context R – 402-417, 607-612)
- She acknowledged stating paragraph 15 of the Complaint as follows: "I wasn't driving. You didn't see me drive." She explained it was in the context of discussing whether there was probable cause. (R - 411) (For context R- 402-417, 607-612)

- She acknowledged making the statements in Paragraph 16 A, B & C on the way to the trooper barracks as follows: "I can't believe you're doing this to me. You're fucking ruining my life." (R – 412-413) (For context R-402-417, 607-612)
- She was handcuffed and shackled to a bench at the trooper barracks. (R - 418) While shackled to a bench she was referred to as "your honor" by the Troopers. (R - 488)
- She testified that she asked Trooper Kowalski "Why are you doing this to me", she was asking him for the legal basis for her arrest. (R - 485)
- She advised Trooper Kowalski both in the police car and at the station, "I would never do this to you." This statement is made in the context of the one hour thirty minute interrogation and negotiation based on Petitioner's belief that there was no probable cause for the arrest as well as her concern that she was due in Court with a courtroom full of people waiting. (R – 402-417) (R - 488)
- She was concerned that people at City Court were waiting for her to do arraignments. She expressed this at the Trooper Barracks arriving after 9:30, the time City Court was to start that day. She

asked for her cell phone which contained the number she needed to call. She called Kate Johnson at City Court to ultimately advise her of her plight and that she could not do arraignments. (R – 417-418)

- She was released from the State Police station at about 11:00. (R - 418)

According to Trooper Kowalski and Lieutenant Lupo, the following occurred:

- She thought she only had a flat tire. (R - 141)
- Trooper Kowalski had her get out and look at the vehicle. (R - 146)
- She did not have a license and registration. (R - 146)
- Trooper Kowalski asked her to come back to his vehicle and she got in. She sat behind him. (R – 146-147)
- Trooper Kowalski asked her to sit in his car at 8:00 a.m. (R - 183)
- She was chewing gum, but he could smell an alcoholic beverage. (R - 147)
- He asked her to remove the gum from her mouth, he rolled down the window and she threw it out. (R - 147)
- There was still a strong odor of alcoholic beverage. (R - 148)

- He asked her if she consumed any alcohol and she answered that she had drank in her lifetime. (R – 395, 402)
- He asked where she was coming from and she said her house. (R - 148)
- He asked her where she was coming from and where she was going to and what direction she was headed in. She said she was going down to the City of Rochester for her Court arraignments at 9:30. "I am going to the City Court to do the arraignments at 9:30 this morning." (R – 149, 194-195) Trooper Kowalski testified that he did not know she was a City Court Judge until he was processing her at the Trooper barracks when she asked to call her secretary to let them know that she wasn't going to be present for the 9:30 arraignments and to have a Judge sit in. (R - 170)
- According to Trooper Kowalski, she was placed under arrest at 8:43. Trooper Kowalski did not speak to Mr. Catalano at any time before the arrest. (R - 184)
- Trooper Kowalski asked her to take a field sobriety test "a few times". (R - 200)
- Trooper Kowalski stated she did do the counting and alphabet test and passed. (R - 200)

- He kept asking her questions and she said she was uncomfortable. (R – 202-206)
- Trooper Dolan arrived at shortly after 9:00 a.m. with the PBT (Preliminary Breath Test). (R - 161)
- The PBT after 3 attempts came back as a .19 according to Trooper Kowalski. (R - 161) There is no written printout or machine generated record of the test result.
- Trooper Kowalski acknowledged that he mentioned that he could unarrest her just to get her to take the PBT test, but admitted he had no intention of unarresting her. (R - 210)
- The PBT only measures the presence of alcohol and the odor of alcohol. (R - 160)
- Trooper Kowalski denied he stated to Petitioner in words and substance, if she had a brain injury, how she could be a Judge. (R - 405, 607-612)
- Trooper Kowalski testified she was loud and swearing in the back seat of his car after 9:17 a.m. on the way to the station. (R – 162, 186)
- Trooper Kowalski testified she was angry and crying at the station. (R - 164)

- Trooper Kowalski arrived at the Trooper Barracks at or about 9:30 with Judge Astacio in custody. (R - 164) Kowalski testified that Lt. Lupo told her not to swear and to act like a Judge. (R - 162)
- At 10:03, Petitioner was reported by Lieutenant Lupo to be cooperative to that point in an email to his superior. (Ex. 84 – R - 146) Trooper Kowalski contradicts this in his testimony. (R - 164)
- She was handcuffed and shackled to the bench at the Trooper barracks. (R - 488)
- She told the troopers she had to go to work. She asked to call City Court because she had to be there for arraignments at 9:30. (R – 417-418)
- She was eventually permitted to call City Court. (R – 417-418)

Christian Catalano an attorney who arrived at the scene of the arrest, testified at the Trial in City Court before Judge Aronson on the DWI charge, the testimony set forth in Exhibit 25 found in the Record at P. 708-815 as follows:

- When Mr. Catalano arrived at the scene Trooper Kowalski told him "he was going to be placing … Ms. Astacio under arrest" for DWI. (Ex. 25, R - 775) She was already in custody. (Ex. 25, R - 776)

- Trooper Kolwalski told Mr. Catalano she was under arrest at 7:50 a.m. (Ex. 25, R - 775) Mr. Catalano told Trooper Kowalski that he was going to represent her. (R - 775)
- Mr. Catalano told Trooper Kowalski that his client did not wish to speak with Kowalski or to take any diagnostic tests. (Ex. 25, R - 775)
- Mr. Catalano did not smell alcohol on her breath and her speech was clear and there was no mental impairment. (Ex 25, R - 778)
- A second trooper arrived at 8:15 a.m. or 8:20 a.m. approaches Catalano and asked him where she was going and Catalano said the Elmgrove Y, and then to work. He asked if she really was a Judge, and if she had to be at work at 9:30 and Catalano said yes. (Ex. 25, R - 778)
- Mr. Catalano had asked the Trooper as her attorney not to speak with her but one half hour later they were still at the roadside. (Ex. 25, R - 779)
- At 9:15 a.m., Trooper Kowalski told Mr. Catalano he could unarrest her if she - - under some circumstances. (Ex. 25, R - 780)
- He did not hear her curse at the Trooper either in the police car or at the Trooper barracks. (Ex. 25, R - 786)

- She may have used profanity when speaking with Mr. Catalano. He did hear her crying at the police station and almost hyperventilating. (Ex. 25, R - 784)

CHARGE III

Petitioner acknowledged that she attempted to start and operate her vehicle on October 3, 2016 having consumed alcohol sometime previously.

Petitioner testified that she had not read the conditional discharge order, Ex. 37 (R – 860), with sufficient care and was unaware that she was under an order not to consume alcohol. (R – 424)

Petitioner was honest, truthful and remorseful to both Judge Aronson and the Commission and this tribunal with regard to her transgression. She apologized to Judge Aronson (R – 426) (Ex. 34, R - 873)

The Petitioner violated the conditions of her probation which she acknowledged. As a consequence she violated the Rules alleged which she acknowledged with candor and regret.

CHARGE IV

ARRAIGNMENT OF J. T.

This charge involves the arraignment of J.T. on January 20, 2015 by Petitioner. (R – 427) Petitioner had been a Judge for 20 days. (R – 428) J. T. had

previously been a client of Petitioner's when she was a practicing lawyer. (R – 427) On January 20, 2015, Petitioner made the determination she should not arraign Mr. T. and wanted to transfer the case. (R – 428)

Petitioner stated "I was still pretty new and didn't know the procedure for transferring cases." (R – 428) Petitioner testified Mr. T. was being held by parole "so I did what I typically do. I put a $50 hold on the petit larceny, so he would get credit for the time he was in jail, for that and adjourned it to be arraigned in front of, I believe Judge Miller." (R – 428) Petitioner asked: "Can it (the case) not go to Johnson, please". (R – 428) Petitioner testified at this hearing that she now realizes that the request was inappropriate. (R – 429) Petitioner testified that she treated Mr. Thomas as she would have treated any other defendant being held by parole in holding him with a $50 cash or bond so he could credit for time served, but understands now that has an inappropriate appearance. (R - 430)

CHARGE V

PEOPLE V. T. L.

Petitioner had an off the record discussion about this defendant on January 27, 2015, 27 days into being a Judge. (R - 431) Because Rochester City Court uses voice recording and not a stenographer, off the record conversations are sometimes recorded such as in this case. The Petitioner was talking to a deputy who had approached the bench. He told her that Defendant was "spitting on us,

she's fighting us; she's calling racial slurs. Do we have to bring her out?" (R - 432) The Judge had a conversation with a deputy stating "she would like to bring her out, but asked if I make you bring her out, we're going to end up turning a dis-con into an assault II?" (R - 432) Petitioner acknowledged that what was said by her during this conversation such as: "Is she crazy or is she bad", the question was intended to determine if she was angry and disrespectful or did she legitimately have issues. (R – 433-434) She incorrectly remembered she went off the bench to see her that day while she was in custody. (R - 434)

A discussion that was off the record was recorded. (R - 435) Petitioner acknowledged that the wording of her casual conversation off the record was disrespectful and inappropriate but simply does not rise to misconduct, particularly 27 days into her Judgeship. (R – 433-434) She had the discussion to attempt to avoid escalating the situation so that Ms. L[redacted] would not create further legal problems for herself by acting out in open court. (R - 432)

Petitioner was candid and remorseful, and was not intentionally being disrespectful. (R – 433-434)

PEOPLE V. V.

The Defendant was being arraigned by Petitioner. He was a 17 year old high school student who was accused of selling prescription drugs in school. At arraignment, Petitioner gave the Defendant a lecture that implied that he was

guilty. She acknowledged her statements could have given the Defendant the impression she was not being given the presumption of innocence. (R - 437) She stated: "I would probably be beating my daughter currently, right now, while she was getting arraigned… Don't embarrass your mother." (R - 434) Petitioner testified by beating she meant a "whoopin" (Tr. 287, 288) or a "spanking", not that she or any parent would or should beat up a child. It was a figure of speech. (R – 435-436)

The Respondent qualified her statements to the defendant acknowledging that he was presumed innocent:

"Now, I'm not saying you did anything, but these accusations are horrible and you are wasting your time in School doing this stupid stuff like this if it is true." (Ex. 74, R - 1056)

Petitioner conceded that her choice of words was poor and that in giving the lecture to the young man at his arraignment, she gave the impression he would not receive due process. (R - 437) However, she did acknowledge his presumption of innocence.

The Petitioner's "lecture" was administered because she observed the 17 year old boy's mother crying at his arraignment, she believed he would be into Teen Court diversion program, likely receive an adjournment in contemplation of

dismissal, and not proceed through the system and she wanted to make an impact on him. (R - 435)

PEOPLE V. D. W.

The Defendant was being arraigned before Petitioner for sexual misconduct. Petitioner acknowledged in the pleadings and during the hearing that her conduct and comments on the bench were inappropriate in that she:

(a) Laughed at the defense attorney's characterization of the alleged victims delay in signing a statement as "buyer's remorse"

(b) For saying it was

- "funny" four times
- "freaking hilarious" and "hilarious"

The Petitioner was aware the Complainant was not present in the Courtroom. The comments were made with counsel at the bench, people weren't in the courtroom as it was the end of the docket, and the courtroom was emptying out. (R - 441)

The Petitioner was surprised by defense counsel's flip comment. (R - 439) She did not intend to laugh. (R - 441) The initial laughter was involuntary. The Petitioner in attempting to explain her inappropriate laugh obviously made the situation worse which she acknowledges. (R - 441)

Petitioner was candid about her conduct and expressed genuine remorse to this Tribunal, stating that her conduct was not intended to mean she "took the situation lightly or that I didn't care about what was alleged to have happened to her. That's the opposite of everything I've ever stood for." (R - 442)

Petitioner acknowledges that she violated Rules 100.1, 100.2(A) and 100.3(B) (3) for which she is charged. She is candid regarding her failure and remorseful for her conduct.

PEOPLE V. D. Y.

On August 15, 2015, Petitioner arraigned D. Y. for disorderly conduct. Mr. Y. pled guilty. When accepting his plea, the Petitioner stated:

> "Mr. Y[redacted] stay out of the Street. It's super annoying. I hate when people walk in front of my car. If there was (sic) no rules. I would totally run them over because it's disrespectful." (R - 438)

The Petitioner acknowledged that she used these words. (R - 438) The Petitioner simply was advising the Defendant that his conduct was both annoying to the public and dangerous in plain language he could understand. (R – 437-438)

CHARGE VI

On 8/22/16, Petitioner was convicted of DWI and given a conditional discharge. (Ex. 27, R - 826) The Vehicle and Traffic Law Conditions of Conditional Discharge (CCD) is a three page document signed by Judge Aronson

(the Judge who tried her DWI) and the Petitioner on 8/22/16 and went into effect thereon. (Ex. 27, R - 826) It was to expire on 8/22/17. The CCD ordered that Petitioner install an ignition interlock device (id). The CCD provides that Judge Astacio shall:

> "submit to any recognized tests that are available to determine the use of alcohol or drugs." (Ex. 27, R - 826)

There is no provision within the CCD which required Petitioner to remain in the City of Rochester or Monroe County or in America. No alcohol or drug test was ordered pursuant to the CCD until May 15, 2017 when Judge Aronson wrote a letter to Petitioner's then attorney, that he:

> "intend (ed) to enforce the provision of the conditional discharge requiring the defendant to submit to tests for alcohol use" (Ex. 44, R – 895)

And Petitioner was "require(d) … to submit to an EtG lab analysis of her urine sample"… to be done immediately. (Ex. 45, R - 898)

At the time of this order, Judge Aronson learned the Respondent was in Thailand. (Ex. 47, R – 903-906) The ordered laboratory test was to be submitted to the Judge by counsel. The Respondent left for Thailand on vacation on May 2, 2017.

Previous to that date she had been relieved of any duties, she was not allowed to report to the Monroe County Courthouse as a Judge, and had no report obligations of any type. (R - 453, Ex.I – R - 1206, Ex. J – R - 1207) She had been subject to a high level of media attention that was deemed very stressful by her psychologist. (Ex. H – R - 1192) On April 9, 2017, there had been a "bad blow" into her ignition interlock device. There were no ramifications from that and she believed that issue had been resolved. (R - 455)

On May 2, 2017, the Petitioner left for Thailand on vacation with a one way ticket. (R - 455) She was not assigned any work, had her access to the Hall of Justice taken away, did not have computer privileges and had not heard from the Court system administration for months. Petitioner upon leaving believed she had satisfied all requirements of the conditions of the pending conditional discharge. (R - 454)

There was a "bad blow" on April 29, 2017 that Petitioner was unaware of. (R - 457) Her daughter was also using her car. On May 7, 2017, the Petitioner had a telephone conversation with her then DWI attorney Edward Fiandach who advised her there had been a bad blow, but he didn't know the date. Petitioner in the conversation with Mr. Fiandach believed he was discussing the April 9, 2017 bad blow and not the new one. Petitioner advised Mr. Fiandach she was in Thailand, that she intended to stay until August, but she could come back. She

advised in this conversation on May 7, 2017, that Mr. Fiandach should contact her by internet, and not phone, as phone service was "not the best". (R - 517) Email would be the most reliable measure of communication with her while she was away. (R - 457)

The Petitioner was told by Mr. Fiandach in the May 7, 2017, that probation had indicated the Judge should not file a violation. (R - 452)

She proceeded with her trip living for a period of time in a Wat with Monks. (R - 457)

On May 15, 2017, the Petitioner was ordered to do an immediate ETG Lab. (Ex. 44, R - 897 and Ex. 45, R - 898) There was no conclusive proof that either order was sent to the Petitioner's home. Judge Aronson knew at or around the time of this order that she was in Thailand. (Ex. 47, R -897, R- 306; Ex. 45, R – 898, Ex. 46, R -899, Ex. 47, R – 900, Ex. 48 – R - 911)

Mr. Fiandach was not able to contact Petitioner until May 27th because he did not use the agreed upon method of communication, email. (Ex. 51, R - 922)

On 5/23/17, a letter notice was ostensibly sent to the Petitioner's home and Mr. Fiandach. (Ex. 46, R 899)

On 5/30/17, the Petitioner was declared to be delinquent by Judge Aronson. (Ex. 48, R - 911) On 5/30/17, a bench warrant was issued by Judge Aronson. (Ex. 49, R - 912) On June 5, 2017, Mr. Fiandach explained to the Court that

communication had broken down, Petitioner had not received a voicemail left by Fiandach, but once they made contact by email Petitioner returned promptly. Mr. Fiandach pointed out to the Court that there was "no willful violation of the Court Order." (Ex. 51, R - 922)

At that arraignment, Judge Aronson advised the Petitioner that:

- He regarded her as being contemptuous. (Ex. 51, R - 924)
- Criticized her not turning herself in on Sunday evening rather than Monday morning. (Ex. 51, R - 925)
- Told her she was self-sabotaging her return to the bench. (Ex.51, R - 925)
- He advised her that based on her attorney's representations, he would "have a lot of trouble with the defense of impossibility when it was self-imposed by you travelling half way around the world". (Ex. 51, R - 927)

On May 27, 2017 in Thailand at 3:30, she received an email from Mr. Fiandach advising her she had Court on May 30, 2017, a Tuesday, based on the bad blow on April 29, 2017. (R - 459) When Fiandach next achieved contact with her on May 27, 2017, and advised her that the Judge had issued a warrant without bail. (R - 459) She did not have sufficient time to get a urine ETG test in Thailand and she didn't have sufficient time to travel back to the U.S. for the May 30, 2017

return date, so she requested that Mr. Fiandach request an adjournment of her case, requesting a week. (R - 459) Once Judge Aronson denied that request. She made prompt arrangements to come home.

At this time, she also became aware of a letter from Judge Lawrence Marks, the Chief Administrative Judge of the State of New York, dated May 30, 2017 ordering Petitioner's presence on June 5, 2017 at 9:00 a.m. in the Rochester Chambers of the Administrative Judge. (Ex. K, R - 1208)

Petitioner had been functioning under the terms of a conditional discharge since 8/22/16 when she left for Thailand, and

- No type of alcohol tests had been previously ordered. (R - 464)
- Mr. Fiandach left her a voicemail message on or about May 15, 2017, but did not email her and calls were not being put through to her voicemail. (Ex. 51, R - 921)
- With proper email notice, she could have complied with the testing in Thailand. (R - 464)
- Once e-mailed, the Respondent promptly responded and came home. (Ex. 51, R - 922)

The Petitioner provided proof of her plane flight home. Mr. Fiandach advised her he asked to have the warrant lifted and the DA consented but Judge Aronson refused. (R - 460) The Judge flew home promptly, arriving on Sunday,

June 4th, intending to go to the Hall of Justice the next day on Monday to meet with Administrative Judge Doran and comply with the arrest warrant. (R – 461, Ex. 51, R - 922)

The Petitioner arrived at the Hall of Justice reporting to Judge Doran's office before 9:00 a.m. The Rochester Police arrived after Petitioner's arrival and before Judge Doran, but did not arrest her until she completed her meeting with Judge Doran. (R – 461-462)

She appeared before Judge Aronson at 10:30 on June 5, 2017 for her arraignment. (R - 462)

Judge Aronson advised Petitioner at her arraignment as follows:

-That he was angry with her;

-That he was denying bail;

-That he was jailing her pending a hearing. (Ex. 51, R - 914)

The Petitioner was removed to jail without bail pending her hearing. (Ex. 51, R - 914) A hearing was held on June 10, 2017 before Judge Aronson. (Ex. 52, R - 929) The Petitioner was found to be in violation of her conditional discharge and sentenced to jail and probation.

The matter was appealed and affirmed. In his bench decision, Judge Aronson stated:

- "… no ETC test (was) submitted as required by the orders of the conditional discharge.
- The fact that the defendant absented herself from the jurisdiction intending it to be for three months was not a technical violation of the conditions. However, it was inferentially a violation if she absented herself from this jurisdiction with the understanding that she intended to be away from this jurisdiction for three months. (Ex. 52, R - 970) (emphasis added)

At the time, Judge Aronson ordered the Respondent to have the ETG test on May 15, 2017 to be done by her own physician, he knew she was in Thailand. (Ex. 45, R – 898, and Ex. 47, R – 903-906, Ex. 46, R - 899, Ex. 47, R – 900, and Ex. 48 – R-911)

Petitioner's violation of the conditional discharge was acknowledged by Judge Aronson to be "inferential". (Ex. 52, R - 970) Respondent has not found any authority to support Judge Aronson's decision and he did not cite authority for this holding.

Petitioner had not previously been ordered to take any drug and alcohol tests.

The Petitioner returned to the Country promptly when advised that the arrest warrant would not be lifted. (Ex. 51, R - 922) She was not intentionally in

violation of the conditional discharge. The conditional discharge does not limit travel. She only received actual notice of Judge Aronson's order that she appear on May 30, 2017 on May 27, 2017 while she was in Thailand. When she returned to the Country, she had two obligations – attending the ordered meeting with Administrative Judge Doran (Ex. K, R - 1208), and complying with the outstanding warrant. It is noteworthy that the police allowed her to complete her meeting with Judge Doran before she was formally arrested and taken to Judge Aronson.

Petitioner offers in mitigation that she voluntarily submitted to a test of 1.5 inches of hair, extricated by a recognized laboratory on 8/31//17. (Ex. G, R - 1191) The sample was obtained by Claudia P. Caparco, a registered nurse who operates Alpha Checkpoint of Rochester, Inc., a company that provides drug and alcohol testing services and DNA testing services. (R – 319-321) The sample was sent to ExperTox, a Texas laboratory certified to do this type of testing. (R - 324) The test showed there was no exposure to or the consumption of alcohol by the Petitioner within approximately 3 months of the date of the test. (R – 235-328) (Ex. G, R - 1191) The test was offered to demonstrate that around or during the time Judge Aronson was ordering a urine test, Petitioner had not consumed alcohol and was therefore compliant with the terms of the conditional discharge.

The Petitioner candidly testified that in retrospect she would have handled the trip in a different manner. (R - 465) The Petitioner also testified that with proper notice, she could have complied with the conditional order while in Thailand. (R - 464)

ARGUMENT

POINT I:

THE COMMISSION PROCEEDING WAS UNFAIR.

Under the Rules of the Commission on Judicial Conduct, the Respondent in a proceeding is entitled to address the Commission after counsel have argued. The Petitioner availed herself of that opportunity, praised the Commission, and took responsibility for her actions and apologized for her conduct. However, during this, an exchange occurred between Petitioner and the Chair of the Commission which:

(1) Introduced highly prejudicial information to the other Commission members that was not in evidence;

(2) Violated the Rules of Evidence;

(3) Created a toxic environment in which Petitioner could not effectively argue for mitigation and demonstrate remorse and was deprived of the chance to avoid this proceeding by receiving Censure from the Commission.

The Petitioner respectfully asserts that the determination of the Commission on Judicial Conduct was unfair and tainted by the introduction of this prejudicial material that was not part of the record.

Specifically, one Commission member stated while Petitioner was addressing the Commission: "Well, you started this by saying that you have respect for Mr. Postel and that he hasn't made you upset with him and that you have respect for us but you've also made comments in the public that you are not going to take any shit from the Judicial Conduct Commission and that's recent. And I don't understand how you can come before this Commission and tell the Commission that you have a level of respect for us and you appreciate our work and you are not upset with Mr. Postel, and also be making those comments." (R - 69) None of the information referenced in this comment was in the Record before the Commission.

Petitioner's counsel then interposed an objection, and the Chair of the Commission ruled that Petitioner opened the door by stating that she had respect for the Commission thereby allowing his above referenced commentary with regard to information that was not in the record.

Petitioner's counsel then asked for the opportunity to be provided the actual source or language of the comment referenced by the Commission member stating: "Well then I have a further application Mr. Belluck, respectfully. Perhaps you could identify the particular writing you are referring to at the conclusion of this proceeding and perhaps we could be further heard on it." (R - 70)

The Chair responded: "If you would like me to do that, I would be happy to do that." (R - 70)

Respondent's counsel then stated: "Yes". (R - 70)

The comments made by a member of the Commission were unsupported in the record, but uttered to the entire panel. They were obviously prejudicial. No sources for the comments were ever provided on that day, or at any other time, nor was Petitioner given the opportunity to review and comment upon the information alleged.

As a consequence of the foregoing, the Court is asked to disregard the Commission's recommendation of removal. Because this prejudicial outburst occurred, the Petitioner was deprived of a chance of having a determination of Censure by the Commission and avoiding the appearance before this Court and the peril to her career it presents. The Court is asked, consistent with the other points raised herein, to determine that censure is the appropriate remedy.

POINT II:

THE PETITIONER HAS ACKNOWLEDGED THAT HER CONDUCT WAS INAPPROPRIATE AND THAT SHE SHOULD BE DISCIPLINED.

The Petitioner in her hearing testimony and in her appearance before the Commission has acknowledged inappropriate conduct. She has further acknowledged throughout this proceeding that she should be disciplined. She believes that the Determination by the Commission of removal is harsh and unfair.

CHARGE I AND CHARGE II

Petitioner recognizes that her conduct on the day of her arrest was inappropriate in that she was verbally abusive to the State Trooper Kowalski. She offered in mitigation at the hearing that she was provoked by being held in the back seat of the police car for one and a half hours. Petitioner told the Commission in retrospect she should have taken the test. She acknowledged she was emotional and irrational at that time. (R - 83)

The Commission in their Determination holds that her request to call City Court was unnecessary and that she was asserting her position as a Judge to attempt to receive favorable treatment. The Petitioner argues that because she was due in City Court at 9:30 a.m. at the same time she was in custody, and she was seeking to advise the Court she would not be there to preside over the Saturday calendar of the Rochester City Court.

CHARGE III

As to Charge III, Petitioner acknowledged that she had not read the conditional discharge order carefully and was unaware that she was under an order not to consume alcohol. (R – 276) She pled guilty to the violation of the order. She apologized to City Court, and subsequently to the Commission for her transgression. (R – 424, Ex. 34, R - 859)

CHARGE IV

Regarding Charge IV, the matter of J.T., Judge Astacio acknowledged her conduct was inappropriate. (R – 430) In her experience before the Commission, she referred to her comments as grossly inappropriate. (R – 81) At the time of this transgression, she had been on the bench for 20 days.

CHARGE V

Regarding Charge V:

1. People v. T.L., Judge Astacio acknowledged that the off the record conversation that was inadvertently recorded was inappropriate and that she regretted it. (R – 431-432) She was 27 days into her Judgeship at the time of this transgression. She respectfully argues that she should be disciplined, but not removed for this transgression.

2. People v. V – the Commission did not find that the Judge violated any judicial canon with regard to this charge. (R – 19, 20)
3. People v. D.Y. – While Petitioner advised D.Y. that his conduct standing in the road was disrespectful and that it was dangerous, she acknowledges her wording was harsh, and she respectfully disagrees that she violated any judicial canons by these comments. . (R – 437-438)
4. People v. D.W. – Judge Astacio when deposed by Commission Counsel, when she testified at the hearing and before the Commission acknowledged that her comments were totally inappropriate as was her spontaneous laughter. (R. 439-442) She recognized that she was wrong and that she made matters worse by trying to explain her laughter. (R- 439-442) She respectfully argues that she should be disciplined but not removed for this transgression.

CHARGE VI

As to Charge VI, the Petitioner traveled to Thailand in April, 2017. She was not assigned a caseload and was barred from the courthouse. (R – 73) She was under a conditional discharge when she took said vacation. While there was no provision in the conditional discharge that required her to obtain permission to take

this trip, Judge Astacio has told the Commission that she would have handled her leaving in a different manner. (R - 73) The claim by Commissin Counsel is that by virtue of taking the trip, she impeded the ability of the Court and/or Probation Department to perform a laboratory test to ascertain whether or not she had been consuming alcohol. The Commission found the trip was a change of address in violation of the conditional discharge. This is entirely inconsistent with the record - - it was a vacation not a permanent removal of the Respondent to another place. (R – 74-75)

The record clearly indicates that she communicated with her criminal attorney on May 7, 2017, and that she advised him that the best method of reaching her would be email and not telephone. (R - 457) The record further indicates that said attorney mistakenly utilized telephone and not email to attempt to reach her on or around May 15, 2017. (Ex. 51, R - 922) When he did use email, they exchanged emails, and he advised her of the warrant and she promptly made arrangement to be back in Rochester to clear the matter up. (Ex. 51, R - 922)

In any event, once Acting City Court Judge Aronson learned that she was out of the Country, he ordered a urine laboratory test. There was a delay of approximately 12 days in communicating that order to the respondent because the Petitioner was out of the Country, and therefore, she was not able to receive any mail notice, and because her attorney attempted her to reach her by telephone.

When her attorney ultimately, on or about May 27th, utilized email to reach her, she responded immediately. (Ex. 5, R – 666, R - 457)

That set off a cascade of events in which she sought an adjournment of a Court appearance at the end of May. The adjournment was denied, and a warrant was issued. The Respondent returned to the United States on Sunday, June 4, 2017. She presented at the Courthouse the next day, June 5, 2017, for the dual purpose of surrendering herself for an arraignment and an appearance at a meeting with the administrative Judge which was scheduled at the Monroe County Courthouse. When she arrived at the Courthouse at 8:30 a.m., she went directly to the administrative judge's chambers. The police presented at chambers for the purpose of arresting her on the warrant. The police allowed her to meet with the administrative judge before arresting her. She was then arrested, arraigned and incarcerated without bail.

She was ultimately found in violation of the conditional discharge after having been remanded to jail without bail. The violation of the conditional discharge was found by Judge Aronson to be "inferential". She was sentenced to sixty days in jail.

The Petitioner has acknowledged that in retrospect she should have handled the circumstances of her trip in a different manner to the Commission.

POINT III:

PETITIONER SHOULD BE CENSURED BUT NOT REMOVED.

A Commission on Judicial Conduct member once aptly referred to removal from the bench as a career death sentence. Judge Astacio is 37 years old, a self-made individual who clearly has made a number of mistakes. She does not deserve the career death sentence of removal.

This Court has a precedent of weighing the status of the Judge to be disciplined – his/her age, circumstances and the factors surrounding the transgression.

In *Matter of Quinn*, 54 N.Y.2d 386 (1981), the Court reversed the Commission determination of removal taking into consideration Judge Quinn's age, his health and his departure from the bench. There can be no question his conduct was far more egregious than the Petitioner's conduct.

The Petitioner is at the beginning of her career. She has acknowledged her failures - - several at the tune of her lack of judicial experience, several due to her situational abuse of alcohol and several just pure and simple mistakes.

However, none of her transgressions rise to the level of the actions in *Matter of Cunningham*, 57 N.Y.2d 270 (1982). In that case the Judge actually advised a lower Court Judge prospectively that he would not reverse the Judge when future appeals were pursued before the transgressing Judge. Indeed, Judge Cunningham

wrote two letters to the lower Court Judge so advising, there were actual appeals pending before him. This is clearly a significant violation of the fundamental principles of justice which far exceeds the Petitioner's conduct.

In *Cunningham, supra*, this Court stated:

> "*Removal is an extreme sanction and should be imposed only in the event of truly egregious circumstances.* (*Matter of Steinberg*, 51 N.Y.2d 74, 83) *Indeed, we have indicated that removal should not be ordered for conduct that amounts simply to poor judgment or even extremely poor judgment. (Matter of Shilling*, 51 N.Y.2d 397, 403, citing *Matter of Steinberg, supra.* at p. 81) *Under the circumstances of this case, we believe that censure is the appropriate sanction."*

In the *Matter of Steinberg,* 51 N.Y.2d 74, 83) the Court found that the offending Judge had fraudulently engaged in a business while on the bench and intentionally misrepresented his income therefrom on his tax returns filed while he was a sitting Judge.

The Court found that the Respondent Judge Steinberg's conduct was:

> "*Not just a case of simple careless inattention to the applicable ethical standards."*

In the *Matter of Shilling*, 51 N.Y.2d 397 (1980), this Court removed Judge Shilling for using the power and influence of his office to obtain public agency permits and used his office to influence pending cases by conduct including sitting in the courtroom of another Judge and arguing the merits of the case with the attorney in the hallway.

In the *Matter of Duckman*, 92 NY2d 141, this Court removed a Judge who demonstrated an ongoing bias against the prosecution and who demonstrated a longstanding lack of civility toward attorneys and litigants. There were 10 instances of Judge Duckman engaging in knowing disregard of the law. He engaged in a continuing course of publicly berating and chastising prosecutors "demonstrating impatience and intolerance, even at times ordering prosecutors who disagreed with him out of the Courtroom". He would often refer to prosecutors in open Court by nicknames such as "Marshal Dillon", or the "Marshall". He made sexist and racist comments.

In the *Matter of Esworthy*, 77 N.Y.2d 280, and *Matter of Mulroy*, 99 N.Y.2d 652 (2000), the offending Judges were found to have uttered expressions of racial and ethnic bias among other egregious acts of misconduct.

In the *Matter of Sardino,* 58 NY2d 286, 292, this Court upheld a determination that the Judge under review had "so distorted his role as Judge as to render him unfit to remain in Judicial office". The petitioner was charged and found to have engaged in 62 abuses of his office over the year period.

None of the foregoing rise to the level of conduct of *Cunningham, supra.*, *Steinberg, supra, Shilling, supra, Duckman, supra, Sardino, supra, Esworthy, supra* and *Mulroy, supra.* The Petitioner has not demonstrated a pattern of

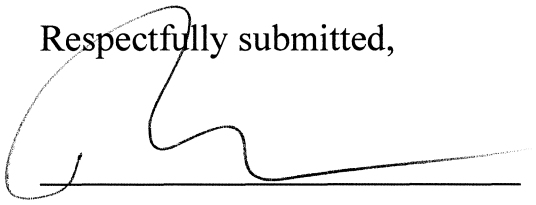
corruption and deceit, nor bias against racial or ethnic groups. She was a new Judge who exercised poor judgment in the Courtroom and in her personal life.

She has demonstrated very poor judgment at a time when she has been barred from the Courthouse, ignored by the system, but followed and bullied and pestered by the press. (Ex. H, R – 1192) While her choices have been poor, we respectfully argue they are not at a level where the harsh remedy of removal should be imposed.

CONCLUSION

The Petitioner should be given the sanction of Censure. The Determination of the Commission on Judicial Conduct should be reversed.

Respectfully submitted,



Date: June 14, 2018

Robert F. Julian, Esq.
Attorney for the Petitioner Astacio
2037 Genesee Street
Utica, NY 13501
315-797-5610

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word 2010.

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Dated: June 14, 2018

Robert F. Julian, Esq.
ROBERT F. JULIAN, P.C.
2037 Genesee Street
Utica, NY 13501
315-797-5610