IN THE SUPREME COURT
OF THE STATE OF MISSOURI

IN RE:	)	
	)	
THE MATTER OF	)	
THE HONORABLE	)	
BARBARA T. PEEBLES,	)	Case No. SC92811
	)	
Respondent.	)	

ANSWER BRIEF

OF

THE COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

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JURISDICTIONAL STATEMENT

This is a review of the Commission on Retirement, Removal and Discipline's recommendation for discipline pursuant to Article V, §24 of the Constitution of the State of Missouri. This Court has exclusive jurisdiction to "remove, suspend, discipline or reprimand any judge of any court... for the commission of a crime or for misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency or any offense involving moral turpitude, or oppression in office." [Mo. Const. art. V, §24(3)]. Under Supreme Court Rule 12.08 the Respondent has filed her objections to the Commission's findings and recommendations. Pursuant to Supreme Court Rule 12.07 this Court shall review the record, consider the recommendation of the Commission and make such order as it deems just.

STATEMENT OF FACTS

The Commission on Retirement, Removal and Discipline received a complaint from Judge Steven R. Ohmer, Presiding Judge of the 22nd Judicial Circuit, concerning alleged misconduct involving the Honorable Barbara T. Peebles. The complaint concluded:

"It is clear to me that her tardiness is symptomatic of her overall lack of supervision, management, sloppiness in handling her docket due to her being routinely late throughout the year, and further not being there at all times without providing for full coverage while in China is simply a failure to perform her judicial responsibilities.

Clerks were placed in an impossible situation to the overall detriment of the court resulting in a serious breach of public trust" [T81].

In addition, the Commission was in receipt of a newspaper article making similar allegations [E6]. The Commission's investigation included a series of letters [E2,5,11,13,26] to Respondent, her responses [E3,7,12,24,27], and the interviews of numerous witnesses. The Commission heard evidence on a Second Amended Notice [E1] July 31, 2012 through August 2, 2012 on charges of misconduct. The Commission filed its Findings of Fact, Conclusion of Law and Recommendation on August 30, 2012 and Respondent has filed a Brief and Objections to the Commission's Findings.

The Commission found Respondent guilty of Counts 1, 4, 5, 6, and 9 and not guilty of Counts 2, 3, 7, and 8.

In Count 1 the Commission found Respondent made statements to a newspaper reporter to justify her decision to lower the bond in a pending case. Respondent admitted the statements violated Canon 3B(9) [E3][T717].

In Count 4 the Commission found Respondent had a pattern of being an hour or more late on the bench, causing discourtesy and delay.

In Count 5 the Commission found Respondent failed to supervise her clerk when the clerk called the docket and Respondent was either in chambers or not at the courthouse. Even though Respondent approved the clerk's announcements at a later time, the process was found to create an appearance that the clerk was functioning as the judge. The Commission also found that Respondent failed to make proper arrangements for a substitute judge or to continue her dockets when she was on vacation. With

Respondent out of the country, the clerk started to call the docket as before, once again creating the appearance that the clerk was acting as a judge.

In Count 6 the Commission found that Respondent destroyed a filed Motion to Dismiss without notice to the parties, knowing she had no authority to do so and then made statements to her clerk encouraging the clerk to deny knowledge of this event if questioned by the Circuit Attorney.

In Count 9 the Commission found Respondent failed to be candid in a phone call to the Circuit Attorney's Office about her destruction of the Motion in Count 6.

The Commission concluded that Respondent violated various Canons including 1, 2A, 3A, 3B1, 3B2, 3B3, 3B4, 3B8, 3B9, 3C1, 3C2, 3C3, VAMS 575.110 and that her actions were misconduct, willful neglect of duty and the commission of a crime under Article V, §24 of the Constitution.

The Commission recommends that Respondent be removed from office [Findings p21-25].

Judge Steven R. Ohmer, Presiding Judge of the 22nd Judicial Circuit, testified as to the duties a presiding judge [T18-19] and the responsibilities of the judge assigned to Division 25. The responsibility includes a confined docket of defendants arrested overnight or over the weekend who are making their initial court appearance [T21]. Dockets are large with 50 [T23] to 200 [T647-648] cases and a packed courtroom [T23]. Cases are set at 9:00 a.m. [T24,131,167,214, 634,642-644]. Judge Ohmer's practice was to call the Division 25 docket when scheduled at 9:00 a.m. [T24]. Judges previous to

Respondent took the bench anywhere between 8:00 a.m. and 9:00 a.m. [T168], and called the docket themselves [T169,668].

Respondent made a calculated plan to delay taking the bench beyond 9:00 a.m. claiming that in so doing she allowed the attorneys and defendants to "conclude their business in my courtroom without delay" [E12, p 2]. Instead of following the practice of prior Division 25 judges, Respondent instructed her clerk to make the first docket call. The clerk's announcements in the first docket call included continuance dates, dismissals, and that capias warrants would be issued. All of these announcements were specifically authorized by Respondent in early 2011 [T233,293,309,814]. Occasionally, Respondent was on the bench for the clerk's call of the docket but most often Respondent was either in chambers or absent from the courtroom facilities of Division 25 [T214,463,472-473].

Deputy Clerk Whitney Tyler, assigned to Division 25 in 2011 as a courtroom clerk, generally made the first docket call around 9:15 a.m. – 9:45 a.m. [T168,181,201,216,463]. Respondent testified that she usually arrived at the courthouse at 9:15 a.m. She also maintained that "If I was not on the bench but something required my attention, I was available in my office and accessible" [E12, p2]. Three attorneys who regularly appeared before Respondent testified that while Respondent was in chambers sometimes before the first docket call, she usually did not arrive at chambers until 9:50 a.m. [T292] – 10:30 a.m. [T142-143,214,308]. As a result, on frequent occasions Ms. Tyler made announcements regarding continuances, dismissals, and capias warrants without the immediate supervision of Respondent [T144,202-203,216-217,232-233,293,309,382,464-465]. Respondent would then review the first call announcements

and preside over contested matters at a second docket call [T184,464,722]. Respondent took the bench for second call most days between 10:00 a.m. and 10:30 a.m. [T26,136,142,167,201,214,231,291,308,429,590,657,762-763] for the period January 2011 through November 2011.

On fewer occasions, Respondent arrived in the courtroom as early as 9:30 a.m. [T181,214,354] or as late as 11:00 a.m. [T308]. The docket was usually completed by 12:00 p.m. – 12:15 p.m. [T149,294]. On fewer occasions, the docket was completed as late as 12:30 p.m. [T751]. Some attorneys adjusted their schedules to ignore the 9:00 a.m. scheduled start and arrived between 9:15 a.m. and 10:00 a.m. [T148,658]. Non-regular attorneys and those who believed that the best practice required an attorney, party, or witness to appear at the time a case was scheduled continued to appear at 9:00 a.m. [T148,214,231,291,209,590-591].

Assistant Public Defender Ramona Gau testified that Respondent's practice "wasted time" [T310]. She also acknowledged that there was a "general grumbling, complaining, impatience among the gallery, among the crowd" and stated that with the attorneys "it became a joke" [T332-333].

Assistant Public Defender Chad Oliver described the reaction of many who experienced Respondent's late start as follows:

> "...People would complain about having to be in several other divisions, and having clients in Division 25, and Division 25 starting late, and it delaying them from getting to other divisions in the city or county or wherever" [T383].

Respondent's witness, Attorney Doug Forsyth, testified that Respondent's method of a 10:00 a.m. docket call was "inconvenient" and that he was not willing to adjust his arrival time because "...you just never knew" when your case would be called and "You didn't know whether you could play hooky and come back, you know" [T591-592].

Assistant Circuit Attorney Shawn Morgan testified that her concern was not when the docket ended but "when it should have started probably, at 9 a.m.... It's less about when it ended and more the time that was spent sitting and waiting for it to start" [T208].

Another of Respondent's witness, Attorney Terry Niehoff, described his experience in getting business done in Respondent's court as follows:

> "Well, initially because Judge Peebles started doing things a little differently, it was frustrating, because she wasn't taking the bench until sometimes around ten o'clock, and you know, I would be there at nine because that's the way it had been done.
>
> It was annoying, because I usually had multiple divisions to be at to do different things in the city and sometimes in other places, and I approached Judge Peebles about it in chambers, you know, and asked her about it, and she explained to me why she was doing things that way, and it made sense" [T657].

Mr. Niehoff adjusted as follows:

> "So, I started doing my other stuff first, going to my other divisions and getting there around ten o'clock, and then it would kick into gear" [T658].

Those attorneys, police officers, defendants, and witnesses who were not regulars in the Respondent's court or who, like Mr. Forsyth, did not feel comfortable "playing hooky" were delayed on a regular basis by an hour or more on contested matters while waiting for Respondent to take the bench [T231-232,294,308].

In the spring of 2011, a "parade" of lawyers complained to Judge Ohmer [T26] about Respondent's lack of timeliness in taking the bench [T26-27]. Judge Ohmer had one or two conversations with Respondent wherein he discussed the complaints and Local Court Rule 2.1 which sets the hours of court at 9:00 a.m. to 5:00 p.m. [T30].

Respondent's practice of late arrival and late second docket calls did not substantially change until November or December 2011 [T201]. Respondent rarely apologized for the inconvenience caused by her lack of timeliness [T181,216,232,292,313].

Respondent has made a public statement to the effect that no other judge can tell her how to operate her courtroom [T801].

Amongst the members of the Bar who frequently appeared before Respondent in Division 25, the common term when referring to Deputy Clerk Whitney Tyler was "Judge Whitney." Attorney David Stokely described the appearance that "Judge Whitney" was making the decisions of the court:

> "Because she basically decided if the state was going to get a continuance, or if it was going to get dismissed, things like that, when we were going to do the new dates. Until the Judge got there, she was the judge" [T146].

He pointed to the language Ms. Tyler used in announcing dismissals as: "[c]ase dismissed, failure to prosecute..." [T152].

Assistant Circuit Attorney Shawn Morgan testified that lawyers argued with Ms. Tyler when they disagreed with her announcements when Respondent was not in the courtroom [T205,212].

Assistant Circuit Attorney Adeyinka Faleti testified that Ms. Tyler would make her announcements for dismissals as follows: "this case will be dismissed for failure to prosecute" [T226] and that Ms. Tyler was called "Judge Whitney" "because she seemed to wield powers that some would consider reserved for a judge" [T219-220].

Assistant Circuit Attorney Stanislav Levchinsky called Ms. Tyler, "Judge Whitney" "because she was acting like a judge" [T233].

Assistant Circuit Attorney Patrick Carmody testified that in calling the docket Ms. Tyler would grant continuances, dismiss cases, and call capias warrants and that it appeared that she had discretion on whether to do so [T293].

Assistant Public Defender Ramona Gau described the practice of Ms. Tyler announcing continuances, dismissals, and capias warrants without Respondent being present and stated that it put the clerk in a difficult position because she had to deal with the occasional attorney who was frustrated in having to take up their case with a clerk rather than a judge [T310,330]. Ms. Gau testified that she had never been in any other courtroom where a clerk was performing the functions that Ms. Tyler was performing in Division 25 for Respondent [T330-331].

Respondent never made a public announcement or posting defining the extent of Ms. Tyler's responsibilities and powers [T148,233]. The use of Ms. Tyler to announce continuance dates, dismissals, and the issuance of capias warrants was most problematic when Respondent left on vacation for China October 11, 2011 through October 21, 2011 and then attended the Trial College October 25, 2011 through October 27, 2011 [E32,37].

Respondent was required by Local Court Rule 2.1 [E40] to "make arrangements with another judge to be responsible for the absent judge's division" and to "post that arrangement in a manner reasonably calculated to inform any person who may appear in the absent judge's courtroom."

In Division 25, the usual practice on those days when the Division 25 judge would be absent is to not schedule any cases other than the confined docket. Limiting the size of the Division 25 docket in this way enabled the substitute judges the time to also handle their own dockets [T34,42-44]. Respondent arranged for a substitute judge to handle her confined docket October 11, 2011 through October 14, 2011 [E33,34,36][T495,502-503,517]. Respondent did arrange for a substitute judge to handle her entire docket during the second week of her vacation, October 17, 2011 through October 21, 2011 [E35,37][T517]. Since Respondent did not finalize her vacation plan until October 3, 2011 [E32], many cases could not be continued in time to contact the approximate 200 attorneys involved [T469].

Respondent left for China leaving her clerk with the instructions to "continue everything" [T51,468-469,522]. The substitute judges, on October 11, 2011 through October 14, 2011, per their arrangement with Respondent, left after presiding over the

Division 25 confined docket to return to their own dockets. Ms. Tyler was left to "continue everything" [E33,34,35,36] [T45-46,468-469,495,517,726-727]. Respondent testified that when she left for China her instructions to Ms. Tyler were "to continue as we've always done" [T783].

During the first week of Respondent's China vacation Ms. Tyler continued cases, making decisions on whether to assign the continuance to the state, defendant, or court and whether to give a long or short continuance date [T471-472]. She announced dismissals based on the prior practice before Respondent of dismissing grand jury cases after two continuances assigned to the state. She announced capias warrants for those cases where the defendant did not appear [T464-467].

Ms. Tyler used the Judge's signature stamp on a few dismissals [T462] and entered capias warrants in the docket sheets of non-appearance defendants [T465,474]. The warrants themselves were not signed until Respondent returned from vacation [E7, p 2]. Continuances were entered by use of a form containing Respondent's photocopied signature [T463].

Respondent had not given Ms. Tyler specific instructions on handling the dismissal of cases so Ms. Tyler texted Respondent in China after two days of announcing dismissals on her own [T465]. Respondent responded with the "parameters" in which a case qualified for dismissal. The texts did not discuss individual cases but based on the "parameters" Respondent authorized Ms. Tyler to continue dismissing cases [T494].

Judge John F. Garvey, the Criminal Assignment Judge in 2011, had been critical of Respondent's use of a clerk to make the first docket call and the use of signature stamps

[T37]. He had complained to Judge Ohmer and Circuit Clerk Jane Schweitzer in June 2011 and requested that Respondent's clerks be reassigned to another division [T782]. At that time Judge Ohmer accepted Respondent's assurance that the clerks were following Respondent's instructions when calling the docket and that there was no improper use of signature stamps or pre-signed orders [T37].

On October 14, 2011, Judge Garvey substituted for Respondent while she was in China and was critical of the Division 25 clerks for their handling of the docket. Judge Garvey complained to Judge Ohmer and Ms. Jane Schweitzer [T35]. Ms. Landa Poke, Ms. Tyler's supervisor, instructed Ms. Tyler to quit dismissing cases [T468]. Ms. Tyler texted Respondent in China and told her of Judge Garvey's concerns [T479]. Respondent called Judge Ohmer on that same day from China and complained about Judge Garvey "sticking his nose in her docket" [T35].

On October 24, 2011, Judge Ohmer met with Respondent, Judge Garvey, Circuit Clerk Jane Schweitzer, Judge Paula Bryant, Judge Calea Stovall-Reid, and Ms. Landa Poke [T466] to discuss Judge Garvey's concerns about the clerks running the docket, using signature stamps, and pre-signed blank memos in Division 25. Respondent assured Judge Ohmer that "there was no problem" [T37].

Judge Ohmer testified to his opinion that other than consent situations to allow a clerk to announce continuances and dismissals without the presence of a judge was a problematic practice in that it required discretionary decisions that should be reserved for a judge [T52-56]. Further, a practice of having the clerk announce capias warrants that

are not signed by the judge and entered into the system until as much as two weeks later can cause public safety problems [T56-60].

On October 26, 2011, Respondent was once again absent from Division 25, this time to attend the Judicial College [E37,33, EB p 4][T528,531]. Judge Michael Stelzer had been present earlier in the morning to handle the confined docket in Division 25 and had left consistent with prior agreements with Respondent to only cover the confined docket [T360]. Contrary to the requirements of Local Court Rule 2.1 [E40], there was no posting around the courtroom of the identity of the substitute judge [T360].

Assistant Public Defender Chad Oliver, representing Defendant Thomas Williams in *State v Thomas Williams,* Cause No. 1122-CR04034, approached Ms. Tyler upon the call of the *Williams* case and asked that the case be dismissed [T356-357]. The *Williams* case had been continued twice before waiting for a preliminary hearing or grand jury return. The general policy in such cases in Division 25 before Respondent is that upon a Motion to Dismiss for Failure to Prosecute such cases are dismissed on the third appearance date [T357].

Mr. Oliver was told by Ms. Tyler that there was no judge and that the case had to be continued until November 30, 2011 [T357]. Mr. Oliver was concerned about the possibility that a continuance might increase the length of time his client remained imprisoned [T365]. Mr. Oliver asked Ms. Tyler to review the file and confirm the two prior continuances for the state. She did and a discussion occurred over whether there had been two continuances for the state or one for the state and one charged to the defendant [T358]. Ms. Tyler concluded: "Excuse me. I'm denying your Motion to

Dismiss. I'm sorry" [T361]. Mr. Oliver, wanting to make a record of the event, took a preprinted Motion to Dismiss from the clerk's desk and hand printed an interlineation to the following preprinted language:

> "Motion to Dismiss for Failure to Prosecute.
>
> Comes now Defendant by and through counsel and moves that this Court dismiss the case pending against him because of the State's failure to prosecute."

The interlineation added:

> "The Court issued a warrant against Defendant for these charges on July 19, 2011 and the warrant was served on July 24, 2011. The Court granted the State 3 previous continuances over defense counsel's objection. The court clerk denied this motion without a judge present and without allowing defense counsel an opportunity to argue the motion" [E26].

Ms. Tyler file stamped the Motion, Mr. Oliver made copies, returned the original to Ms. Tyler, and provided a copy to the Assistant Circuit Attorney [T359].

Mr. Oliver thought it was appropriate to argue the dismissal motion with the Ms. Tyler because "it was rampant around the courthouse, private attorneys, Public Defender's Office, Judge Whitney's running court today" [T362]. Mr. Oliver further testified that by understanding and practice: "...Whitney Tyler was called Judge Whitney for good reason. She was believed widely, and her actions supported, that she was running that division in Judge Peebles' absence, and one of the things is she was

dismissing cases, she was continuing cases, she was – I mean, she was doing it all" [T381].

Defense Attorney David Stokely testified about the practice of having a clerk dismiss cases: "I think it is illegal as hell" [T147].

On the next scheduled court date, November 30, 2011, Ms. Tyler brought the file that contained the Motion to Dismiss [E26] to Respondent's attention. At the time there was a courtroom full of people in Division 25, Respondent was on the bench, and Ms. Tyler was the only person before the bench. Respondent read the motion and inquired "...who wrote this?" Ms. Tyler told her Mr. Oliver did. Respondent became furious [T789][E27, p 2] and "snatched" the Motion to Dismiss out of the file, crumbled it up, threw it in the trash [T506] and stated: "Get this shit out of my file" [T480-481]. Respondent recalled saying "Give me that damn thing" but denied saying the word "shit" as she does not use profanity [T734-735]. Respondent then, using the same printed form as was used by Mr. Oliver to create Exhibit 26, dismissed the case for failure to prosecute [EB, p 4].

On December 18, 2011, the St. Louis Post-Dispatch ran an article critical of Respondent and her clerks' actions while Respondent was in China. It also mentioned the *State v Williams* case and the Motion to Dismiss missing from the court file [E6]. The Circuit Attorney's Office began an investigation of whether there was criminal conduct involved in the missing Motion in *State v Williams* [T533].

In the course of the investigation Ms. Tyler was interviewed by Assistant Circuit Attorney Rachel Smith on March 13, 2012 and March 15, 2012. Ms. Tyler first knew of

the investigation in early March 2012 when Circuit Clerk Jane Schweitzer told Ms. Tyler that the Circuit Attorney's Office wanted to question her about some paperwork missing from a file [T485].

Later that same day in early March 2012 as Ms. Tyler was styling Respondent's hair at a cosmetology school, they discussed the Motion to Dismiss [E26] that Respondent destroyed in the *Williams* file. Ms. Tyler told Respondent of the fact that the Circuit Attorney's Office wanted to question her about "that particular piece of paper that was in the file." Ms. Tyler testified that Respondent told her: "This is something we're going to keep between us, it's something we're going to take to our graves." Ms. Tyler responded, "Yeah, I know" [T482-484,511].

Two weeks later on March 13, 2012, when asked about the missing Motion by Assistant Circuit Attorney Rachel Smith, Ms. Tyler "...told them I didn't know what they were talking about" [T485]. Ms. Rachel requested that Ms. Tyler take a polygraph test [T535].

The next day, on March 14, 2012, Ms. Tyler had a discussion with Respondent about her interview with the Circuit Attorney's Office. Ms. Tyler told Respondent: "I didn't tell them anything because I didn't know what to say" [T486]. She testified that Respondent told her that she wouldn't advise her taking a polygraph test, to talk to an attorney, and: "I don't know but you didn't do anything, I didn't do anything, how are they going to prove anything happened with the piece of paper" [T487].

Ms. Tyler retained counsel and returned to the Circuit Attorney's Office on March 15, 2012 and, thinking her job may be in jeopardy for not telling the truth, told Ms. Smith

that Respondent had torn the Motion out of the *Williams* file. [T485-508] Ms. Tyler underwent a polygraph examination regarding the missing motion in the *Williams* case on March 19, 2012. That same morning Respondent called Ms. Smith. Ms. Smith returned the call later that day. The call was recorded and transcribed [E29]. During the phone call Respondent admitted that she ripped the Motion to Dismiss in the *Williams* case out of the court file and destroyed it [E29, p 2-3].

Ms. Smith did not find that Respondent was candid or truthful with her during the conversation [T54] regarding whether the Motion to Dismiss was not a motion but either an order or "not a true order" [E29, p 2-3] [T541].

Judge Ohmer, Chad Oliver and Rachel Smith testified that the existence of an unsigned courtesy signature line for the Judge did not make Exhibit 26 an improper filing and that the existence of such courtesy signature lines in motions is a common practice [T64,362,542].

Respondent testified that she did not recall making a statement to Ms. Tyler about taking to their graves the destroyed Motion to Dismiss incident but she admitted saying "something along that line" [T792]. Respondent admitted that she "said some things to Miss Tyler that in hindsight was probably inappropriate" and Respondent contended that some of what she said to Ms. Tyler was "in jest" [T792]. Respondent denied saying, "You didn't take that piece of paper out of the file, I didn't take that piece of paper out of the file," but conceded she "could have been saying something like that in jest" [T795]. When asked if Respondent could have told Whitney Tyler that they were "going to take it to their graves", Respondent admitted: "I probably told her something along that way"

[T826]. Respondent denied telling Ms. Tyler "how they going to prove what happened to a piece of paper" and Respondent denied advising Ms. Tyler not to take the polygraph test" [T486,795-796]. Respondent attributed the different recollection of her conversations with Ms. Tyler to Ms. Tyler's "maturity level" [T821] and that Respondent's statements were either in jest "without any conviction" or not "serious conversations" [T823-824]. Respondent knew of no reason for Ms. Tyler to lie concerning her recollection of the Motion to Dismiss incident [T796].

POINTS RELIED ON

I

The Commission on Retirement, Removal and Discipline's Findings of Fact, Conclusions of Law and Recommendation with respect to Count 4 of the Second Amended Notice are not in error in that they are supported by a preponderance of evidence showing that Respondent had a pattern of conduct in which she was frequently an hour or more tardy in not taking the bench but also in not arriving at the courthouse to attend scheduled court activities and that such conduct caused delay, inconvenience and discourtesy to the various litigants, witnesses, and attorneys who appeared in Respondent's court.

In re Corning, 538 S.W.2d 46, 50 (Mo. 1976);

In the Matter of Barrett, 593 A.2d 529, 532-533 (Del. Jud., 1991);

In re Lokuta, 964 A.2d 988, 1005 (2008);

II

The Commission on Retirement, Removal and Discipline's Findings of Fact, Conclusions of Law and Recommendation with respect to Count 5 of the Second Amended Notice are not in error in that they are supported by a preponderance of evidence showing that Respondent had a pattern of requiring her clerk to call the court's docket and to advise attorneys and litigants of continuance dates, dismissals, and the issuance of capias warrants. Further, during these times, Respondent was frequently either not on the bench or not even in chambers and that Respondent left on vacation to China in October 2011 without making proper arrangements to either continue her dockets or provide a substitute judge for her entire dockets and provided her clerks with inadequate instructions other than to continue calling dockets as before and to continue all cases. And, finally, that as a result of such practices, the attorneys who regularly appeared before Respondent jokingly referred to the clerk as "Judge" and to many members of the public and some attorneys, the clerk appeared to be functioning as the judge.

In the Matter of Briggs, 595 S.W.2d 270 (Mo. 1980)

III

The Commission on Retirement, Removal and Discipline's Findings of Fact, Conclusions of Law and Recommendation with respect to Count 6 of the Second Amended Notice are not in error in that they are supported by a preponderance of evidence showing that Respondent destroyed a Motion to Dismiss filed in the case *State v Thomas Williams,* without notice to the parties and with knowledge that she

lacked authority to destroy said Motion. Further, that a preponderance of evidence showed that Respondent's statements to Ms. Whitney Tyler that they would take the destruction of the Motion to their graves was not made in jest but for the purpose of concealing the act of destroying a public record.

VAMS §575.110;

VAMS §483.140;

In re Justin, 809 N.W.2d 126,127 (Michigan 2012);

Fletcher v Commission on Judicial Performance, 968 P.2d 958,968 (California 1998);

In re Sterlinske, 365 N.W.2d 876-877-878 (Wisconsin 1985);

Inquiry Concerning Rodella, 190 P.3d 338 (New Mexico 2008).

IV

The Commission on Retirement, Removal and Discipline's Findings of Fact, Conclusions of Law and Recommendation with respect to Count 9 of the Second Amended Notice are not in error in that they are supported by a preponderance of evidence showing that during Respondent's phone call to Assistant Circuit Attorney Rachel Smith, Respondent made statements that the Motion to Dismiss [E26] was not a Motion but an Order. Further, since the conversation occurred at a time wherein Respondent knew that Ms. Tyler had accused Respondent of destroying the Motion, Respondent's motivation in making the call was to establish a defense based on a false premise that the Motion was an improper Order justifying purging it without notice to the parties.

VAMS §575.110.

V

The Commission on Retirement, Removal and Discipline's recommendation of removal should be adopted by this Court for the reason the Findings of Fact, Conclusions of Law are supported by a preponderance of evidence. These findings show that Respondent had a pattern of tardy arrival to the courtroom and failure to properly supervise her clerks. Respondent failed to comply with the recommendations of her Presiding Judge regarding her tardy arrivals. Respondent violated her special duty to superintend a public record by destroying a record in violation of VAMS §575.110. Further, the Commission on Retirement, Removal and Discipline found that Respondent failed to provide candor in the investigations of this Commission and the Circuit Attorney and that her sworn testimony before the Commission on Retirement, Removal and Discipline regarding her arrival at the courthouse and conversations with her clerk regarding the destruction of the public document was not truthful.

Missouri Constitution Article V, §24

VAMS §575.110;

Inquiry Concerning Rodella, 190 P.3d 338 (New Mexico 2008);

In re King, 857 So.2d 432 (Louisiana Supreme Court October 21, 2003);

Adams v Commission on Judicial Performance, 897 P.2d 544 (1995).

STANDARD OF REVIEW APPLICABLE TO ALL POINTS

The standard of review applicable to all claims of error in this case is set forth in *In re Baber*, 847 S.W.2d 800,802 (Mo. Banc 1993):

"This Court is not required to adopt the recommendation of the Commission in a judicial disciplinary proceeding. The ultimate responsibility to 'remove, suspend, discipline or reprimand any judge of any Court' is entrusted to this Court [*Missouri Constitution Article V §24.3; Matter of Buford,* 577 S.W.2d 809,821 (Mo. Banc 1979)]. Accordingly, we conduct an independent review of the evidence and the Commission's fact findings, and where credibility is at issue, we give substantial consideration and due deference to the Commission's ability to judge the credibility of witnesses appearing before it [*In re Voorhees,* 739 S.W.2d 78,181 (Mo. Banc 1987); *Buford* 577 S.W.2d at 821]. Because a disciplinary proceeding is civil rather than criminal in nature, the charges must be proved by a preponderance of the evidence [*Elliston,* 789 S.W.2d at 475]."

ARGUMENT

I

The Commission on Retirement, Removal and Discipline's Findings of Fact, Conclusions of Law and Recommendation with respect to Count 4 of the Second Amended Notice are not in error in that they are supported by a preponderance of evidence showing that Respondent had a pattern of conduct in which she was frequently an hour or more tardy in not taking the bench but also in not arriving at the courthouse to attend scheduled court activities and that such conduct caused

delay, inconvenience and discourtesy to the various litigants, witnesses, and attorneys who appeared in Respondent's court.

Cases in Division 25, Respondent's Division, were set at 9:00 a.m. [T24,131,167,214,634,642-644]. Respondent's Brief concedes: "[T]he record supports a finding that Respondent took the bench anywhere from 9:30 a.m. to 10:30 a.m..." [Brief p 38]. Assistant Public Defender Ramona Gau estimated that on a typical day it was between 10:30 and 11:00 a.m. when Respondent took the bench. Respondent argues that her practice in this regard does not constitute "tardiness" in that "tardiness" has no legal meaning and the standard is vague and pejorative and, further, such "tardiness" does not constitute "inconvenience".

In the Matter of Barrett, 593 A.2d 529 (Del. Jud., 1991), the Board of Examining Officer suspended the Judge for among other things "chronic tardiness" in that over a four and one-half year period of time she was "five to ten minutes late in starting her court shift a majority of the time". The court in not finding the Judge's excuses of family obligations and her contention that she was not "the only court employee with a tardiness problem" to be persuasive held:

> "Her insensitivity to the schedules of others interferes with the routine performance of work, is an imposition on parties appearing in court, and, in time, must affect the morale of those who work with her. Part of the administrative responsibility of a judge is to meet schedules. Part of the ethical responsibility of a judge according to Canon 3(B)(2) is to set a high standard of diligence for to other court personnel. Through her chronic

tardiness Judge Barrett has failed to fulfil [sic] both of these responsibilities. Her continued disregard for promptness following warnings from the Deputy chief Magistrate constitutes willful [sic] misconduct" [Supra 534].

While the Commission did not find her testimony to be truthful, Respondent testified that she arrived at the courthouse by 9:15 a.m. [T748,761], thus matching the chronic tardiness found in *Barrett.* Further, as in the *Barrett* case, Respondent was warned by her Presiding Judge about the "parade" of lawyers complaining to him about her lack of timeliness in taking the bench [T26-27].

The Pennsylvania Supreme Court removed a judge for amongst other things being frequently late to court and, therefore, being discourteous. The Court held:

> "Respondent's custom of arriving 15, 20 minutes, or a half hour or an hour or more late for scheduled court sessions is the quintessential discourtesy to litigants, jurors, witnesses, and lawyers. When it is commonplace, as here, it takes on the character of arrogance and disrespect for the judicial system itself, as well, of course, disrespect for those who, bidden by the court to be in court at a time chosen by the court, wait, sometimes in a "packed courtroom," for the arrival of the judge.
>
> These considerations lead us to a contemporaneous finding that this conduct is such that brings the judicial office into disrepute which subjects Respondent to discipline under Article V, § 18(d)(1) of the Pennsylvania Constitution."

In re Lokuta, 964 A.2d 988, 1005 (2008)

As in *Lokuta*, Respondent's Division 25 tended to be a packed courtroom [T23,647-548]. While some attorneys adjusted to ignore the 9:00 a.m. scheduled start and arrive later [T148,658], non-regular attorneys and those attorneys, parties, or witnesses who either did not know of Respondent's custom of late arrival or who believed that the best practice required an appearance at the scheduled time arrived near 9:00 a.m. and then waited for Respondent to appear [T148,214,231,209,296,590,591].

> "Certainly the reasonable expectations of the public would include the expectation that the judicial officer act with the same respect for the court as those members of the public did by obeying the court's scheduling order; would include the expectation that the judicial officer would act with consideration for the time and schedules of the hard-working people who crowd her courtroom; and would include the expectation that a judicial officer would conduct herself with the same deference and consideration for others as is taught in the schools and in the homes of Luzerne County. Respondent's conduct described in this record is the kind of conduct which gives the judicial office itself and courts in general a "bad name."
>
> We conclude that the conduct of Respondent was so extreme as to bring the judicial office into disrepute."

In re Lokuta, supra, at 1006.

Missouri addressed the situation of a judge being "habitually late for court" in the matter *In re Corning,* 538 S.W.2d 46, 50 (Mo. 1976). The Court agreed with the Commission's conclusion that:

> "Respondent violated Supreme Court Rule 2.07 by failing to be prompt in the performance of his judicial duties and failing to recognize that the time of litigants, jurors, and attorneys is of value and that habitual lack of punctuality on his part justifies dissatisfaction with the administration of the business of the Court."

Judge Corning was removed for this and other charges. *In re Corning,* supra, at 53.

Other examples of judges being disciplined (amongst other charges) for late arrivals to court or "tardiness" are:

(1) *In re Woodard,* 919 So.2d 389 (Florida 2006) – reprimanded for being "frequently late in beginning scheduled first appearance hearings."

(2) *In re Albritton,* 940 So.2d 1083 (Florida 2006) – suspended for 30 days for an "ongoing basis" of being late to hearings and trials.

(3) *In the Matter of McVay,* Judgment and Order, No. JC-07-0003 (Arizona Supreme Court September 25, 2007) – suspended for 60 days for arriving five to eighteen minutes later in the courtroom almost 20 percent of the time. (Amended Agreement for Stipulated Censure, Case No. 06-181, December 26, 2006, p 3) (Agreement for Stipulated Suspension, Case No. 06-181, July 20, 2007, p 3)

(4) *In re Nettles-Nickerson,* 750 N.W.2d 560, 563 (Michigan 2008) – removed for "belated commencement of proceedings."

(5) *Matter of Ryan,* Order No. 32,369 (New Mexico Supreme Court June 20, 2012) – was chronically late for the business of the court and ordered to never seek or hold judicial office in the future.

(6) *Inquiry Concerning Singbush,* No. SC11-905 (Florida Supreme Court June 7, 2012) – reprimanded for being "habitually tardy for hearings, first appearance and trials." [p 5]

(7) *In re Merlo,* Opinion, Order No. 3 JD 10, No. 1 JD 11 (Pennsylvania Court of Judicial Discipline August 29 and October 17, 2011) – removed for "habitual lateness and frequent "call offs." [p 13].

Respondent also argues that "each judge handles his or her courtroom differently" [Brief p32] and that her practice of having her clerks attend to uncontested matters involving standard continuances, dismissals, and capias warrants resulted in these matters being expedited for the convenience of the parties.

The different handling of Division 25's docket call was described by Judge Ohmer and long-time bailiff Sheriff Tammy Hogan. Judge Ohmer testified his practice was to call the Division 25 docket as scheduled at 9:00 a.m. [T24]. Sheriff Tammy Hogan, who had served as Respondent's bailiff from January 2011 to August 2011 and who had been assigned to Division 25 for the previous ten years, testified that other than Respondent, the judges in Division 25 called their own dockets between 8:30 and 9:00 a.m. and that unless

there was a specific reason for the delay, no other judge other than Respondent would show up on the bench at 10:00–10:30 [T168-169].

Respondent has consistently claimed that having the clerk call the docket while the judge's chair is empty is an "efficient" way of handling the docket. In one of her responses to the Commission, Respondent states:

> "The attorneys and defendants are able to conclude their business in my courtroom without delay, even though in my discretion it was not necessary to assume the bench when others believe I should have. My delay in taking the bench was not inadvertent but calculated to allow some of the court business to be finished so that when I did enter the courtroom, all remaining matters were handled immediately and efficiently. This delay also allowed attorneys to finish their business in other courts, and adjust their calendars accordingly. If I was not on the bench but something required my attention, I was available in my office and accessible" [E12, p2].

In addition to creating an appearance to the public that the clerk was presiding over the docket instead of the judge, it is clear that any issue that involved a contest would require the attorneys, witnesses and parties to have a seat and wait for the judge [T112,153-154,294,464,467]. For the 50–60 [T143,215,308,324] or so attorneys, parties and witnesses whose cases required a judge, they had no choice but to sit and await Respondent's arrival.

Judge Ohmer received complaints from a "parade" [T25] of attorneys in March or April 2011 about Respondent's habit of taking the bench at 10:30 a.m. [T24-26,92] and

that "the clerks were getting kind of more involved than they felt than they should have" [T92]. In the spring of 2011, Judge Ohmer met with Respondent about the complaints and told her that "the lawyers like to come in that division early, and they could get things done and get about their business" [T26]. He told her she needed to "get here" and that if she did it "takes care of a lot of problems." Respondent said she would [T27]. While Judge Ohmer testified that he did not believe it was necessary to "punch a clock" from 9 to 5, he stated: "...just that those are our hours, and in bulk divisions I think it's incumbent on judges to be there because of volume and to expedite the dockets" [T84-85]. Respondent did not start showing up on time until November or December 2011 [T201,312].

Having her clerk call the docket so as to allow Respondent to appear an hour or so later on the bench may have been more efficient in terms of limiting Respondent's court time to about two instead of three hours per day (court ended 12:00–12:30) [T149,294,751], for those members of the public and officers of the law and court who were required to wait for Respondent to appear, the customary practice of a judge starting court when scheduled was clearly preferable [T26-28,231-232,294,310,591-592].

Respondent's claim that while her clerk was calling the docket she was "available in my office and accessible" was also found by the Commission to be not credible. Three attorneys, who regularly appeared before Respondent and who would check Respondent's chambers to determine if she was present, testified that Respondent most often or usually did not arrive in chambers until 9:50–10:30 [T142-143,214,308]. One of the attorneys, David Stokely, described how he would position himself in a chair outside

Respondent's chambers waiting for Respondent to arrive [T143]. Ms. Tyler stated she would start the first call of the docket each day between 9:30 and 9:45 a.m. [T463] and as to whether Respondent was back in chambers during Ms. Tyler's call of the docket: "Some days she was, some days she wasn't but for the most part *{emphasis added}* I was in the courtroom before she came out, before she was there" [T464].

Respondent's Brief suggests that Assistant Circuit Attorney Patrick Carmody "lauded Respondent's practice of calling private attorneys' cases first so as to accommodate their schedules..." [Brief p10-11]. It was private Attorney Stokely, not Circuit Attorney Carmody, who praised calling the attorneys' cases before those of the general public [T151]. In addition, Mr. Carmody did not say, as suggested in Respondent's Statement of Facts [Brief p11], that when he sought Respondent in chambers, Respondent "sometimes" was there and "other times" she was not. Mr. Carmody did testify that "almost every day" he would go back to Respondent's chambers between 10:00–10:30 and "usually" *{emphasis added}* she was not there [T291-292].

Attorney David Stokely testified: "She wasn't there. Sometimes she was but most *{emphasis added}* of the time she wasn't" [T143]. Respondent's absence from the courthouse during the first docket call was described by other witnesses as "usually" [T292], "not there" [T308], or "for the most part" [T464].

Exacerbating the harm to the public and the judiciary was Respondent's failure to apologize to the 50–60 attorneys, parties, witnesses, court staff, and police officers waiting for Respondent to appear [T181,216,232,292,313]; her failure to heed her Presiding Judge's warnings to start court on time; her public statements that no judge could tell her

how to operate her courtroom; and most importantly her lack of candor with this Commission in insisting that she arrived in Division 25 at 9:15 a.m. and was accessible to anyone who needed her attention during the clerk docket call.

ARGUMENT

II

The Commission on Retirement, Removal and Discipline's Findings of Fact, Conclusions of Law and Recommendation with respect to Count 5 of the Second Amended Notice are not in error in that they are supported by a preponderance of evidence showing that Respondent had a pattern of requiring her clerk to call the court's docket and to advise attorneys and litigants of continuance dates, dismissals, and the issuance of capias warrants. Further, during these times, Respondent was frequently either not on the bench or not even in chambers and that Respondent left on vacation to China in October 2011 without making proper arrangements to either continue her dockets or provide a substitute judge for her entire dockets and provided her clerks with inadequate instructions other than to continue calling dockets as before and to continue all cases. And, finally, that as a result of such practices, the attorneys who regularly appeared before Respondent jokingly referred to the clerk as "Judge Whitney" and to many members of the public and some attorneys, the clerk appeared to be functioning as the judge.

First, contrary to Respondent's Brief's suggestion, there was no Commission conclusion that the clerk was to "dispense 'advice'" to attorneys [Brief p40]. Instead, the Commission concluded that the clerk called the docket "to advise attorneys and litigants of

continuance dates, dismissals, and the issuance of capias warrants [Findings p21]. That is, to inform or notify.

The use of the clerk to call dockets with an empty judge's chair and at "most" [T143] "usually" [T292] "not there" [T308], or "for the most part" [T464] an empty chambers was a calculated plan [E12, p2]. This was not an emergency or isolated incident.

As Judge Ohmer testified, nothing prevents a judge from utilizing clerks to expedite and coordinate dockets [T24]. In fact, it is appropriate for uncontested and informal matters to be collected by the clerk for the judge's signature prior to the judge's scheduled 9:00 a.m. docket call [T24,59]. But a general policy of having the clerk announce continuances, dismissals, and calling capias warrants without the immediate supervision of a judge was inappropriate as "that's judging. There is discretion…" [T53] and that the policy, while not "fatal" was "fraught with danger" [T59]. Judge John Garvey, the Criminal Assignment Judge, raised concerns over the way Respondent's clerks were running the docket in June 2011 and again after the October 2011 China vacation [T36-37,782] with Presiding Judge Ohmer. Attorneys were complaining to Judge Ohmer in the early part of 2011 that "the clerks were getting kind of more involved than they felt that they should have" [T92]. Judge Ohmer discussed these concerns with Respondent but was assured that the clerks were doing what they were told and that there was no problem [T37]. Despite Respondent's assurances to Judge Ohmer that her policy caused "no problem," problems occurred. The first was the appearance that the clerk, not the Judge, was running Division 25 [T146,152,205,212,219-220,226,293,310,330]. The

second was when Respondent failed to make adequate arrangements for a substitute judge to handle all her dockets while on vacation and, as a result, the clerk made decisions on several continuances, dismissals, and capias warrants during the first week of Respondent's vacation to China without the benefit of judicial review until Respondent returned from vacation [T464-467,471-472].

To several of the attorneys who appeared before Respondent and Clerk Tyler on a regular basis, it appeared that Clerk Tyler had discretion to grant continuances, dismiss cases, and call capias warrants [T146,293]. Her method of announcing dismissals ("...case dismissed, failure to prosecute..." [T152,219-220,226]) combined with an empty judge's chair and frequent empty chambers led members of the Bar who frequently appeared in Division 25 to refer to the clerk as "Judge Whitney" [T146,219-220,233]. Division 25 "became a joke" [T332-333]. Respondent never made a public announcement or posting of Ms. Tyler's responsibilities and powers [T148,233], and both the Clerk and attorneys were placed in the frustrating and difficult position of having to take a case up with the Clerk rather than the Judge [T205,212,310,330]. Even though Respondent eventually reviewed the Clerk's announcements, the appearance to members of the Bar and public that it was a clerk, not a judge, who was deciding their case could not but have a detrimental effect on the integrity of the judiciary.

Local Rule 2.1 [E40] clearly requires that a judge must make arrangements with another judge to be responsible for the absent judge's division and then to post that arrangement for the public to see so that the public knows where to go to address their case when the judge does not appear. Respondent left for vacation to China for two

weeks, October 11–14, 2011 and October 17–21, 2011 and again for the Judicial College on October 25–27, 2011. There was never any posting to inform the public as required by Local Rule 2.1 [T360]. The practice in Division 25 for an absent judge was to find a substitute judge to handle the daily confined docket and either plan ahead and not schedule other cases on the vacation date [T34,42-44] or get a substitute judge to handle the whole docket. Respondent arranged for a substitute judge to handle both the regular and confined dockets for the week of October 17 through October 21, 2011, but only arranged for a judge to handle her confined dockets for October 11 through October 14, 2011 and for the Judge's attendance at the Judge's College on October 25–27, 2011. The substitute judges for October 17–21, 25–27, had dockets of their own [T34,42-44] and were notified by Respondent they only had to handle the confined dockets [E33,34,36][T495,502-503,517] .

Judge Ohmer also received complaints about Respondent's method of having the clerk call her docket during Respondent's China vacation in October 2011 [T34]. Respondent's statement of Facts asserts that she informed Judge Ohmer before she left that she had "her dockets covered" [T34]. This is misleading since Respondent had not arranged for either a substitute judge to handle her docket other than the confined docket for the week October 11, 2011 through October 14, 2011 [E33,34,36][T495,502-503,517] in violation of Local Rule 2.1 [E40].

Respondent's Brief page 43 suggests that Respondent was justified in assuming that these Judges who had dockets of their own and who had only been notified that they were required to handle a confined docket could attend to "unforeseen or questionable

matters" involving approximately 200 attorneys [T469] and "remain in the courtroom long enough to attend to those matters" [Brief p43] or that the Clerk would "know which cases required judicial attention." The Canons require a judge to give precedence to judicial duties [Canon 3A] and shall maintain professional competence in judicial administration [Canon 3C(1)]. Respondent chose to leave on a two-week vacation without making adequate administrative preparations. The subsequent confusion, inconvenience, and erosion of the administration of justice are her fault, not that of her Clerk or the Judges who agreed to cover part of her docket. Respondent left for China leaving her Clerk with simple instructions to "continue everything" [T51,468-469,522] and to "continue as we've always done" [T783]. The "fraught with danger" [T59] concerns of a policy of the clerk calling the docket with an empty judge's chair were justified by the clerk's efforts to run Respondent's docket in her absence. Ms. Tyler continued cases, making decisions on whether to assign the continuance to the state, defendant, or court and whether to give a long or short continuance date [T471-472]. She announced dismissals using the Judge's signature stamp on a few cases [T462] and entered capias warrants in the docket sheets of non-appearing defendants [T465,474]. These actions brought the attention of Judge Garvey, Judge Ohmer, and Ms. Jane Schweitzer [T36-37,782] and prompted the Ms. Tyler to finally discuss the "parameters" but not the individual facts of cases with Respondent by text while Respondent was still in China [T494].

Respondent's Brief [T43] concedes that her failure to properly instruct her clerk in advance of her China trip "demonstrates carelessness."

This Court has heretofore removed a judge for among other charges:

"(1) failing to supervise staff, (2) failing to maintain court records and conduct court proceedings in a manner which would maintain professional competence and judicial administration and facilitate the performance of administrative responsibilities, and (3) failure to require his staff to observe the same standards of fidelity and diligence that apply to the judge, in violation of Canons 3B(1) and 3B(2)."

In the Matter of Briggs, 595 S.W.2d 270,277 (Mo. 1980)

ARGUMENT

III

The Commission on Retirement, Removal and Discipline's Findings of Fact, Conclusions of Law and Recommendation with respect to Count 6 of the Second Amended Notice are not in error in that they are supported by a preponderance of evidence showing that Respondent destroyed a Motion to Dismiss filed in the case *State v Thomas Williams,* without notice to the parties and with knowledge that she lacked authority to destroy said Motion. Further, that a preponderance of evidence showed that Respondent's statements to Ms. Whitney Tyler that they would take the destruction of the Motion to their graves was not made in jest but for the purpose of concealing the act of destroying a public record.

Respondent's Brief concedes that her choice to remove a document "file-stamped and placed within the proper file" was "inappropriate" and "questionable" [Brief p47]. The Commission went much further finding that Respondent's conduct, in addition to violating various Canons, constituted a violation of VAMS §575.110, a criminal statute

which is a class A misdemeanor. While this Commission has no authority to impose a criminal conviction on Respondent, Canon 3B(2) requires a judge to be "faithful to the law." Respondent's conduct in violation of VAMS §575.110 is an indication of a violation of Canon 3B(2).

Respondent's Statement of Facts points out that Ms. Rachel Smith wrote a letter to the Commission informing the Commission that "[n]o criminal charges will be filed against Judge Peebles absent additional evidence" [T543-544]. She also testified that the investigation was ongoing and Respondent was still considered a suspect [T543].

Respondent's Statement of Facts incorrectly asserts that Assistant Public Defender Chad Oliver agreed that his client, Mr. Williams, had suffered no prejudice as a result of the clerk continuing his Motion to Dismiss until November 30, 2011. This is based on Mr. Oliver's statement to the Commission's investigator [Brief p13-14]. However, before the Commission Mr. Oliver testified that his client spent an additional month confined as a result of the delay in dismissing the charge pending in Division 25 [T365,389-390].

Respondent argues that she destroyed the Motion, in part, because "she was confused and uncertain as to its authorship and genesis" [Brief p46]. Yet the *Williams* court file contains an Entry of Appearance and Discovery Motion signed by Chad Oliver [EB]. Respondent recognized the Motion as a boilerplate form used by the Public Defender's Office [T731] and Ms. Tyler identified Mr. Oliver when Respondent specifically asked Ms. Tyler: "...who wrote this" [T481,505-506]. Finally, Respondent conceded in her testimony that: "I'm looking at a motion that some lawyer has filed..."

[T733]. Granted Mr. Oliver did not sign the Motion, but it is implausible that Respondent was confused as to its authorship.

Respondent's Brief also argues that the Motion "offended" her because of "its apparent failure to conform to her high standards for forms and pleadings" [Brief p46]. Respondent testified that her "spontaneous action" [T788-789] of destroying the Motion was also because she thought Mr. Oliver was not doing his job. Respondent stated: "I expected Mr. Oliver to act like a lawyer." And yet, despite her offense over Mr. Oliver's choice of forms, she never spoke to Mr. Oliver about her concerns [T789]. In fact, Respondent used the exact same "boilerplate" Public Defender form to dismiss the *Williams* case on November 30, 2011 [T667-668, EB]. Note that this dismissal Motion also contained the blank signature line for the judge, and Respondent made use of this line to sign the Motion and thereby grant it. This Motion, like the one Mr. Oliver filed on October 26, 2011 [E26], has no attorney's signature [EB]. If Respondent was so offended by Mr. Oliver's use of the Public Defender form, why did she use it on November 30, 2011?

Respondent next argues that she was concerned that Exhibit 26 "could be misconstrued" [Brief p46]. This seems to refer to Respondent's claim that the unsigned courtesy signature line on the bottom of the Motion could somehow cause "someone" to believe "that this case was dismissed and released the defendant in error" [T734]. Respondent made this same claim in her response to the Commission [E27, p2].

The Commission did not find these explanations to be credible. The existence of such courtesy signature lines in motions is commonplace [T64,362-363,541-542]. In

addition, Respondent coupled her action of destroying the document with the vulgar phrase: "Get this shit out of my file" [T480-481]. There was no other evidence of Respondent having a similar "furious reaction" to any other "irregular and deficient" [Brief p47] document file stamped and placed in a court file. Respondent testified that it is not her usual practice to use "shit" or "damn" in the courtroom [T734,735,773].

The Commission concluded that what made Respondent so furious was that the language of Exhibit 26 highlighted her lack of supervision of the clerks and placed Respondent and the clerks in a bad light.

In describing her reaction to seeing Exhibit 26, Respondent testified that "obviously it's a memorandum of what took place, but I'm thinking why is an attorney making an argument with a clerk" [T733-734]. In her response to the Commission, Respondent explained her reaction as follows: "I believe that to now complain about the lack of dismissal in the case is simply an attempt to bolster the impression that transgressions occurred in my division, in my absence" [E27, p2].

In addition, the furious destruction of Exhibit 26 occurred after the springtime discussions with Presiding Judge Ohmer over Respondent's tardiness and method of docket call and a month after her return from China. Respondent was concerned with Criminal Assignment Judge Garvey "sticking his nose in her docket while she was in China" [T35]. It was also within a month of her meeting with Judge Ohmer, Judge Bryant, Judge Stovall-Reid, Landa Poke, Circuit Clerk Jane Schweitzer, and Judge Garvey about Judge Garvey's concerns about the clerks running Respondent's docket [T36-37]. Respondent had assured the judges and clerks at that meeting that there was "no problem"

in her court and "everything was fine" [T36-37]. Mr. Oliver's experience in Division 25 as preserved in Exhibit 26 contradicted this view of normality. There is ample evidence to support the Commission's conclusion about Respondent's motivation in destroying Exhibit 26.

Respondent next argues that her act in destroying Exhibit 26 in front of a packed courtroom instead of in chambers indicates an absence of an intent to conceal. Respondent testified that the conversation she had with Ms. Tyler was in a normal tone of voice with Ms. Tyler "sitting directly in front of me." She did not know whether anyone else could hear her [T774]. Ms. Tyler testified that no one else could have heard these conversations "unless they were listening real hard" [T482]. No other eye witness to the incident was produced. It is clear that Respondent and her clerk were the only ones who saw what happened to Mr. Oliver's Motion.

Respondent argues that there was no direct evidence that Respondent destroyed Exhibit 26 with the intent "to conceal its nature or content or hide the 'fact' that the court clerk denied the motion without a judge present." Respondent also asserts that Ms. Tyler's credibility was in issue [Brief p47-48]. This is the first time Respondent has raised Ms. Tyler's credibility. When asked about the different recollection of conversations, Respondent attributed it not to a lack of truthfulness on the part of Ms. Tyler but to Ms. Tyler's "maturity level" [T821] such that Ms. Tyler did not understand that Respondent's statements were either in jest "without any conviction" or not "serious conversations" [T823-824].

Respondent has offered no possible motivation for Ms. Tyler not to be truthful. [T796] Ms. Tyler's relationship with Respondent was close [T523]. They were friends [T778]. Ms. Tyler styled Respondent's hair [T778]. Respondent trusted Ms. Tyler and thought she was competent and capable [T774]. Respondent trusted Ms. Tyler's word as to whether a defendant failed to appear and a capias should be issued [T776]. Respondent trusted Ms. Tyler's recollection over her own recollection of text messages exchanged with Respondent when Respondent was in China [T779]. ("I don't remember, but if Whitney says that she did then it must have happened" [T52].)

The Commission in assessing the credibility of witnesses, pursuant to its Constitutional charge, determined that it was Respondent not Ms. Tyler who was not credible.

VAMS §575.110 creates a class A misdemeanor if the judge "falsely alters any public record" or "knowing he lacks authority to do so, he destroys…any public record." It is conceded that Respondent destroyed Exhibit 26, a public record. Respondent has never provided any authority to justify that destruction [T788]. The question becomes did Respondent know she was lacking authority when she destroyed Exhibit 26. Her statements to Ms. Tyler and the time line of when the statements were made are the "smoking gun" of such knowledge.

On December 18, 2011, the St. Louis Post-Dispatch ran an article critical of Respondent and her clerks' actions while Respondent was in China. It also mentioned the *State v Williams* case and the Motion to Dismiss missing from the court file [E6]. The

Circuit Attorney's Office began an investigation of whether there was criminal conduct involved in the missing Motion in *State v Williams* [T533].

In the course of the investigation Ms. Tyler was interviewed by Assistant Circuit Attorney Rachel Smith on March 13, 2012 and March 15, 2012. Ms. Tyler first knew of the investigation in early March 2012 when Circuit Clerk Jane Schweitzer told Ms. Tyler that the Circuit Attorney's Office wanted to question her about some paperwork missing from a file [T482].

Later that same day in early March 2012 as Ms. Tyler was styling Respondent's hair at a cosmetology school, they discussed the Motion to Dismiss [E26] that Respondent destroyed in the *Williams* file. Ms. Tyler told Respondent of the fact that the Circuit Attorney's Office wanted to question her about "that particular piece of paper that was in the file." Respondent told Ms. Tyler: "This is something we're going to keep between us, it's something we're going to take to our graves." Ms. Tyler responded, "Yeah, I know" [T482-484,511]. Two weeks later on March 13, 2012, when asked about the missing Motion by Assistant Circuit Attorney Rachel Smith, Ms. Tyler "...told them I didn't know what they was talking about" [T485]. Ms. Rachel requested that Ms. Tyler take a polygraph test [T535].

The next day, on March 14, 2012, Ms. Tyler had a discussion with Respondent about her interview with the Circuit Attorney's Office. Ms. Tyler told Respondent: "I didn't tell them anything because I didn't know what to say" [T486]. Respondent told Ms. Tyler that she wouldn't advise her taking a polygraph test, to talk to an attorney, and:

"I don't know but you didn't do anything, I didn't do anything, how are they going to prove anything happened with the piece of paper" [T487].

Ms. Tyler retained counsel and returned to the Circuit Attorney's Office on March 15, 2012 and, thinking her job may be in jeopardy for not telling the truth, told Ms. Smith that Respondent had torn the Motion out of the *Williams* file [T485,508]. Ms. Tyler underwent a polygraph examination regarding the missing motion in the *Williams* case on March 19, 2012. That same morning Respondent called Ms. Smith. Ms. Smith returned the call later that day. The call was recorded and transcribed [E29]. During the phone call Respondent admitted that she ripped the Motion to Dismiss in the *Williams* case out of the court file and destroyed it [E29, p2-3].

Ms. Smith did not find that Respondent was candid or truthful with her during the conversation [T54] regarding whether the Motion to Dismiss was not a motion but either an order or "not a true order" [E29, p2-3] [T541].

Respondent's statement to Ms. Tyler about destroying the *Williams* Motion and taking that knowledge to their graves, whether serious or not, indicates Respondent knew she had something to hide and had the effect of making Ms. Tyler deny knowledge of the incident when she was first questioned by Assistant Circuit Attorney Rachel Smith. Then when Ms. Tyler told Respondent that she denied knowledge of the incident, Respondent's remark that "I don't know but you didn't do anything, I didn't do anything, how are they going to prove anything happened to a piece of paper" [T487] once again indicates Respondent had something to hide.

The next day Respondent called Ms. Smith to explain her side of the story concurrent with Ms. Tyler taking the lie detector test.

The Commission concluded that Respondent knew she was in the wrong when she destroyed the public document Exhibit 26.

VAMS §575.110 makes the destruction of the Motion to Dismiss a class A misdemeanor. VAMS §483.140 imposes a "special duty" on every judge to superintend the keeping of court records and to "require" that the records are "properly maintained" and are accurate. While the destruction of the Motion is not a felony, the fact that this class A misdemeanor goes to the function of the Court and the "special duty" of the judge adds gravity to the offense.

Other states have considered misconduct that included intentionally altering a court record to be a serious offense. In Michigan a judge was removed in part for "altering court information that was legally required to have been transmitted to the Secretary of State. *In re Justin,* 809 N.W.2d 126,127 (Michigan 2012). The California Supreme Court found that a judge who "directed the clerk to alter a minute order and contrary to court policy, not to indicate she had changed the order" to be guilty of "willful misconduct" and was removed for this and other charges. *Fletcher v Commission on Judicial Performance,* 968 P.2d 958,968 (California 1998). Also, the California Court removed a judge in part for backdating an affidavit. *Wenger v Commission on Judicial Performance,* 630 P.2d 954,970 (California 1981). Wisconsin removed a judge so he would be ineligible to serve as a reserve judge after the Court determined the judge had dictated and signed a certificate falsely attesting that a

conference on proposed jury instructions and on a proposed verdict had been held in his chambers. *In re Sterlinske,* 365 N.W.2d 876,877-878, (Wisconsin 1985). Finally, in the case *Inquiry Concerning Rodella,* 190 P.3d 338, 343 (New Mexico 2008), the judge was found to have altered a recusal order filed in the case. For this and other willful misconduct the judge was removed.

ARGUMENT

IV

The Commission on Retirement, Removal and Discipline's Findings of Fact, Conclusions of Law and Recommendation with respect to Count 9 of the Second Amended Notice are not in error in that they are supported by a preponderance of evidence showing that during Respondent's phone call to Assistant Circuit Attorney Rachel Smith, Respondent made statements that the Motion to Dismiss [E26] was not a Motion but an Order. Further, since the conversation occurred at a time wherein Respondent knew that Ms. Tyler had accused Respondent of destroying the Motion, Respondent's motivation in making the call was to establish a defense based on a false premise that the Motion was an improper Order justifying purging it without notice to the parties.

While Respondent admitted to destroying the motion during her phone call with Ms. Smith, Respondent's statement that the document was "not a true order" offers a justification for destroying it. Respondent told Ms. Smith:

> "It never should have made it in that file. And the procedure has always been in that division, if you're making requests like that on behalf of

defendant, it's not a dismissal. It is a motion to dismiss the case for failure to prosecute. That's what you file and that's what you hand to the clerk" [E29, p7].

And yet, a Motion to Dismiss is exactly what was filed. But Respondent continued to repeat her claim that the document was defective because it "said order". She said:

"I ripped out something that said *order* out of a case file" [p2];

"I believe at the top it said *order*" [p2];

"How dare a public defender file something that said order" [p2];

"Because in my mind that's not a true order" [p3];

"... at the top of it I think it was handwritten, and it said order..." [p7].

If Respondent could convince Ms. Smith that the document Exhibit 26 was improper, she might establish a defense to VAMS §575.110 which requires the state to prove that Respondent destroyed Exhibit 26 "knowing [s]he lacks authority to do so" [E44].

Ms. Smith testified that she thought Respondent was "pretending" not to know what the document was [T541].

The Brief argues that "Exhibit 26 could reasonably be construed as a proposed order, which is likely what Respondent meant..." [p50]. But even if Exhibit 26 is considered a proposed order to the extent that it had a courtesy signature line for the judge it was still a motion. It was entitled "Motion" and it contained allegations (most importantly an allegation that the motion had been denied by the clerk without a judge present). Respondent, however, explains that had she been there and if the attorney would

have handed to her "something that says order and this case now dismissed" she would have "handed it back to him and say, do you have a motion? You make your motion" [E29, p8]. While Respondent's phone call is rambling and at times difficult to follow, a fair reading would come to the conclusion that Respondent sought to convince Ms. Smith that the document was an improper filing and purging it from the file was justified.

The next argument suggests that Respondent is to be excused for mischaracterizing the document as an improper order instead of motion since she was supposedly commenting from memory alone [Brief p50]. Respondent knew that the case in question was cited in the "newspaper article back in October" [E29, p6]. She recalled it was on the Public Defender's boilerplate form [T731]. While the court file no longer contained Exhibit 26 (Exhibit 26 having been destroyed by Respondent), the same boilerplate Motion to Dismiss printed form which was eventually used by Respondent to dismiss the case was in the file. That document, like Exhibit 26, is clearly entitled as "Motion" [EB].

Finally, the Brief argues that Respondent has not been charged with violating VAMS §575.110 Tampering With a Public Record. A criminal prosecution requires a standard of proof beyond a reasonable doubt. The Commission's standard is by a preponderance of evidence. Respondent remains unindicted but the Missouri Judiciary is held to a much higher standard than to remain unindicted.

ARGUMENT

V

The Commission on Retirement, Removal and Discipline's recommendation of removal should be adopted by this Court for the reason the Findings of Fact,

Conclusions of Law are supported by a preponderance of evidence. These findings show that Respondent had a pattern of tardy arrival to the courtroom and failure to properly supervise her clerks. Respondent failed to comply with the recommendations of her Presiding Judge regarding her tardy arrivals. Respondent violated her special duty to superintend a public record by destroying a record in violation of VAMS §575.110. Further, the Commission on Retirement, Removal and Discipline found that Respondent failed to provide candor in the investigations of this Commission and the circuit attorney and that her sworn testimony before the Commission on Retirement, Removal and Discipline regarding her arrival at the courthouse and conversations with her clerk regarding the destruction of the public document was not truthful.

Respondent's Brief correctly points out that the purpose of judicial discipline is to "maintain standards of judicial fitness" [Brief p53] citing *In re Hill*, 8 S.W.3rd 578, 582 (Mo 2000). The Court should look to violations of the Canons as evidence of misconduct to determine if the Constitutional standards of misconduct, willful neglect of duty and oppression in office have been violated (Mo. Const. art. V, §24). Finally, the Preamble to the Code of Judicial Conduct provides that the degree of discipline "should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of improper activity on others or the Judicial system".

In Count I the Commission on Retirement, Removal and Discipline concluded and Respondent agreed that she made improper statements commenting on a pending case to a newspaper reporter thereby violating Canons 1, 2A and 3B(9). Other courts have

considered such conduct to merit a censure or reprimand. *Disciplinary Counsel v Runyon*, 840 N.E.2d 623, 626 (Ohio 2006); *In re Roe*, 931 So.2d 1076, 1082-1083 (La. 2006).

In Count 4 the Commission on Retirement, Removal and Discipline concluded that Respondent had a calculated plan and a pattern of activity of frequently not showing up to the Courthouse for an hour or more past the scheduled docket call. Given that Division 25 is a bulk division, the courtroom is crowded. Respondent thereby chose to inconvenience numerous members of the Bar and public on an ongoing basis. Respondent claims as a mitigating circumstance that she only received a "limited notice" from the Presiding Judge and "no warnings from this Commission" [Brief p64]. (Commission Chair Judge David Dowd did call Respondent about her tardy habits in late 2011 [T827]). But as pointed out in the *Lokuta* case [*Id* at 1005] a custom of arriving "15, 20 minutes or a half hour or an hour or more late for scheduled court sessions is the quintessential discourtesy to litigants, jurors, witnesses and lawyers". Further, it presents "the character of arrogance and disrespect for the judicial system" and violates standards of courtesy taught in the schools and homes of the "hard working people who crowd her courtroom" (*Id* at 1006). That Respondent would even need to be told to show up on time or be informed by her Presiding Judge of attorney complaints and reminded of the hours of court brings into serious question Respondent ability to maintain standards of judicial fitness.

Had Respondent's pattern of late arrival been the only charge before this Court, the matter might have been "rectified with an admonishment" as suggested by Respondent's Brief. But Respondent compounded her misconduct by her failure to testify truthfully concerning her late arrivals and failing to be candid with the Commission on Retirement,

Removal and Discipline's investigation [E12, p2]. Respondent denied arriving at the courthouse after ten o'clock on a consistent basis and claimed she arrived "about 9:15 or so". She claimed she would call Ms. Tyler if she was going to be later than 9:15 because of a "family emergency, something going on at my house" [T751]. Respondent verified her 9:15 arrival time claim on cross-examination [T761].

The Commission, assessing the credibility of witnesses, chose to believe the attorneys' estimate of Respondent's arrival at between 9:50 a.m. [T292] and 10:30 [T142–143,214,308]. Respondent's claim to a 9:15 arrival was not found to be truthful.

In Count 5 the Commission on Retirement, Removal and Discipline found a pattern of conduct where Respondent failed to supervise her clerks by having the clerk make the first docket call with the Respondent being either in chambers or not even at the courthouse. This practice was "fraught with danger" [T59] as it inevitably led to the appearance to many attorneys and members of the public that it was the clerk, not the Judge, who was continuing cases, dismissing cases and calling capias warrants. This led to the division being considered a "joke" [T332-333] by some attorneys as they derisively referred to the clerk as "Judge Whitney" [T146,219-220,233].

The policy of failing to supervise her clerks became most evident when Respondent chose to leave for a two-week vacation out of the country without making proper arrangements for either continuing cases or a substitute judge [T469,495,502-503,517]. Respondent left her clerk with no more instructions than to continue everything and to continue calling dockets without her presence as before [T45-46,468-469,517,726-727,783]. The clerk began to continue cases, announcing dismissals and calling capias

warrants until the intervention of the Criminal Assignment Judge [T462,464-467]. When told by her clerk of the difficulties with her docket, Respondent's reaction was not to reconsider her lack of supervising her clerks but instead to complain to the Presiding Judge about the Criminal Assignment Judge "sticking his nose in my dockets" [T35]. Together with Respondent's statement that no other judge could tell her how to run her courtroom [T801] and her misleading her Presiding Judge during their post-China vacation discussion of the operation of Division 25's docket that everything was fine [T37] leads to the conclusion that Respondent was more concerned about maintaining her calculated plan of avoiding the first docket call than in the efficient operation of her division.

Then in Count 6, the Commission concluded that there was a preponderance of evidence that Respondent violated a criminal statute by destroying a court record without notice to the parties and knowing there was no authority to do so. While violation of some class A misdemeanors arguably might not be such as to require forfeiture of office (traffic, maybe even drug offenses), this offense had to do with the functioning of the court and further violated a special duty that all judges have to keep court records accurate.

The Commission also found that Respondent's testimony regarding Count 6 was not entirely truthful. Respondent's recollection of her conversations with her clerk differed significantly with that of the clerk's. The "take it to our graves" and the "you didn't do that, I didn't do that" statements reveal an effort to hide the conduct and to encourage her clerk to do likewise [T482-484,487,511,792,795-796,826].

In Count 9, the Commission concluded that Respondent failed to be candid with the Circuit Attorney's investigation of the missing document in Count 6. This conduct is a further indication of Respondent's knowledge that she had no authority to destroy the Motion [E 26] in the *Williams* case.

Failure to be candid in the Commission's investigation to testify truthfully before the Commission has been found in a line of cases to be a significant exacerbating circumstance often requiring removal. In *Inquiry Concerning Rodella,* 190 P.3d 338,349 (New Mexico 2008) the New Mexico Supreme Court held:

> "...to allow a judge who is not truthful to remain on the bench betrays the public trust and threatens the integrity and independence of the judiciary as a whole. And, as we wrote in *In re Griego,* we cannot allow a judge who lacks credibility 'to preside over cases in which he is charged with weighing evidence and determining the credibility of others.' *In re Griego,* 2008-NMSC-020,¶ 21. Accordingly, we adopt the Commission's recommendation that Judge Rodella be permanently removed from the bench."

The Louisiana Supreme Court held *In re King,* 857 So.2d 432,449 (Louisiana Supreme Court October 21, 2003) that:

> "Lying to the commission in his sworn statement is 'conduct while in office which would constitute a felony' and 'willful misconduct relating to his official duties,' for which removal is an appropriate penalty."

The Louisiana Court further cited other jurisdictions holding that "Honesty is a 'minimum qualification' expected of every judge" [*Supra* at 449]:

> "The Supreme Court has noted that there 'are few judicial actions in our view that provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission in the course of its investigation.' ([*Adams v Commission on Judicial Performance,* 10 Cal.4th 866,914, 42 Cal.Rptr.2d 606, 897 P.2d 544 (1995)])."

See also:

In re Nettles-Nickerson, 750 N.W.2d 560,563 (Michigan 2008);

In the Matter of Pfaff, 838 N.E.2d 1022,1024 (Indiana 2005);

In re Belk, 691 S.E.2d 685,692 (North Carolina 2010);

In re James, No. 143942, p2 (Michigan Supreme Court July 31, 2012);

In re Justin, 809 N.W.2d 126,127 (Michigan 2012);

In re Ferrara, 582 N.W.2d 817, 458 Mich. 350 (Michigan 1998);

In the Matter of Waltemade, 409 N.Y.S.2d 989,1002 (N.Y.Ct.Jud., 1975).

The Commission's recommendation of removal should be adopted by this Court for the reason that the Findings of Fact and Conclusions of Law, supported by a preponderance of evidence, shows that Respondent had a pattern of conduct of tardy arrival to the courtroom and failure to properly supervise her clerks. Respondent failed to comply with the recommendations of her Presiding Judge to show up in timely fashion. Respondent violated her special duty to superintend a public record by destroying that

record in violation of VAMS §575.110. Further, the Commission found that Respondent failed to exercise candor in the investigations of this Commission and the Circuit Attorney and that her sworn testimony before the Commission was not truthful regarding her arrival at the courthouse and conversations with her clerk about the destruction of the public document.

CONCLUSION

The Commission found misconduct, willful neglect of duty, and corruption in office under Article V, § 24 of the Constitution. The Commission also found conduct constituting the commission of a class A misdemeanor and violations of various Canons of the Code of Judicial Conduct. In addition, the Commission found exacerbating circumstances, including a pattern of conduct, a failure to promptly follow the advice of Respondent's Presiding Judge to correct her transgressions, a failure to be candid during the Circuit Attorney's investigation and that of the Commission, and failing to provide credible testimony before the Commission. Given these considerations it is difficult to see how returning Respondent to the bench would not have an adverse effect on the judicial system. The Commission's Recommendation should be adopted.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, James M. Smith, hereby certify to the following. The foregoing brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, with a typeface no smaller than Times New Roman size 13 point. Excluding the cover page, the signature block, this certificate of compliance and service, the brief contains 14,309 words, which does not exceed the 27,900 words allowed for an answer brief.

I further certify that the brief was filed with the Clerk of the Court by operation of the Court's electronic filing system, and that a copy of the brief was served on Paul D'Agrosa. and Ronnie White, attorneys of record for the Honorable Barbara T. Peebles, by operation of the Court's electronic filing system, at paul@wolffdagrosa.com, and rwhite@holloranlaw.com.