STATE OF MICHIGAN

IN THE SUPREME COURT

People of the State of Michigan,
Plaintiff-Appellee,

v.

Daniel Albert Loew,
Defendant-Appellant and Cross-Appellee.

Supreme Court No. 164133

On Appeal from the Michigan Court of Appeals
Docket No. 352056

On Appeal from the 48th Circuit Court for
County of Allegan
Case No. 18-021709-FC

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN'S *AMICUS CURIAE* BRIEF

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STATEMENT OF JURISDICTION

Criminal Defense Attorneys of Michigan ("CDAM") incorporates by reference the Statement of Jurisdiction set forth in the Defendant-Appellant's Brief.

QUESTIONS PRESENTED

I. Did the ex parte communication in this case violate Canon 3(a)(4)(a)(i) of the Code of Judicial Conduct?

CDAM Answers: "Yes."

II. Did the trial court properly grant a new trial when it found that the ex parte communications created an appearance of impropriety?

CDAM Answers: "Yes."

III. Should the standard for establishing reversible error be governed by *Liljeberg?*

CDAM Answers: "Yes."

IV. Is Mr. Loew entitled to a new trial under MCR 2.003 or constitutional guarantees of due process of law?

CDAM Answers: "Yes, as to both."

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Since its founding in 1976, the Criminal Defense Attorneys of Michigan ("CDAM") has been a statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has more than 400 members. As reflected in its mission, CDAM exists in part to "promote expertise in the area of criminal law, constitutional law, and procedure and to improve trial, administrative, and appellate advocacy," to "educate the bench, bar, and public of the need for quality and integrity in defense and representation," and to "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws." CDAM was invited to file an *amicus curiae* brief on October 5, 2022, when this Court granted Mr. Loew leave to appeal.

Here, the Court of Appeals overturned the Circuit Court's decision granting Mr. Loew a new trial after the trial Judge communicated with the Prosecuting Attorney ex parte about the case during trial. The Court of Appeals ruled that the ex parte communications between the Judge and Prosecutor about the Detective's investigation of the case were administrative. The Court of Appeals further crafted a new standard, shifting the burden so that defendants would have to prove prejudice, instead of the State having to show that the ex parte communications were absent of prejudice. This issue is squarely within the purview of CDAM's mission, as the Court of Appeals decision will produce injustices in other cases and will undermine the public's confidence in the judicial process if allowed to stand.

STATEMENT OF FACTS

Criminal Defense Attorneys of Michigan ("CDAM") incorporates by reference the Statement of Facts set forth in the Defendant-Appellant's Brief.

As to the Counter Statement of Facts provided in the Plaintiff-Appellee's Brief, CDAM does not incorporate Section (I)(A). While CDAM does not contest the citations from the jury trial transcript, the seven page details of the testimony from the victim, her younger sister, and a friend of the victim detailing accounts of sexual assault and the emotional impact of the victim are not relevant to the legal questions presented here. As to Section (I)(B), CDAM does not contest any of the facts presented except, "Ms. Koch was unaware that a detective had been assigned to this particular case,"[1] which is provided without citation. CDAM does not dispute Section (I)(C).

[1] (Pet. Br, xv)

ARGUMENT

I. The Judge's Emails to the Prosecutor During Mr. Loew's Trial Violate the Michigan Judicial Code of Conduct.

A judge should perform the duties of office impartially and diligently.[2] This rule is the central pillar to the issue at hand and should be the lens that guides all analysis on this issue. The judge's decision to send multiple emails to the prosecutor, ex parte and without even notifying the defense counsel, violated this central pillar and should be condemned by this Court.

A. The Emails Sent During Mr. Loew's Trial Were Prohibited Under Canon 3(A)(4)(a) Because Judges May Not Initiate Ex Parte Communication.

During Mr. Loew's trial, his presiding judge sent ex parte emails to the prosecutor during trial that were about the trial and substantive in nature. The Code of Judicial Conduct, Canon 3(A)(4) governs ex parte communications between the judiciary and parties. The rule is clear: "Á judge shall not initiate, permit, or consider ex parte communications."[3] The Canon prescribes limited circumstances where a judge may allow ex parte communications: only for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits.[4] In addition, the judge must reasonably believe no other party will gain a procedural or tactical advantage, and the judge must promptly notify all other parties of the communication.[5]

Canon 3(A)(4)(a)(i) does not allow the judge to initiate ex parte communications. The rule states that "a judge may *allow* ex parte communications…"[6] This section does not authorize any judge to initiate communications regarding scheduling, administrative purposes, or emergencies, but rather, this section creates an avenue for parties to reach out to the court when these needs arise. The plain language of the rule speaks for itself.

Canon 3(A)(4) of Michigan's Code of Judicial Conduct is not unique. This Canon originates from the American Bar Association's Model Code of Judicial Conduct Rule 2.9. The Michigan Code adopts Rule 2.9 (A)(1)(a-b) word for word in Rule 3(A)(4)(a)(i-ii). Thirty-seven

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[2] Code of Judicial Conduct, Canon 3.
[3] Code of Judicial Conduct, Canon 3(A)(4).
[4] Code of Judicial Conduct, Canon 3(A)(4)(a)(i-ii).
[5] *Id*.
[6] Code of Judicial Conduct, Canon 3(A)(4)(a). (emphasis added)

other states have also adopted the ABA's Revised Model Code of Judicial Conduct as written.[7] Federally, 28 CFR § 76.15 prohibits ex parte communications: "The Judge shall not consult with any party, attorney or person (except persons in the office of the Judge) on any legal or factual issue unless upon notice and opportunity for all parties to participate." The rule does add the caveat, "This provision does not prohibit a party or attorney from inquiring about the status of a case or asking questions concerning administrative functions or procedures."[8] Notice, the federal rule only allows a party or attorney to reach out to the court regarding administrative functions or procedures—not the judge. The common factor across most jurisdictions is that judges may not initiate ex parte contact, but that parties may contact the court ex parte for clarification on scheduling or administrative matters.

Canon 3(A)(4)(e) is explicit when describing a judge's ability to initiate ex parte communications and only allows judges to initiate ex parte contact when authorized by the law.[9] This requirement makes sense given that this canon's purpose is to require that judges maintain impartiality. The Court of Appeals acknowledged "Here, it is undisputed that the trial judge initiated ex parte communications with the elected prosecutor during the defendant's trial."[10] This finding alone puts the ex parte communications outside the scope of the Canon 3(A)(4)(a)(i) carve out for ex parte communications because this section does not permit the judge to initiate the contact.

The State Bar of Michigan has addressed Canon 3(A)(4) in ethics opinions and each time has reinforced that a judge may not initiate ex parte contact. While these opinions are advisory and non-binding in nature, they are instructive.[11] In RI-243, an attorney asked the bar to weigh in on whether it would be appropriate to include the presiding judge and opposing counsel in a letter written to Pretrial Services who was monitoring a defendant while on bond from an appeal.[12] The opinion found: "A letter addressing the substance of a pending matter, which is directed to or

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[7] American Bar Association, *Jurisdictional Adoption of Revised Model Code of Judicial Conduct*, <https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map/>, (accessed January 28, 2023).

[8] 28 CFR § 76.15(a).

[9] Code of Judicial Conduct, Canon 3(A)(4)(e).

[10] *People v. Loew*, ___ Mich App ___; ___NW2d ___ (2022) (Docket No. 352056); slip op at 6. See also (Def. Appx., 608a)

[11] *Evans & Luptak, PLC v. Lizza*, 251 Mich App 187, 202; 650 NW2d 364 (2002).

[12] Ethics Opinions of the State Bar of Michigan, RI-243, (October 5, 1995).

copies the presiding judge, is improper even if the opposing counsel is contemporaneously sent a copy of the same letter."[13] This communication was found to be improper, even while not ex parte, because the author was not "disinterested," the letter concerns a pending or impending proceeding, and did not concern scheduling, administration, nor emergency.[14] The opinion further points out "traditional ways of communicating with a judge about the substance of a pending matter are by pleading and oral argument. We are unaware of any court rule, statute, or other legal authority which authorized communication with the presiding judge in any other manner."[15] While this opinion applies to an attorney contacting a judge, the same analysis of Canon 3(A)(4) applies. Notably, the author was not disinterested—the Judge was in the process of presiding over a jury trial for the case in question. The email concerned a pending proceeding, directly referenced the trial, and questioned testimony of a witness. And finally, the email was not concerning scheduling, administration, nor emergency. Although this advisory opinion is advisory and non-binding, the opinion provides guidance to judges and attorneys on how to interpret this Canon and, because practitioners rely on these opinions, this Court could also consider its applicability in finding that the emails violated Canon 3(A)(4).

The Michigan State Bar has also extended Canon 3(A)(4) to apply to court personnel in Ethic's Opinion JI-134[16] and RI-195.[17] In RI-195, the ethics committee advised, "It is improper for the judge to initiate *ex parte* communications between the clerk and the litigant."[18] The committee weighed in on whether a judge could have their staff reach out ex parte to a prevailing party and ask the party to draft an order that records the findings of fact and conclusions of law. The committee opined that neither the judge nor staff could initiate ex parte contact.[19] While the committee did not analyze in detail whether the requested order was administrative in nature, the opinion concluded that this communication was inappropriate.[20] This issue was addressed again in JI-134 where a judge reached out to the committee asking if the Code of Judicial Conduct reaches to court staff and if a judge can be held responsible for improper ex parte communication between

[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Ethics Opinions of the State Bar of Michigan, JI-134, (Nov. 20, 2006).
[17] Ethics Opinions of the State Bar of Michigan, RI-195, (March 7, 1994).
[18] *Id.*
[19] *Id.*
[20] *Id.*

court staff and parties.[21] The committee extended the requirement of Canon 3(A)(4) to court staff and also found that the judge has an affirmative duty to instruct personnel that ex parte communications are not permissible.[22] "In summary, a judge has a duty not to initiate or permit *ex parte* communications with the judge directly or through court personnel."[23]

The common theme in both the language of Canon 3(A)(4) and its interpretation by the Ethics Committee is that judges are not permitted to initiate ex parte communication. For this reason, the prior opinion should be vacated.

[21] Ethics Opinions of the State Bar of Michigan, JI-134, (Nov. 20, 2006).
[22] *Id*.
[23] *Id*.

B. The Emails Sent During Mr. Loew's Trial Were Prohibited Under Canon 3(A)(4)(a)(i-ii) Because Ex Parte Communication from Parties to a Judge is Only Permitted Regarding Administration, Scheduling, or Emergencies.

In addition to violating the above precept that a judge may not initiate ex parte communication, the emails violated Canon 3(A)(4)(a)(i-ii) because the content was not administrative, related to scheduling, nor an emergency. This Canon allows attorneys to reach out to the court ex parte to request new dates on cases, to let the court know another attorney would be covering their cases, or to advise the court that they would be running late due to backed up traffic resulting from a car accident. These instances are common sense applications where ex parte contact may be permissible and the logical reason for the exception to exist. No party is permitted to conduct ex parte communication with the court or the court with a party for substantive matters. Permitting substantive ex parte communications would undermine the public's confidence that the courts are truly impartial, and the limited transparency the courts currently offer would evaporate.

The Court of Appeals concluded that the emails were not substantive in nature although the emails were sent during trial, the subject line was the trial, and the body referenced specific witness testimony. "Here, we hold that the e-mails relate to administrative matters because neither related to nor bore on substantive matters in defendant's trial."[24] This finding is contrary to the content of the emails. The Court of Appeals found, when the trial judge emailed the prosecutor during the detective's testimony about the officer's flawed investigation, that the judge was seeking clarification of the Michigan State Police's "process for investigating allegations of sexual assault."[25] Review of the email itself shows the judge titled the email "trial," and the email was sent while the trial was taking place and directly inquired into "this trooper,"[26] rather than the police department's process for investigation.

[24] *Id*.
[25] *Id*.
[26] (Def. Appx., 259a) The Judge's email initiated to the prosecutor is provided in part for the convenience of the Court but can be found in full in the Defendant's Appendix.

From: Margaret Bakker
Sent: Tuesday, August 27, 2019 3:41 PM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: trial

This trooper didn't do a very good investigation. Don't they have detectives with MSP anymore?

After the prosecuting attorney responded to the Judge's inquiry about the assigned officer's inadequate investigation, the Judge continued to send emails during trial and referenced Mr. Loew's case or "this victim."[27]

From: Margaret Bakker
Sent: Wednesday, August 28, 2019 8:50 AM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: RE: trial

One more question....this victim was not referred for a medical, do you know why?

The Judge's emails indicate that she was not inquiring into general MSP "process for investigating allegations of sexual assault"[28] as the Court of Appeals held, but was inquiring about this trial, this trooper, and this victim. The content of the emails is contrary to the finding that "[the emails] involved matters of administrative process that did not concern the defendant's trial."[29]

Notably, when Mr. Loew's motion for a new trial was reviewed at the trial court, everyone—the Court, the prosecutor, and Mr. Low—agreed that the emails included were substantive. The prosecutor, Ms. Schikora, acknowledged that the emails included a "substantive issue."[30] While this Court reviews the matter *de novo*,[31] the trial court's decision that the email contents were substantive should be no surprise, when all parties agreed that the contents of the email were not directly related to the substance of the ongoing trial. Upon further questioning of

[27] (Def. Appx, 258a)
[28] *People v. Loew*, ___ Mich App ___; ___NW2d ___ (2022) (Docket No. 352056); slip op at 6. See also (Defendant's Appx., 608a)
[29] *Id.*
[30] (Def. Appx, 578a)
[31] *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015).

the prosecutor, she agrees "absolutely"[32] that the emails involve the substance and merit of the trial.

> THE COURT: Well, we're talking about actually during a trial, where testimony --
>
> MS. SCHIKORA: I agree --
>
> THE COURT: -- is actually taking place at the time, and there's actual commentary about the substance and merit of the actual testimony provided and the investigation conducted, correct?
>
> MS. SCHIKORA: Absolutely.

The ex parte emails relating to Mr. Loew's ongoing jury trial and the substance of the Detective's testimony fall squarely under the prohibition of Canon 3(A)(4).

[32] (Def. Appx, 592a) The full transcript at the hearing on the Mr. Loew's Motion is provided in part for the convenience of the Court but can be found in full in the Defendant's Appendix.

II. A New Trial is the Only Appropriate Remedy When the Trial Court Violates Canon 3(A)(4)(a)(i).

The United States Constitution, the Michigan Constitution, Michigan statutes, and Michigan case law support granting Mr. Loew a new trial because his due process right to a fair trial was violated. Mr. Loew's right to due process and a fair trial is enumerated in the Fourteenth Amendment to the United States Constitution.[33] The Michigan State Constitution also codifies the right to a fair trial. "The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."[34] The Court of Appeals opinion in this matter also recognized due process rights in Michigan case law:

> "A person is entitled to due process of law prior to being deprived of one's liberty, which 'in a criminal trial [includes]. . . a neutral and detached magistrate.' *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). 'Due process requires that an unbiased and impartial decision-maker hear and decide a case.' *TT v KL*, 334 Mich App 413, 431; 965 NW2d 101 (2020) (quotation marks and citation omitted)."[35]

Mr. Loew's right to due process and a fair trial is codified in all overarching legal authorities. One question remains. Do the codified rights to due process and a fair trial give the trial court the ability to Mr. Loew a new trial because the ex parte emails created an appearance of impropriety, even where Canon 3(A)(4) governs?

Yes. This Court may consider whether the emails created an appearance of impropriety when determining if Mr. Loew's due process rights were violated despite *Haley*.[36] The case of *Haley* does not prohibit this Court from considering the impact of an appearance of impropriety despite *Haley*'s holding that "We decline to create an independent 'appearance of impropriety' standard to judge respondent's behavior when there is an express, controlling judicial canon."[37] In *Haley*, this Court reviewed a recommendation from the Judicial Tenure Commission (JTC) that a

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[33] US Const, Ams XIV.
[34] Const 1963, art 1 § 17.
[35] *People v. Loew*, ___ Mich App ___; ___NW2d ___ (2022) (Docket No. 352056); slip op at 5. See also (Def. Appx., 607a)
[36] *In re Haley*, 476 Mich 180; 720 NW2d 246 (2006).
[37] *Id*. at 194.

judge be publicly censured for accepting football tickets as a gift from an attorney in open court.[38] Both the JTC and this Court found that the judge violated Canon 5(C) of the Code of Judicial Conduct.[39] Due to this violation, the Court found analysis of an appearance of impropriety unnecessary and followed the JTC's recommendation of public censure.[40] *Haley* applies in cases of judicial misconduct and should be used to analyze appropriate discipline for violations of the Code of Judicial Conduct. This Court is not analyzing whether the emails are an ethical violation meriting discipline; this Court is determining whether the appearance of impropriety from the emails violated Mr. Loew's constitutional rights to due process and a fair trial. *Haley* does not apply here, the federal and state constitutions do.

The trial court correctly considered whether the judge's emails to the prosecutor created an appearance of impropriety when determining if Mr. Loew's due process rights were violated. According to Michigan Court Rules, a trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice."[41] The Court of Appeals acknowledged in this case as well that "[t]here can be no doubt that "there may be situations in which the appearance of impropriety on the part of a judge . . . is so strong as to rise to the level of a due process violation."[42] The Court of Appeals also agreed with the trial court that the emails created an appearance of impropriety.[43] The analysis, however, appears to contradict, as the appellate court states both that a showing of actual bias is not necessary when judicial bias is too high for constitutional toleration[44] and also creates a hefty burden requiring defendants to prove the judge's conduct influenced the jury.[45]

The Court of Appeals relies upon *Morrow*, a Sixth Circuit case, in order to find that Mr. Loew had a burden to prove that the ex parte contact influenced the jury.[46] In *Morrow*, the defense claimed judicial bias tainted the trial's result when the presiding judge reminded the defendant his

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[38] *Id*. at 182.
[39] *Id*. at 191.
[40] *Id*. at 195.
[41] MCR 6.431(B).
[42] *People v. Loew*, ___ Mich App ___; ___NW2d ___ (2022) (Docket No. 352056); slip op at 7. See also (Def. Appx., 609a).
[43] *Id*. at 8.
[44] *Id*. at 8, citing *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975), quoting *Withrow v Larkin*, 421 US 35, 47; 95 SCt 1456; 43 L Ed2d 712 (1975).
[45] *Id*. at 8.
[46] *Id*. at 8, citing *United States v Morrow*, 977 F2d 222, 225 (CA 6, 1992).

testimony must be truthful outside the presence of the jury.[47] The Sixth Circuit held that the court's statement was free of bias and consistent with the law.[48] *Morrow* is entirely distinguishable from Mr. Loew's circumstance. The communication in *Morrow* was not ex parte and did not violate any rules or law. Here, all agree the communication is ex parte. The emails were initiated by the court, which is not permissible, the emails were substantive in nature, and the court did not correct the error through notifying the parities. Here, the showing of judicial bias is too high for constitutional tolerance, which was found not to be present in *Morrow*.

The judge's emails created a showing of judicial bias too high for constitutional tolerance because the emails gave the prosecutor a tactical advantage, were strategic, and likely influenced the prosecutor's decision to emphasize and address the detective's failures during closing argument. The fact that the judge secretly reached out to a prosecutor ex parte during a trial, about the trial, shows the close, friendly relationship and bias towards the prosecutor. While the emails are a concrete example of judicial bias in Mr. Loew's trial, further bias may have permeated Mr. Loew's trial that would be unidentifiable to a defendant. For example, at the time of Mr. Loew's motion for a new trial, Mr. Loew had requested copies of any text messages between the judge and prosecutor regarding his case.[49] The judge did not respond.[50] Criminal defendants often have limited resources in comparison the system of the courts and prosecuting attorneys. The trial reached a conclusion without Mr. Loew uncovering the improper ex parte contact, and the emails were only revealed through a coinciding judicial election and FOIA request. From just the evidence available at this time, the bar is met in Mr. Loew's case. One is left to wonder, with the outstanding test messages—does more evidence of bias exists that is being covered up?

Mr. Loew is at a disadvantage not only due to the emails, but also due to the trial judge's decision not to follow the corrective requirement of the Code of Judicial Conduct. The judge must "…promptly notify all other parties and counsel for parties of the substance of the ex parte communication…"[51] First, Mr. Loew's trial judge improperly initiated an ex parte communication with the prosecutor and, second, did not inform the defense attorney. This choice created a situation where neither Mr. Loew nor his attorneys were able to show how these emails influenced the

[47] *United States v Morrow*, 977 F2d 222, 225 (CA 6, 1992).
[48] *Id*. at 226.
[49] (Def. Appx, 570a)
[50] *Id*.
[51] Code of Judicial Conduct, Canon 3(A)(4)(a)(ii).

prosecutor's strategic sources during trial. As such they are akin to structural errors. Structural errors, defined by *Fulminante*, "are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards."[52] These rights are so fundamental that their violation cannot be harmless by definition. Harmless error should not be applied, nor *Morrow*.

While *Morrow* did not address an ex parte communication, this court has reviewed the issue in *France*.[53] In *France*, the court reviewed types of ex parte communication between the court and jury.[54] Although Mr. Loew's case does not involve communication with a deliberating jury, the analytical framework is comparative because the *France* court was focused on evaluating whether the contact in question was administrative in nature. Because the case law in this area is so limited, this Court can use *France* as a framework to evaluate whether the emails were administrative or substantive. The court's responses in *France*, while given to the jury without counsel present, were later provided to counsel, and counsel had no objection. The *France* court found the following ex parte instruction to the jury were administrative: that a diagram board was not an exhibit, the definition of criminal sexual conduct, and that a police report was not evidence the jury could review.[55] *France* distinguishes substantive and administrative contact: "Substantive ex parte communication occurs when the trial court provides the jury with supplemental instructions on matters of law. Administrative ex parte communication includes instructions regarding the availability of certain pieces of evidence, and an instruction which encourages the jury to continue its deliberations."[56] Administrative communications are only reviewed when an objection is on the record.[57]

The emails in Mr. Loew's case are not administrative contact under *France*. Like communication with a jury, the distinction between administrative and substantive is important with ex parte communications with opposing counsel and a judge, pursuant to Cannon 3(A)(4). In terms of the jury, substantive communications include when the court provides supplemental instructions on the law.[58] In *France*, even just an administrative communication that is objected

[52] *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991).
[53] *People v France*, 436 Mich 138; 461 NW2d 621 (1990).
[54] *Id*.
[55] *Id*.
[56] *Id*. at 156.
[57] *Id*. at 143.
[58] *Id*.

to, shifts the burden of proof to the non-objecting party: "Upon an objection, the burden of persuasion lies with the nonobjecting party to demonstrate that the communication lacked any prejudicial effect."[59] This makes sense because communication with a deliberating jury could easily affect the verdict in case. The emails to a prosecutor during trial about witness testimony are analogous to a judge providing instructions on the law to a jury. They are substantive.

The analysis regarding ex parte communications falls outside of *Morrow* because another Sixth Circuit case, *Barnwell*, is resolutely on point. In *Barnwell*, the prosecution and government agents met with the court ex parte five times during the trial.[60] The government and its agents met with the court while they suspected a juror was bias towards the defendant due to governmental wiretapping efforts.[61] The court held in *Barnwell*, "An ex parte communication between the prosecution and the trial judge can only be 'justified and allowed by compelling state interest.'"[62] *Barnwell* and *France* shift the burden of *Morrow* when ex parte communications are at issue. The burden is not on Mr. Loew but is on the prosecution to show that the ex parte communication did not influence the trial. The prosecution "bears a heavy burden in showing that the defendant was not prejudiced when his counsel was excluded from these communications."[63] Prosecutors should be held to the same burden as defendants when the burden is shifted due to the high likelihood that an ex parte communication between would give the opposing party a tactical advantage. The prosecutor should be required to prove the ex parte communication did not influence the outcome at trial or give the prosecutor a tactical advantage.

Contrary to the Court of Appeals analysis when reviewing Mr. Loew's case, the prosecution did not meet this burden. In fact, the prosecution admitted the emails were *absolutely substantive*.[64] Ex parte, substantive emails about the case, during trial *de facto* create a judicial bias to which the constitution shall not abide. Judges above all, should be neutral arbiters of the law. The ex parte communications in Mr. Loew's case made the proceedings unfair because the

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[59] *Id*.
[60] *United States v. Barnwell*, 477 F3d 844, 850 (CA 6 2007).
[61] *Id*. at 849.
[62] United States v. Barnwell, 477 F3d 844, 850 (CA 6 2007) quoting United States v Minsky, 963 F2d 870, 874 (CA 6 1992).
[63] *Id.* at 851.
[64] (Def. Appx, 592a)

judge cannot act as an advocate, which is what happens when the judge aids or encourages one side of the proceedings.

III. The Dissent Adopted the Correct Standard Outlined by *Liljeberg,* Which Requires the Court to Weigh Factors In Addition to Actual Harm to the Defense.

I dissent.

These two words have found themselves on t-shirts, wall hangings, Christmas ornaments, bumper stickers, key chains, and coffee mugs across the United States. Justice Ruth Bader Ginsberg brought these two words into pop culture. Although many wearing a shirt with her "dissent collar" may have never read one of her opinions, they know what the words stands for: Grit. Determination. Courage. Standing up for what is right against an often-unchallenged majority.

I dissent.

In a digital era, justices and judges have become icons, celebrities even, and courtrooms do not hold the mystery, perhaps even the same reverence with the public. In a supreme court survey conducted by C-SPAN running regularly since 2009, 57% of people polled reported last year that they trust the federal government less than several years ago.[65] In a world where the public doesn't know if they can trust police officers,[66] elected officials,[67] or perhaps even the President of the United States[68] to follow the law, maintaining the public's confidence in the judicial process remains more important than ever. Of those surveyed in 2022, 60% reported that they "very often" or "somewhat often" follow news stories about the United States Supreme

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[65] C-SPAN, *Supreme Court Survey Agenda of Key Findings*, <https://static.c-spanvideo.org/assets/documents/scotusSurvey/fullSurvey.2022.b.pdf>, (accessed January 28, 2023).

[66] Corey Murray, *Former Deputy Sheriff Sentenced for Misconduct in Office*, <https://www.hillsdale.net/story/news/courts/2023/01/12/former-deputy-sheriff-sentenced-for-misconduct-in-office/69801070007/>, (accessed January 28, 2023).

[67] Michigan Department of Attorney General, *Former Flint Township Clerk Pleads on Misconduct Charge*, <https://www.michigan.gov/ag/news/press-releases/2023/01/25/former-flint-township-clerk-pleads-on-misconduct-charge>, (accessed January 28, 2023).

[68] Dan Mangan, *FBI Finds More Classified Documents in 13-hour Search of Biden Home*, <https://www.cnbc.com/2023/01/21/search-of-bidens-home-by-doj-finds-6-more-classified-documents.html>, (accessed January 28, 2023).

Court.[69] The public monitors what happens in the courtroom closely. Even this case has already joined the public arena.[70]

I respectfully dissent.[71]

In this case, CDAM asks this Court to adopt the dissent's recommendation to use the *Liljeberg* factors to determine whether the ex parte communication's appearance of impropriety results in Mr. Loew needing a new trial.[72] The *Liljeberg* factors are: (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process.[73] CDAM's position is that use of any other standard would be unjust, erode the criminal justice system, and create an insurmountable standard that criminal defendants cannot meet. The dissent agreed with the trial court in finding that an appearance of impropriety was created when the presiding judge emailed the prosecutor during Mr. Loew's jury trial.[74] In applying the *Liljeberg* factors, the dissent found that granting a new trial was appropriate because (1) "there is some risk of injustice to defendant if a new trial is not ordered,"[75] (2) "a denial of relief to defendant would tend to produce injustice in future cases,"[76] and (3) "there is a risk that the public's confidence in the judicial process would be undermined if defendant does not obtain relief."[77] CDAM agrees with analysis and believes *Liljeberg* is precedent applicable to Michigan matters.

In further review of the three *Liljeberg* factors, Mr. Loew faces first a serious risk of injustice if a new trial is not ordered. The trial judge emailed the prosecutor, as mentioned above,

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[69] C-SPAN, *Supreme Court Survey Agenda of Key Findings*, <https://static.c-spanvideo.org/assets/documents/scotusSurvey/fullSurvey.2022.b.pdf>, (accessed January 28, 2023).
[70] Sarah Leach, *Appeals Court Walks Back New Trial for Man After Prosecutor, Judge Emailed During Trial*, <https://www.hollandsentinel.com/story/news/courts/2022/01/17/appeals-court-walks-back-new-trial-man-after-prosecutor-judge-emailed-during-trial/6553867001/>, (accessed January 28, 2023).
[71] *People v. Loew*, ___ Mich App ___; ___NW2d ___ (2022) (Docket No. 352056) (RIORDAN, J., dissenting); slip op at 1. See also (Def. Appx., 617a).
[72] *Liljeberg v Health Servs Acquisition Corp*, 486 US 847; 108 S Ct 2194; 100 L Ed 2d 855 (1988).
[73] *Id*. at 864.
[74] *People v. Loew*, ___ Mich App ___; ___NW2d ___ (2022) (Docket No. 352056) (RIORDAN, J., dissenting); slip op at 2. See also (Def. Appx., 618a).
[75] *Id*. slip op at 4.
[76] *Id*. slip op at 5.
[77] *Id*.

not in reference to overarching police policy, but specifically questioning the detective's investigation in Mr. Loew's case and the lack of a medical examination for the alleged victim in Mr. Loew's case.[78] Believing that the prosecutor would not gain an advantage from these emails is inconceivable. While the assigned prosecutor had already mentioned in opening statement that there were issues in the investigation, the trial judge's emails emphasized the strategic barriers potentially interfering with a juror's reluctance to side with the prosecutor. The dissent agrees, "Conceivably, this may have led to the trial prosecutor addressing these weaknesses later in trial or during closing argument when she would not otherwise have done so."[79] Noticeably, the prosecutor highlighted the investigative flaws, and they became a theme throughout the case after the prosecutor was on notice from the presiding judge. The jury convicted Mr. Loew, and he was sentenced to 20 – 40 years on two counts of CSC first degree and 20 – 30 years on one count of CSC second degree and two counts of CSC third degree. Considering that the inconvenience to the state is merely recalling witnesses and expenses,[80] this factor should weigh heavily in favor of Mr. Loew and the potential 40 years of his life that could be required incarcerated. "These facts tend to show injustice to defendant if a new trial is not ordered."[81] CDAM agrees.

Second, failing to recognize the improper conduct and grant Mr. Loew relief would produce rampant injustice in future cases. With either decision this Court takes, the Court will be sending a message. The Court must choose whether the message is going to judges, granting Mr. Loew a new trial and explaining that serious violations of the Michigan Judicial Code will not be tolerated, or to criminal defendants, denying Mr. Loew a new trial showing that the burden to get a fair trial truly has been and always will be on criminal defendants. With either decision, this case will have far reaching consequences on our judicial system. The dissent agreed, "If defendant does not obtain a new trial in this case, other trial judges in future cases would not be deterred from engaging in ex parte communications with the prosecution during trial concerning the strengths and witnesses of the prosecution's case."[82] The implications of this case are far reaching when considering that the presiding judge had former experience as a prosecutor from 1982 – 2011; she

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[78] (Def. Appx., 258a-259a)
[79] *People v. Loew*, ___ Mich App ___; ___NW2d ___ (2022) (Docket No. 352056) (RIORDAN, J., dissenting); slip op at 4. See also (Def. Appx., 20a).
[80] *Id*. slip op at 5.
[81] *Id*. slip op at 4.
[82] *Id*. slip op at 5.

worked nearly thirty years in the same prosecutorial office she communicated with during trial.[83] Data already reflects that defendants who appear before judges with past experience as a prosecutor are more likely to have a sentence involving incarceration.[84] "Hypothetically, if the current share of judges with prosecutorial experience (35 percent) instead had public defender experience, there would be about 20,000 fewer incarceration sentences over a ten-year period."[85] If Mr. Loew is not granted a new trial, the message is sent that prosecutors get to have their prior co-workers on the bench, choose their sentence, and get tactical ex parte communication from the judges who used to work in their office. The second factor weighs in Mr. Loew's favor.

Third, the public's confidence in the judicial process will be undermined if Mr. Loew does not obtain relief. Perhaps it was not available to the Court of Appeals, but neither the majority nor the dissent discussed the manner in which the emails came to light. In a highly contested judicial election, the presiding judge's opponent issued Freedom of Information Act requests that revealed multiple instances of the judge and prosecutor communicating about court cases.[86] Neither the presiding judge nor the prosecutor followed the requirement to notify other parties after the ex parte communication occurred.[87] That the emails were send surreptitiously, without correction, and only revealed in a contested judicial election, shows the communications are likely to continue and the public's confidence in the judicial system will be undermined. The dissent agrees this factor weighs in favor of Mr. Loew, "…a trial judge unilaterally identifying the strengths and weaknesses of a case to one party, but not the other, creates a perception that the judge is not

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[83] Allegan County Michigan, *Judges*, < https://www.allegancounty.org/courts-law-enforcement/48th-circuit-court/judges#:~:text=Honorable%20Margaret%20Zuzich%20Bakker%2C%20Circuit%20Court%20Judge&text=As%20an%20Assistant%20Prosecuting%20Attorney%20and%20Chief%20Assistant%20Prosecuting%20Attorney,neglect%20and%20other%20violent%20crimes.>, (accessed January 30, 2023).

[84] Allison P. Harris and Maya Sen, *How Judges' Professional Experience Impacts Case Outcomes: An Examination of Public Defenders and Criminal Sentencing,* <https://scholar.harvard.edu/files/msen/files/harris-sen-public-defenders.pdf>, (accessed January 30, 2023).

[85] *Id*. At 7.

[86] Audra Gamble, *Complaints filed Against Allegan County Judge, Prosecutor by Challenger*, <https://www.hollandsentinel.com/story/news/politics/elections/2020/07/31/complaints-filed-against-allegan-county-judge-prosecutor-by-challenger/114347090/>, (accessed January 30, 2023).

[87] Code of Judicial Conduct, Canon 3(A)(4)(a)(ii).

neutral and impartial."[88] Mr. Loew's case has already been in the news, and the media will continue to document the results whether this Court rules in his favor or against. There is no doubt a ruling minimizing the judge emailing the prosecutor during his trial and failing to grant Mr. Loew a new trial will result in eroding public trust in the judicial process.

The Supreme Court of the United States has provided us a framework in *Liljeberg* to analyze and decide types of cases exactly like Mr. Loew's. The Court here has only to apply the factors. Not only does *Liljeberg* apply, but its application resolutely should result in Mr. Loew having a new trial. All three of the *Liljeberg* factors weigh in Mr. Loew's favor.

[88] *People v. Loew*, ___ Mich App ___; ___NW2d ___ (2022) (Docket No. 352056) (RIORDAN, J., dissenting); slip op at 5. See also (Def. Appx., 20a).

IV. Both MCR 2.003 and Due Process Require a New Trial.

A. Mr. Loew Should be Granted a New Trial Under MCR 2.003, Which is Designed to Protect Parties From Judges Who Should be Disqualified Due to Bias or Failure to Adhere to the Appearance of Impropriety.

While CDAM's position is that a judge emailing a prior co-worker during a jury trial regarding substantive legal strategy in the very case before the court satisfies MCR 2.003(C)(1)(a) for a showing of bias, this section will be limited to MCR 2.003(C)(1)(b) due to the circuit court's finding that actual bias was not present but an appearance of impropriety created the need for a new trial. According to the Appellate Court in *Rodgers*, "A mistrial should be granted for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to receive a fair trial."[89] Once the trial court violated Canon 3(A)(4), Mr. Loew's right to have the judge disqualified under MCR 2.003 would have been immediately triggered. Yet, as this Court knows, the ex parte communications were not properly remedied with notice. The emails only came to light after a FOIA request was made. Part of the trial court's findings granting Mr. Loew a new trial were based on MCR 2.003. The trial court analyzed that the need for an objective and impartial judiciary is key.[90] "And the judicial canon of ethics demand that we avoid even the appearance of impropriety."[91] This section of the trial court's determination is clearly within the realm of MCR 2.003(C)(1)(b)(ii). At the moment the emails were sent, Canon 3(A)(4) and MCR 2.003 was violated. The trial judge should have recused, and the lack of recusal requires Mr. Loew to have a new trial.

CDAM's position is that *Haley* is inapplicable and distinguishable, so Mr. Loew continues to be entitled to a new trial under MCR 2.003. Under *Haley*, this Court made a determination regarding whether discipline of a judge for receiving gifts was proportional to the conduct.[92] The analysis placed judicial conduct outside the sphere of the appearance of impropriety because it was analyzed within the lens of judicial conduct and not regarding a criminal defendant's constitutional rights. If this Court were analyzing whether the trial court should have been disciplined, *Haley*

[89] *People v. Rodgers,* 248 Mich App 702, 714; 645 NW2d 294 (2001).
[90] (Def. Appx 593a)
[91] *Id*.
[92] *In re Haley*, 476 Mich 180; 720 NW2d 246 (2006).

would be appropriate for consideration. *Haley* does not apply here, and Mr. Loew is entitled to a new trial because MCR 2.003 was not followed.

B. Mr. Loew Should Also be Granted a New Trial Because His Right to Due Process was Violated.

Due Process is the thread that weaves through Mr. Loew's case and is the fundamental reason why Mr. Loew should be granted a new trial. Due Process was more thoroughly addressed in Section II of this brief. There is no question that the trial court sending ex parte emails to the prosecutor about substantive legal issues violates Mr. Loew's right to Due Process. The further application of *Liljeberg* weigh in favor of Mr. Loew receiving a new trial.

The prosecutor erroneously argues that Mr. Loew is not entitled to a new trial under *Hereford*, which analyses a criminal defendant's Sixth Amendment rights, not the Fourteenth Amendment Due Process rights. In this case, the judge presiding over the *Hereford* trial held a short bench conference about the testimony of a witness while defense counsel was not present.[93] The Michigan Court of Appeals first reviewed *Hereford* and determined the ex parte communication was harmless error, then this matter came to federal district court on a writ of habeas corpus for review.[94] The analytical framework of *Hereford* cannot be applied to the case at hand. *Hereford* was reviewed through the highly deferential lens of federal habeas corpus review and the Sixth Amendment's right to counsel and confrontation clause, not Due Process. The federal court deferred to the state court's finding that there were "…no significant consequences for Hereford's case because no rights could be asserted or lost."[95] In fact, the trial court made entirely opposite findings to *Hereford*. The emails in Mr. Loew's case were not *de minimums*. The emails were substantive,[96] they flagged the prosecutor to change the trial strategy,[97] and they were detrimental to the interests of Mr. Loew.[98]

The analysis in *Hereford*, has not even been continuously applied. A quick Shephard's search reveals three following negative cases, including two cases that declined to use the analysis in *Hereford*. *Sweeney* was one of the cases that chose not to extend the case-by-case analysis in

[93] *Hereford v Warren*, 536 F3d 523 (CA 6, 2008).
[94] *Id*.
[95] *Id*. at 530.
[96] (Defendant's Appx, 592a)
[97] (Defendant's Appx, 593a)
[98] (Defendant's Appx, 594a)

Hereford.[99] In *Sweeney*, defendant's counsel was gone from the court for 10 minutes during witness testimony.[100] Again, this analysis continues under the Confrontation Clause, not Due Process and the case law here is conflicting. *Sweeney* recognizes this: "Courts have taken many conflicting and (sometimes) confusing approaches in analyzing whether and under what circumstances a defense lawyer's temporary absence from a criminal proceeding requires reversal of a conviction."[101] *Sweeney* again used the harmless error analysis because they followed a body of law under the Sixth Amendment right to counsel and confrontation clauses.[102] The Eastern District of Michigan, in *Ambrose*, also declined to apply *Hereford*.[103] The Plaintiff-Appellee included case law that is entirely conflicting and also inapplicable to the Due Process analysis.

The correct analysis regarding Due Process and ex parte communication can be found in *Barnwell*.[104] Similar to Mr. Loew's case, *Barnwell* dealt with ex parte communications between the trial court and prosecutor.[105] The court reviewed the violation within the lens of Due Process, not the Confrontation Clause.[106] Instead of harmless error the court found, "The Government bears a heavy burden in showing that the defendant was not prejudiced when his counsel was excluded from these communications"[107] Just like in Mr. Loew's case, *Barnwell* was not immediately notified of the error. Instead, "… the Government and trial judge kept all five *ex parte* communications from defense counsel during the entire second trial."[108] "Defense counsel only truly found out about these conversations in March 2005, six months *after* Barnwell was convicted in a second trial and nearly eighteen months after the communications had occurred."[109] The *Barnwell* court found that the ex parte violations, which mirror exactly what happened to Mr. Loew, merited a new trial.[110]

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[99] *U.S. v. Sweeney*, unpublished opinion of the United States District Court of Minnesota, issued April 3, 2013 (Case No.06-CR-0249), p 5..
[100] *Id*. at 4.
[101] *Id*.
[102] *Id*. at 5.
[103] *Ambrose v. Booker*, 24 FSupp3d 626, 638 n6 (ED Mich 2014).
[104] *United States v. Barnwell*, 477 F3d 844 (CA 6 2007).
[105] *Id*. at 847.
[106] *Id*. at 850.
[107] *Id.* at 851 citing *United States v. Minsky*, 963 F2d 870, 874 (CA 6 1992)
[108] *Id*. at 853.
[109] *Id*.
[110] *Id*. at 854.

CONCLUSION

CDAM asks this Honorable Court to reverse the decision of the Court of Appeals, to reinstate the trial court's order granting Mr. Loew a new trial, and to adopt the *Liljeberg* factors as the governing analysis for all future ex parte communications during trials of criminal defendants in the State of Michigan.

Respectfully submitted,

Dated: 2/17/23

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