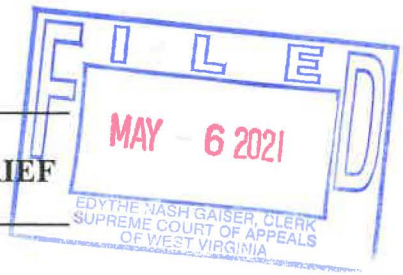
THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF:
THE HONORABLE LOUISE E. GOLDSTON,
JUDGE OF THE 13TH FAMILY COURT CIRCUIT

SUPREME COURT NO. 20-0742
JIC COMPLAINT NOS. 30-2020
33-2020



JUDICIAL DISCIPLINARY COUNSEL'S BRIEF

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I.

STATEMENT OF THE CASE

Respondent is a 1984 graduate of the West Virginia University College of Law. Before becoming a judge, Respondent engaged in the practice of law in Southern West Virginia. Respondent believed that 30 to 40% of her practice involved domestic relations law (Joint Exhibit No. 6 at 26). She also did some federal work and "a lot of" property work (Joint Exhibit No. 6 at 5). In her time as a practicing attorney, Respondent never requested a home view in any domestic relations case despite her belief that one family law master in her jurisdiction may have engaged in the custom (Joint Exhibit No. 6 at 26-27).

In 1994, Respondent was appointed to serve as family law master by then Governor Gaston Caperton. She has served continuously as a family law master and a family court judge since that time. At all relevant times during the allegations set forth below, Respondent served as a Judge of the Family Court Circuit. She has not been the subject of any prior discipline.

During her time on the bench, Respondent visited litigants' homes to either determine if certain disputed marital property was present and/or to supervise the transfer of the disputed property. Respondent alleges that she made these visits on eleven different occasions during the

past twenty years.[1] According to Respondent, the majority of the home visits were prompted by oral motion of one party's attorney without objection (Joint Exhibit No. 6 at 14-15). After granting the motion, Respondent would meet the parties at the home.

Respondent acknowledged that the criteria for going to a party's home was largely based on the consent of both parties and/or the loss of items carrying sentimental value (Joint Exhibit No. 6 at 30-31; 45-46). Concerning the lawyer's request, Respondent testified:

> Q. You said the word was out after you'd done this a few times that you better be truthful or else:
> A. Well, let me rephrase that –
> Q. Okay
> A. -- the lawyers – the lawyers love that I do this because it enables them to say, you know, be truthful in your disclosure because if you try to hide something, she might go out and look for it.
> Q. Doesn't that put the lawyer, the parties who are represented by lawyers at an unfair advantage because they're aware of this while the pro se litigants are not.
> A. Possibly. But again, that's only happened twice that the pro se's have been –
> Q. And how do you decide when it's appropriate to do when it's not appropriate? You say 95 percent of the cases, you don't do it. In five percent of the – or 11 cases, you've decided to do it. What are the criteria for doing it versus not doing it?
> A. Generally, it's the attorney asks me to do it, and there appears to me – and, again, it's generally agreed to that if I don't do it, the party without the asset they are awarded is not going to get it any other way.
> Q. So just by what I am hearing you say, it does put individuals with lawyers at an advantage because they know to ask while pro-se litigants do not know to ask. Would you agree with that statement?
> A. Yes, Except I'll make this caveat, the two pro se cases where I've been, one being Gibson and one being – I can't believe I can't remember that name – I don't see it – anyway, both had been represented by counsel at one time.
> Q But you would agree that if pro-se litigants came before you and knew about this, you might've been doing it more than 11 times, correctly – I mean is that correct?
> A. Maybe, but I doubt it.
> Q. So, it's only when lawyers – so the benchmark for deciding when to go and when not to go is when the lawyers ask for it?

[1] During a March 4, 2020 hearing in *Gibson*, Respondent stated that "I do this probably two or three times a year and we have jury views all the time" (Exhibit A to JDC's 2/16/2021 Brief at 65).

A. The benchmark, generally, is if the lawyers agree to go, agree that I should go.

(Joint Exhibit No. 6 at 30-31).

Beginning in 2017, Respondent presided over a divorce case styled *In re Gibson*, Raleigh County Civil Case No. 17-D-655-G. The Second Amended Corrected Final Order of Divorce was entered on June 19, 2019. In that Order, the Court noted:

> The parties divided their household furnishings by agreement which is represented by a four-page exhibit entered before the Court and attached hereto. Each page is initialed and dated by the parties. The circled items are Respondents [Matt Gibson]. The items not circled items are the Petitioners [Carrie Gibson] The parties shall cooperate to set a time and date for the Petitioner to pick up said items. The Petitioner may bring others to help her move the items.

On or about September 26, 2019, the ex-wife filed a Petition for Contempt against her husband.

On March 4, 2020, during a contempt hearing an allegation arose that Mr. Gibson failed to follow through with Court ordered counseling for a minor child (Exhibit A at 13-19). The ex-wife also asserted that Mr. Gibson negligently damaged marital property he was ordered to turn over to her (Exhibit A at 19-44). Lastly, the ex-wife alleged that Mr. Gibson failed to turn over several items of sentimental value (Exhibit A at 44-62). Mr. Gibson represented himself *pro se*[2] at the hearing while the ex-wife was represented by Attorney Kyle Lusk. The ex-wife and Mr. Gibson intended to call at least three or four witnesses each at hearing (Exhibit A at 69).

Since the contempt petition was brought by the ex-wife, she bore the burden of proof at hearing and was the first to take the stand and testify (Exhibit A at 13). Following her testimony

[2] Respondent asked Mr. Gibson if he knew he could have an attorney with him. He replied, "I didn't know I could have a court-appointed attorney" (Exhibit A at 4). Respondent then told him he would have to "hire one" (Exhibit A at 4-5). Respondent countered that he thought "any time the opposing counsel would threaten jail time, that it could be considered for a court appointed [attorney]" (Exhibit A at 5) Respondent replied, "Well, you're not going to get jail time" (Exhibit A at 5). Attorney Lusk then interjected, "Well, I would certainly like for him to" (Exhibit A at 5). Mr. Gibson said that he would like a court-appointed attorney and Mr. Lusk said he had no objection. However, when Respondent explained that it would delay the proceedings, Mr. Gibson waived his right to counsel (Exhibit A at 20-21).

concerning the counseling issue, the Court believed the matter moot except for purposes of whether the ex-wife could ask for attorney fees (Exhibit A at 15). The ex-wife then gave lengthy testimony about the purported damage done to marital property (Exhibit A at 19-44). Her attorney also introduced into evidence photographic evidence of the alleged damage as well as an email about the place and time when the ex-wife could retrieve the property (Exhibit A at 19-44).

The ex-wife then testified about Mr. Gibson's alleged failure to provide her with certain sentimental items. Her attorney also introduced some exhibits into evidence in support of the claim (Exhibit A at 44-62). At some point, the ex-wife's attorney asked her the following:

Q. Ma'am do you want those items?
A. Yes, I do.
Q. Where do you believe those items are?
A. They're in the house.
Q. If we were to go over to the house right now, would you be able to find them quickly?
A. If they were in the same spot when I left, yes.

(Exhibit A at 49) (emphasis added).

The ex-wife testified about the issue for thirteen more pages before the Judge suddenly and without warning stated:

Mr. Gibson: I made copies from Staples and I sent you all those.
The Court: Do you – that was not what the order said. **Where do you live?**
Mr. Gibson: I live in 113 Quiet Oak Street in Beaver.
The Court: Say it again.
Mr. Gibson: 113 Quite Oak Street, Beaver, West Virginia.
The Court: All right. We're all going to meet there in ten minutes. Have you got anybody that's got a truck?
Ms. Gibson: Just leave my stuff right there? Yeah. Yeah.
The Court: If you do, go get them. You do not have to pack up your stuff. Nobody will be in here until we get back or whatever. Okay?

(Exhibit A at 62-63) (emphasis added). The parties then went off the record at approximately 10:34 a.m. or 1 hour and 5 minutes into the hearing (Joint Hearing Exhibit No. 5). The hearing

transcript clearly demonstrates that Respondent never explained to Mr. Gibson the purpose of the recess or gave him any opportunity to object in the courtroom.

Once everyone arrived at Mr. Gibson's home and the purpose of the visit became clear, Mr. Gibson moved to recuse Respondent on the ground that she had become a potential witness in the case. Respondent denied the motion as untimely:

Mr. Gibson:	I am asking you right now I am putting in a motion to recuse yourself because you are putting yourself in a witness capacity instead of a judicial capacity. There is no search warrant. I need a list of everything we're looking for.
The Court:	You have a list of everything we are looking for attached to the order.
Mr. Gibson:	Not today. Not today. I don't know where some of it's at.
The Court:	Well, we're going to find it. Your motion's denied. **It's not timely filed.**
Mr. Gibson:	I need a search warrant. You won't get in my house without a search warrant.
The Court:	**Oh yeah, I will.**

(Joint Exhibit No. 3 video from 1: 25 to 1:45) (emphasis added).

The group remained outside for a short time while the Judge looked at a disputed swing. The judge then reiterated to Mr. Gibson that she was going in the house:

The Court:	**Now, you're either gonna let me in that house or he's gonna arrest you for direct – are you recording this?**
Mr. Gibson:	Yes, ma'am.
The Court:	**Take his phone. You're not allowed to record this.**
Mr. Gibson:	Don't take my phone, sir.
The Court:	**The girlfriend's recording too. Turn off your phones. I'll take you to jail if you don't turn them off. You understand that.**
Unknown:	unintelligible
The Court:	Put it up. **Give him the phone or your going to be arrested.**
Mr. Gibson:	I can record on my land.
The Court:	**You cannot.**
Mr. Gibson:	This is my land ma'am.
The Court:	**I am the judge. I am trying to effect equitable distribution. We're having a hearing. Now, you let me in that house or he is going to arrest you for being in direct contempt of court.**
Mr. Lusk:	I don't think the phone's off, your honor.
Mr. Gibson:	unintelligible.

The Court: Let the officer check the phone.
Unknown: Oh, it was on.
The Court: It was on.
Mr. Gibson: No. My phone's not off. It was on. The recording's off.

(Joint Exhibit No. 3 video at 2:37 to 3:41) (emphasis added). The recording stopped at that moment when Mr. Gibson felt he had no choice but to relent.

Once inside, Respondent's bailiff, on his own initiative and without the approval of the Court, used his phone to record both video and audio of the separation of marital assets (Joint Exhibit No. 6 at 81, 83). Respondent acknowledged that Mr. Gibson had already turned over most of the disputed items on the list (Exhibit B video attached hereto and made a part hereof at 1:45). She also told the ex-wife that "I can't let you search [for particular items] unless you have some idea of where they might be" (Exhibit B video at 2:32). When they went downstairs to go through DVDs, Respondent sat down in a rocking chair uninvited and remained there while Mr. Gibson and the bailiff went to look at the gun cabinet for some other items (Exhibit B at 3:27 to 6:09). The bailiff only recorded seven minutes of the household search (Exhibit B). However, the search lasted a total of 20 to 30 minutes (Joint Exhibit No. 6 at 80).

The parties returned to the Courtroom and went back on the record at 11:48 a.m. (Joint Exhibit No. 8). No more testimony was taken at the hearing (Exhibit A at 63-72). Instead, the Court stated:

> I will state on the record that we did a home view of the marital property, the marital real estate that was awarded to Mr. Gibson in the divorce. And at that view, Ms. Gibson was able to obtain the following items that were awarded to her in the final order: the 16 x 20 canvas photo of B, the four pictures on the wall in the dining room, her handwritten recipes, all of your yearbooks. We didn't look for the original picture of B, three picture collage. . . .
>
> Now, while we were at – on scene, Mr. Gibson made an oral motion to recuse me, stating that he believed that I was making myself a witness in the case. I disagree because I do this probably two or three times a year and we have jury views all the time. However, we're not going to get much more done today, Mr. Gibson. So, if

you want to follow up on that Motion to Recuse, you should do it at least 20 days before we come back for the conclusion of this hearing.

(Exhibit A at 63-65).

Respondent next explained the process of filing a motion to disqualify after Mr. Gibson stated it was "[a]bsolutely going to happen:"

The Court:	I will send your motion and my thoughts on it and basically what I always put in this is I don't think I'm prejudice, but I'll leave it to the Court to make the decision. It goes to the Supreme Court.
Mr. Gibson:	Cool.
The Court:	The Supreme Court will make a decision on whether or not I should be removed from the case.
Mr. Gibson:	Right.
The Court:	**And just so the record's clear, not only do I think I'm not a witness, but I do not believe your Motion to Recuse was timely filed. It generally has to be filed seven days ahead of hearing. I understand your position that you didn't know I was going to the house, so you didn't know that that might be an issue.**
Mr. Gibson:	No.

. . .

Mr. Gibson:	Supreme Court and the JIC Committee will be notified.
The Court:	Excuse me?
Mr. Gibson:	The JIC Committee, that's also, right, is that part of the –
The Court:	If you want to file an ethics complaint against me, yes, sir, the JIC. It's the Judicial Investigation Commission.
Mr. Gibson:	Right. Yes, ma'am.
The Court:	But I will tell you, also that your filing of Judicial Investigation complaint against me –
Mr. Gibson:	Yes, ma'am.
The Court:	-- is not grounds for my recusal.
Mr. Gibson:	And that's cool.
The Court:	That's been – that's well-established law.

(Exhibit A at 65-67) (emphasis added).

Later that same day, Respondent for the first time became aware that the bailiff had used his cell phone to record a portion of what happened inside the Gibson house (Joint Exhibit No. 6

at 81). The bailiff sent her a copy of the video via text (Joint Exhibit No. 6 at 81-83, 91). Respondent testified:

> I still to this day [the date of Respondent's sworn statement] have not viewed it because I didn't think it – first of all, I didn't know I was going to stay in the case. I didn't think it was proper for him to do that, and I don't think I told him I thought it was improper. I just was not going to withhold it from the JIC. It was something that was provided to me, so I provided it to you but I still to this day have not viewed it.

(Joint Exhibit No. 6 at 82). Respondent further stated:

> I didn't believe it was properly taken, and I didn't know whether or not I was going to continue on the case, and so I considered it improper evidence for me to see and consider.

(Joint Exhibit No. 6 at 92). Respondent also testified that she told the bailiff not to do it again (Joint Exhibit No. 6 at 104).

Two days after the home visit, Mr. Gibson's video went viral on YouTube (Exhibit No. 6 at 94). On March 11, 2020, the Judicial Investigation Commission ("JIC") opened Complaint No. 30-2020 against Respondent. On March 18, 2020, Mr. Gibson filed Complaint No. 33-2020. The JIC immediately began an investigation into the complaints. Respondent filed a written response to the complaints on March 18, 2020. Much of what Respondent wrote in her response required further explanation. However, her reasoning for not allowing the Respondent to record what happened at the house was clear:

> In regard to prohibiting Respondent from recording the proceedings at Respondent's house, the Court was relying on Rule 8 of the Rules of Practice and Procedure for Family Court which is titled "unofficial Recordings of Proceedings."

(Joint Exhibit No. 4 at 2). Rule 8 is the same reason Respondent gave for her belief that the bailiff's recording was also inappropriate (Joint Exhibit No. 6 at 82-83).

Meanwhile, Mr. Gibson filed a Motion to Disqualify Respondent citing the events of March 4 as the reason (Exhibit No, 6 at 93-94). Respondent transmitted the motion to the Chief Justice

of the Supreme Court along with the videos (Joint Exhibit No. 6 at 93-94). She took no position on the motion (Joint Exhibit No. 6 at 93-94). Based upon information and belief, Respondent also informed the Chief Justice that she would not allow Mr. Gibson to record the proceedings because of Rule 8 of the Rules of Practice and Procedure of Family Court. The Chief Justice disqualified Respondent from continuing to preside over the matter (Joint Exhibit No. 6 at 94). Respondent said she wasn't surprised at her disqualification because "at that point, it had blown up so much in the media and that kind of thing that I figured they'd take me off of it" (Joint Exhibit No. 6 at 94).

On July 22, 2020, JDC took Respondent's sworn statement. When asked Respondent, with her vast experience in family law, could provide no statute, rule or case that gave her the authority to conduct home visits. Respondent admitted that she never had any clear or written procedures for conducting a home visit, including but not limited to, when the proceeding should be utilized and how the process should take place.

Respondent raised three defenses to the allegations: (1) the "home view" was similar to a jury view and therefore permissible; (2) the contempt powers authorized her to take such action; and (3) mutual consent of the parties.

Jury View

Respondent said that she never recorded home visits even though she considered it a part of the proceeding (Exhibit 6 at 20). Respondent likened home visits to a jury view:

Q. Based on what you just told Ms. Tarr a few moments ago, you see the home visits as a continuation of the contempt hearing is that correct:
A. I view it more as – and maybe my thinking s wrong, but I view it more as a jury view because I am a judge and jury in these cases.
Q. But you would agree in a jury view, they take either a court reporter or someone along to record what's going on?
A. Yes. And I'm not saying that's not a concern. It has always been a concern, but to be frank with you, I didn't know how to deal with it because we don't have court reporters and I can't take my computer to record it.

Q. Well, certainly, you would agree now that you could have gotten a handheld recorder or your cellphone to record it at least, if the parties had agreed to that; is that correct?
A. Yes.

. . .

Q. But whether you view it as a jury view or whether you view it as part of the contempt proceeding, you would agree that it is the continuation of a court matter, correct?
A. Correct.
Q. And so, because it was a continuation of a court matter, you would agree that it should have been recorded, correct?
A. Yes.
Q. Okay.
A. In the best of world, yes.

. . .

Q. But you agree it should have been recorded in some fashion.
A. Yes.
Q. And by recording it, it might've taken you out of being a witness, correct?
A. Yes.

(Exhibit No. 6 at 22-25).

The following colloquy occurred over W. Va. Code § 56-6-17, the statute governing jury views:

Q. Is it your testimony that that's the code section that you were following to give you the authority to go view the scene; is that accurate.
A. Yes, but I'll – I mean I'm not going – I'm not sure I ever read that to go by. In my mind, that was the authority that I thought I had. . . . And, again, as in my response, if I don't, I don't. I'm sorry. I won't do it again.
Q. In the case law underneath it, I put a Post It note by it, there's a Westover Volunteer Fire Department versus Barker case.
A. Uh-huh.
Q. Can you read what it says?
A. "There is no statutory authority for a trial judge trying a case in lieu of a jury to take a view." I was not aware of that case, but I can tell you when I was practicing law, I was trying a horrible case over whether or not repairs to a roof were done correctly, and I asked the judge to go and look and he did. And he was mad.

(Joint Exhibit No. 6 at 34-35). Respondent also admitted that she never spoke to anyone at the JIC, the Supreme Court, or any other judge about the process before implementing it in her courtroom until after the Gibson video went viral (Joint Exhibit No. 6 at 20-21, 36, 48-50).

Contempt Powers

Respondent acknowledged that there was nothing in the contempt powers that gave her the authority to conduct a home visit. Respondent confessed that she never held anyone in contempt prior to going to the home and that she failed to enter any order subsequent to the visit reflecting what had happened at the residence, whether any items had been secured and/or whether or not a party was in contempt. Respondent also acknowledged that instead of doing a home view, she could have entered an order holding Mr. Gibson in contempt and requiring him to turn over the items or requiring law enforcement to secure the items (Joint Exhibit No. 6 at 16-18). Respondent testified:

> Q. No matter what happens at the implementation of the contempt order, either party would still have a right to file for another hearing based on something that happened at the scene?
> A. Correct.
> Q. If that's the case, with you being present at the home during the implementation of a contempt order, how does that not possibly make you a possible material witness to another contempt filing by either party?
> A. In my mind if I am there, I know we're there – I know what we're there to get. That's all I allowed them to get, so that – him taking the clock is not going to happen.
> Q. He doesn't take the clock, but she files – to your knowledge, he doesn't take the clock. She files with you a motion for contempt because while you weren't looking, he took a clock. Doesn't that now make you a material witness in that next proceeding?
> A. I guess it could, but I'm never not watching, in my mind.

(Joint Exhibit No. 6 at 19-20).

After reviewing CJC Rule 2.11, the following colloquy took place between JIC/JDC Counsel and Respondent:

Q. So, would you agree with me that the Code would require you to disqualify yourself if you are a possible witness in a case?
A. Yes.
Q. Would you agree with me also that the code says that as a judge, you're supposed to not put yourself into situations that might require you to recuse yourself at a later point?
A. Yes.
Q. So, I guess that goes back to my original question. If there is an infinite amount of scenarios where one of the parties could contest what happened at the enforcement of your contempt order while you're on the scene, how does that not make you a possible material witness for the rest of the case?
A. I'm not sure. I think that if that happened, at that point, I would look at disqualifying myself, if there were factual issues about what happened while we were there. That's never happened until this Gibson case.

(Joint Exhibit No. 6 at 22).

Respondent also admitted not holding the parties in contempt before going to the home

(Joint Exhibit No. 6 at 42, 61). Respondent further testified:

Q. You would agree that you didn't give him an opportunity to purge himself of the contempt?
A. No, because I had not heard all the evidence and I was not in the position where I could make that ruling yet.
Q. But you went to the house to see certain items if they were there correct?
A. Correct.
Q. Which would assume that you thought that he was in contempt to do that, correct?
A. He had stated on the record that he knew that the items that were there had been awarded to her and he had not given it to them.
Q Would you agree then that at that point, you should have held him in contempt and given him an opportunity to purge himself of that contempt.
A. Because I had not heard all the evidence, I did not think I—I thought that ruling was – would be premature. I don't like to rule people in contempt until I've heard their side of the story.

. . .

Q. You could've ordered him to bring them in though, to view them, couldn't you?
A. I could have.
Q. And you didn't did you?
A. No.
Q. But you would agree with me that in order to – for him to have to turn something over or bring it in, he'd have to be held in contempt correct?

A. Generally, yes.

(Joint Exhibit No. 6. at 62-64).

Respondent also agreed that the burden of proof in a contempt proceeding rests not with the Family Court Judge but with the moving party. She agreed that it is the moving party's responsibility to provide evidence in support of his/her contention that the other side has failed to produce the items in question. Respondent admitted to improperly putting herself in the role of litigant.

Consent

Respondent admitted that she failed to obtain Mr. Gibson's consent before going into his home:

Q. Did you state on the record why you were going to be at the house.
A. I don't remember.
Q. If you didn't, how would he – was he represented by an attorney?
A. No.
Q. How would he know why you were going to his house and have an opportunity to object?
A. He may not have.
Q. Then you would agree with me that if you didn't explain to him on the record why you were going to adjourn and go to his house, then he really didn't give consent in the court?
A. In the – in the – yes. I've never thought he gave consent in the courtroom, but he did not object.
Q. Would you agree with me that he may not have known?
A. He may not have known.

. . .

Q. It's fair to say then that you didn't have consent before you left the courtroom to go to his house?
A. I would say that's fair.
Q. Yet early on when we discussed this, you said one of the primary reasons that you did it was because the parties consented –
A. Correct.
Q. --both parties consented?
A. Correct. And this case does not follow that.
Q. And why doesn't it follow that?

A. Because I was frustrated and worried that if I didn't do it, something was going to happen to the stuff.
Q. You would agree that notic[e and] an opportunity to be heard are essential in procedural issues correct?
A. Yes.
Q. So, if going into the hearing, he did not know that there was any contemplation of you going to the house, you didn't give him an opportunity ahead of time to raise any objection, correct?
A. That is correct, except at the time we started the hearing, I had no contemplation of going into the house.
Q. [W]hen you decided in your mind that you were going to go, you would agree that you had an obligation to tell him why you were going to his house to give him an opportunity to object, correct?
A. Yes. . . .
Q. And you would agree that when at the house he moved for you to recuse yourself, that because you hadn't followed procedure that far, why did you say you're going to have to – the rule gives me seven days?
A. You have to file the rule in seven days. . . Because I've been told by Supreme Court staff that that's the answer if they file a motion during a hearing.
Q. So, you would agree that there are times when you follow procedure and there are times when you don't follow procedure?
A. I would say in this case, that's probably true.
Q. And is it fair to say that you should have followed procedure no matter what?
A. Of course.

(Joint Exhibit No. 6 at 68-72).

The matter, including multiple exhibits and Respondent's written and sworn statements, was presented to the JIC at its August 2020 meeting. After a thorough review of all evidence, the JIC unanimously voted to issue a one-count formal statement of charges against Respondent charging her with violating CJC Rules 1.1, 1.2, 1.3, 2.2, 2.4(B), 2.5 and 3.1(A), (B) and (D).[3] On September 23, 2020, the JIC filed the 14-paragraph formal statement of charges against Respondent in the State Supreme Court.

[3] The vote was 7-0. The Honorable H.L Kirkpatrick III, Judge of the 10th Judicial Circuit and Senior Status Circuit Judge James Rowe recused themselves. Two members of the JIC served on the Judicial Hearing Board for several years just prior to their appointments to the JIC. The Family Court Judge representative to the JIC also did not know of any rule, statute or case law that would permit Respondent to conduct home views.

On or about September 30, 2020, Respondent, who is and at the time was represented by counsel, entered into a written agreement with the JDC whereby she would admit to (1) all of the facts contained in paragraphs 1 through 14 of the formal statement of charges; and (2) violating CJC Rules 1.1, 1.2, 1.3, 2.2(A), 2.4(B) and 2.5 for her behavior set forth therein. Both parties agreed to recommend sanctions of a censure, a $5,000.00 fine and the payment of costs.

Respondent's hearing was held on January 15, 2021. It was the second disciplinary hearing of the day. JHB Chair, the Honorable Michael D. Lorensen, Judge of the 23rd Judicial Circuit, presided over the hearing and in attendance were: (1) The Honorable Paul T. Farrell, Judge of the 6th Judicial Circuit; (2) The Honorable Richard G. Postalwait, Magistrate of Calhoun County; and (3) The Honorable Glen Stotler, Judge of the 23rd Family Court Circuit.

The agreement was placed on the record, and Respondent took the stand. Consistent with the agreement, Respondent admitted all of the facts contained in the formal statement of charges and all of the Rule violations pertaining thereto. The JHB asked the parties to provide it with the second portion of the March 4, 2020 hearing after Respondent stated at the hearing that while she did not prepare an Order reflecting the outcome of the day's events she did place the matter verbally on the record. Interestingly, at that same hearing, Respondent took inconsistent positions concerning a verbal recitation versus an actual order:

> The Court: Okay Mr. Lusk is correct, once I speak it, it's the order. So, I am going to deny your Motion to Dismiss on that ground.
>
> . . .
>
> Mr. Gibson: The Court recorded audio says we can –
> The Court: I don't care what the audio says. I want to know what the order says.
>
> . . .
>
> Mr. Gibson: But the audio says we would – my understanding was we would make copies.
> The Court: That's not what the order says.

. . .

(Exhibit A at 10, 59, 62).

At the disciplinary hearing, Judge Stotler displayed bias in favor of Respondent and against the JDC/JIC. The bias was exhibited from the start when the JHB Chair said to Judge Stotler, "Well, we'll have – we'll have an argument piece that – that we can address that at, **I think if you wish to just have a discussion with counsel about your views** (1/15/2021 Tr. at 10, emphasis added). Judge Stotler exhibited a harsh attitude toward JDC when questioning the attorneys. He did not let JDC complete answers before interrupting. He expressed contempt for the answers. Most importantly, he very clearly stated that he believed the charges should never have been brought against Respondent by the JIC. Thus, his mind was plainly and unmistakably made up before he came to the hearing. He had also reached his conclusion before all evidence had been submitted as the JHB asked JDC to provide as additional evidence a second video pertaining to the Gibson hearing. JDC promptly objected to Judge Stotler's comments pertaining to the JIC and his questioning of the outcome when both parties were in full agreement. Judge Stotler's questions and comments were addressed at the hearing by at least one other JHB member when he opined that the Judge's statements were better left to the noontime deliberation (1/15/21 Tr. at 21). On January 20, 2020, JDC filed a Motion to Disqualify Judge Stotler.

By Order entered January 22, 2020, Judge Stotler declined to disqualify himself. In his Order, Judge Stotler never denied making the statement that the JIC never should have brought the charges against Respondent.[4] His Order also had at least one misstatement in contravention of *In*

[4] Judge Stotler's bias and prejudice against JDC and JIC was further reinforced by a March 25, 2021 letter he sent to the Supreme Court Justices and others seeking the termination or severe reprimand of JDC over untoward allegations concerning the handling of the instant matter. The letter was leaked to the West Virginia Record. The timeliness of the improper allegations while the Goldston matter is still pending demonstrates, at a minimum, a flagrant attempt to influence the Court in the *Goldston* matter in violation of Rule 2.10 of the Code of Judicial Conduct.

the Matter of Starcher, 202 W. Va. 55, 501 S.E.2d 772 (1998), *infra*, when he opined that the Board could "accept, reject, or modify its terms in the Board's recommended decision to the Supreme Court of Appeals" (1/22/2021 Order at 1). The undersigned immediately inquired of the JHB Clerk whether the disqualification would be transferred to the Chief Justice for further consideration and was informed by email:

> The Trial Court Rules do not apply to the Board. Moreover, even if the Trial Court Rules did apply, the motion was filed after the hearing, you were permitted to make a record and you can challenge the ruling as an objection to the Board's recommended decision. . . .We defer to the Clerk's judgment as to whether it should be transmitted to the Chief Justice at this time, or whether the issue may be addressed upon any objections to the Board's recommended decision.[5]

On the same day, the JHB issued another Order requiring post-hearing briefs and raising multiple questions to address. On or about February 16, 2021, JDC filed its post-hearing brief along with two exhibits – one was a copy of the Transcript of the March 4, 2020 hearing. The second was the video taken by the bailiff at Mr. Gibson's house. Respondent did not object to the admission of these exhibits into evidence. Respondent also filed a post-hearing brief, an amended post-hearing brief and a reply brief.

On or about March 16, 2021, JDC received the recommended decision of the JHB. The JHB made no specific findings or conclusions. However, by implication the JHB referenced the agreement and Respondent's admission to all facts contained in the Formal Statement of Charges and her violations of CJC Rules 1.1, 1.2, 1.3, 2.2, 2.4(B) and 2.5. The JHB then incorrectly stated as support for its recommended discipline:

> [A]lthough there was no clear legal foundation for conducting the judicial view in question, the scope of a judicial officer's inherent authority relative to judicial views is uncertain, and guidance to judicial officers from the Supreme Court of

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[5] At the time, the Court had not yet issued *Aaron v. Montgomery*, ___ W. Va. ___, 855 S.E.2d 891 (2021).

> Appeals through rule making or otherwise regarding the proper scope of conducting judicial views would be beneficial.

(JHB Recommended Decision at 4).

A majority of the panel recommended an admonishment and a $1,000.00 fine. Two JHB members voted for censure and a $1,000.00 fine. Judge Stotler was the only member who voted to dismiss the complaint In its recommended decision, the JHB incorrectly stated that both parties agree that the JIC nor JDC "incurred any costs as a result of the investigation into the disciplinary charges"[6] (JHB Recommended Decision at 3). In fact, the agreement between JIC and Respondent stipulates that costs will be paid by the Respondent. Moreover, Respondent testified at hearing that she was responsible for costs (1/15/2021 Tr. at 9). On or about March 23, 2021, JDC timely filed objections to the JHB recommended decision.

II

SUMMARY OF ARGUMENT

"Don't interfere with anything in the Constitution. That must be maintained, for it is the only safeguard of our liberties."[7] Both the federal and state constitutions guarantee every citizen the right to life, liberty and property. No one is above the law -- not even a family court judge. A non-lawyer was able to discern what a family court judge with decades of legal experience couldn't – that she violated his constitutional rights against unlawful search and seizure and those involving due process.

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[6] The JHB appears to have confused the Goldston decision with *In the Matter of Williamson*, Supreme Court No. 20-0654 and JIC Complaint No. 57-2020, which was heard the same morning and where the parties agreed there were no costs associated with the case.

[7] Abraham Lincoln uttered those words in a speech he gave in Kalamazoo, Michigan in 1856.

Nothing trumps the constitution. There is absolutely no rule, statute or case law that gives a family court judge the right to enter anyone's home without express permission to search for items that a litigant failed to turn over in a divorce case. Permission must be knowing, voluntary and intelligent. If it isn't, a family court judge cannot enter. There is nothing in the West Virginia Code or the rules governing family courts that gives a judge the authority to conduct a home view. Family court judges cannot conduct jury views as part of a contempt proceeding. In order to effectuate equitable distribution through the contempt powers afforded a family court judge, the jurist must first give the contemnor the opportunity to purge himself of his contumacious behavior.

By going into Matt Gibson's home without permission, Respondent engaged in an unlawful search and seizure and must be held accountable. The JIC correctly charged Respondent with violations of the CJC. JIC/JDC Counsel and Respondent have entered into a binding agreement. Respondent in writing and in open court has admitted to the Code violations contained in the Formal Statement of Charges.

The hardest thing a body can do is to police its own, but it must be done. Otherwise, the judiciary lacks independence, impartiality and integrity. Respondent engaged in serious violations of the CJC and therefore must be censured and fined $5,000.00 for her misconduct and ordered to pay the costs of the proceeding.

III

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In a March 25, 2021 Order, the State Supreme Court stated that the "matter is set for oral argument under Rule 19 of the Rules of Appellate Procedure" on Wednesday, September 15, 2021.

IV.

ARGUMENT

A. JUDGE STOTLER ERRED IN NOT DISQUALIFYING HIMSELF FROM THE MATTER AND SHOULD BE UPON ANY REMAND TO THE JHB.

Rule 3.10 of the Rules of Judicial Disciplinary Procedure ("RJDP") governs disqualification of JHB members and provides in part that "[b]oard members shall disqualify themselves in any proceeding in which a judge, similarly situated, would be required to disqualify himself or herself." CJC Rule 2.11(A)(1) states that:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonable be questioned including but not limited to the following circumstances: (1) [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

CJC Rule 2.11(C) makes clear that disqualifications pursuant to Rule 2.11(A)(1) are mandatory when it states:

> A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1) may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider outside the presence of the judge and court personnel, whether to waive disqualification. If following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding.

Comment [2] to Rule 2.11 notes that "[a] judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed." Comment 5 states that "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."

In *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994), the State Supreme Court considered whether the circuit court was correct in holding that a search warrant issued by

a magistrate was void because the magistrate was married to the Chief of Police and one of his officers had obtained the warrant. The Court held that in any criminal matter where the magistrate's spouse was involved the magistrate would be disqualified from hearing that matter. The Court declined to extend a *per se* rule to other members of the police force. The fact that the magistrate's spouse was the chief of police of a small agency did not automatically disqualify the magistrate who could be otherwise neutral and detached from issuing a warrant sought by another member of the police force.

In *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 459 S.E.2d 374 (1995), the Court held that a judge should disqualify himself or herself from any proceeding in which his impartiality might reasonably be questioned. The Court noted that the avoidance of the appearance of impropriety is as important in developing public confidence in the judicial system as avoiding actual impropriety and that the judge should take appropriate action to withdraw from a case in which the judge deems himself or herself biased or prejudiced. Litigants and counsel should be able to rely on judges complying with the Code of Judicial Conduct. There is no obligation imposed on counsel to investigate the facts known by the judge which could possibly disqualify the judge. The judge has a duty to disclose any facts even if the judge does not feel that they are grounds for disqualification *sua sponte*.

Tennant also addressed the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. In so doing, the Court set forth a balancing test between the two concepts. While giving consideration to the administration of justice and the avoidance of the appearance of unfairness, a judge must also consider whether cases may be unfairly prejudiced or delayed or discontent may be created through unfounded charges of prejudice or unfairness made against the judge. The Court noted that the standard for recusal is an objective one. Facts should

be viewed as they appear to the well-informed, thoughtful and objective observer rather than the hypersensitive, cynical and suspicious person.

Words matter and the context in which they are stated by a judge can warrant disqualification. In *Judith R. v. Hey*, 185 W. Va. 117, 405 S.E.2d 447 (1990), *superseded on other grounds by statute* in *Lucas v. Lucas*, 215 W. Va. 1, 592 S.E.2d 646 (2003), the State Supreme Court disqualified a judge on remand in a child custody case in which he made adverse comments on national television about petitioner's reputation, character, and motivations and in the joint answer submitted by the respondent and he to the petition for writ of mandamus.[8]

Of import was that fact that in the joint answer the judge relied on facts not in evidence to make the statements in question. The Court stated:

> These are the types of issues that should properly be heard and considered in an evidentiary setting, but which the circuit court apparently accepted and alleged in his response without ever having heard or even reviewed any evidence relating thereto. It is obvious that Judge Hey has exceeded the role he could properly take in defending his ruling and is acting in his response as a **partisan.**

Id. at 123, 405 S.E.2d at 453 (emphasis added). In disqualifying the trial judge, the Court stated:

> Judge Hey's acceptance of facts not in the record, together with the scurrilous aspersions he casts upon the petitioner's character both in his response to the petition and on the public airways, **goes far beyond the acceptable realm of comment as to the law or judicial philosophy. Although a judge shares a community of interest with a party in a proceeding before him in defending his jurisdiction and authority when the other party seeks to limit such authority in a prohibition action, that community of interest is strictly limited to the issue of whether the judge exceeded his legitimate powers in making the ruling of which the party complains. A judge who demonstrates a bias and prejudice against the other party on the underlying issues will be precluded from presiding over the case upon remand.** We find that Judge Hey has **departed from his neutral role** on the underlying case. Therefore, upon remand, we direct the court administrator of the Thirteenth Judicial Circuit to assign this

[8] *But see Judicial Inquiry Cmm'n v. McGraw,* 171 W. Va. 441, 299 S.E.2d 872 (1983) (court found that a public expression of a judge as to a legal issue does not automatically require his later disqualification when the issue is presented to him in a specific case. More specifically, the Court found that a judge's statements regarding the judiciary's independent budget-making power made in advance of a mandamus action regarding the constitutional independence of the judicial budget did not warrant judge's disqualification on the grounds of lack of impartiality. Unlike *Hey, Sanders* or the instant matter , the comments in *McGraw* were not made during the pendency of the matter, were not specifically about the matter in question, and were not made at a time when all the evidence had not been submitted.

case to another judge in the circuit.

Id. at 124, 405 S.E.2d at 454 (emphasis added).

This concept was again reinforced in *State v. Sanders,* 209 W. Va. 367, 549 S.E.2d 40 (2001) where a trial judge was disqualified on remand of a robbery case where jurist told defendant if he pleaded guilty he would sentence him to thirty years in prison but if he went to trial and was convicted he would receive a 40-year sentence. In removing the judge, the Court found that his statement clearly violated Rule 11(e)(1) of the West Virginia Rules of Criminal Procedure. The Court stated:

> Rule 11(e)(1) prohibits absolutely a trial court from all forms of judicial participation in or interference with the plea negotiation process. . . . As we explained . . .[t]here are . . . good reasons for the rule admitting of no exceptions. First and foremost, it serves to diminish the possibility of judicial coercion of a guilty plea, regardless of whether the coercion would cause an involuntary, unconstitutional plea. **Second, such involvement is likely to impair the trial court's impartiality. A judge who suggests or encourages a particular plea bargain may feel a personal stake in the agreement and, therefore, may resent a defendant who rejects his advice. Third, judicial participation in plea discussions creates a misleading impression of the judge's role in the proceedings. As a result of his participation, the judge is no longer a judicial officer or a neutral arbiter. Rather, he becomes or seems to become an advocate for the resolution he suggests to the defendant.** For these reasons, Rule 11(e)(1) draws a bright-line prohibiting judicial participation in plea negotiations. . . . As a consequence of the lower court's obvious violation of Rule 11(e)(1) **and the detached neutrality that it commands in the context of plea bargaining negotiations,** we are left with no alternative but to require that upon remand this case be assigned to a different judge.

Id. at 383, 549 S.E.2d at 56 (citations omitted)(emphasis added).

The leading treatise on judicial ethics is the *Judicial Conduct and Ethics* (Alfini, et al. 5th ed. 2013). Section 4.07(2) addresses judicial remarks and comments as indicative of bias or prejudice and provides:

> Remarks and comments made by a judge in the context of court proceedings ordinarily will not be considered indicative of improper bias or prejudice unless they go so far as to show that the judge has closed his or her mind about a case before all of the evidence has been presented. . . . And, as noted above, remarks

> indicating that a judge is biased against the particular claim presented in a case may, on occasion, call for disqualification. Otherwise, it is not a mark of improper bias for a judge to make comments regarding the court proceedings before him or her. . . . At any rate, so long as a judge remains open-minded enough to refrain from finally deciding a case until all of the evidence has been presented, remarks made by the judge during the course of the proceedings will not be considered as indicative of disqualifying bias or prejudice. . . .
>
> [W]hen a judge's remarks are so extreme that they show that his or her decision has been predetermined, improper bias or prejudice will be found to exist. In one case for instance, after an attorney stated that he would appeal a judge's ruling, the judge responded by saying, "Buddy boy, you're not going to get away with this. . . .I'm going to see that you lose this case big." These and other similar statements were held to indicate an impermissible personal involvement in the case, as well as an unhealthy and entirely improper concern to shield the judge's rulings from reversal on appeal. In a California case involving a claim of sexual harassment, a reviewing Court found that the trial judge had created an appearance of bias by repeatedly making statements that conveyed the sense that he considered sexual harassment cases to be "detrimental to everyone concerned" and a misuse of the judicial system.

Id. at 4-17 to 4-19 (citations omitted).

Based upon the foregoing, Judge Stotler's comment and actions are an extreme example of bias in favor of the Respondent and against the JDC. In an agreed upon case, he called in to question the JIC's right to even bring charges. The comments were specific in reference to the case. Yet, they were also very personal to him. Most importantly, the comments were made before all of the evidence had been submitted. While the case was still pending before this Court, Judge Stotler, a member of the JHB, sent a public letter to the Justices, members of the WV Legislature and to someone who submitted it to the West Virginia Record commenting on Respondent's case and the JDC's handling of the same in violation of CJC Rule 2.10. The comments and conduct when taken together clearly indicate that Judge Stotler's mind was already made up before he entered the courtroom. Because of this Judge Stotler erred when he refused to disqualify himself from presiding over this case. This Court must disqualify the Judge should the matter be remanded back to the JHB for further action/consideration.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE BINDING ON THE JHB AND THE COURT AND ONLY THE RECOMMENDED SANCTION IS SUBJECT TO CHANGE.

This Court is the final arbiter of judicial ethics in West Virginia. *In the Matter of Callaghan*, 238 W. Va. 495, 796 S.E.2d 604 (2017). The longstanding rule is that the Court will make an independent evaluation of the record and recommendations of the JHB. *Id.* The review is *de novo*. *Id. See also Judicial Inquiry Commission v. Dostert,* 165 W. Va. 233, 271 S.E.2d 427 (1980). Included "within this independent evaluation is the right to accept or reject the disciplinary sanction recommended by the Board." *In the Matter of Crislip,* 182 W.Va. 637, 638, 391 S.E.2d 84, 85 (1990),

The Court will generally defer to the factual findings of the JHB unless there is some apparent irregularity in the proceedings, or the charged misconduct is especially serious. *In the Matter of Baughman*, 182 W. Va. 55, 386 S.E.2d 910 (1989). In *In the Matter of Browning*, 192 W.Va. 231, 234, n. 4, 452 S.E.2d 34, 37, n. 4 (1996), the Court stated "that substantial consideration should be given to the Hearing Board's findings of fact. This consideration does not mean that this Court is foreclosed from making an independent assessment of the record, but it does mean that absent a showing of some mistake or arbitrary assessment, findings of fact are to be given substantial weight."

In *Starcher, supra,* judicial disciplinary proceedings were brought against a circuit judge who ran for a seat on the Supreme Court. During the campaign, the judge authored, typed, signed and personally sent a letter to individuals involved with an endorsement committee asking the entity to endorse him. The letter went on to ask the group not to support his opponent stating:

> The candidate that your . . . Committee endorsed may be a fine gentleman, but he is also a lawyer who had made his living on the backs of labor and who finagled the endorsement through a political deal. Enclosed is a copy of a page from Martindale-Hubbell, a rich lawyer's advertising book. Look at the companies my

> opponent lists as his clients. Do you really believe that a man who has worked for those companies will provide a level playing field for labor? My opponent is a lawyer who has represented asbestos companies and joined in asking for delays in the process of asbestos-injured workers' cases while I have steadfastly moved nearly 20,000 of these cases through court in order that injured workers can receive compensation.

Id. at 59, 501 S.E.2d 776. Respondent was charged with violations of Canons 5A(3)(A), 5A(3)(d)(i) and II and 5C(2) of the former Code of Judicial Conduct.

Like the instant case, the parties in *Starcher* entered into stipulations of fact which were entered into the record by the JHB. Like this case, the *Starcher* JHB did not make any findings of fact or conclusions of law. However, the JHB in this case by implication set forth the findings and conclusions contained in the Goldson formal statement of charges. The *Starcher* JHB only found that the judge violated 5C(2) and recommended an admonishment. Respondent objected to the recommended decision. In its opinion upholding the admonishment, the Court stated:

> "Stipulations or agreements made in open court by the parties in the trial of a case and acted upon are binding and a judgment found thereon will not be reversed." . . . Where facts are stipulated, they are deemed established as full as if determined by the [trier of facts]. A stipulation is a judicial admission. As such, it is binding in every sense, preventing the party who makes if from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact. . . . Having entered into stipulations of fact, the respondent [Starcher] is bound by them. Stipulations of fact are sufficient to prove facts not only in cases where the burden of proof is by preponderance of the evidence, but also where there is a heightened burden of proof.

Id. at 61, 501 S.E.2d 778. The Court also stated:

> [I]t is clear that a party who stipulates facts is bound by those stipulations, that the party with the burden of proof is relieved of the duty of producing evidence to prove the facts so stipulated and that the facts stipulated are considered to have been proven to the requisite standard of proof, whether the burden of proof be by a preponderance of the evidence, by clear and convincing evidence or beyond a reasonable doubt. These purposes seem to be at a minimum, the reasons for entering into stipulations of fact. There would be very little point in parties entering into and a tribunal accepting stipulations of fact if the party without the burden of proof could claim that the party with the burden of proof failed to meet the burden.

> The party with the burden of proof would be required to prove that which has already been stipulated, defeating the very purpose of the stipulations.
>
> The standard of proof . . . is by clear and convincing evidence. The parties were aware that the Judicial Investigation Commission bore the burden of proof in this action. The parties stipulated the relevant facts with knowledge of the standard of proof, either actual or construction. The Court is convinced that the stipulation entered into by the respondent and the Judicial Investigation Commission constitutes proof of the stipulated facts by clear and convincing evidence.

Id. at 62-63, 501 S.E.2d 779-780.

In this case, the findings of fact and conclusions of law are binding. Respondent is a long time lawyer and judge who deals with agreements on a daily basis in Family Court. Respondent reviewed and suggested changes to the Formal Statement of Charges before they were filed with the State Supreme Court. Respondent and her attorney participated in the crafting of the agreement that was entered into by the parties. For example, Respondent did not want to admit to any Rule 3.1 violations so Counsel removed those from the agreement. The document very clearly refers to the *Starcher* case and informs her that the agreement is binding (Joint Exhibit No. 7 at 1). By signing the agreement, Respondent admitted all of the findings of fact and conclusions of law, or CJC Rule violations, contained in the Formal Statement of Charges.

Importantly, Respondent testified at hearing that she knowingly voluntarily and intelligently entered into the agreement (H.Tr. at 7). Instead of solely relying on the stipulated findings of fact and conclusions of law, the undersigned submitted additional evidence in support of the claims. Those findings of fact and conclusions of law were inartfully but implicitly included in the JHB recommended decision. They were also reinforced by the JHB vote in which eight of the members voted for some form of discipline and only Judge Stotler voted to dismiss.

Therefore, Respondent is bound by the findings of fact and conclusions of law contained in the Formal Statement of Charges. Since Respondent has admitted the facts contained in the Formal Statement of Charges and the rule violations she is bound to them. Accordingly, this Court must find that Respondent violated CJC Rules 1.1, 1.2, 1.3, 2.2, 2.4(B) and 2.5 of the Code of Judicial Conduct.

C. THE JHB CORRECTLY RECOGNIZED THAT "THERE WAS NO LEGAL FOUNDATION FOR CONDUCTING A JUDICIAL VIEW" BUT ERRED IN CONCLUDING THAT IT'S INHERENT AUTHORITY RELATIVE TO THE SAME IS "UNCERTAIN."

Following the January 15, 2021 hearing, the JHB asked the parties to brief a series of questions relating, in part, to judicial view, inherent authority and a series of statutes governing Family Courts. The undersigned pointed out why Respondent had no authority to conduct a home view and why it was in violation of the search and seizure and due process provisions of the State and Federal constitutions. Respondent could not adequately explain what gave her the right to enter Mr. Gibson's home other than her blanket claim that she had the inherent authority. Rather than side with long held state and federal law and the Rules governing the Family Court, the JHB "punted" the decision so to speak. The analyses set forth below demonstrate that Respondent had absolutely no right to enter Mr. Gibson's home, and by doing so she violated CJC Rules 1.1, 1.2, 1.3, 2.2, 2.4(B) and 2.5.

1. AS A LIMITED JURISDICTION COURT, THE FAMILY COURT HAS NO AUTHORITY TO CONDUCT HOME VIEWS.

W. Va. Code § 51-2A-2(e) provides:

> A family court is a court of limited jurisdiction. A family court is a court of record only for the purposes of exercising jurisdiction in the matters for which the jurisdiction of the family court is specifically authorized in this section and in chapter 48 of this code. A family court may not exercise the powers given courts of record in § 51-5-1 of this code or exercise any other powers provided for courts of record in this code unless specifically

> authorized by the Legislature. A family court judge is not a "judge of any court of record" or a "judge of a court of record" as the terms are defined and used in § 51-9-1 et seq of this code.

"Limited jurisdiction" is defined as "[j]urisdiction that is confined to a particular type of case or that may be exercised only under statutory limits and prescriptions." *State ex rel. Silver v. Wilkes*, 213 W.Va. 692,696, 584 S.E.2d 548, 552 (2003) citing *Black's Law Dictionary* 856 (7th ed.1999). The power of family courts to exercise jurisdiction over various matters is narrowly prescribed by the Legislature. "The jurisdiction of family courts is limited to only those matters specifically authorized by the Legislature. . . . " Syl. pt. 5, in part, *Lindsie D.L. v. Richard W.S.*, 214 W.Va. 750, 591 S.E.2d 308 (2003). *See also Deitz v. Deitz,* 222 W.Va. 46, 659 S.E.2d 331 (2008). "Pursuant to Article VIII, §§ 6 and 16 of the West Virginia Constitution, W. Va. Code § 51–2–2 . . . and the Family Court statutes . . . , family courts are courts of limited jurisdiction and are inferior to circuit courts. Family courts are, therefore, subject to both the appellate jurisdiction and the original jurisdiction of the circuit courts in this State." Syllabus point 4, *Silver, supra,* and *Deitz, supra.*

Magistrate Courts, Circuit Courts and the State Supreme Court are constitutionally created courts. With respect to Magistrate Courts, the State Supreme Court held in Syl. Pt. 3, *State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 278 S.E.2d 624 (1981) (writ of prohibition granted against a circuit court judge who entered an administrative order wrongly controlling the discretion of the magistrates to grant or deny motions to dismiss criminal warrants issued by them) that "[t]he constitutionally created office . . . is an independent judicial office and the exercise of the power of the office is subject only to the constitution and the law." Magistrate Courts are also courts of limited record in criminal and civil cases whenever there is a jury trial or felony preliminary hearings. *See* W. Va. Code 50-5-8(e) and *West Virginia Rules of Criminal Procedure for Magistrate Court* 5.1 and 17(d).

Circuit Courts "are courts of general jurisdiction and have power to determine all controversies that can possibly be made the subject of civil actions. Syl. Pt 3, *Silver, supra.* The State Supreme Court stated that "[w]here circuit courts have concurrent original jurisdiction with the West Virginia Supreme Court of Appeals over matters arising in family court, the preferred court of first resort is the circuit Court." Syl. Pt 5, *Silver, supra.* In a concurrence. then Chief Justice Margaret Workman noted that circuit courts are "invested with general jurisdiction that provides expansive authority to resolve myriad controversies brought before them." *Huston v. Mercedes-Benz,* 227 W. Va. 515, 525, 711 S.E.2d 585, 595 (2011) *quoting Thompson v. City of Atlantic City*, 190 N.J. 359, 378-79, 921 A.2d 427, 438-39 (2007). Importantly, circuit courts are the only general jurisdiction trial courts of record.

The instant case is about a family court judge who violated the Code of Judicial Conduct. It is not about a magistrate or a circuit court judge. There is no statute, rule or case law that allows a judge to conduct a home view in a contempt proceeding. Respondent could provide none, the family court judge representatives to the JIC and the JHB could provide none, and the undersigned could find none. That is because none exists. As such, the family court has no independent authority to conduct a home view and Respondent violated the Code of Judicial Conduct by exceeding her authority. If family court judges want to conduct home visits, then they should have the legislature enact a statute or the State Supreme Court adopt a rule that gives them the authority to take such action.

2. THE FAMILY COURT DOES NOT HAVE THE INHERENT AUTHORITY TO CONDUCT A HOME VIEW.

The inherent power of the judiciary is not unfettered and is generally limited to matters that are reasonably necessary for proper functioning. *State ex rel. Lambert v. Stephens*, 200 W.Va. 802, 490 S.E.2d 891 (1997). The judiciary must be leery of overstepping its boundaries and

violating the separation of powers doctrine by encroaching upon legislative and executive affairs. *Id.* In *Lambert*, a circuit judge held a county commission president and a sheriff in civil contempt for violating its general order designating a parking area behind the Court solely for use by magistrate court personnel. *Id.* The order specifically provided that contemnors could purge themselves of contempt by restoring the area to its original condition. The president and the sheriff filed a petition for writ of habeas corpus. The State Supreme denied the writ noting that the Constitution explicitly vests the judiciary with the control over its own administrative business in order to maintain independence. The Court also stated in three syllabus points:

> 3. Courts have inherent authority to require necessary resources, such as sufficient funds for operating expenses, work space, parking space, supplies, and other material items. In order for a court to invoke use of its inherent power to require resources the court must demonstrate that such resources are reasonably necessary for the performance of its responsibilities in the administration of justice.
> 4. It is the constitutional obligation of the judiciary to protect its own proper constitutional authority by upholding the independence of the judiciary.
> 5. A court may use the legal resources available to it to defend those interests it is constitutionally bound to protect, including, but not limited to ex parte orders in necessary circumstances in administrative matters within the court's inherent authority.

The *Lambert* Court also cited *Anderson County Quarterly Court v. Judges*, 579 S.W.2d 875, 879 (Tenn.Ct.App.1978) ("However broad and justifiable the use of inherent powers may be, it is not a license for unwarranted flexing of the judicial power. The generally recognized standard for applying the inherent powers doctrine requires its use to be reasonable and necessary"). The *Lambert* Court ascribed to the principle that there are three separate and distinct equal branches of government—legislative, executive, and judicial. It also stated that no one branch shall exercise the powers properly belonging to either of the others.

In *State ex rel. Farley v. Spaulding*, 203 W. Va. 275, 507 S.E.2d 376 (1998), a sheriff petitioned for a writ of prohibition after a circuit court judge entered administrative orders issued

by the county commission designating civilian security officers and giving them the power to act as court bailiffs. *Id.* The Court found that the county commission had the authority to hire court security personnel, but the judge lacked the power to authorize court marshals to serve as bailiffs. *Id.* The Court held in the following syllabus points:

> 5. The sheriff, though an important law enforcement officer, does not have the complete or the exclusive control of the internal police affairs of the county. By virtue of [Article IX, Section 11 of the West Virginia Constitution], the county court has the authority to superintend and administer, subject to such regulations as may be prescribed by law, the police affairs of the county.
> 6. A county commission has the authority to employ individuals to perform security functions for the county judiciary, but this authority is limited insofar as it cannot properly be exercised in a manner which impairs and supplants the power and duty of the county sheriff . . . .
> 7. The judge . . . has the inherent administrative power to designate and authorize persons to perform security services necessary to the safe and efficient operation of the county judiciary, provided that such administrative action does not impair or supplant the power and responsibility of the county sheriff to furnish deputy sheriffs to serve as court bailiffs. . . .

In *Shields v. Romine*, 122 W. Va. 639, 13 S.E.2d 16 (1940), the State Supreme Court tackled W. Va. Code § 6-6-7(removal from office). The Court created three new syllabus points:

> 1. A new method of procedure provided by statute must ordinarily be strictly pursued.
> 2. Procedural statutes will be construed, if possible, in harmony with other recognized procedure.
> 3. A court "has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.

The Court has also addressed the ability of judges to sanction misconduct, which includes the authority to enter default judgment orders in appropriate circumstances. In Syl. pts 1 and 2 of *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996), the Court held:

> Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in

> controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct.
>
> In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

In *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders,* 226 W.Va. 103, 697 S.E.2d 139 (2010), the State Supreme Court said that imposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party.

In Syl. Pt. 4 of *Aaron, supra,* this Court stated that "upon motion of a party, a family court, by its express authority under W. Va. Code § 51-2A-7(a), may disqualify a lawyer from a case . . . where the conflict is such as to clearly call in question the fair or efficient administration of justice." The Court recognized that per W. Va. Code §§ 51-2A-2(e) and (a)(1, 15) the Family Court is a court of limited jurisdiction and can only exercise jurisdiction over actions for divorce and all proceedings for property distribution. The Court further identified that a Family Court has the authority to discipline attorneys by virtue of W. Va. Code § 51-2A-7(a)(5). However, in the instant case there is no recognized authority for conducting a home view. The only means to recover property is through the power of contempt.

Based upon the foregoing, the family court does not have the inherent authority to conduct a home view absent consent of the parties. Moreover, this was not a home view in the traditional

sense. It was an unreasonable search and seizure. Search and seizure is an executive branch function. Therefore, Respondent exceeded her authority and in doing so repeatedly violated the Code of Judicial Conduct. On the other hand, the contempt provisions gave Respondent appropriate remedies, but she ignored them. She could have found Mr. Gibson in contempt after hearing all of the evidence and given him an opportunity to purge himself of his contumacious behavior. Failing that she could have issued some type of order that allowed the Sheriff's Office to go in and retrieve any items.

3. RESPONDENT VIOLATED MR. GIBSON'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AGAINST UNLAWFUL SEARCH AND SEIZURE.

A man's home is his castle and he has a right to a reasonable expectation of privacy therein. *See State v. Peacher,* 167 W. Va. 540, 280 S.E.2d 559 (1981); and *State v. Hambrick*, 177 W. Va. 26, 350 S.E.2d 537 (1986). This right is guaranteed by the 4th Amendment to the United States Constitution which provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things seized.

Article III, § 6, to the West Virginia Constitution is virtually identical in meaning to the 4th Amendment and states:

> The rights of the citizens to be secure in their houses, persons, papers, and effects against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

The Court has repeatedly said that "searches conducted outside the judicia process, without prior approval by a judge or a magistrate" are *per se* unreasonable under the search and seizure amendments to the state and federal constitution subject to a few well-defined exceptions which

are "jealously and carefully drawn." The Court also stated that "there must be a showing by those who seek exemption that the exigencies of the situation made the course imperative." *State v. Deem,* ___ W. Va. ___, 849 S.E.2d 918 (2020); *State v. Farley*, 167 W. Va. 620, 280 S.E.2d 234 (1981); and *State v. Choat,* 178 W. Va. 607, 363 S.E.2d 493 (1987). In other words, a warrant is required before a home may be searched absent any exception.

Exceptions include but are not limited to automobile in motion, searches made in hot pursuit, searches around the area where an arrest is made, things that are obvious to the senses, property that has been abandoned, voluntary surrender of evidence and consent. *State v. Angel,* 154 W. Va. 615, 177 S.E.2d 562 (1970); *State v. Duvernoy*, 156 W. Va. 578, 195 S.E.2d 631 (1973); and *State v. Garrett*, 182 W. Va. 166, 386 S.E.2d 823 (1989). The burden of proof rests on the party moving for the warrantless search to prove by a preponderance of evidence that it falls within an authorized exception. *State* v. *Moore*, 165 W. Va. 837, 272 S.E.2d 804 (1980), *overruled on other grounds in State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991).

The 4th Amendment also applies to civil cases. *See The Emergency Doctrine, Civil Search and Seizure and the Fourth Amendment*, 43 Fordham Law Review 571 (1972); *The Civil and Criminal Methodologies of the Fourth Amendment,* 93 Yale Law Journal 1126 (1984); and *Applicability of the Fourth Amendment in Civil Cases*, 1963 Duke Law Review 473 (1963). In 1967, the United States Supreme Court held that administrative inspections to detect building code violations must be undertaken pursuant to a warrant if the occupant objects to the search. *See Camara v. Municipal Court,* 387 U.S. 523 (1967) (search involving home) and *See v. City of Seattle,* 387 U.S. 541 (1967) (search involving warehouse). In *Camara*, the Court stated:

> We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. . . .But we cannot agree that the Fourth Amendment interests at state in these inspection cases are merely 'peripheral.' It is surely

> anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

Camara at 530.

In *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), the United States Supreme Court invalidated a city ordinance that gave the police the authority to inspect hotel registration records without prior notice. Those who failed to make the records available can be charged with a misdemeanor offense and face up to six months incarceration if convicted. *Id.* The Court called the inspections "administrative searches" and held "that a hotel owner must be afforded an opportunity to have a neutral decisionmaker review an officer's demand to search the registry before he or she faces any penalties for failing to comply" *Id.* at 2453. In reaching this conclusion, the Court noted that it had only recognized four industries as "having such a history of government oversight that no reasonable expectation of privacy could exist" – liquor, firearms, mining and auto junkyards. *Id.* The Court stated that the "clear import . . . is that the closely regulated industry . . . is the exception." *Id.* at 2455. The Court distinguished hotel operations from the foregoing because "there was nothing inherent in the operation of hotels [that] poses a clear and significant risk to the public welfare." *Id.* The Court also said that in any event the ordinance would be considered unreasonable under the 4th Amendment unless it satisfied three additional criteria:

> (1) [T]here must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.

Id. at 2456.

In a somewhat unique case for its time, the United States Supreme Court applied a general test of reasonableness to the question of whether a government benefits recipient for her children

could refuse a home visit by a caseworker without risking termination of benefits. *Wyman v. James*, 400 U.S. 309 (1971). After first questioning whether such a visit constituted a search in the context of the 4th Amendment, the Court decided that even if it did, it was not unreasonable. *Id.* In reaching the conclusion, the Court looked at multiple factors including the statutory and regulatory prohibition of forcible entry or entry by false pretenses, visitation outside working hours, "snooping in the home," the public interest in the welfare of the child and expenditure of public funds, the giving of advance notice of the visit, the importance of observing the child at the actual place of residence, and whether or not the visit was conducted by police or uniformed authorities and/or whether it was related to a criminal investigation. *Id.* In determining that no issue of "constitutional magnitude was presented, the Court noted that the parent had the right to refuse the home visit, with the only consequence being the cessation of public assistance. *Id.* The Court specifically noted that the visit fell outside the 4th Amendment proscription against unreasonable search and seizures where the visit was made by a caseworker and was not permitted outside work hours and because forcible entry and snooping were prohibited. *Id.*

Meanwhile, the Pennsylvania Superior Court had to decide whether a court could order a home visit by county services during a child abuse investigation. *In re Petition to Compel Cooperation with Child Abuse Investigation,* 875 A. 2d 365 (PA 2005). At issue was a statute that required county services to make at least one home visit during a child abuse investigation. *Id.* If the home visit was refused, county services was required to petition the court to order the home visit. *Id.* The statute did not require the court to grant the petition and county services was required to establish probable cause to believe that an act of child abuse and neglect had occurred and evidence relating to the abuse would be found in the home before the visit could be ordered. *Id.*

As a matter of first impression, the Court was asked to determine whether constitutional provisions governing searches and seizures applied to the Child Protective Services Law. The Court found that they did. The Court also found that the statute as written was constitutional because it required consent. If consent was not given, it mandated a verified petition alleging facts amounting to probable cause and the judge is free to grant or deny the request. The Court found that in this case the verified petition did not contain sufficient facts to establish probable cause. The Court also addressed whether the homeowners were denied due process because the order was issued without notice and a hearing. The Court stated:

> We determine that as in a criminal matter where authorities solicit a search warrant from a magistrate, the trial court was not required under the due process clause of the Fourteenth Amendment to the United States Constitution to give appellants notice and an opportunity to be heard prior to considering the merits of [the] petition. Appellants are correct that as reflected in the court's order giving them ten days in which to comply, exigent circumstances were not alleged and there was ample time for an evidentiary hearing to occur; however, as a general matter, we hold that the court's issuance of its *ex parte* order granting the petition to compel did not violate appellants' due process rights. Particularly in the arena of child abuse/neglect and assuming probable cause for a search did exist, it would be unreasonable to direct the courts to give notice and schedule a hearing in every instance.

Id. at 379.

In *Omni Behavioral Health v. Nebraska Foster Care Review Board*, 764 N.W.2d 398 (NE 2009), the Nebraska Supreme Court looked at whether warrantless home visits by the State Review Board pursuant to the Foster Care Review Act would violate the constitutional rights of operators of foster care facilities throughout the state. *Id.* The Court held that a general standard of reasonableness applied to home visits by the State Board. The Court also noted that such visits in the absence of regulations did not necessarily violate operators' constitutional search and seizure rights. *Id.* The Court stated:

> The State, as the legal custodian of [foster] children, has an obligation to see that they are receiving proper care, and foster care providers have an obligation to the children and the State to provide such care. The Legislature has empowered the State Board and its designated local boards with oversight responsibilities regarding foster care placements, including specific authority to conduct home visits. On this record, it is uncertain whether such visits would constitute a search or seizure with the meaning of the Fourth Amendment or article I, § 7 of the Nebraska Constitution. The visit is not for the purpose of law enforcement, and the record indicates that in the past, the State Board has complied with restrictions on visits imposed by foster care providers.
>
> To the extent constitutional rights may be implicated, . . . we agree with the district court that the visits should be judged under a general standard of reasonableness which courts have applied when special [governmental] needs, beyond the normal need for law enforcement, justify a departure from the requirement of individualized suspicion, warrants, and probable cause under traditional Fourth Amendment analysis. . . . Here, the State has a special need to visit foster care facilities arising from its obligation to see that children entrusted to its legal custody are receiving proper and appropriate foster care from those who contract to provide such care. Thus, we conclude that any claim that a home visit by the State Board infringes upon Fourth Amendment rights, or corresponding rights under the Nebraska Constitution, must be judged by a standard of reasonableness taking into consideration all relevant circumstances. Normally, this would be an issue of fact.
>
> The Foster Care Review Act permits but does not require the State Board to promulgate regulations. The absence of specific regulations governing home visits is one factor that a court could consider in determining whether a specific visit was constitutionally unreasonable but is not the exclusive or necessarily the dispositive factor. For example, the absence of regulations defining the permissible scope and circumstances of home visits might be entitled to significant weight in determining the reasonableness of an unannounced visit conducted in the middle of the night without logical justification, but considerably less weight in the circumstances where the date, time and scope of a daytime visit are discussed in advance by the State Board and the foster care provider. In other words, the absence of specific regulations governing home visits may or may not result in a particular visit's being held unreasonable and therefore unconstitutional, depending upon all of the other pertinent facts and circumstances.

Id. at 407-409.

Importantly, this Court recently addressed search and seizure in the context of a civil domestic violence emergency protective order ("EPO") in *State v. Snyder*, 2021 WL 1310670, slip op No. 19-0428 (WV 4/8/2021). Police went to defendant's home to serve the EPO which

prevented him possessing firearms and provided for their surrender to the officer serving the document. The officers interpreted the civil EPO as a search warrant permitting them to enter and search the home for weapons. Upon entering the home, the officers smelled marijuana and did a protective sweep including a pat down of the defendant and others in his home. The pat down and protective sweep yielded meth and a home growth marijuana operation. This evidence prompted law enforcement to seek an actual search warrant for defendant's home. Subsequently, the defendant was indicted on two felony counts of manufacturing a controlled substance and one count of possession with intent do deliver marijuana. Thereafter, defendant filed a motion to suppress all the evidence derived from the search of his home arguing that the search violated his 4th Amendment rights. The trial court denied the motion and defendant pled guilty to manufacturing while preserving his right to appeal the 4th Amendment issue.

On April 8, 2021, this Court reversed and remanded the lower court's ruling stating in Syllabus Pt. 3:

> The authority granted to law enforcement officers serving domestic violence emergency protective orders to accept the surrender of firearms under a civil proceeding, West Virginia Code §48-27-403 (2006) is not equivalent to search and seize authority under search warrants in criminal matters. So an officer's use of a domestic violence emergency protective order as a *de facto* search warrant infringes on Fourth Amendment protections unless some other exception to the warrant requirement applies to validate the search.

The Court also noted:

> This statutory framework for EPOs is insufficient to justify a valid search and seizure under the guise of a search warrant. The most obvious problem is the stark and crucial difference between a statutory requirement that the order prohibit possession of firearms and a statutory authorization to order a search and seizure of firearms. . . . The process of obtaining an EPO is a civil proceeding, not a criminal one. With that distinction comes the loss of procedural safeguards both implicitly and explicitly required of criminal proceedings, a different standard of proof, and the potential for abuse of the EPO process.

Id. at 5. Those safeguards include a request from a law enforcement officer or an attorney for the state and a sworn affidavit setting forth the facts establishing grounds for the issuance of the warrant.

The Court also recognized that Rule 41 of the West Virginia Rules of Criminal Procedure only gives a circuit judge or a magistrate the authority to issue a search warrant in Syllabus Pt. 6 when it stated:

> "Search conducted outside the judicial process, without prior approval by judge or magistrate, are per se, unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution – subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative."

In applying the foregoing to the instant case, it is fundamentally clear that Respondent violated Mr. Gibson's state and federal constitutional rights against unlawful search and seizure by even the more liberal standard of reasonableness. Contrary to Respondent's assertion it was not a "home view." It was a search and seizure. Respondent went to the home with the idea that she was going to find the disputed items, take them and turn them over to the wife. Thus, it was a search and seizure and not a view. A view implies that you go and simply look but you do not take. There was a taking. Hence there was a search and a seizure.

The search was unreasonable. There was no statute, rule or case that gave the Respondent the authority to go into Mr. Gibson's home, search it, and seize the items in question. Like the Pennsylvania case, there was no consent, so a court order or a warrant was needed to enter the home. There was none. The entry was forceable in that Respondent threatened incarceration in order to gain entry. They snooped through the home. There was no advance notice of the visit and law enforcement was present in the house. Not only was the bailiff there from the beginning but additional officers eventually came to the scene. The only public interest in going to the home

is to preserve the property. However, public interest is already secured through the less invasive civil remedies afforded in the contempt statute which were readily available but not utilized by Respondent in this case. Accordingly, Respondent violated Mr. Gibson's state and federal constitutional rights against search and seizure. By doing so, she violated the Code of Judicial Conduct as set for in the Formal Statement of Charges and as admitted by her at the January 15, 2021 hearing.

a. Respondent Never Voluntarily Consented to his Home Being Searched.

Where a person voluntarily and knowingly consents to a search of his premises, the search may be conducted without a search warrant. *State v. Hambrick, supra.* Whether consent is voluntary or is the result of duress or coercion, express or implied, is a question of fact that must be determined by a totality of the circumstances. *Id.* Mere submission to colorable authority is insufficient to validate a consent search or to legitimatize the fruits of the search. *State v. Williams,* 162 W. Va. 309, 249 S.E.2d 758 (1978).

Where the party relies upon consent to justify the lawfulness of a search, it has the burden of proving that consent was, in fact, freely and voluntarily given. *Id.* Importantly, the consenting person must have the authority to consent. *Id.* Consent to search may be expressly given. Consent to search may also be implied by the circumstances surrounding the search, by the person's prior actions or agreements, or by the person's failure to object to the search; thus, a search may be lawful even if the person giving consent does not actually recite the phrase: "You have my permission to search." *State v. Flippo,* 212 W. Va. 560, 575 S.E.2d 170 (2002).

Consent is the key. Respondent never obtained the consent of Mr. Gibson to enter the house and search. She never asked and Mr. Gibson never said, "You have my permission to search." She never even told Respondent why they were going to the house. Mr. Gibson expressly

denied entry to his house. He told Respondent that no one was going in his house without a search warrant. Respondent was only able to gain entrance to the home and the search when she threatened jail. Therefore, no valid consent was given and, it is evident that Respondent engaged in an unlawful search and seizure of Respondent's home.

4. RESPONDENT DENIED MR. GIBSON DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

The 14th Amendment to the United States Constitution states that "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Article III, § 10 of the West Virginia Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers. In Syl. pt., *Crone v. Crone*, 180 W. Va. 184, 375 S.E.2d 816 (1988), the State Supreme Court stated that procedure in the courts of the land, requires both notice and the right to be heard.

Crone involved a divorce case where the wife was awarded custody of the minor child and the husbanded was granted visitation at "reasonable and seasonable times." *Id.* at 185, 375 S.E.2d at 817. When the wife refused to allow the husband to visit during two weeks of military leave from Korea, the husband's attorney requested clarification of the visitation order. The wife's attorney responded by letter. *Id.* The Court then entered an order giving the husband "exclusive visitation privileges for a period of time equal to one-half of his military leave. *Id.* The wife then filed a motion for reconsideration asserting that "the modification of the divorce decree without affording her notice and an opportunity to be heard violated her due process rights." *Id.* By letter, the Court denied the motion. *Id.* In reversing the lower court, the State Supreme Court stated:

> W. Va. Code § 48-2-15(e) vests a circuit court granting a divorce with continuing jurisdiction to modify its original order as to alimony, custody and child support as the alter circumstances of the parties and the needs of the children may require. . .

> . Although not specifically included within the statute, we have recognized that noncustodial visitation is an important natural parental right closely related to the issue of custody and meriting the same due process protections. . . . Applying these principles to the case at bar, we conclude that the circuit court violated [the wife's] due process rights in failing to afford her notice and an opportunity to be heard prior to modifying the divorce decree granting [the husband] exclusive visitation. The summary disposition of the matter is particularly egregious in view of the fact that [the wife] produced some evidence upon her motion for reconsideration indicating that such visitation might not be in the child's best interests.

Id. at 185-186, 375 S.E.2d at 817-818.

The Supreme Court reinforced due process rights in divorce cases in *Henry v. Johnson*, 192 W. Va. 82, 450 S.E.2d 779 (1994). The wife filed a motion seeking custody of the couple's minor children. A temporary hearing was held which consisted of the presentation of oral and documentary evidence by way of proffer only. The husband and wife were not allowed to testify. Subsequently, an order was entered giving the wife custody of two of the children and the husband was granted custody of the third child who suffered from epilepsy. There was no explicit finding that the wife was an unfit mother. The order also failed mention a DVP order issued against the husband. The wife filed petition for writ of prohibition in circuit court. The court refused to issue a rule to show cause. The wife then appealed the decision to the Supreme Court alleging in part that he due process rights were violated by the Family Law Master's failure to allow her to be heard during the temporary hearing in her divorce case.

The State Supreme Court sided with the wife stating:

> Divorce and custody proceedings are subject to traditional standards of procedural and substantive due process. . . .Although both parties had notice in this case, there is insufficient evidence in the record to conclude whether [the wife] had a meaningful opportunity to be heard by way of proffer. The simple fact that the evidence was by proffer, and not presented in a full evidentiary hearing, does not automatically negate a finding that due process was observed. . . . If sufficient evidence had been proffered, them [the wife's] due process rights would have been vindicated. However, this is a temporary custody proceeding involving the separation of an epileptic child from her two siblings and from the mother who was her primary

> caretaker from birth. This is not a hearing on the disposition of an inanimate object such as a television, or a set of golf clubs. Under the circumstances of this case, we conclude that a more elaborate evidentiary hearing is warranted.

Id. at 84, 450 S.E.2d at 781.

With respect to equal protection, the State Supreme Court has stated:

> Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article II of the West Virginia Constitution, which is our equal protection clause.

Syl. pt. 1, *State ex rel. Boan v. Richardson,* 198 W. Va. 545, 482 S.E.2d 162 (1996).

In *Boan*, a workers' compensation claimant sought a writ of prohibition to prevent enforcement of a statute in so far as it required reduction of permanent total disability benefits paid to him by reason of his receipt of old age insurance benefits under the Social Security Act. *Id.* The State Supreme Court granted the writ. *Id.* The Court found that the classification of old age social security recipients created by the statute violated equal protection because it bore no reasonable relationship to the proper governmental purpose of avoiding duplication of benefits. *Id.* The Court also held that the statute did not treat all persons within the class of old age social security recipients' equally. *Id.*

In *Anderson v. City of Hinton,* 161 W. Va. 505, 242 S.E.2d 707 (1978), a plaintiff filed a personal injury action against the City of Hinton. The circuit court dismissed the action on the ground that the plaintiff failed to comply with a statute requiring that notice of the claim against a municipality must be filed within 30 days after the cause of action accrues. *Id.* The plaintiff appealed. The State Supreme Court held that notice of the claim violated both the due process and equal protection clauses of the State and Federal Constitutions. *Id.* In reaching this conclusion the

Court relied on its decision in *O'Neil and Hendrickson v. City of Parkersburg,* 160 W. Va. 694, 237 S.E.2d 504 (1977). In so holding, the Court stated:

> An examination of the foregoing authorities reveals many injustices resulting from the application of notice of claim provisions. Also, apparent in the opinions is a reluctance by the courts to strictly apply such provisions. The rationalization by many courts in refusing to require strict compliance shows that there is no sanctity to notice of claims provisions.

Id. at 698-699, 237 S.E.2d at 507. With respect to the West Virginia statute, the Court said:

> [It] arbitrarily divides tort-feasors into two classes, thus resulting in a similar classification of the victims of such tort-feasors. First, there are private tort-feasors, to whom no notice of claim is owed; and second, there are governmental tort-feasors, to whom notice must be given. The first classification allows the victim the full period prescribed by the statute of limitations in which he may institute an action; the right of the victim of a governmental tort-feasor to sue is absolutely barred after a most unfair and short period of thirty days, should he not give the required notice during that period. Effectively imposed upon the latter is a special statute of limitations.

Id. at 699, 237 S.E.2d at 508.

Respondent violated Mr. Gibson's due process rights in two ways. First, she never let him present his case during the contempt hearing. She only heard from one witness – the wife – before suddenly deciding to go to the home. Mr. Gibson was not allowed to present his case. He was never given his opportunity to be heard or to present his witnesses. Therefore, Respondent denied him his right to be heard during the hearing. Secondly, Respondent did not afford him any opportunity to be heard about the search of his home until after the damage had already been done. She never told him in the courtroom why she was going to his house and once there, she patently ignored his right object by saying it was not timely made. Accordingly, Respondent clearly violated Mr. Gibson's right to due process.

Respondent also violated equal protection as it relates to unrepresented parties. By her own admission, Respondent's practice of going to litigant's home is designed largely to benefit

those represented by counsel. It creates two classes – represented parties who get the "benefit" of a home visit and unrepresented parties who don't. Thus, Respondent violated Respondent's right to due process and equal protection.

5. RESPONDENT DID NOT FOLLOW THE APPROPRIATE MECHANISM FOR CONTEMPT PROCEEDINGS.

The following provisions govern contempt in family court and provide in pertinent part:

W. Va. Code § 48-1-304:

> (a) Upon a verified petition for contempt, notice of hearing and hearing, if the petition alleges criminal contempt or the court informs the parties that the matter will be treated and tried as a criminal contempt, the matter shall be tried in the circuit court before a jury, unless the party charged with contempt shall knowingly and intelligently waive the right to a jury trial with the consent of the court and the other party. If the jury, or the circuit court sitting without a jury, shall find the defendant in contempt for willfully failing to comply with an order of the court made pursuant to the provisions of article three, four, five, eight, nine, eleven, twelve, fourteen or fifteen of this chapter, as charged in the petition, the court may find the person to be in criminal contempt and may commit such person to the county jail for a determinate period not to exceed six months.
>
> (b) If trial is had under the provisions of subsection (a) of this section and the court elects to treat a finding of criminal contempt as a civil contempt and the matter is not tried before a jury and the court finds the defendant in contempt for willfully failing to comply with an order of the court made pursuant to the provisions of article three, four, five, eight, nine, eleven, twelve, fourteen or fifteen of this chapter, and **if the court further finds the person has the ability to purge himself of contempt, the court shall afford the contemnor a reasonable time and method whereby he may purge himself of contempt. If the contemnor fails or refuses to purge himself of contempt, the court may confine the contemnor to the county jail for an indeterminate period not to exceed six months or until such time as the contemnor has purged himself whichever shall first occur.** If the petition alleges civil contempt, the matter shall be heard by the family court. The family court has the same power and authority as the circuit court under the provisions of this section for criminal contempt proceedings which the circuit court elects to treat as civil contempt.

(emphasis added).

W. Va. Code § 51-2A-9:

> (a) In addition to the powers of contempt established in chapter forty-eight of this code, a family court judge may:
>
> (1) Sanction persons through civil contempt proceedings when necessary to preserve and enforce the rights of private parties or to administer remedies granted by the court.
> (2) Regulate all proceedings in a hearing before the family court judge; and
> (3) Punish direct contempts that are committed in the presence of the court or that obstruct, disrupt or corrupt the proceedings of the court.
>
> (b) A family court judge may enforce compliance with his or her lawful orders with remedial or coercive sanctions designed to compensate a complainant for losses sustained and to coerce obedience for the benefit of the complainant. **Sanctions must give the contemnor an opportunity to purge himself or herself. In selecting sanctions, the court must use the least possible power adequate to the end proposed.** A person who lacks the present ability to comply with the order of the court may not be confined for a civil contempt. **Sanctions may include, but are not limited to, seizure or impoundment of property to secure compliance with a prior order. Ancillary relief may provide for an award of attorney's fees.**
>
> (c) **Upon a finding that a person is in civil contempt, the court, when otherwise appropriate and in its discretion, and as an alternative to incarceration, may place the person on work release, in a weekend jail program, in an existing community service program, in an existing day-report center program, in any other existing community corrections program or on home confinement until the person has purged himself or herself of the contempt.**

(emphasis added).

W. Va. Code § 61-5-26:

> The courts and the judges thereof may issue attachment for contempt and punish them summarily only in the following cases: (a) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice; (b) violence or threats of violence to a judge or

> officer of the court, or to a juror, witness, or party going to, attending or returning from the court, for or in respect of any act or proceeding had, or to be had, in such court; (c) misbehavior of an officer of the court, in his official character; (d) disobedience to or resistance of any officer of the court, juror, witness, or other person, to any lawful process, judgment, decree or order of the said court. No court shall, without a jury, for any such contempt as is mentioned in subdivision (a) of this section, impose a fine exceeding $50, or imprison more than ten days. But in any such case the court may impanel a jury (without an indictment or any formal pleading) to ascertain the fine or imprisonment proper to be inflicted and may give judgment according to the verdict. No court shall impose a fine for contempt, unless the defendant be present in court, or shall have been served with a rule of the court to show cause, on some certain day, and shall have failed to appear and show cause.

Contempt may be direct or indirect. Direct contempt is misconduct that occurs in the actual presence of the court. Indirect contempt is any misconduct which occurs entirely or partially outside the presence of the court. *Trecost v. Trecost*, 202 W. Va. 129, 502 S.E.2d 445 (1998). Contempt may be civil or criminal:

> Whether a contempt is classified as civil or criminal does not depend upon the act constituting such contempt because such an act may provide the basis for either a civil or criminal contempt action. Instead, whether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate. The contempt is civil where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemnor so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order. The appropriate sanction in a civil contempt case is an order that incarcerates a contemnor for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged thereby securing the immediate release of the contemnor or an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemnor to comply with the order.
>
> The contempt is criminal where the purpose to be served by imposing a sanction for contempt is to punish the contemnor for an affront to the dignity or authority of the court, or to preserve or restore order in the court or respect for the court. The appropriate sanction in a criminal contempt case is an order sentencing the contemnor to a definite term of imprisonment or an order requiring the contemnor to pay a fine in a determined amount. A rational distinction can thus be established between civil and criminal contempt. An act itself may well constitute the basis for either civil or criminal contempt, but the Court's purpose in employing the

> contempt sanction determines the classification. That an act is punished as neither wholly civil nor altogether criminal reflects an impermissible confusion or combination of purpose on the part of the sanctioning court.

State ex rel. Robinson v. Michael, 166 W. Va. 660, 670-71 276 S.E.2d 812, 818 (1981).

The Court also stated:

> The purpose of a civil contempt proceeding is to preserve or enforce the rights of a private party and to compel obedience to a court order that benefits such party. Courts which have considered the issue have held that only a party that has a right under a court order that has been violated, and who is seeking enforcement or protection of that right, may institute a civil contempt action.

Id. at 672, 276 S.E.2d at 819. In Syl. pt. of *Trecost, supra*, the Court also stated that "[a] party's private counsel is prohibited from replacing the prosecuting attorney whose duty it is to prosecute criminal contempt charges stemming from a civil suit and it makes no difference whether such private lawyer is appointed special prosecutor." Importantly, in both *Robinson* and *Trecost* the Court noted that appropriate sanctions in civil contempt cases include orders "sentencing the contemnor for an indefinite period of incarceration and specifying a reasonable way the contemnor may purge the contempt in order to obtain his or her immediate release" or "requiring the contemnor to pay a fine as a form of compensation or damages to the party aggrieved by the contemptuous conduct." *Trecost* at 132, 502 S.E.2d at 448, *quoting* Syl. pt. 3 of *Robinson, supra.*

A judge must afford parties notice and an opportunity to be heard in contempt cases. *PG&H Coal v. International Union, United Mine Workers of America*, 182 W. Va. 569, 390 S.E.2d 551 (1988) (union cannot be held in civil contempt when it was not given adequate notice of contempt charges). In civil contempt proceedings that don't involve child support arrearage, the general rule is that the burden of proof rests with the complaining party to demonstrate that the defendant is in noncompliance with a court order. *Carpenter v. Carpenter*, 227 W. Va. 214, 707 S.E.2d 41 (2011). The moving party is also required to prove that the alleged contempt prejudiced

his or her rights. *Id.* When the moving party establishes such, the burden then shifts to the nonmoving party to establish any defense he or she may have. *Id.* At the conclusion of the proceedings, either a final order or an interlocutory order approximating a final order in its nature and effect must be entered. *See Guido v. Guido* 202 W. Va. 198, 503 S.E.2d 511 (1998) (order finding divorced father in civil contempt for not paying child support pursuant to divorce decree, but which reserved imposition of a sanction was not a final appealable order).

In *Deitz, supra*, the Court noted that an "integral part of the family court's authority to enter final orders of divorce is its corresponding power to enforce those orders through contempt proceedings." *Deitz* at 54, 659 S.E.2d at 339. The Court also stated:

> When imposing sanctions for contempt, a court must afford the contemnor an opportunity to purge him/herself of the contempt. With respect to the contempt powers of family court judges, W. Va. Code § 51–2A–9(b) directs that "[s]anctions must give the contemnor an opportunity to purge himself or herself." Similarly, W. Va. Code § 48–1–304(b) requires "the court shall afford the contemnor a reasonable time and method whereby he may purge himself of contempt." Neither of these provisions, however, explains the manner in which a court should allow a contemnor to purge him/herself of contempt but instead rest such a determination in the court's sound discretion.

Id. at 58, 659 S.E.2d at 343.

The hearing involved a contempt petition. Respondent failed to hear all of the wife's evidence. She heard none of Mr. Gibson's evidence. Respondent made no findings or conclusions. She never gave Mr. Gibson an opportunity to purge himself of the contempt. She also never entered an order granting or denying the wife's contempt petition. As the State Supreme Court has repeatedly stated and Respondent clearly recognized during the March 4, 2020 hearing, "[i]t is a paramount principle of jurisprudence that a court speaks only through its orders." *In re Walter G.*, 231 W. Va. 108, 114, 743 S.E.2d 919, 925 (2013), *Legg v. Felington*, 219 W. Va. 478, 483, 637 S.E.2d 576, 581 (2006); *State v. White*, 188 W. Va. 534, n2, 425 S.E.2de 210, 212 n.2 (1992). *State ex rel. Erlwine v. Thompson*, 156 W. Va. 714, 718, 207 S.E.2d 105, 107 (1972). Without an

order finding Mr. Gibson in contempt, Respondent inappropriately went into his home, searched his house and seized the property. As such, Respondent failed to apply an appropriate statutory remedy and violated the Code of Judicial Conduct by doing so. Had, she properly applied the contempt statutes as written, she would have avoided judicial discipline.

6. THE JURY VIEW STATUTE IS NOT APPLICABLE TO THE CASE AT HAND.

W. Va. Code § 56-6-17 governs jury views and provides in its entirety:

> The jury may, in any case, at the request of either party, be taken to view the premises or place in question, or any property matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision, and in such case the judge presiding at the trial may go with the jury and control the proceedings; and in a felony case the judge and the clerk shall go with the jury and the judge shall control the proceedings, and the accused shall likewise be taken with the jury or, if under recognizance, shall attend the view and his recognizance shall be construed to require such attendance. The party making the motion, in a civil case, shall advance a sum sufficient to defray the expenses of the jury and the officers who attend them in taking the view, which expenses shall be afterwards taxed like other legal costs.

The purpose of a view is to acquaint the jury with the situation of the premises, and the location of the property, so that it may better understand the evidence and apply it to the case. *Fox v. B. & O. R.R.*, 34 W. Va. 466, 12 S.E. 757 (1890). The Court has said that a jury view cannot occur except as authorized by this statute. *State v. Henry*, 51 W. Va. 283, 41 S.E. 439 (1902). Importantly, there is no statutory authority for a trial judge trying a case in lieu of a jury to take a view. *Westover Volunteer Fire Dep't v. Barker*, 142 W. Va. 404, 95 S.E.2d 807 (1956). Barker involved a boundary line dispute. *Id.* The judge on his own volition viewed the premises without the consent of either party or the attorneys. *Id.* The judge then decided the case solely on the basis of the view. *Id.*

In reversing the decision of the trial court, the State Supreme Court noted that even where there is a view by a jury, the view alone "is insufficient of itself to justify the trial court in entering a judgement on the basis of what the jury saw on the view." *Id.* at 409, 95 S.E.2d 811. The Court also enforced this concept in *Frampton v. Consolidated Bus Lines*, 134 W. Va. 815, 836, 62 S.E.2d 126, 142 (1950), when it stated:

> [A] jury view may be considered by a jury, together with the evidence introduced by plaintiff and defendant. Clearly, in the sense that matters brought to the attention of the jury on the view of the premises, the view is evidence. **But a jury view will not serve to take from the party upon whom the burden of proof lies the duty of introducing sufficient other evidence on which the jury could properly hold that the party upon whom the burden of proof lies has sustained that burden by evidence other than the jury view.**

(emphasis added).

Based upon the foregoing, the jury view statute does not apply to a contempt hearing presided over by a judge. Once again, a view is not the same thing as a search and seizure. Therefore, the jury view statute is inapplicable to the facts of this case.

7. RESPONDENT'S CONDUCT AMOUNTS TO AN INAPPROPRIATE JUDICIAL INVESTIGATION OF THE FACTS.

CJC Rule 2.9(C) states that "[a] judge shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may be properly judicially noticed." Comment [6] to the Rule provides:

> The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic. Importantly, this provision is not intended to refer to routine court records available from the bench, as long as the records are disclosed to and subject to review by both parties.

Section 5.04 of *Judicial Conduct and Ethics* addresses factual investigations and states in part:

> Independent investigation into the facts, in which the judge plays amateur sleuth and visits the crime scene, hunts for clues, conducts experiments to test a party's

> theory of the case, etc., may not involve ex parte "communications" in the traditional sense, but can be nonetheless problematic. Thus, the Commentary on Canon 3(B)(7) of the 1990 Model Code of Judicial Conduct states that "a judge must not independently investigate facts in a case and must consider only the evidence presented. This comment sought to protect the functioning of the adversarial system, under which a judge best serves as a neutral arbiter. Independent factual investigation impairs the function of an adversarial system by allowing a judge to craft decisions on the basis of facts that may be unknown to one or both of the parties and therefore indisputable by them regardless of their accuracy or relevance. The 2007 Model Code of Judicial Conduct clarified the intended weight of the provision by elevating it to Rule 2.9(C).

Id. at 5-24.

In *Price Brothers Company v. Philadelphia Gear Corporation*, 629 F.2 444 (6th Cir. 1980), the United States Court of Appeals for the 6th Circuit took a district court judge to task for independently investigating facts in the case. In this case, plaintiff sued defendant claiming that machine components produced by them and used in the company's pipe wrapping machine failed to perform as represented. At some point, the trial judge's law clerk purportedly traveled to New York and visited the plaintiff's plant where he observed the malfunctioning pipe wrapping machine. Thereafter, the judge entered judgment in favor of the plaintiff in the amount of $125, 864.15. The defendant appealed. Chief among the allegations raised was the propriety of the judge sending his law clerk to view the subject matter of the litigation.

In sending the case back, the appellate court stated that "where a suit is to be tried without a jury, sending a law clerk to gather evidence is so destructive of the appearance of impartiality required of a presiding judge that we must remanding this case for an evidentiary hearing to determine the truth of [defendant's] allegations." *Id.* at 446. The appellate court also discussed the duty imposed on a judge to disqualify himself where his impartiality might reasonably be questioned because of personal knowledge of disputed evidentiary facts concerning the proceedings. The Court opined:

> The problem attendant to a judge having personal knowledge of the facts is that he may thereby be transformed into a witness for one party. Where the trial is to a jury, explicit rules provide some protection. If a judge is to preside, he may not testify. If he is to testify, he may not preside. A rule that merely prohibits a presiding judge from testifying in open court, however, does not ensure that the fact finder will be "free from external causes tending to disturb the exercise of deliberate and unbiased judgment," . . . where the trial is to the bench. Whether, in a bench trial, a judge can avoid an involvement destructive of impartiality where he has personal knowledge of material facts in dispute is a question that cannot be answered satisfactorily, and therefore, a judge should recuse himself in such circumstances.

Id. at 447. *See also Kennedy v. Great Atlantic & Pacific Tea Co.*, 551 F.2d 593 (5th Cir. 1977) (jury verdict where the trial court let its law clerk testify to what he saw at a curiosity-inspired private view of the scene of a slip and fall).

The Code of Judicial Conduct precludes a judge from engaging in independent investigations of cases. Respondent, on her own initiative, went to Mr. Gibson's house to conduct a search and seizure. This was an investigation not a view. As such, Respondent violated the Code of Judicial Conduct's prohibition against independent investigations. It also caused her to lose her impartiality. Lastly, as a result of her conduct, Respondent was disqualified from presiding over the case. The Rule is in place to prevent disqualification. By violating the Rule and conducting her own investigation Respondent caused her disqualification.

8. THE PRINCIPLES OF STATUTORY CONSTRUCTION NEGATE ANY CLAIM THAT RULE 4 OF THE RULES OF PRACTICE AND PROCEDURE FOR FAMILY COURT OR W.VA. CODE § 51-2A-7(a) AUTHORIZES A HOME VIEW; HOWEVER, RULE 8 OF THE RULES OF PRACTICE AND PROCEDURE FOR FAMILY COURT DOES ALLOW A JUDGE TO AUTHORIZE THE RECORDING OF SUCH A VIEW.

In Syl. pt. 1, of *White, supra*, the State Supreme Court opined:

> A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part;; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter,

> whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

The same is true of any rule written by the State Supreme Court. In Syl. pt. 2 of *White, supra,* the Court noted that "[i]n ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." Once again, the same is true of any rule written by the State Supreme Court.

The Court has long held that "in the absence of any definition of the intended meaning of words or terms, used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. pt. 6, *State v. Sulick,* 232 W. Va. 717, 753 S.E.2d 875. (2012). The maxim "*expressio unius est exclusio alterius*" provides that where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute. *State ex rel. Hechler v. Christian Action Network,* 201 W. Va. 71, 491 S.E.2d 618 (1997) and *Stonewall Jackson Mem'l Hosp. v. American United Life Ins. Co.,* 206 W. Va. 458, 525 S.E.2d 649 (1999).

a. Rule 4.

Rule 4 of the Rules of Practice and Procedure for Family Court states:

> Upon a family court judge's request, **the sheriff shall provide a bailiff for any family court proceeding.** Except for such bailiffs or persons authorized by order of the circuit court, no person shall carry or permit another person to carry any weapon **to a family court proceeding or upon any premises of family court. These premises shall include, but are not limited to courtrooms, offices, and associated public areas such as conference rooms, waiting rooms, hallways, and parking areas.**

(emphasis added)

The heading of this provision is simply "bailiff." Rule 1, which addresses the scope of the Rules, states that "these rules shall govern all proceedings in Family Court with the exception of

domestic violence civil proceedings unless specifically referenced in these rules. If these rules conflict with other rules or statutes these rules shall apply."

Rule 4 does not give the family court the authority to conduct a jury view. Rule 4 strictly deals with bailiffs for family court, security, and where they may where they may carry a weapon in order to protect a judge. It has nothing to do with contempt hearings and whether a judge may conduct a home view without the permission of the homeowner.

b. W, Va. Code § 51-2A-7(a).

This provision of the Code states:

> (a) The family court judge will exercise any power or authority provided in this article, in chapter forty-eight of this code or as otherwise provided by general law. Additionally, the family court judge has the authority to:
> (1) Manage the business before them;
> (2) Summon witnesses and compel their attendance in court
> (3) **Exercise reasonable control over discovery;**
> (4) **Compel and supervise the production of evidence, including criminal background investigations when appropriate;**
> (5) Discipline attorneys;
> (6) Prevent abuse or process; and
> (7) Correct errors in the record.

(emphasis added).

W. Va. Code § 51-2A-7(a) likewise does not give a judge the authority to conduct a home view. This provision sets forth specific duties and functions of a judge. "exercising reasonable control of discovery" must be read with the discovery provisions themselves. Black's Law Dictionary 466 (6th ed. 1990) defines "discovery" as:

> The ascertainment of that which was previously unknown, the disclosure or coming to light of what was previously hidden; the acquisition of notice or knowledge of given acts or facts; as, in regard to the "discovery of fraud affecting the running of the statute of limitations or the granting of a new trial for newly "discovered" evidence.

The whereabouts of the items in question were not in issue. Mr. Gibson acknowledged that many of the items were at his house. What occurred was not discovery but was an unlawful search and seizure. With respect to the provision concerning "compel and supervise the production of evidence," when read *in pari materia* with the contempt statute sets forth the appropriate mechanism for effectuating equitable distribution. It does not contemplate the judge going to someone's house, barging in, snooping and retrieving items.

c. Rule 8.

Rule 8 provides:

> Unless **prior permission is granted by the family court,** no person shall be permitted to make photographs, video recordings, sound recordings, or any other form of recording of proceedings, or any sound, video, or other form of transmission or broadcast of proceedings; and **unless prior permission is granted by the court,** such activities are not permitted in areas immediately adjacent to the courtroom. With prior approval of the court, photographs, video recordings, sound recordings, other forms of recordings and sound, video or other forms of transmissions or broadcasts may be made of ceremonial proceedings in the courtroom.

(emphasis added). The title of the Rule is "Unofficial Recording of Proceedings."

Rule 8 allows unofficial recordings with the prior approval of the judge. In this case, the judge said the trip to the house was still part of the official proceedings. She had two ways to memorialize the trip – through an order which was not done or by giving prior permission for the bailiff to record the entire trip. She never gave the authority, and he only recorded seven minutes of the visit.

D. THE JHB ERRED IN RECOMMENDING AN ADMONISHMENT AND A $1,000.00 FINE AND IN FAILING TO AWARD COSTS TO JDC.

1. THE JHB ERRED IN ITS CONCLUSIONS CONCERNING AGGRAVATING AND MITIGATING FACTORS.

JDC objects to in part to the aggravating and mitigating factors outlined by the JHB. JDC agrees that Respondent has no prior disciplinary record. However, JDC only agrees that Respondent was somewhat cooperative in the proceeding. However, when Judge Stotler cracked the door ajar to possible dismissal, Respondent pushed it open and charged through with her blatant attempts to avoid discipline in her post-hearing briefs and in her objections to the recommended decision. By doing so, she exhibited a distinct lack of any remorse for her conduct which is an aggravating factor to her misconduct.

This Court has consistently held that the purpose of judicial disciplinary proceedings is the preservation and enhancement of public confidence in the honor, integrity, dignity and efficiency of the members of the judiciary and the system of justice. *See* Syl. Pt. 1, *In re Cruickshanks*, 220 W. Va. 513, 648 S.E.2d 19 (2007). The Court has set forth the following non-exhaustive list of factors to consider in determining when it is appropriate to suspend a judicial officer in *Cruickshanks*. Those factors are also helpful in determining discipline in general and include: (1) whether the charges of misconduct are directly related to the administration of justice or the public's perception of the administration of justice; (2) whether the circumstances underlying the charges of misconduct are entirely personal in nature or whether they relate to the judicial officer's public persona; (3) whether the charges of misconduct involve violence or a callous disregard for our system of justice; (4) whether the judicial officer has been criminally indicted, and (5) any mitigating or compounding factors which might exist. Syl. Pt. 3, *In re Cruickshanks*.

Counsel asserts that the ethics charges are directly related to the administration of justice given that Respondent's actions were the direct result of a court proceeding. The circumstances were not personal in nature and do relate to Respondent's public persona in that the misconduct occurred as a result of a court hearing. The evidence further demonstrates that Respondent exhibited a callous disregard for our system of justice. Respondent admits that she went into the home without permission

to curry favor with the divorce bar in her jurisdiction and she fundamentally ignored the established procedures for contempt proceedings. Moreover, she violated the husband's constitutional rights against unlawful search and seizure. Respondent's misconduct was spread all over YouTube and as a result the then Chief Justice was forced to disqualify her from the case.

The JHB's sole reliance on the JIC admonishment in *In the Matter of Aboulhosn*, Complaint No. 91-2013 in recommending an admonishment and a $1,000.00 fine is misplaced and ignores the decision recommended by the JHB and adopted by this Court of a censure and a $1,000.00 fine in *In the Matter of Massie,* Supreme Court No. 19-0915 and JIC Complaint No. 04-2019 (WV August 25, 2020) (Judge censured and fined in part for going to potential crime scenes). The JHB also ignored the following facts that Respondent: (a) violated the Federal and State constitutional provisions against unlawful search and seizure, (b) has no authority to conduct a "home view;" (c) ignored the appropriate process for contempt of court hearings; (d) denied the ex-husband due process and equal protection under the law; and (e) engaged in an inappropriate judicial investigation of the facts. Thus, Respondent's conduct warrants a censure, a $5,000.00 fine and costs.

2. JDC BELIEVES THE INITIAL AGREED UPON RECOMMENDED DISCIPLINE IS APPROPRIATE.

WVRJDP 4.12 sets forth the permissible sanctions and provides in pertinent part:

> The Judicial Hearing Board may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a violation of the Code of Judicial Conduct: (1) admonishment; (2) reprimand; (3) censure; (4) suspension without pay for up to one year; (5) a fine of up to $5,000; or (6) involuntary retirement for a judge because of advancing years and attendant physical or mental incapacity and who is eligible to receive retirement benefits under the judges' retirement system or public employees retirement system. . . .

The Rule also provides that "the extent to which the judge knew or should have reasonably known that the conduct involved violated the Code of Judicial Conduct may be considered in determining the appropriate sanction." *Id.* The Court may impose one sanction per violation of

the Code of Judicial Conduct or multiple sanctions for each violation. *See Callaghan, supra.* The Court may run the sanctions concurrently or consecutively, and it may impose a suspension without pay which is greater than the judge's term of office. *See In the Matter of Toler,* 218 W. Va. 653, 625 S.E.2d 731 (2005)

An admonishment is the lightest form of discipline that can be imposed and "constitutes advice or caution to a judge to refrain from engaging in similar conduct which is deemed to constitute a violation of the Code of Judicial Conduct." *See* RJDP 4.12 A reprimand, which is the intermediate written sanction, "constitutes a severe reproof to a judge who has engaged in conduct which violated the Code of Judicial Conduct.." *Id.* A censure, which is the most serious of the written reprimands, "constitutes formal condemnation of a judge who has engaged in conduct which violated the Code of Judicial Conduct." *Id.* The severity of a public censure was addressed in *In re Binkoski,* 204 W. Va. 664, 515 S.E.2d 828 (1999).

In *Binkoski*, a magistrate was charged with violating Rules 1 and 2A of the former Code of Judicial Conduct after having been charged with the misdemeanor offenses of driving under the influence of alcohol and simple possession of marijuana and attempting to encourage a witness to be less than candid about the magistrate's behavior on the night he was arrested. *Id.* The magistrate did not contest the charges and entered into an agreement with the JDC which called for a one year suspension without pay and drug testing/treatment. *Id.* After the JHB issued its recommended decision adopting the agreement, Respondent resigned his position. *Id.* Instead of suspending the Magistrate without pay, the Court censured him. *Id.* The Court stated that "the conduct admitted to by [the magistrate] was addressed by the proposed agreement. However, [his]'s resignation renders the issues of suspension, drug testing and treatment moot. The only remaining reasonable sanction open to this Court is public censure." *Id.* at 667, 515 S.E.2d at 831.

The judicial disciplinary system is neither civil nor criminal in nature, but *sui generis* – designed to protect the citizenry by ensuring the integrity of the judicial system. *See generally, In re Conduct of Pendleton,* 870 N.W.2d 367 (MN 2015). West Virginia has already recognized the same with respect to attorney disciplinary cases:

> Proceedings before the Lawyer Disciplinary Board are ***sui generis,*** unique, and are neither civil nor criminal in character. As one court noted, disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, ***sui generis,*** and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice. Thus, the real question at issue in a disbarment proceeding is the public interest and an attorney's right to continue to practice a profession imbued with public trust. . . . We have likewise found that, "Attorney disciplinary proceedings are not designed solely to punish the attorney, but rather to protect the public, to reassure it as to the reliability and integrity of attorneys and to safeguard its interest in the administration of justice."

Lawyer Disciplinary Board v. Stanton, 233 W. Va. 639, 649, 760 S.E.2d 453, 463 (2014) (citations omitted). Moreover, the Court has stated that in determining what discipline is warranted, each case must be decided on its own particular facts. *See Committee on Legal Ethics of the West Virginia Bar v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994).

CJC Preamble [6] cautions a "reasonable and reasoned application" in determination whether discipline should be imposed. Factors to be considered include but are not limited to "the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others." *Id.* The JIC believes the facts of this case are egregious.

Respondent has admitted to multiple violations of the CJC for misconduct that was broadcast over YouTube and cast the judiciary as a whole in an extremely bad light. Respondent

now refuses to concede that she did anything wrong. Upon catching a glimmer of hope at the disciplinary hearing, Respondent began to back peddle on the agreement she entered into with JDC which ultimately morphed into her saying she did nothing wrong. She testified at hearing that while she knowingly, voluntarily and intelligently entered into the agreement, she did not knowingly or intentionally violate the CJC Rules she was charged with. This statement is disingenuous at best. The standard is knew or should have known and at a minimum Respondent clearly should have known that going into a litigant's home without permission violated federal and state search and seizure laws and therefore the CJC. A pro se litigant who was not a lawyer knew. While this Court is free to impose whatever discipline it deems appropriate, JDC is compelled to honor its agreement and ask that Respondent receive a public censure, a $5,000.00 fine and costs of the proceeding. As this Court noted in *In re Watkins,* 233 W. Va. 170, 182, 757 S.E.2d 594, 606 (2013):

> A Clarksburg lawyer (who rose to be chief counsel for the IRS) once wrote, "A judge is a leader whether he wants to be or not. He cannot escape responsibility in his jurisdiction, for setting the level of the administration of justice and of the practice of law." Citizens judge the law by what they see and hear in courts, and by the character and manners of judges and lawyers. "The law should provide an exemplar of correct behavior. When the judge presides in court, he personifies the law, he represents the sovereign administering justice and his conduct must be worthy of the majesty and honor of that position." Hence, a judge must be more than independent and honest; equally important, a judge must be perceived by the public to be independent and honest. Not only must justice be done, it also must appear to be done.

3. THE JHB ERRED IN NOT AWARDING COSTS TO THE JDC.

RJDP 4.3 states that "[e]xcept where otherwise provided for by these rules, the provisions of the West Virginia Rules of Civil Procedure and West Virginia Rules of Evidence shall govern proceedings before the Judicial Hearing Board." Rule 54(d) of the West Virginia Rules of Civil Procedure governs costs and provides in pertinent part:

> Except when express provision therefore is made either in a statute of this State or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State, its officers, and agencies shall be imposed only to the extent permitted by law. The clerk shall tax the costs within 10 days after judgment is entered, and shall send a copy of the bill of costs to each party affected thereby. On motion by any party served within 10 days after receipt of the bill of costs, the action of the clerk may be reviewed by the court.

Generally, under Rule 54(d) only the prevailing or successful party is awarded costs at the conclusion of a matter. The question of who gets the costs turns on the meaning of prevailing or successful party:

> The most obvious connotation of a successful party is his/her ultimate victory in the controversy as the winner of the lawsuit. However, it is not necessary for a party to have won every argument advanced or contention made in order to be deemed the successful party. Rather, it is sufficient if the party requesting reimbursement of costs prevailed on the principal issue comprising the controversy. Where a party prevails on the disputed main issue, even though not to the extent of his/her original contention, he/she will be deemed to be the successful party for the purpose of taxing costs. . . . A final interpretation of "successful" emphasizes the impact the institution and prosecution of the underlying action had upon the defendant whose conduct was at issue in the lawsuit. Accordingly, where the plaintiff bringing the suit achieves the desired change in the defendant's behavior, he/she may be said to have been successful in that his/her litigation had a significant influence on altering the defendant's conduct.
>
> It has been held that the plain language of Rule 54(d) limits "prevailing party" to mean only one party. Therefore, to the extent that a plaintiff prevails on certain claims and a defendant prevails on certain claims, the rule only permits one party — not both — to be the prevailing party. Rule 54(d) has no special rule or exception for mixed judgment cases, where both parties have some claims decided in their favor. Thus, even in mixed judgment cases the rule does not allow every party that won on some claims to be deemed a "prevailing party." For the purposes of costs and fees, there can be only one winner. A court must choose one, and only one, "prevailing party" to receive any costs award. . . . As previously mentioned, to be a "prevailing party," requires that the party have received at least some relief on the merits. That relief must materially alter the legal relationship between the parties by modifying one party's behavior in a way that "directly benefits" the opposing party.

Litigation Handbook on West Virginia Rules of Civil Procedure, 5[111] Ed. (2017) at 1248-1249 (citations omitted). The burden of establishing costs and the entitlement thereto rests with the

prevailing party. *Id.* Costs must be reasonable. *Id.* Once the burden is met, the load shifts to the losing party to overcome the presumption that the costs will be taxed against him/her. *Id.*

Time and again over the past 30 years, the Supreme Court of Appeals of West Virginia has awarded JDC costs when it has prevailed in total or in part in judicial disciplinary cases which were resolved by contested hearing or agreement of the parties. *See In the Matter of Codispoti,* 190 W. Va. 369, 438 S.E.2d 549 (1990); *In the Matter of Mendez,* 192 W. Va. 57, 450 S.E.2d 646 (1994); *In the Matter of Hey ("Hey II'),* 193 W. Va. 572, 457 S.E.2d 509 (1995); *In the Matter of Rice,* 200 W. Va. 401, 489 S.E.2d 783 (1997); *Toler, supra*; *Watkins, supra* and *Callaghan, supra.*

The JHB erred in not awarding costs to JDC since it was the prevailing party below. The parties agreed that Respondent would pay costs associated with the prosecution. Respondent acknowledged at hearing that she was responsible for the costs of the proceeding. Therefore, this Court should award costs to the JDC if it continues to prevail in the matter.

V.

CONCLUSION

"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence."[9] The facts of this case demonstrate that Respondent violated Rules 1.1, 1.2, 1.3, 2.2, 2.3(B) and 2.5 of the Code of Judicial Conduct. Respondent admitted it in her written agreement with JDC and in open court on January 15, 2021. The facts also bear out that the Respondent is not remorseful for her conduct and now does not believe she has done anything wrong. Because of the nature of her misconduct and her

[9] Quote from John Adams, 2nd President of the United States.

lack of remorse, JDC respectfully requests that the Court publicly censure Respondent, fine her $5,000.00 and award it costs.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF
THE HONORABLE LOUISE E. GOLDSTON,
JUDGE OF THE 13TH FAMILY COURT CIRCUIT

Supreme Court No. 20-0742
JIC Complaint No. 30 & 33-2020

CERTIFICATE OF SERVICE

I, Teresa A. Tarr, Judicial Disciplinary Counsel, hereby certify that I have served a true and accurate copy of the foregoing Judicial Disciplinary Counsel's Brief by placing the same in the United States Mail, first class postage pre-paid, on this 6th of May 2021, to:

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