IN THE SUPREME COURT FOR THE STATE OF MICHIGAN
Appeal from the Michigan Court of Appeals

People of the State of Michigan,
Plaintiff-Appellee,

v.

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

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

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

DEFENDANT-APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear the instant appeal pursuant to MCR 7.303(B)(1), which provides that the Michigan Supreme Court may review a case after a decision by the Court of Appeals. The final order from which Mr. Loew appeals was entered by the Court of Appeals on January 13, 2022. Mr. Loew filed his Application for Leave to Appeal on March 7, 2022, which this Court granted on October 5, 2022. Under MCR 7.312(E)(1)(a), Mr. Loew's appeal brief must be filed within 56 days after entry of this Court's Order; thus, the instant appeal brief is timely because it is being filed within 56 days of October 5, 2022.

STATEMENT OF QUESTIONS

I. Did the Court of Appeals correctly conclude that the ex parte communications in this case did not violate Canon 3(A)(4)(a)(i) of the Code of Judicial Conduct because they were merely administrative in nature?

Defendant-Appellant: No

Plaintiff-Appellee: Yes

II. Does an appearance of impropriety occur where a trial judge violates Canon 3(A)(4)?

Defendant-Appellant: Yes

Plaintiff-Appellee: No

III. Is Defendant-Appellant required to show actual harm?

Defendant-Appellant: No

Plaintiff-Appellee: Yes

IV. Is Defendant-Appellant entitled to a new trial?

Defendant-Appellant: Yes

Plaintiff-Appellee: No

STATEMENT OF FACTS

On March 13, 2018, the Allegan County Prosecutor's Office charged Defendant-Appellant Daniel Loew ("Mr. Loew") with three counts of criminal sexual conduct ("CSC"). After the People later amended the charges against him, Mr. Loew proceeded to trial on five counts of CSC: two counts of CSC-first degree (MCL 750.520B(1)(f)), one count of CSC-second degree (MCL 750.520C(1)(f)), and two counts of CSC-third degree (MCL 750.520D(1)(a) and MCL 750.520D(1)(b)).

1. The Trial

Mr. Loew's trial began on August 27, 2019. The Honorable Margaret Zuzich Bakker of the 48th Circuit Court in Allegan County, Michigan, presided. Assistant Prosecuting Attorney ("APA") Emily Jipp represented the People.[1]

a. Day One of Trial

As is customary, the trial began with opening statements. During its opening statement, the prosecutor briefly informed the jury that a key piece of evidence – the bathmats from the bathroom where an assault allegedly occurred – were devoid of any DNA evidence. The prosecutor stated:

> And we will hear, unfortunately, that there is no D.N.A. [The victim] will testify that she made her aunt aware, she made law enforcement aware of blue bath mats that she last remembered the Defendant ejaculating on. And you will hear from Trooper Desch that aunt met him in the middle of the night at a gas station with a garbage bag full of bath mats that were green, white, and blue. Those bath mats were never taken and shown to the victim. Those bath mats were not seized personally by law enforcement. But Aunt Jane turned those over and those obviously didn't have any DNA on them.

(Appx, 102a).

[1] Ms. Jipp no longer works at the Allegan County Prosecutor's office.

After delivering her opening statement, the prosecutor called the complainant, J.B., as the first witness. Michigan State Police ("MSP") Trooper Eric Desch was the second witness. Trooper Desch took the stand at 3:11 p.m. (Appx, 192a). Judge Bakker excused Trooper Desch after cross-examination concluded. Immediately after excusing Trooper Desch, Judge Bakker called J.B. back to the witness stand at 3:47 p.m. to address a question from a juror. (Appx, 216a).

At 3:41 p.m. during the first day of trial, Judge Bakker sent the following e-mail to the elected Allegan County Prosecutor, Myrene Koch: "This trooper didn't do a very good investigation. Don't they have detectives with MSP anymore?" (Appx, 259a).[2] Approximately nine minutes later, at 3:50 p.m., Judge Bakker called for a bench conference to address a juror question. The bench conference concluded at 3:51 p.m. (Appx, 217a) At approximately 3:51 p.m., MSP Trooper Todd Workman took the stand. During his testimony, the prosecution elicited testimony that the complainant did not undergo a medical examination after bringing her allegations against Mr. Loew. (Appx, 224a-225a). The first day of Mr. Loew's trial ended at 4:39 p.m.

b. Day Two of Trial

On the second day of trial, at 8:47 a.m., Ms. Koch replied to Judge Bakker's e-mail from the previous day expressing her opinion of the law enforcement investigation. Ms. Koch wrote: "They do but not typically for CSC's. This trooper has been given additional personal training since this investigation." (Appx, 258a). Judge Bakker responded at 8:50 a.m.: "One more question….this victim was not referred for a medical, do you know why?" (*Id.*) Two minutes later, at 8:52 a.m., Judge Bakker took the bench and began the second day of Mr. Loew's trial.

[2] Because the transcript does not reflect exactly when Trooper Desch was excused as a witness, it is unclear whether Judge Bakker sent the e-mail during Trooper Desch's testimony or after the court excused him.

While the trial was underway, Judge Bakker and Ms. Koch continued their ongoing email conversation. Ms. Koch replied to Judge Bakker's e-mail at 9:02 a.m., stating: "Yes, because the prior APA assigned to the case did not catch that it was missed nor did anyone else who touched the file. As a result, there will now be a checklist for CSC's in files." (*Id.*) During another witness' testimony, Judge Bakker replied to Ms. Koch from the bench at 9:03 a.m.: "I thought Safe Harbor would catch it." (*Id.*) The second day of Mr. Loew's trial adjourned at 4:08 p.m. Ms. Koch responded to Judge Bakker's last e-mail at 4:49 p.m. by answering: "Unfortunately, no. The forensic interviewer is supposed to check that before case review but the list often is given to interns. I noticed it after the fact at case review but by then not clear on if the victim had much support." (*Id.*)

c. Day Three of Trial

The third day of Mr. Loew's trial began with closing arguments. In its closing argument, the prosecution addressed Trooper Desch's testimony by admitting that he obtained "the minimal facts" during his initial investigation. (Appx, 517a). The prosecution then spent a substantial amount of time admitting to the shortcomings of the investigation, something she had not done during her opening statement. Indeed, she argued:

> Do we know where these bath mats came from? Probably a bathroom, I mean they are bath mats. Do we know, did they come from Brooke's bathroom? Are they the light blue bath mats described to Trooper Desch the night that he first went to their home? No. Should Trooper Desch have opened this bag and looked at these bath mats and investigated it? Yes. Should Trooper Desch have -- have -- have taken these bath mats, these blue, white, and green bath mats to Jenna and said, "Are these the bath mats you remember being sexually assaulted on?" Yes. If he didn't do that, should he have taken a photograph of these bath mats and sent that to Jenna and said, "Are these green, white, light blue, dark blue bath mats the blue bath mats you described?" Yes. But we didn't do that. Did he go that night to Aunt Janie's home where the Defendant resides and take photographs of the inside of the home? You know, at this point, the Defendant knows. So let's just go ahead and deal with it. Should he have gone and done that? Yes. He could have gone in and he could have

> seen the bathroom that these -- these mats had been taken from…And we don't have any way to verify where these rugs came from."

(Appx, 518a – 519a).

2. Postconviction Proceedings

On August 29, 2019, following the three-day trial, a jury convicted Mr. Loew of all five counts. On November 4, 2019, Judge Bakker sentenced Mr. Loew to serve 240 to 480 months' incarceration on the CSC-first degree counts, and 240 to 360 months' incarceration on the CSC-second degree and CSC-third degree counts. (Appx, 602a). On December 20, 2019, Mr. Loew, through his appointed appellate attorney, filed a timely claim of appeal in the Michigan Court of Appeals. On May 12, 2020, Mr. Loew retained undersigned counsel.

On August 3, 2020, Mr. Loew filed a motion for new trial pursuant to MCR 7.208(B). In his motion for new trial, Mr. Loew argued that he was entitled to a new trial on the following grounds: (1) judicial misconduct; (2) ineffective assistance of counsel; and (3) prosecutorial misconduct. Prior to arguing his motion for new trial, Mr. Loew moved to disqualify Judge Bakker from hearing his motion on the ground that Judge Bakker participated in substantive ex parte communications with the elected Allegan County Prosecutor during his trial. Judge Bakker disqualified herself from hearing Mr. Loew's motion for new trial and assigned the matter to Judge Kengis. Mr. Loew then filed a motion to disqualify Judge Kengis because Judge Kengis had authorized the original charges against Mr. Loew when Judge Kengis was the Allegan County Prosecutor, prior to his appointment to the Circuit Court. Mr. Loew's request for a new trial was then assigned to Allegan County District Judge William A. Baillargeon.

On October 29, 2020, following the disqualification of Judge Bakker and Judge Kengis, Judge Baillargeon heard oral argument on Mr. Loew's motion for a new trial. (Appx, 565a). On November 2, 2020, the trial court entered an order granting Mr. Loew's motion for a new trial due

to the ex parte communications between Judge Bakker and Ms. Koch. Judge Baillargeon denied Mr. Loew's claims of ineffective assistance of counsel and prosecutorial misconduct.

The ex parte communications, however, concerned Judge Baillargeon. He stated that the communications "create[d] that appearance that you have this coaching situation or, at the very least, flagging as to boy, you better address this." (Appx, 594a). He further noted that "the Judicial Tenure Commission would be interested in something like this . . . because it's a matter of the public perception of the ethical obligations entailed with the judicial office and I worry that as unintentional as this may be, it could do damage to that." (Appx, 594a-595a). Judge Baillargeon emphasized the importance of the right of citizens to a full and fair hearing and expressed concern about the possibility of the occurrence of other, unrecorded, ex parte communications. Indeed, he stated: "[o]ne of the things that I think that goes – that ties into the whole idea and that – this whole current atmosphere of conspiratorial theories is exactly what the – what defense counsel brought up in saying he doesn't know were these other conversations. The [prosecutor's] office is just down the hall from the courthouse. He doesn't know if there were text messages that explore different lines of questioning or aspects of the case that have not been discussed or disclosed here." (Appx, 595a). Judge Baillargeon also mentioned the collaborative atmosphere of law offices, and noted that "we see people communicating with their offices, prosecutors with Prosecutor's office, and defense counsel with their home offices." (*Id.*) Judge Baillargeon granted Mr. Loew's motion for new trial with "a heavy heart" due to the "appearance – bre[a]ch of the appearance" of impartiality. (Appx, 596a).

On November 2, 2020, Judge Baillargeon entered an order vacating Mr. Loew's conviction and ordering that he be released from the custody of the Michigan Department of Corrections (MDOC) to the Allegan County Jail pending a hearing on the issue of bond. (Appx, 600a). Judge

Baillargeon also ordered that the case be set for further proceedings consistent with his order. (*Id.*) Following the Circuit Court's order granting Mr. Loew's motion for new trial, the prosecution filed a claim of cross appeal on November 12, 2020. The prosecution then filed its cross-appellant brief on December 29, 2020.

On January 13, 2022, the Court of Appeals issued its opinion reversing the trial court's decision to grant Mr. Loew a new trial. (Appx, 603a). In addition, the Court of Appeals upheld the trial court's findings that Mr. Loew's trial counsel was not ineffective and that the prosecutor's actions did not amount to prosecutorial misconduct. (*Id.*) One judge issued a dissenting opinion. (Appx, 617a). Mr. Loew filed his application for leave to appeal to this Court, which this Court granted on October 5, 2020. (Appx, 624a). In granting Mr. Loew's application for leave to appeal, this Court limited the issues to those addressed herein.

ARGUMENT

I. The Court of Appeals Erred in Finding that the Ex Parte Communications were Administrative in Nature and Did Not Violate Canon 3(A)(4)(a)(i) of the Code of Judicial Conduct.

The ex parte communications between Judge Bakker and Ms. Koch were substantive and not administrative in nature. The Michigan Code of Judicial Conduct (the "Code") Canon 3(A)(4) prohibits judges from "initiat[ing[, permit[ting], or consider[ing]" ex parte communications except for "scheduling, administrative purposes, or emergencies." Code of Judicial Conduct, Canon 3(A)(4). Indeed, the Code states:

> (4) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:
>
> (a) A judge may allow ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided:
>
> (i) The judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) The judge makes provision promptly to notify all other parties and counsel for parties of the substance of the ex parte communication and allows an opportunity to respond.

Id. The Code recognizes that some ex parte communications are appropriate, such as those concerning scheduling or administrative purposes. As the Court of Appeals' dissent in this case correctly explained, "an ordinary understanding of the word 'administrative' in this context contemplates simple procedural matters concerning the judicial process itself, such as the orderly handling of motions." (Appx, 622a). Ex parte communications dealing with "substantive matters" are prohibited. Code of Judicial Conduct, Canon 3(A)(4). Substantive ex parte communications are forbidden because "*[e]x parte* communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. *Ex parte* conversations or

correspondence can be misleading; the information given to the judge 'may be incomplete or inaccurate, the problem can be incorrectly stated.' At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, *ex parte* communication is an invitation to improper influence if not outright corruption." *Grievance Adm'r v Lopatin*, 462 Mich 235, 262-263; 612 NW2d 120 (2000) quoting Shaman, Lubet & Alfini, Judicial Conduct and Ethics (3d ed), § 5.01, pp 159-160.

Canon 3(A)(4) of the Code prohibits ex parte communications on "substantive matters or issues on the merits." The Code does not define "substantive." This Court, however, has included as "substantive communications" those between judges and juries that "encompass[] supplemental instruction on the law given by the trial court to a deliberating jury." *People v France*, 436 Mich 138, 163-164; 461 NW2d 621 (1990).

Here, the issue involves communication between a trial court and a prosecutor, but cases concerning ex parte communications between a judge and jury are instructive. See *France*, 436 Mich at 165 (finding that a typewritten note to the jurors was a substantive communication subject to the presumption of prejudice, but finding that "the presumption of prejudice was overcome by the consent of the defense counsel prior to the instruction being sent to the jury"); *People v Powell*, 303 Mich App 271, 276; 842 NW2d 528 (2013) (holding that the communication between the trial court and jury was administrative because "instructions that encourage a jury to continue its deliberations" fall in the administrative category); *Meyer v City of Center Line*, 242 Mich App 560, 564-565; 619 NW2d 182 (2000) (trial judge's instructions to the jury on how to complete the verdict form was an administrative communication). In *France*, this Court provided examples of ex parte communications that qualify as administrative. Those examples include: "an instruction

which encourages a jury to continue its deliberations," and "instructions regarding the availability of certain pieces of evidence." *France*, 436 Mich at 143.

In Michigan, there are few cases involving ex parte communications between a trial court and attorney. One of the few criminal cases arising out of Michigan concerning ex parte communications between a trial court and a prosecutor is *Hereford v Warren*, 536 F3d 523, 530 (CA 6, 2008). In *Hereford*, the Sixth Circuit determined that an ex parte bench trial between the trial court and prosecution was an "administrative conference" because it dealt with the limited purpose of discussing the duration of a witness' testimony. In that case, the prosecutor "informed the court that, although [the witness] indicated he wanted to testify, [the witness'] mother did not think he understood the court's questions, and [the witness] might benefit from speaking with his mother." *Hereford*, 536 F3d at 530. The judge and prosecutor did not discuss the content of the witness' testimony or any material issues pertaining to trial; rather, the purpose behind the bench conference was merely to request time for the witness to speak with his mother. *Id.* The Sixth Circuit also considered the duration of the bench conference. The bench conference lasted "seconds, not minutes," which supports the finding that it was a "*de minimis* communication that was administrative in nature." *Id.* See also, *Girard v Montgomery*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2011 (Docket No. 299531), p 5, (concluding that the plaintiff's ex parte letter to the court dealt with scheduling (i.e., administrative) issues rather than substantive issues because it merely explained that the plaintiff's absence from the hearing was due to a medical appointment).

Here, the Court of Appeals incorrectly reasoned that the e-mails "related to administrative matters because neither related to nor bore on substantive matters in defendant's trial." (Appx, 608a). The Court of Appeals' finding that the ex parte communications did not concern

"substantive matters in defendant's trial" is patently incorrect. None of the e-mails between Judge Bakker or Ms. Koch make mention of administrative or scheduling issues involved with the trial. Indeed, Judge Bakker and Ms. Koch began their multi-day ex parte exchange by discussing the prosecution's witnesses and the facts of the case, including the quality of law enforcement's investigation and why J.B. did not undergo a medical examination, issues important enough that the trial prosecutor later addressed them directly during her closing argument, and not in her opening statement as the Court of Appeals stated in its opinion.

Further, in its attempt to validate the ex parte communications the Court of Appeals seized on the term "process," reasoning the ex parte communications related to the "*process* for investigating allegations of sexual assault" and the "*process* of referring victims of sexual assault for medical examinations." (Appx, 608a). The e-mails, however, were specific to the investigation that occurred *in Mr. Loew's case*, and the medical examination that did not occur *in Mr. Loew's case*. They were not about the general "processes" followed by law enforcement in these types of cases, as the Court of Appeals described, but pertained specifically to Mr. Loew's case; that is, the investigating trooper's inadequate investigation and the failure of law enforcement to refer J.B. for a medical examination. As the Court of Appeals' dissenting opinion noted, "[t]he trial judge's commentary to the county prosecutor regarding the internal investigatory procedures of the State Police, a law enforcement agency independent of the judicial branch of government, addressed the substance of the trial itself as the comments directly implicated the plausibility of the victim's allegations. In other words, the weaknesses of the investigation might tend to weigh against a guilty verdict. This, I believe, means that the e-mail communications involved 'substantive matters' and were therefore prohibited by Canon 3." (Appx, 622a). Moreover, the subject line in the e-mail conversation was "trial," further supporting that the ex parte communications contained

substantive inquiries and information specifically related to Mr. Loew's trial rather than procedural or administrative statements and comments.

While the case law is sparse, examples of permissible "administrative" ex parte communications can be found. A trial judge's concern about the duration of a witness' testimony due to the court's docket, communicated ex parte, was administrative in nature. See *Hereford* 536 F3d at 530 (finding that ex parte bench conference was administrative because it dealt with the duration of a witness' testimony); *Adesanya v Novartis Pharmaceuticals Corp*, 755 Fed App'x 154, 158 (CA 3, 2018) (explaining that ex parte communications did not violate Code of Conduct for United States Judges Canon 3 because "[t]he Magistrate Judge and Appellee's counsel were simply seeking a way to manage the numerous pro se discovery requests Appellants had filed"). Likewise, the e-mails may have been permissible ex parte communications had they dealt with a scheduling issue. See *Gerber v Veltri*, 702 Fed App'x 423, 432-433 (CA 6, 2017) (explaining that ex parte communications did not violate Code of Conduct for US Judges Canon 3 because "[t]heir discussion concerned when, and how, the court should reschedule the appearance of witnesses slated to testify that day, particularly defendant's expert.").

Finally, that the substantive ex parte communications here took place via electronic mail lends further proof that the communications were premeditated and not spontaneous, and were fully intended to take place out of the view of defense counsel, Mr. Loew, and the public.[3] Both

[3] Even if this Court finds that the trial court's ex parte communications were administrative in nature, the trial court still failed to comply with the requirements of Canon 3(A)(4)(iii) and (iv), which require that "[t]he judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage," and that the judge "promptly" sends notice to "all other parties and counsel for parties of the substance of the ex parte communications and allows an opportunity to respond." It is inconceivable that the trial court did not believe the prosecution would gain a "procedural or tactical advantage" from sending ex parte e-mails to the elected county prosecutor remarking on issues that are commonly brought up during jury trials. In addition, the trial court failed to notify all parties of the e-mails and failed to allow all parties to respond. It is plausible

Judge Bakker and Ms. Koch had ample time to consider the content of their e-mails and how to respond. This is unlike *Hereford*, where the Sixth Circuit noted that the ex parte communication was de minimis, in part, because it occurred for only a few seconds.

II. An Appearance of Impropriety Occurs Where a Trial Judge Violates Canon 3(A)(4).

According to this Court's decision in *In re Haley*, 476 Mich 180, 194-195; 720 NW2d 246 (2006), where there is an express controlling canon, the courts should not engage in an independent "appearance of impropriety" analysis. Canon 2, in essence, is a catchall provision, potentially applicable when a judge's alleged actions fall outside the scope of express prohibitions of specifed judicial conduct.

Here, the trial court did not order a new trial based on Canon 2 – the appearance of impropriety. Rather, the trial court's order granting Mr. Loew's motion for new trial indicated that the motion was granted "based on Defendant's first theory of the motion." (Appx, 599a). Mr. Loew's "first theory" was that Judge Bakker violated Canon 3(A)(4), which expressly proscribes substantive ex parte communications. During the hearing on Mr. Loew's motion for new trial, the trial court concluded that the ex parte e-mails were substantive in nature, and the prosecutor agreed that the communications discussed the substance and merit of actual trial testimony. Indeed, the trial court asked:

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

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that Mr. Loew's trial attorney would have objected and moved for a mistrial had he been promptly presented with the ex parte communications.

PROSECUTOR: Absolutely.

(Appx, 592a).

In granting Mr. Loew's motion, the trial court considered the risk that substantive "ex parte communications . . . suggest bias or partiality on the part of the judge," *Grievance Adm'r v Lopatin*, 462 Mich 235, 262-263; 612 NW2d 120 (2000), a citation that Mr. Loew included in his motion for new trial. For that reason, the trial judge also incidentally remarked on the "appearance of impropriety," as well as the importance of an impartial judiciary. The trial court was not implying it was relying on a violation of Canon 2 in granting Mr. Loew's motion by using the phrase "appearance of impropriety," inasmuch as it was explaining that Judge Bakker's clear violation of Canon 3(A)(4) would have appeared improper even in the absence of an express prohibition on communications of the sort seen here. In fact, the only time Mr. Loew referenced Canon 2, other than in his application for leave to appeal to this Court, was in a brief parenthetical citation in his Appellant Brief and Cross-Appellee Response Brief (filed in the Court of Appeals on March 2, 2021). At no time has any alleged violation of Canon 2 been a basis for Mr. Loew's claim for relief, or the trial court's decision granting him a new trial.

III. Defendant-Appellant is Not Required to Show Actual Harm.

Should this Court finds that the ex parte communications were substantive and violated Canon 3(A)(4), Mr. Loew is not required to show actual harm because substantive ex parte communications are presumed prejudicial. Likewise, if this Court finds that the substantive ex parte communications gave rise to legal error for an appearance of impropriety in Canon 2, Mr. Loew need not demonstrate actual harm.

A. Substantive Ex Parte Communications are Presumed Prejudicial.

The trial court violated Canon 3(A)(4) when it engaged in substantive ex parte communications with the prosecution during Mr. Loew's trial. Because the ex parte

communications at issue are substantive in nature, a presumption of prejudice exists. For that reason, Mr. Loew does not need to establish actual harm. Rather, the prosecution bears the burden to make "a firm and definite showing of an *absence* of prejudice." *France*, 436 Mich at 143. Although the substantive nature of the ex parte communications gives rise to a presumption of prejudice, regardless of whether an objection occurs or not, the existence of an objection is evidence of possible prejudice. See *In re Argue*, unpublished opinion per curiam of the Court of Appeals, Docket No. 182413, issued July 19, 1996, pg. *3-4 (finding that defense counsel's failure to object after learning about trial court's ex parte communications with a social worker regarding procedural matters was "evidence of a lack of prejudice.").

In *France*, this Court modified the rule of automatic reversal in the context of ex parte communications between judges and juries. However, because the dangers present in the *France* judge/jury context also exist here, the same analysis should apply. In *France*, this Court wrote that "[t]he linchpin of the new rule centers on a showing of prejudice. For purposes of this rule, we broadly define prejudice as 'any reasonable possibility of prejudice.'" *France*, 436 Mich at 142. This Court then classified ex parte communications as falling into one of the following categories: substantive, administrative, or housekeeping. *Id.* at 142-143. The type of ex parte communication determines showing of prejudice. A substantive ex parte communication "carries a presumption of prejudice in favor of the aggrieved party regardless of whether an objection is raised." *Id.* at 143. The prosecution bears the burden of rebutting the presumption of prejudice by showing "a firm and definite showing of an *absence* of prejudice." *Id.* (emphasis in original). On the other hand, an administrative ex parte communication does not carry a presumption of prejudice. *Id.* Instead, the nonobjecting party must establish "that the communication lacked any prejudicial effect." *Id.*

Here, the People cannot meet its burden to demonstrate an absence of prejudice to Mr. Loew. Mr. Loew did not know the communications existed until a year after his trial concluded and was not provided an opportunity during his trial to view and challenge the communications. See *Lopatin*, 462 Mich at 262-263 (finding that the potential prejudicial impact of the ex parte communication was cured when the parties engaged in a discussion on the record about the ex parte document at issue, which allowed the party not involved in the ex parte communication to challenge the information contained in the communication); *Cheesman v Williams*, 311 Mich App 147, 162; 874 NW2d 385 (2015) (finding that the court found that the plaintiff was not prejudiced by the ex parte communications because the trial court disseminated the ex parte communication at issue and because the "plaintiff had the opportunity to challenge information in the ex parte communication, and, in fact, disputed its accuracy"); *Girard v Montgomery*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2011 (Docket No. 299531), p 5 (concluding that the defendant was not prejudiced by the plaintiff's ex parte letter to the court because the trial court immediately revealed the contents of the letter to the defendant, and the defendant never objected to the note as being inappropriate and never attempted to get a copy of it).

It is inconceivable that Mr. Loew's trial counsel, had he been aware of the ongoing conversation between the judge and his opponent, would not have objected; indeed, it is likely he would have moved immediately for a mistrial. These communications occurred during Mr. Loew's trial and pertained to substantive matters in his trial, so his attorney should have been involved in all discussions regarding the trial. Where, as here, Mr. Loew's attorney was deliberately excluded from discussions of such matters and therefore given no opportunity to object, Mr. Loew's Sixth Amendment right to the effective assistance of counsel was violated. See *Glasser v United States*, 315 U.S. 60, 76; 62 S Ct 457 (1941) ("[t]he right to have the assistance of counsel is too

fundamental and absolute to indulge in nice calculations as to the amount of prejudice arising from its denial."). Judge Bakker's questions, critiques, and observations about the trial provided Ms. Koch invaluable knowledge about deficiencies in the prosecution's case; knowledge at least imputed, if not actually provided, to the prosecutor trying Mr. Loew's case.

B. Mr. Loew is Not Required to Demonstrate Actual Harm Where the Trial Judge Failed to Avoid the Appearance of Impropriety.

As argued above, while the "appearance of impropriety" was not the basis on which the trial court granted Mr. Loew's motion for new trial, the trial judge's ex parte communications in violation of Canon 3(A)(4) did, in fact, also run afoul of established standards governing the appearance of impropriety. Because neither of those standards, as articulated in MCR 2.003(C)(1)(a)(ii) and Canon 2, requires a showing of actual harm or actual bias to the defense, other factors – namely, those laid out in *Liljeberg v Health Servs Acquisition Corp*, 486 US 847; 108 S Ct 2194 (1988) – must be considered.

Because neither MCR 2.003(C)(1)(a)(ii) nor Canon 2 make mention of "actual harm," this Court should not impose such a requirement. As a threshold matter, "[s]tatutes . . . are interpreted in accordance with legislative intent…" *People v Mazur*, 497 Mich 302, 308; 872 NW2d 201 (2015). The most reliable evidence of legislative intent is the plain language of a statute. *Id.* When interpreting a statute courts "must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *People v Miller*, 498 Mich 13, 25; 869 NW2d 204 (2015). A statute including the disjunctive word "or" is indicating a "disunion, a separation, an alternative." *People v Kowalski*, 489 Mich 488, 499 n 11; 803 NW2d 200 (2011).

MCR 2.003(C)(1) provides, in pertinent part, the following:

> Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
>
> (a) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, [556 US 868]; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

Canon 2 of the Code requires judges to "avoid all impropriety and appearance of impropriety." A violation of Canon 2 is also a violation of MCR 2.003(C)(1)(b). The language in MCR 2.003(C)(1)(b) provides two reasons, separated by the disjunctive term "or," why a judge should disqualify herself. First, disqualification of a judge is appropriate if there is a "serious risk of actual bias" impacting due process rights. MCR 2.003(C)(1)(b)(i). Secondly, disqualification is warranted where a judge has failed to adhere to the appearance of impropriety standard set forth in Canon 2. MCR 2.003(C)(1)(b)(ii). Only the first prong requires a showing of actual bias; the second does not. If the legislature had intended to impose a threshold of actual harm or actual bias for a violation of Canon 2 and MCR 2.003(C)(1)(b)(ii), it would have included the phrase "actual bias" or "actual harm" within that section.

Because the plain meaning of MCR 2.003(C)(1) does not require a showing of "actual harm," reversible prejudice is determined by weighing factors the United States Supreme Court delineated in *Liljeberg v Health Servs Acquisition Corp*, 486 US 847; 108 S Ct 2194 (1988). This Court may rely on applicable federal case law as persuasive authority when interpreting state-law parallel provisions. See *Garg v Macomb Co Comm'y Mental Health Servs*, 472 Mich 263, 283; 696 NW2d 646 (2005) (reasoning that "federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues…"). The *Liljeberg* factors are as follows:

1. the risk of injustice to the parties in the particular case;

2. the risk that the denial of relief will produce injustice in other cases, and

3. the risk of undermining the public's confidence in the judicial process.

Liljeberg v Health Servs Acquisition Corp, 486 US 847, 864; 108 S Ct 2194 (1988).

Applying the *Liljeberg* factors, the ex parte communications between Judge Bakker and Ms. Koch prejudiced Mr. Loew. Although the dissenting opinion from the Court of Appeals found the first *Liljeberg* factor to be neutral, the risk of injustice by not granting a new trial to Mr. Loew is far greater than the risk of injustice to the prosecution. To serve at least a 25-year minimum sentence after being deprived of a fair trial is a larger injustice than the prosecution's expenses involved with running another trial. The ex parte communications here addressed several specific issues pertaining to Mr. Loew's trial – the quality of the law enforcement investigation and the lack of medical examination. The communications were relevant to the credibility of the law enforcement officers involved. Addressing trial issues specific to Mr. Loew's case with the elected county prosecutor "may have led to the trial prosecutor addressing these weaknesses later in trial or during closing argument when she would not otherwise have done so." (Appx 620a). Indeed, it wasn't until her closing argument that the prosecution addressed law enforcement's bad investigation. Indeed, she argued:

> Do we know where these bath mats came from? Probably a bathroom, I mean they are bath mats. Do we know, did they come from Brooke's bathroom? Are they the light blue bath mats described to Trooper Desch the night that he first went to their home? No. Should Trooper Desch have opened this bag and looked at these bath mats and investigated it? Yes. Should Trooper Desch have -- have -- have taken these bath mats, these blue, white, and green bath mats to Jenna and said, "Are these the bath mats you remember being sexually assaulted on?" Yes. If he didn't do that, should he have taken a photograph of these bath mats and sent that to Jenna and said, "Are these green, white, light blue, dark blue bath mats the blue bath mats you described?" Yes. But we didn't do that. Did he go that night to Aunt Janie's home where the Defendant resides and take photographs of the inside of the home? You know, at this point, the Defendant knows. So let's just go ahead and deal with it. Should he have gone and done that? Yes. He could have gone in and he could have

> seen the bathroom that these -- these mats had been taken from…And we don't have any way to verify where these rugs came from."

(Appx, 518a). The prosecution's closing argument was in contrast to her opening statement where she mentioned the bath mats to the jury only to explain why they wouldn't be presented with DNA evidence.

The second *Liljeberg* factor also weighs in favor of Mr. Loew. Indeed, there is far more at issue in this case than the constitutional rights and future of one litigant. It is no exaggeration that the integrity of the judicial system in Michigan, and the public's interest in fair and transparent judicial proceedings, are at stake. By straining to the breaking point the respective meanings of "administrative" and "substantive," and then concluding that in-trial communications about witness testimony and the quality of the very law enforcement investigation that led to Mr. Loew's trial were "administrative," the Court of Appeals' decision threatens the underpinnings of our criminal justice system, which presumes fairness and impartiality, and depends on judges who operate at a remove from the interests and objectives of any particular party to a case. The Court of Appeals' decision also threatens the civil divisions of our state's legal practice. Under the Court of Appeals' decision, judges and lawyers can now talk about their specific cases in the absence of other parties so long as their communications can somehow be cloaked as administrative. Michigan's judicial code and professional code of conduct prohibit ex parte communications, but the Court of Appeals' decision offers no deterrent to allowing judges and attorneys from engaging in the exact type of ex parte communications that Michigan's rules prohibit. However, providing Mr. Loew with a new trial may deter other courts – criminal and civil – from engaging in ex parte communications. See *United States v Atwood*, 941 F3d 883, 885 (CA7, 2019) ("As in *Liljeberg*, we thin kthat enforcing § 455(a) in this case may prevent a substantive injustice in some future

case – here, by encouraging judges to exercise caution in their communications.") (quotation marks and citation omitted).

The third *Liljeberg* factor – the risk of undermining the public's confidence in the judicial process – also weighs in favor of Mr. Loew. Judge Bakker and Ms. Koch's conduct was indisputably improper. The ex parte e-mails exchanged by those officials, and the January 13, 2022 Court of Appeals' opinion that entirely failed to recognize the gravity of those communications and the circumstances under which they occurred, erode the public's confidence in the judiciary and the criminal justice system. See *In re Chumra*, 461 Mich 517, 535; 608 NW2d 31 (2000) (explaining that the state has a "compelling interest in preserving the integrity of the judiciary . . . The state's interest in the integrity of the judiciary extends to preserving public confidence in the judiciary. The appearance of fairness and impartiality is necessary to foster the people's willingness to accept and follow court orders"); *Landmark Communications, Inc v Virginia*, 435 U.S. 829, 848; 98 S Ct 1535 (1978) (Stewart, J., concurring) (Justice Stewart writing that "[t]here could hardly be a higher governmental interest that a State's interest in the quality of its judiciary."). As the dissenting opinion reasoned "a trial judge unilaterally identifying the strengths and weaknesses of a case to one party, but not the other, creates a perception that the judge is not neutral and impartial." (Appx, 621a.)

IV. Mr. Loew is Entitled to a New Trial.

A. Because the Trial Court Violated Mr. Loew's Due Process Rights, He is Entitled to a New Trial.

Due process grants criminal defendants "the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings[.]" *Faretta v California*, 422 US 806, 820 n 15; 95 S Ct 2525 (1975). See also *United States v Cronic*, 466 US 648, 659 N 25; 104 S Ct 2039 (1984) ("The Court has uniformly found constitutional error *without any showing of*

prejudice when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding.")(emphasis added). "Even where a compelling necessity for secrecy exists, it must be weighed against the extent of the intrusion, if any, upon the interests of the excluded defendant." *United States v Madori*, 419 F3d 159, 171 (2 CA 2005).

Due process also affords to a person "an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v Jerrico, Inc.,* 446 US 238, 242; 100 S Ct 1610; 64 L Ed 2d 182 (1980). The trial court "deprives a party of a fair trial if [its] conduct pierces the veil of judicial impartiality." *Stevens*, 498 Mich at 164. See also, *In re Del Rio*, 400 Mich 665, 721-726; 256 NW2d 727 (1977) ("[a] citizen's experience with the law is often confined to contact with the courts. Therefore, it is important not only that the integrity of the judiciary be preserved, but the appearance of that integrity be maintained"). Judicial misconduct takes many forms, including "belittling of counsel, inappropriate questioning of witnesses, providing improper strategic advice to a particular side, biased commentary in front of the jury, or a variety of other inappropriate actions." *People v Swilley*, 504 Mich 350, 371-372; 934 NW2d 771 (2019).

In the context of ex parte communications between a trial court and a jury, the United States Supreme Court has held that a trial court's ex parte communication with the jury can constitute error requiring reversal. In *Shields v United States*, 273 US 583; 47 S Ct 478 (1927), the jury asked for additional instructions from the trial court regarding the issue of entrapment. Neither the defendant nor his counsel was present for those additional instructions. Later, the jury informed the court that it could not agree on a verdict, and, again, neither the defendant nor his counsel was present. The record did not contain what instructions the trial court gave the jury; however, after additional deliberations, the jury returned a guilty verdict against the defendant. The Supreme Court found that the communications between the judge and jury were improper and prejudicial.

Similarly, in *Rogers v United States*, 422 US 35; 95 S Ct 2091 (1975), the Supreme Court once again took up the issue of ex parte jury communications. In *Rogers*, the jury sent the trial court a note asking if it "would 'accept the Verdict – "Guilty as charged with extreme mercy of the Court."'" *Rogers*, 422 US at 36. The trial court did not inform the defendant or his counsel of the note and responded to the jury. Shortly thereafter, the jury returned the guilty verdict against the defendant. *Id.* at 36-37. The Supreme Court rejected that the trial court's communication was harmless, in part, due to the substantive nature of the ex parte communication. Indeed, the Supreme Court explained that "the nature of the information conveyed to the jury, in addition to the manner in which it was conveyed, does not permit that conclusion in this case." *Id.* at 40.

"An *ex parte* communication between the prosecution and the trial judge can only be 'justified and allowed by compelling state interest.'" *United States v Barnwell*, 477 F3d 844, 850 (CA 6 2007) quoting *United States v Minsky*, 963 F2d 870, 874 (CA 6 1992). The prosecution "bears a heavy burden in showing that the defendant was not prejudiced when his counsel was excluded from these communications." *Id.* at 851. In *Barnwell*, the Sixth Circuit reversed and remanded a case for a new trial, holding that the trial court's ex parte communications with the prosecution and jury foreperson during defendant's trial violated the defendant's due process rights. The trial judge and prosecution engaged in five ex parte communications regarding the existence of a wiretapped communication potentially relating to the defendant's case. Although related to the defendant's case, the government claimed that the wiretapped communication was part of a separate, ongoing investigation. *Id.* Even after finding the ex parte communications may have related to an ongoing investigation, the Sixth Circuit held that the government failed to provide a compelling state interest for the occurrence of the communications. *Id.* Examples of compelling state interests include matters of national security or the safety of witnesses or jurors.

Id. Moreover, "[t]he record shows that the AUSAs had an open invitation to contact and meet with the judge as much as they deemed necessary." *Id.* Neither the defendant nor his counsel were aware of the ex parte communications. See also *United States v Napue*, 834 F2d 1311, 1317 (CA 7, 1987) ("ex parte communications between the trial court and the prosecution in a criminal case are to be greatly discouraged and should be permitted only in very limited circumstances.")

Here, the trial court violated Mr. Loew's right to due process of law, and the proper remedy is a new trial. As in *Barnwell*, the prosecution cannot establish a compelling state interest to justify the ex parte communications between Judge Bakker and Ms. Koch. There were multiple e-mails between Judge Bakker and Ms. Koch, so their ex parte communications did not consist of an isolated incident. Rather, the ex parte communications were fluid, and occurred during one of the most adversarial types of legal proceedings – a criminal jury trial. While "[t]he mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right . . . the constitutional right to presence, which derives from the Sixth Amendment's Confrontation Clause . . . exists where there is a reasonably substantial relation to the fullness of opportunity to defend against the charge and to the extent that a fair and just hearing would be thwarted by the defendant's absence." *United States v Bishawi*, 272 F3d 458, 461-461 (CA 7 2001) (citing *United States v Gagnon*, 470 US 522, 526; 105 S Ct 1482 (1985)). Because the ex parte communications dealt with substantive trial issues – the investigation employed by law enforcement in Mr. Loew's case, the lack of medical examination of the complainant, and law enforcement's credibility – Mr. Loew's counsel should have been included in that e-mail exchange.

B. Mr. Loew is Also Entitled to a New Trial under MCR 2.003.

The Court of Appeals' majority decision conflates two elements of MCR 2.003(C)(1)(b). As set forth above, that rule provides that a judge should be disqualified if she has either "a serious risk of actual bias impacting the due process rights of a party," *or* she "has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." MCR 2.003(C)(1)(b). In its majority decision, the Court of Appeals held that a defendant must establish "actual bias" or "prejudice" where a violation of Canon 2 is alleged.[4] Where a violation of Canon 2 occurs, a showing of actual bias or prejudice is unnecessary, pursuant to the plain language of MCR 2.003(C)(1)(b), which requires that actual bias exist only if a defendant is asserting that their due process rights "as enunciated in *Caperton v Massey*, 556 US 868; 129 S Ct 2252 (2009)," have been violated. MCR 2.003(C)(1)(b)(i). Here, if MCR 2.003 applies, then only MCR 2.003(C)(1)(b)(ii), which states that disqualification is warranted where a judge violates Canon 2, applies.

An "appearance of impropriety" exists where the judge's "conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.'" *Caperton v Massey*, 556 US 868, 888; 129 S Ct 2252 (2009). Where there is not an ongoing relationship between a judge and an attorney or an ongoing reason for possible prejudice, disqualification is unnecessary. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 600; 640 NW2d 321 (2001). Here, Judge Bakker and Ms. Koch worked as prosecutors in the same office prior to Judge Bakker's election to the Circuit Court

[4] The Court of Appeals wrote "that a showing of actual bias is not necessary where "'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable;" thus, stating that a showing of actual bias is otherwise necessary. The Court of Appeals continued to explain that "even if there was an appearance of impropriety in the e-mail exchange from the bench, defendant has not established prejudice."

bench and continue to regularly interact in court. Their ongoing relationship makes the ex parte communications all the more improper, the conduct in which they engaged all the more likely to sow seeds of distrust in citizens who rely on an independent judiciary.

An appearance of impropriety by a trial judge does not automatically result in a violation of due process. See *Cain v Deep't of Corrections*, 451 Mich 470, 512 n 48; 548 NW2d 210 (1996) (stating that "there may be situations in which the appearance of impropriety on the part of a judge or decisionmaker is so strong as to rise to the level of a due process violation. However, this case does not present such a situation."). Thus, a mere appearance of impropriety does not automatically entitle a defendant to relief. *In re Bergeron*, 636 F3d 882, 883 (CA 7, 2011) (providing that "[a]ctual bias would entitle the losing party to a new trial, but the mere appearance of bias would not . . ."). However, in cases where judicial impartiality is reasonably questioned, the test set forth in *Liljeberg v Health Servs Acquisition Corp*, 486 US 847; 108 S Ct 2194 (1988)[5] determines whether a new trial should be granted. As Mr. Loew outlined in a previous section of this brief, a weighing of those factors favors granting Mr. Loew a new trial.

[5] 28 USC 455(a) is a federal analog to MCR 2.003(C)(1)(b).

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Mr. Loew respectfully requests that this Court reverse the Opinion of the Court of Appeals and affirm the trial court's order granting Mr. Loew a new trial.

Respectfully submitted,

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/s/ *Heath M. Lynch*

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