STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

DANIEL ALBERT LOEW, **No. 164133**
Defendant-Appellant.

L.C. No. 18-021709-FC
COA No. 352056

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

THOMAS WEICHEL
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief, Research, Training, and Appeals

TIMOTHY A. BAUGHMAN (P 24381)
Special Assistant Prosecuting Attorney
11TH Floor
Detroit, Michigan 48226
Phone: (313) 224-5792

Table of Contents

Index of Authorities

Cases **Page**

FEDERAL CASES

STATE CASES

MICHIGAN STATUTES AND COURT RULES

FEDERAL STATUTES

OTHER

Statement of the Question

I.

No non-constitutional error may result in reversal unless it affirmatively appears that the error caused a miscarriage of justice, which is to say that the defendant must show it is more probable than not that without the error there would have been a different result. The trial judge erred under the Code of Judicial Conduct in failing to disclose e-mail contacts during trial with the elected prosecutor, but those contacts gave no procedural or tactical advantage to the prosecution, and do not constitute constitutional error. Has defendant shown a miscarriage of justice?

Defendant answers: YES

The People answer: NO

Amicus answers: NO

Statement of Facts

Amicus joins the statement of facts supplied by the People.

Argument

I.

No non-constitutional error may result in reversal unless it affirmatively appears that the error caused a miscarriage of justice, which is to say that the defendant must show it is more probable than not that without the error there would have been a different result. The trial judge erred under the Code of Judicial Conduct in failing to disclose e-mail contacts during trial with the elected prosecutor, but those contacts gave no procedural or tactical advantage to the prosecution, and do not constitute constitutional error. Defendant has not shown a miscarriage of justice.

A. Introduction

This Court has granted leave to appeal, directing briefing on:

- whether the Court of Appeals correctly concluded 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;

- whether a trial court may properly grant a new trial in a criminal case based on an appearance of impropriety where Canon 3(A)(4) governs the conduct at issue, see *In re Haley*, 476 Mich. 180, 194-195, 720 N.W.2d 246 (2006);

- if the ex parte communications here give rise to legal error for either a violation of Canon 3(A)(4)(a) or an appearance of impropriety, whether the standard for ascertaining reversible prejudice requires a showing of actual harm to the defense, or is instead determined by weighing other factors as well, see, e.g., *Liljeberg v Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988); and

- whether the defendant is entitled to a new trial under MCR 2.003 or constitutional guarantees of due process of law.[1]

Amicus answers:

[1] *People v. Loew*, 979 N.W.2d 851 2022)

- the Court of Appeals correctly concluded 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, and more importantly, because, however they are characterized, they did not provide the prosecution a procedural or tactical advantage; further, the Code is not law and creates no substantive rights;

- whatever the standard for judicial discipline for violation of a canon of the Code of Judicial Conduct,[2] reversal of a conviction for an "appearance of impropriety" under the judicially-adopted Code is improper where statute requires that in a criminal case "*No* judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, *it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice*."[3]

- if the ex parte communications here give rise to legal error reversal is not justified, no miscarriage of justice affirmatively appearing; and

- the defendant is not entitled to a new trial under MCR 2.003, as there is absolutely no showing that defendant was tried by a biased judge, or that the e-mails in question, objectively speaking, demonstrate a "probability of actual bias on the part of the judge that is too high to be constitutionally tolerable,"[4] as, if anything, they reflect poorly on the prosecution's proofs,[5] and the error in failing to notify defense counsel of the emails did not work a miscarriage

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[2] And amicus does not suggest for a moment that judicial discipline is needed or appropriate in the circumstances here.

[3] MCL § 768.26. And "a preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v. Lukity*, 460 Mich. 484, 496 (1999).

[4] *Rippo v. Baker*, 580 U.S. 285, 287, 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017); *Williams v. Pennsylvania*, 579 U.S. 1, 8, 136 S.Ct. 1899, 1905, 195 L.Ed.2d 132 (2016) (cleaned up).

[5] Defendant says that "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." Defendant's brief, at 17. But of course, defendant errs, for neither Canon 2 nor MCR 2.003 *are* statutes, while MCL § 769.26 *is*.

of justice as it is not more probable than not that the error was outcome determinative.[6]

B. Reversal is not appropriate where no miscarriage of justice affirmatively appears

1. Recusal as required by due process and as required by court rule

In the Court's statement of the issues, MCL § 769.26 is never mentioned, nor does it appear at any place in the defendant's application for leave to appeal or supplemental brief.[7] But that standard governs review of all error save constitutional error, where the standard set by the Supreme Court is that the prosecution must prove that the error was harmless beyond a reasonable doubt; that is, that it did not contribute to the verdict,[8] with the demonstration of certain "structural" error conclusive on the point, including a trial before a biased judge,[9] which includes circumstances where

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[6] *People v. Lukity*, 460 Mich. 484, 496 (1999).

[7] Nor, for that matter, does it appear in either the Court of Appeals majority opinion (which found the emails not to be substantive), or the dissent. The dissent would have found a new trial required "on the basis that the trial judge had an appearance of impropriety, in violation of Canon 2 and MCR 2.003(C)(1)(b), and that the error was not harmless"; that is, on the basis of a canon of judicial conduct and a court rule governing not actual bias, or even "a probability of actual bias on the part of the judge or decisionmaker that is too high to be constitutionally tolerable," *People v. Loew*, 340 Mich. App. 100, 136 (2022) (though "acknowledg[ing] that defendant did not argue in the trial court, and d[id] not argue on appeal, that he [wa]s entitled to relief under MCR 2.003(C)(1)(b)") (Riordan, J., dissenting), and other than the conclusory statement "the error was not harmless," giving no analysis on that point.

[8] *Neder v. United States*, 527 U.S. 1, 15–16, 119 S. Ct. 1827, 1837, 144 L. Ed. 2d 35 (1999) ("In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), we set forth the test for determining whether a constitutional error is harmless. That test, we said, is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'").

[9] Some constitutional errors are "deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process. . . . Those precedents include . . . *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased judge)." *Weaver v. Massachusetts*, 198 L. Ed. 2d 420, 137 S. Ct. 1899, 1911 (2017).

"the likelihood of bias on the part of the judge is too high to be constitutionally tolerable."[10] That standard is not met here, and thus there is no due process violation, however that which occurred is characterized.

MCR 2.003(C)(1)(b) sets out when recusal is "warranted," including 1) actual bias,[11] 2) where the circumstances demonstrate a serious risk of actual bias so as to violate due process under the *Caperton* standard,[12] 3) a number of circumstances where actual bias would appear apparent to a neutral observer,[13] and 4) where the judge, based on objective and reasonable perceptions, has "failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct,"[14] a ground thus separate and distinct from where under *Caperton* and *Williams* due process requires recusal. By way of comparison, the federal recusal statute, 28 U.S.C.

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[10] *Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 872, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009); *Williams v. Pennsylvania*, , supra; *Rippo v. Baker*, 580 U.S. 285, 287, 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017).

See *Coley v. Bagley*, 706 F.3d 741, 750 (CA 6, 2013) ("judicial bias is a structural defect both when actual and when merely unconstitutionally probable").

[11] MCR 2.003(C)(1)(a).

[12] MCR 2.003(C)(1)(b)(i).

[13] MCR 2.003(C)(1): "(c) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding. (d) The judge has been consulted or employed as an attorney in the matter in controversy. (e) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years. (f) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding. (g) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (I) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; (iv) is to the judge's knowledge likely to be a material witness in the proceeding."

[14] MCR 2.003(C)(1)(b)(ii).

455, provides similarly that a judge must recuse 1) if actually biased,[15] 2) under a number of circumstances where actual bias would appear apparent to a neutral observer,[16] and 3) where his or her "impartiality might reasonably be questioned."[17] The federal Code of Judicial Conduct in Canon 3 also has a provision concerning disqualification that includes in C(1)(a) that "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has . . . personal knowledge of disputed evidentiary facts concerning the proceeding."

2. Canons 2 and 3 of the Code of Judicial Conduct are not law and vest no substantive rights

The Michigan recusal court rule, then, refers to a violation of Canon 2 of the Code of Judicial Conduct. That canon provides in paragraph A, in pertinent part, that "A judge must avoid all impropriety and appearance of impropriety." Canon 3, much discussed by the Court of Appeals and by the appellant, provides in paragraph A(4)(a)(i) and (ii) that

> (4) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the

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[15] 28 U.S.C. 455(b)(1): "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding . . . [w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

[16] 28 U.S.C. 455(b): "(1) Where he has personal knowledge of disputed evidentiary facts concerning the proceeding (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy; (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (I) Is a party to the proceeding, or an officer, director, or trustee of a party; (ii) Is acting as a lawyer in the proceeding; (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) Is to the judge's knowledge likely to be a material witness in the proceeding."

[17] 28.U.S.C. 455(a).

> 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.

The Code was adopted by the Court in 1974,[18] and, "is not law, but a guideline to be followed" by judges in their conduct,[19] and vests no substantive rights in litigants.[20] Most cases considering the canons of judicial conduct are, in fact, cases concerning judicial discipline, as this Court's citation of *In re Haley*[21] demonstrates. Certainly, principles embodied in the canons may, of their own force, constitute statements of law, but if so that they are in the Code adds nothing to their independent force as law, and their enforceability in litigation. Canon 3(4)(a)(i)'s prohibition on substantive ex parte communications is such a rule, as the communications may—though not necessarily—demonstrate that the judge is actually biased, or, given their content, that the likelihood of bias on the part of the judge is too high to be constitutionally tolerable, both of which are constitutionally impermissible, which would be so also if the communication gave a tactical or

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[18] *Matter of Lawrence*, 417 Mich. 248, 256 (1983); *Att'y Gen. v. Michigan Pub. Serv. Comm'n*, 243 Mich. App. 487, 492 (2000).

[19] *Braman v. Corbett*, 19 A.3d 1151, 1161 (Pa. Super. Ct., 2011).

[20] The canons "do[] not confer substantive rights upon the parties to the litigation in question." *Goodheart v. Casey*, 565 A.2d 757, 762 (Pa., 1989). Cf. *People v. Mitchell*, 454 Mich. 145, 175 (1997), concerning this Court's sentencing guidelines, holding that "because this Court's guidelines do not have the force of law, a guidelines error does not violate the law."

[21] *In re Haley*, 476 Mich. 180 (2006). And see, e.g., *In re Morrow*, 508 Mich. 490 (2022); *In re Brennan*, 504 Mich. 80 (2019); *In re Church*, 499 Mich. 936 (2016); *In re Mazur*, 498 Mich. 923 (2015); *In re McCree*, 495 Mich. 51 (2014).

procedural advantage to a litigant. But there is a record of the communications here, which demonstrate that no advantage of any sort was gained, and so no miscarriage of justice is affirmatively demonstrated.

3. The violation here was of Canon 3(4)(a)(ii) regarding notification, a violation which does not require recusal and does not affirmatively demonstrate a miscarriage of justice under MCL § 769.26

The Court of Appeals majority opinion and the People's brief well-mine this point; that is, that the communications here went to no substantive matter. Ex parte communications are not prohibited regarding scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, so long as 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 the judge promptly notifies the other side of the fact and substance of the communication and allows a response. Here, the queries concerned weaknesses in the investigation of the case, principally the absence of a medical exam on the complainant, something that referred to a past event not remediable in the case, and did not provide the prosecution with a procedural or tactical advantage, or the judge with knowledge of a disputed evidentiary fact. However otherwise characterized, the emails were not substantive; as the Court of Appeals majority opinion well put it, "These communications did not relate to or bear on any substantive issue in defendant's proceeding, but instead related to larger issues of process. Admittedly, the concerns were tangential to defendant's trial because the general concerns arose during the MSP trooper's testimony, yet the nature of the questions focused more globally on investigatory processes and not on issues specific to the trial itself."[22]

The Court of Appeals found that the trial judge *did* violate the disclosure requirements of Canon 3(A)(4)(a)(ii) by failing to notify defense counsel of the e-mail contacts with the elected prosecutor.[23] But violations of the Code vest no substantive rights and "do not necessarily give rise

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[22] *People v. Loew*, at 113.

[23] *People v. Loew*, at 115.

to a violation" of recusal requirements[24] by denying the accused an impartial judge. And the question, amicus submits, is not whether the Code was violated, but whether the circumstances demonstrate that the trial was presided over by a biased judge, or that the likelihood of bias on the part of the judge was too high to be constitutionally tolerable, so that defendant's constitutional right to an unbiased judge[25] was violated, which constitutes a miscarriage of justice without any showing of prejudice.[26]

Though the canons of judicial conduct vest no substantive rights in litigants enforceable in litigation, the principle embodied in a canon may well be one that expresses, in terms of appropriate judicial conduct, a right that is, independent of the canons, possessed by a litigant. The federal code has provisions referring to disqualification that largely mimic the federal statute. As to ex parte contacts, that code in Canon 3(A)(4) is essentially identical to the Michigan code. Part C. of the canon concerns disqualification,[27] and provides that:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> (a) the judge has a personal bias or prejudice concerning a party, or personal *knowledge of disputed evidentiary facts* concerning the proceeding (emphasis supplied).

But neither the canon nor the federal statute mention ex parte communications as a ground for disqualification—nor does MCR 2.003. What both the federal canon in its disqualification

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[24] *Andrade v. Chojnacki*, 338 F.3d 448, 459 (CA 5, 2003); *In re Kensington Int'l Ltd.*, 368 F.3d 289, 326 (CA 3, 2004) (Fuentes, J., dissenting).

[25] *Tumey v. Ohio*, supra.

[26] Id.; *Weaver*, supra.

[27] It should not escape the Court's notice that defendant never raised recusal principles until mentioned by the dissenting opinion in the Court of Appeals.

provisions and the federal recusal statute, as well as MCR 2.003, all list as disqualifying is personal knowledge by the judge of disputed evidentiary facts concerning the proceeding.[28]

As one judge has noted, "the Code tellingly leaves out ex parte communications in its listing of grounds for disqualification . . . . [and] that Congress codified so much of the Code but did not codify the prohibition on ex parte communications evinces a Congressional judgment that ex parte communications do not warrant recusal per se. In short, ex parte communications must give the judge information on a specific disputed material fact gleaned from outside the judiciary process to warrant recusal."[29] The prohibition on ex parte communications on substantive matters concerning the case has a purpose to avoid off-the-record contacts that might influence the outcome of the case. When a judge has personal knowledge of disputed evidentiary facts he or she "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. Rule 605 . . . . If he or she is to testify, the judge may not preside. . . . [and] whether, in a bench trial, a judge can avoid an involvement destructive of impartiality where the judge 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."[30] Further, that ex parte communications on administrative matters are permissible where the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result demonstrates that a purpose of the prohibition on substantive ex parte communications is to avoid providing a party with such an advantage. Again, no such advantage was provided the prosecution here, for the reasons laid out by the Court of Appeals majority and the People in their brief, and amicus will not repeat them here, nor did the judge gain knowledge of any disputed evidentiary facts.

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[28] Federal Code of Judicial Conduct Canon 3(C)(1)(a); 28 U.S.C. 455(b)(1); MCR 2.003(C)(1)(c).

[29] *In re Kensington Int' Ltd*., 368 F.3d 289, 326 (CA 3, 2004) (Fuentes, J., dissenting).

[30] *Price Bros. Co. v. Philadelphia Gear Corp*., 629 F.2d 444, 447 (CA 6, 1980).

4. Canon 2 does not provide a basis for demonstrating a miscarriage of justice

As amicus has said, the canons of judicial conduct are not law and vest no substantive rights. Canon 2 is, however, referenced in MCR 2.003(C)(1)(b), which provides that disqualification is "warranted"—not "required"—where "[t]he judge, based on objective and reasonable perceptions has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." First, amicus would note that the adoption of this provision was a mistake, as it arguably refers to *any* judicial impropriety, including one having nothing to do with the standards for judicial bias, or affecting the litigation of the case in any way (though one could argue that if such a violation were shown disqualification—particularly after the fact, invalidating the judgment—would not be required[31]). If a standard of this sort should exist it should go to judicial bias, and thus the current provision would be better replaced by the federal standard that disqualification is required if under the circumstances the judge's impartiality might reasonably be questioned, assessed from the perspective of an objective, well-informed, thoughtful observer.[32] In any event, no appearance of impropriety under the Canon as seemingly embraced in MCR 2.003 should be said to exist where a specific Canon, here Canon 3, is not violated as to its substance, or violated in a way that works no miscarriage of justice.

Though the canons are not law and vest no rights, case law concerning them may be informative in the odd situation here where the Court through its rules appears to have embraced one of them. In *In re Haley*, a judicial discipline case, the judge was found to have violated Canon 5(C)(4) by accepting football tickets in open court from an attorney appearing before him, with no

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[31] And indeed, two justices, defending the standard, argued that the "appearance of impropriety" standard and the standard that "the judge's impartiality might reasonably be questioned" are "one and the same," or "synonyms." *Pellegrino v. AMPCO Sys. Parking*, 485 Mich. 1134, 1136, 1146 (2010) (Hathaway, J., and Kelly, C.J., concurring in the order denying motion to disqualify 3 justices), though if that were the case one would think the Court would simply have used the impartiality language, but whether that is or is not the case, the Court should now change the language of the rule.

[32] *Thomas v. Dart*, 39 F.4th 835, 844 (CA 7, 2022).

applicable exceptions to the prohibition applied.[33] This Court firmly continued to reject application of Canon 2 where the conduct in question is governed by a specific canon:

> We decline to create an independent "appearance of impropriety" standard to judge respondent's behavior when there is an express, controlling judicial canon. . . . [t]he "appearance of impropriety" standard is relevant not where there are specific court rules or canons that pertain to a subject ... but where there are no specific court rules or canons that pertain to a subject and that delineate what is permitted and prohibited judicial conduct. Otherwise, such specific rules and canons would be of little consequence if they could always be countermanded by the vagaries of an "appearance of impropriety" standard.
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> The more general "appearance of impropriety" standard does not govern when the specific prohibition [of another canon] controls. Otherwise, the "appearance of impropriety" standard would undermine, and potentially countermand, the remaining canons' authority to proscribe and prescribe specific judicial conduct. We reserve application of the "appearance of impropriety" standard to conduct by a judge that is neither permitted nor forbidden by a specific canon.[34]

Here, then, if the legal principle that animates Canon 3 when applied to a litigant is not violated—that is, the ex parte communications do not reveal a biased judge, nor provide a procedural or tactical advantage to a litigant, and the circumstances do not show a likelihood of bias on the part of the judge that is too high to be constitutionally tolerable—then Canon 2 can provide no basis for recusal under MCR 2.003(C)(1)(b).

And in all events, not every failure to recuse requires the setting aside of a judgment, and cannot do so in Michigan under MCL § 769.26 where there is no constitutional error. In the federal system, it is clear that a recusal error may be harmless. Indeed, the Supreme Court case cited in the

[33] *In re Haley*, at 182-183.

[34] Id., at 194-195.

Court's order granting leave to appeal—*Liljeberg v. Health Servs. Acquisition Corp*.,[35]—makes that plain. There a recusal error was made by the trial judge, who, as a member of the board of trustees of Loyola University had a conflict of interest with regard to the litigation, one which, he said, he had forgotten about. Applying the statutory standard that disqualification is required federally in any proceeding in which the judge's impartiality might reasonably be questioned, the Court found it unnecessary that the judge be subjectively aware of the circumstances leading to that conclusion.[36] But that there was a violation of the statute did not, said the Court, necessarily mean that the judgment was to be vacated: "A conclusion that a statutory violation occurred does not, however, end our inquiry. As in other areas of the law, there is surely room for harmless error . . . . There need not be a draconian remedy for every violation of § 455(a)."[37] To be considered are (1) "the risk of injustice to the parties in the particular case"; (2) "the risk that the denial of relief will produce injustice in other cases"; and (3) "the risk of undermining the public's confidence in the judicial process."[38] Applying that test, the Court found reversal warranted on the facts before it.

Here, assuming only for the sake of argument that the communications create an "appearance of impropriety," they do not create a circumstances where the judge's partiality might reasonably be questioned (and, as pointed out previously, they show neither actual bias or create circumstances where the likelihood of bias on the part of the judge is too high to be constitutionally tolerable, and so there is no constitutional error), and no miscarriage of justice was occasioned. No procedural or tactical advantage was obtained by the prosecution, nor any disputed evidentiary facts learned by the judge. There was, given the content of the communications, no risk of injustice to the parties in this case. Whatever the Supreme Court dictates with regard to the federal recusal statute, under MCL

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[35] *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).

[36] "[E]ven though his failure to disqualify himself was the product of a temporary lapse of memory, it was nevertheless a plain violation of the terms of the statute." Id., 108 S. Ct. at 2203.

[37] Id., 108 S. Ct. at 2203-2204.

[38] Id., 108 S. Ct. at 2205.

§ 769.26 this should end the inquiry.[39] But if *Liljeberg* is applied, then there is no risk that denial of a new trial will produce injustice in other cases, and little risk of undermining the public's confidence in the judicial process; indeed, public confidence in the judicial process might be undermined if the communications here, such as they are, caused reversal of the conviction (note that in *Liljeberg* the judge had a conflict of interest he had purportedly forgotten about, and a conflict of interest in the litigation is much more likely to undermine public confidence in the judicial process).[40]

C. Conclusion

The conviction here may be set aside only if the error worked a miscarriage of justice, meaning that the defendant must show that it is more probable than not that without the error a difference result would obtain. The ex parte communications do not reveal a biased judge, or create circumstances where the likelihood of bias on the part of the judge is too high to be constitutionally tolerable, and neither did they provide the prosecution with a procedural or tactical advantage, or the trial judge with knowledge of a disputed evidentiary fact. Absent any of these, no miscarriage of

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[39] And see *Joritz v. Univ. of Kansas*, 2022 WL 817968, at 4 (CA 10, 2022) ("Even assuming that failure to recuse was error, Professor Joritz cannot show that such error affected the result"); *Higganbotham v. Okla. ex rel. Okla. Transp. Comm'n*, 328 F.3d 638, 645–646 (CA 10m 2003) (any alleged error in failure to recuse was harmless); *In re Cox*, 2021 WL 2310356 (CA3, 2021) ("We will deny the petition [for mandamus] because Cox has not shown that he is entitled to an order requiring the District Judge's recusal. Although ex parte communications are strongly disfavored . . . the District Judge's May 13, 2020 videoconference with the Government does not warrant recusal here because there is no indication that substantive advice was either solicited or offered"); *In re Kensington*, 368 F.3d at 305 ("We do not hold that ex parte communications alone—in the absence of any conflict of interest—require recusal."); *In re Pearson*, 990 F.2d 653, 661 (CA 1, 1993). ("in this instance, the communication was wholly innocuous and petitioners have been unable to suggest how the judge's lapse was harmful. Because the court's impetuosity was in no way prejudicial, issuance of a prerogative writ would be tantamount to using a bazooka to slay a gnat"); *Grieco v. Meachum*, 533 F.2d 713, 719 (CA 1, 1976) (applying harmless-error analysis where alleged ex parte contact caused no harm).

[40] "[I]t is remarkable that the judge, who had regularly attended the meetings of the Board of Trustees since 1977, completely forgot about the University's interest in having a hospital constructed on its property in Kenner." 108 S. Ct. at 2205..

justice appears. Violation of a canon, here the failure to disclose the communication, does not create a miscarriage of justice, or justify reversal even applying the *Liljeberg* factors; indeed, even if an "appearance of impropriety" appears—and amicus believes that as meant by the canon it does not—it is not one that, objectively viewed, causes the impartiality of the judge to reasonably be questioned by a well-informed, thoughtful observer. Reversal is inappropriate.

Relief

Wherefore, amicus requests that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

THOMAS WEICHEL
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief, Research, Training, and Appeals

/S/
TIMOTHY A. BAUGHMAN
Special Assistant Prosecuting Attorney
11TH Floor
Detroit, Michigan 48226

Certificate of Compliance

It is hereby certified that the brief filed here consists of 5340 countable words.

/S/
TIMOTHY A. BAUGHMAN