STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

vs

DANIEL ALBERT LOEW,

Defendant-Appellant/Cross-Appellee,

SUPREME COURT NO: 164133

COURT OF APPEAL NO: 352056

LOWER COURT NO: 18-21709-FC

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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

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COUNTERSTATEMENT OF JURISDICTION

The Plaintiff-Appellee has no objection to Defendant-Appellant's statement of jurisdiction.

QUESTION PRESENTED

During the course of the jury trial, the presiding judge sent emails to the elected county prosecutor. The emails showed no bias against or prejudice to Defendant, provided no tactical advantage, and did not reference issues on the merits. On the basis of the emails, is Defendant-Appellant entitled to a new trial?

Trial Court Answered:	"Yes"
Defendant-Appellant Answers:	"Yes"
Plaintiff -Appellee Answers:	"No"
Court of Appeals answered:	"No"

I. COUNTERSTATEMENT OF FACTS

The Honorable Margaret Zuzich Bakker presided over Defendant's jury trial and sentencing. Defendant was convicted as charged of two counts of First Degree Criminal Sexual Conduct (Personal Injury), contrary to MCL 750.520b(1)(f), two counts of Third Degree Criminal Sexual Conduct (Force or Coercion and Person 13-15) contrary to MCL 750.520d(1)(b) and MCL 750.520d(1)(a), and one count of Second Degree Criminal Sexual Conduct (Personal Injury), contrary to MCL 750.520c(1)(f). He was sentenced to concurrent minimum sentences of imprisonment as a third offense habitual offender, MCL 769.11, to 240 to 480 months for the First Degree Criminal Sexual Conduct convictions and to 240 to 360 months for the Second and Third Degree Criminal Sexual Conduct convictions.

A. Facts established at trial.

Testimony at trial established that victim Jenna Bluhm was born on November 24, 2002. (Trial Transcript I, hereafter "TT", at 114). At the time of her first sexual assault by Defendant, in December 2015, Jenna had recently turned 13. Defendant sexually assaulted her until January 2018. The incident in December 2015 occurred on the date of Jenna's father's wedding, shortly before her father Robert Bluhm was sentenced to prison. (TTI at 117, 129-131).

The December 2015 wedding reception was held at the home of Scott and Jane Heppe, Jenna's paternal uncle and aunt. Jane is Robert's Bluhm's sister. (TTII at 93). Jane and Scott hosted the reception in their pole barn in Allegan County and it continued until the early morning hours the following day.

Defendant was the live-in boyfriend of Jane and Scott's daughter Brooke (or "Brook" or "Brouk"). (TTI at 117). Brooke, Defendant, their baby son, Jane, and Scott all resided together. (TTII at 94). Jenna, her older sister Taylor Bluhm, and her younger sister Anna Bluhm, were very close to these relatives. Defendant previously attended Jenna's thirteenth birthday party. (TTI at 123).

Reception guests were generally disallowed to enter the Heppe house during the wedding reception. Jane and Scott had house keys. Brooke had a house key but did not know where it was. (TTII at 199-200). Jenna testified that at some point during the reception, Defendant and Brooke made a trip to the store. When they returned from the store, Brooke asked Jenna to go inside and help Defendant unload the groceries. Jenna and Defendant were alone in the house. (TTI at 124, 130).

Defendant called Jenna to come into Brooke's bathroom. When Jenna walked in, Defendant shut the door and locked it. Jenna was wearing only a dress and underwear. He removed these. Conversation was limited to Jenna asking Defendant what was going on. Jenna testified that she was in "shock," afraid, and "confused." (TTI at 129). He began kissing her shoulder, neck, and "body." He turned her around and pushed her down until she was on her elbows and knees. He, too, had undressed and he attempted to insert his penis into her vagina. Jenna testified that his penis would not "go in." She said that it finally did penetrate her and that she remembered feeling "a very bad cramp" in her "stomach." She did not know how long it took him to enter her. He had his hands on her hips. She did not

call out. He eventually pulled out of her and ejaculated on the hardwood floors. He wiped up the ejaculate with a tissue and threw it out. He dressed and left the bathroom. She remained on the bathroom floor for a "second, because [her] stomach was killing [her]." She bled from her vagina onto the bathroom floor. (TTI 130-133). (Contrary to Defendant-Appellant's repeated assertion otherwise, Jenna never testified that she "lost her virginity" during that encounter. See Defendant-Appellant's Application for Leave to Appeal at 1, 2, 7, 29.)

Anna Bluhm testified that Defendant danced with Jenna "a lot" at Robert's wedding reception. (TTI at 250).

At trial, when she was asked to look at a picture of Brooke's bathroom, including the rugs on the bathroom floor, Jenna stated that the picture did not depict the bathroom as it was decorated at the time of the first of the assaults. (TTI at 130).

After Jenna's father went to prison, Aunt Jane began regularly taking Jenna and her sister Anna (and sometimes Taylor) to prison to visit him. The girls would spend the Friday night before the Saturday visit in order to leave early Saturday morning for the long drive to the prison. Sometimes they would also spend Saturday nights. (TTI at 140).

It became almost routine for Defendant to assault Jenna on the Friday nights that she slept at her aunt's house. (TTI at 143). Jenna and Anna, and sometimes one of their friends, would sleep on the family room couches. Friends spent the night on Saturdays. Defendant would never come to her when she had a friend

there. (TTI at 156-157). Defendant would waken her by touching her over and under her clothing and then would lead her to Brooke's bathroom where he would assault her. There would be no conversation or pretense of affection. (TTI at 150). He would generally penetrate her from behind, ejaculate on the floor, wipe up and leave. She would stay behind to dress, sometimes crying. (TTI at 148).

Once as he tried to waken her and she was feigning sleep, someone came out of a bedroom. He retreated. Jenna was scared and tried not to cry. She woke Anna and made her sleep with her. (TTI at 151).

In June of 2017, Defendant and Brooke's son turned two and Jenna's aunt and uncle hosted a birthday party for him. Jenna attended in the afternoon and then went to her mother's house. She and her mother argued so she contacted her aunt and requested to come back to her house. Her aunt agreed to pick her up but then sent Defendant to get her. He drove to a secluded spot and pulled down his pants. Jenna asked what he was doing. He pushed the back of her head to his crotch and forced her to perform fellatio. He ejaculated in her mouth. When it was over she asked him how long the contacts would occur – whether they would end when he and Brooke were married. He said, "If you tell anyone, you don't want to know what happens." She said nothing more. (TTI at 162-164).

On one occasion, Jenna's father requested that she take pictures of the inside of his mobile home and send them to him. Temporary occupants had left and he was concerned about the home's condition. She told her aunt who indicated that Defendant would take her there. Once inside, he led her to Anna's bedroom. He

pushed her onto her stomach and penetrated her from behind. He ejaculated on the bed covers. (TTI at 166).

Jenna's longtime friend Audriana Ordonez testified to seeing a number of texts from Defendant on Jenna's phone once when she borrowed the phone. His texts were long. Jenna's texts in response were one or two words. Audriana was surprised by the text exchange as she had been unaware that Defendant and Jenna communicated at all. (TTII at 43-44).

In about November 2017, Jenna again feigned sleep one night when Defendant came to take her to the bathroom. He finally pinched her very hard and she pretended to wake up. He took her into the bathroom. She was wearing her hair in a bun. When she was on her hands and knees, he grabbed the bun and pushed her head into the bathroom floor. He continued to hold the back of her neck during the penetration. She felt strong pressure behind her eyes. After, she went back to the couch, but could barely open her eyes due to swelling. Eventually she woke her aunt, who felt that she might be having an allergic reaction. Photographs of the facial swelling and of redness circling her eyes were admitted at trial. (TTI at 159-160). After a day or so, the swelling subsided. (TTII at 160).

At a prison visit with her father in January 2018, the topic of "Dan" (Defendant) came up. Robert Bluhm is in prison for criminal sexual conduct. (TTI at 169). Speaking privately with her father Jenna started to cry and said she had something to tell him. She told him that someone had been molesting her for years and pointed to the letters on a PowerAde bottle to spell out "Dan". (TTI at 168). Her

father told her that her word alone would not be sufficient to engage police assistance. (TTI at 169). He then pulled her aunt into the conversation. Together, Robert and Jane decided that they would try to catch Defendant in the act overnight. Jenna's aunt would stay awake and wait until Defendant took Jenna into the bathroom. Jane would then burst in. (TTI at 170, 174). The following weekend Jenna went to her aunt's house. She felt secure in going there, believing that Defendant was away working. However, he shortly returned home and Jenna became afraid. She called her sister Taylor who picked her up. Jenna told Taylor what had been happening. Taylor called the police. (TTI 173-175).

Jenna had mentioned to her aunt that she thought Defendant's DNA might be on the bathmats in Brooke's bathroom. Very late on the night that the police became involved, Jane Heppe contacted the investigating trooper. She was in her car and explained that she had the bathmats with her and wanted to give them to him. They arranged to meet at a gas station and she gave him a bag with two bathmats inside. (TTI at 193). He never asked Jenna to identify the mats, but sent them for DNA testing. Jenna subsequently testified that they were not the bathmats that had been on the floor of Brooke's bathroom during the assaults and that her aunt had clearly known that the mats in Brooke's bathroom, which had not been delivered to the State Police, were the relevant mats. (TTI at 176-177).

Jenna testified that now she has no relationship to speak of with her aunt, uncle, Brooke, or her paternal grandmother. Jenna nearly never sees her father; she is uncomfortable that her aunt frequently asked what news she had about the

case against Defendant. Her paternal grandmother asked why she didn't just "...go to those prosecutors and let them know you just lied about all of this, you made this up?" (TTI at 178-181).

No witness disputed that the girls had been very close to their paternal relatives prior to Jenna disclosing the sexual abuse by Defendant. Aside from Anna's testimony that Defendant seemed to be paying a lot of attention to Jenna the night of her father's wedding, and Audriana's being perplexed that there were texts between Defendant and Jenna, all witnesses noted that interactions between Jenna and Defendant were extremely limited.

Jane Heppe and Brooke Loew, who is now married to Defendant, testified that the rugs Jane delivered to MSP were the rugs from Brooke's bathroom. (TTII at 98, 166).

Brooke testified that she believes she would have wakened immediately if Defendant had withdrawn his body heat and left their bed during the night. (TTII at 201-202). A general theme from defense witnesses was that they would surely have heard if sexual activity was occurring in Brooke's bathroom in the middle of the night. While there was some reference to the family having noisy small dogs, all agreed that the dogs were noisiest when people entered the home, as opposed to barking when people walked from room to room. (TTI at 122).

B. Emails

MSP Trooper Eric Desch also testified on the first day of trial. He testified immediately after Jenna. Beginning from page 198 of the trial transcript of August

27, 2019 ("TTI") through page 211, Ms. Jipp elicited a catalogue of Trooper Desch's investigative shortcomings – failure to properly and timely collect evidence (including the bathmats), failure to properly identify the rugs, failure to document rugs in other bathrooms, failure to properly photograph the crime scene, and failure to conduct timely and thorough witness interviews. His testimony went in total from 3:11 p.m. to 3:47 p.m. The 36 minute time period included direct-examination by Ms. Jipp and cross-examination by Mr. Maesen (trial attorney for Defendant), followed by a bench conference. There was no redirect. (TTI at 192-215).

Judge Bakker sent the first email to Ms. Koch at 3:41 p.m. that first day of trial. She commented, "This Trooper [Desch] didn't do a very good investigation. Don't they have detectives with MSP anymore?" (Appendix A). By the time Judge Bakker sent her first email, Ms. Jipp had already finished questioning Trooper Desch.

Approximately 10 minutes later, Ms. Jipp called MSP Detective Sergeant Todd Workman to the stand. (TTI at 217-218). Among other things, Detective Workman testified that based on the allegations in the case, as a matter of protocol, Jenna should have been referred for a medical exam but had not been. (TTI at 225).

Prosecutor Koch did not respond to Judge Bakker until 8:47 a.m. on the second day of trial, August 28, 2019, "They do [have detectives] but not typically for CSC's. This trooper [Desch] has been given additional personal training since this investigation." (Appendix A). Ms. Koch was unaware that a detective had been assigned to this particular CSC case.

At 8:50 a.m., also on day two of the trial, Judge Bakker asked, "One more question… this victim was not referred for a medical, do you know why?" (Appendix A).

Ms. Koch responded at 9:02 a.m., "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 CSCs in files." (Appendix A).

Judge Bakker replied, "I thought [the children's advocacy center] would catch it." (Appendix A).

Several hours later, at 4:49 p.m., Ms. Koch stated, "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." (Appendix A).

C. Post-conviction proceedings.

Ryan Maesen, trial counsel for Defendant, filed a motion for a new trial prior to sentencing on the basis that the jury verdict was contrary to the weight of the evidence. The motion was denied. (Motion transcript of October 21, 2019). Following sentencing, Defendant filed a claim of appeal.

Defendant subsequently filed a motion for disqualification of Judge Bakker and for a new trial alleging three grounds for relief. By then he was represented by new counsel. In addition to claims of ineffective assistance of counsel and prosecutorial misconduct, Defendant alleged that bias on the part of the trial court had "pierced the veil" of impartiality and resulted in structural and, therefore,

reversible error. Specifically, Defendant contended that Judge Bakker had engaged in a substantive ex parte email exchange with elected prosecutor Myrene Koch during the trial. (Appendix A). Judge Bakker disqualified herself from post-judgment proceedings on the basis of the appearance of impropriety. Following recusal also by Judge Roberts A. Kengis, pursuant to local administrative order the case was assigned to the Honorable William A. Baillargeon. On November 2, 2020, Judge Baillargeon granted Defendant's motion for new trial on the basis of the ex parte communications and denied relief as to the additional grounds.

Defendant's appeal then focused on the allegations of prosecutorial misconduct and ineffective assistance of counsel. The People filed a cross-appeal of the trial court's granting of a new trial. On January 13, 2022, the Court of Appeals reversed the granting of a new trial and affirmed the denial of relief on the claims of prosecutorial misconduct and ineffective assistance of counsel. *People v Loew*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 352056) (Riorden, J., dissenting).

Additional facts will be set forth as they relate to Plaintiff-Appellant's claim on appeal.

II. ARGUMENT

> Where emails sent by the presiding judge to the elected county prosecutor during jury trial showed no bias against Defendant or prejudice to him, provided no tactical advantage, and did not reference issues on the merits, Defendant-Appellant is not entitled to a new trial.

A. Standard of Review

"Whether the facts underlying defendant's motion for disqualification is a question of law reviewed de novo." *Cain v Michigan Dept of Corrections*, 451 Mich 470, 503 n 38 (1996).

B. Analysis

[Response to the Court's questions in granting leave will supplement the analysis, but will be addressed more explicitly under item C below.]

As the Court of Appeals correctly identified, among other considerations, timing is a critical factor in determining error, or in making judgments about the appearance of impropriety. As this Court quoted in *Adair v State Department of Education*, 474 Mich 1027 (2006), "'[The "appearance of impropriety"] inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.' (citations omitted)." *Id.* at 1039.

While there was error on the part of Judge Bakker in not disclosing her communications with Prosecutor Koch to trial counsel Ms. Jipp and Mr. Maesen, consideration of the precise timeline of events dispels the appearance of impropriety or any claim of a reasonable possibility of prejudice.

Myrene Koch is the elected prosecutor for Allegan County. Emily Jipp was the assistant prosecutor who tried this case; Ryan Maesen represented Mr. Loew.

The presiding trial judge, the Honorable Margaret Zuzich Bakker, sent three emails during the trial to Prosecutor Koch. (Appendix A). A third party secured the emails by Freedom of Information Act request after the trial and sentencing had concluded. Upon receipt of the emails and on two additional, unrelated grounds, Defendant moved for new trial. Judge Bakker then recused herself from the case. As to the emails, Judge Baillargeon found that while he was convinced no unlawful purpose was intended by Judge Bakker with respect to the emails, the appearance of impropriety, specifically that of "coaching," compelled that a new trial occur. He stated, "But it just creates that appearance that you have this coaching situation or, at the very least, flagging as to boy, you better address this." (Motion transcript of October 29, 2020, hereafter "MT", at 29-30). And, "[It is] pursuant to this appearance – the breech (sic) of the appearance – that I am going to grant the motion for a second trial in this matter..." (MT at 32). Judge Baillargeon also acknowledged that he had not read the transcript of proceeding. Thus, he was not an adequately informed observer. (MT at 30). See *Adair,* 474 Mich at 1039.

Context is critical in considering the notion that Judge Bakker was "coaching" or "flagging" issues that the prosecution needed to address. It was the trial prosecutor, Emily Jipp, who flagged the issues for consideration by the courtroom at large. First, on the morning of the first day of trial, August 27, 2019, in her opening statement, Ms. Jipp addressed missteps in the investigation by the Michigan State Police (MSP) as follows:

> ... And we will hear, unfortunately, that there is no D.N.A. evidence. Jenna will testify that she – she made her aunt aware, she made law

> enforcement aware of the 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 [by Trooper Desch]. Those bath mats were not seized personally by law enforcement. But Aunt Jane turned those over and those obviously didn't have any D.N.A. on them. [TTI at 102].

The shortcomings were important to the prosecution's explanation of the absence of certain corroborating evidence.

Jenna Bluhm's testimony also occurred on August 27, 2019, from 1:06 p.m. to approximately 2:47 p.m. As forecast in Ms. Jipp's opening, Jenna testified that she had told her Aunt Jane (Defendant's mother-in-law), that she believed there could be DNA from Defendant's semen on the rugs in her cousin Brooke's bathroom. Jenna also testified that she had not bothered to describe the rugs to her aunt because "they were the only ones in Brooke's bathroom." (TTI at 176). When Ms. Jipp showed Jenna the bath mats received by Trooper Desch, Jenna indicated that those were not the rugs from Brooke's bathroom and were not the rugs on which she was sexually assaulted by Defendant. In addition, she did not recall ever seeing green, white, and blue bath mats at her aunt's house. (TTI at 176-177).

MSP Trooper Eric Desch testified immediately after Jenna. As she had forecasted in her opening, beginning from page 198 of the trial transcript of August 27, 2019 ("TTI") through page 211, Ms. Jipp elicited a catalogue of Trooper Desch's investigative shortcomings – that he had failed to properly and timely collect evidence (including the bathmats), that he failed to secure proper identification of

the rugs, failed to document rugs in other bathrooms, failed to properly photograph the crime scene, and failed to conduct timely and thorough witness interviews. His testimony went in total from 3:11 p.m. to 3:47 p.m. The 36 minute time period included direct-examination by Ms. Jipp and cross-examination by Mr. Maesen (trial attorney for Defendant), followed by a bench conference. There was no redirect. (TTI at 192-215).

Judge Bakker sent the first email to the elected prosecutor Myrene Koch at 3:41 p.m. that first day of trial and commented, "This Trooper [Desch] didn't do a very good investigation. Don't they have detectives with MSP anymore?" (Appendix A). By the time Judge Bakker sent her first email, Ms. Jipp had already finished questioning Trooper Desch. (Prosecutor Koch did not reply until the following day.)

Immediately following Trooper Desch's testimony, Ms. Jipp called MSP Detective Sergeant Todd Workman to the stand. (TTI at 217-218). Among other things, Detective Workman testified that based on the allegations in the case, as a matter of county investigative protocol, Jenna should have been referred for a medical exam. She had not been. (TTI at 225). Detective Workman's testimony was very brief. There was no additional testimony regarding the investigation or the medical exam.

Prosecutor Koch did not respond to Judge Bakker until 8:47 a.m. on the second day of trial, August 28, 2019. She wrote, "[MSP does have detectives] but not typically for CSC's. This trooper [Desch] has been given additional personal training since this investigation." (Appendix A). From her response, Ms. Koch was

unaware of the fact that a detective (Workman), **had** been assigned to this particular CSC case.

At 8:50 a.m., also on day two of the trial, Judge Bakker asked, "One more question… this victim was not referred for a medical, do you know why?" (Appendix A).

Ms. Koch responded at 9:02 a.m., "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 CSCs in files." (Appendix A).

Judge Bakker replied, "I thought [the children's advocacy center] would catch it." (Appendix A).

Several hours later, at 4:49 p.m., Ms. Koch stated, "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." (Appendix A).

There was no additional communication.

Canon 3 of the Michigan Code of Judicial Conduct provides at section A(4) that:

> 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 or parties of the substance of the ex parte communication and allows an opportunity to respond.

Under Michigan Rule of Professional Conduct (MRPC) 3.5,

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(b) communicate ex parte with such a person concerning a pending matter, unless authorized to do so by law or court order;

Black's Law Dictionary (11th ed.) defines "ex parte" as the following:

ex parte *adj.* (17c) *Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest*; of, relating to, or involving court action taken or received by one party without notice to the other, usu. for temporary or emergency relief <an ex parte hearing> <an ex parte injunction>. [Emphasis added].

The clearest relevant Michigan analytical framework is set forth in *People v France*, 436 Mich 138 (1990) and its progeny. *France* articulated a means for analyzing appellate ramifications when ex parte communication between a judge and the jury occurs in violation of MCR 6.414 (A). The *France* Court held as follows:

> The 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." We find that communication with a deliberating jury can be classified into one of three categories: substantive, administrative, or housekeeping. Upon appeal, it is incumbent upon a reviewing court to first categorize the communication that is the basis of the appeal. This will necessarily lead to the determination of whether a party has demonstrated that the communication was prejudicial, or that the communication lacked any reasonable prejudicial effect.

> Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication carries a *presumption* of prejudice in favor of the aggrieved party regardless of whether an objection is raised. The presumption may only be rebutted by a firm and definite showing of an *absence* of prejudice.
>
> Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication carries no presumption. The failure to object when made aware of the communication will be taken as evidence that the administrative instruction was not prejudicial. Upon an objection, the burden of persuasion lies with the non-objecting party to demonstrate that the communication lacked any prejudicial effect. Alternatively, a reviewing court, upon its own volition, may find that an instruction which encourages a jury to continue its deliberations was prejudicial to the defendant because it violated the ABA Standard Jury Instruction 5.4(b), as adopted by this Court in *People v Sullivan,* 392 Mich 324, 220 NW2d 441 (1974).
>
> Housekeeping communications are those which occur between a jury and a court officer regarding meal orders, rest room facilities, or matters consistent with general "housekeeping" needs that are unrelated in any way to the case being decided. A housekeeping communication carries the presumption of no prejudice. First, there must be an objection to the communication, and then the aggrieved party must make a firm and definite showing which effectively rebuts the presumption of no prejudice. (Footnotes omitted). *Id.* at 162-164.

The *France* Court noted, "We are persuaded by our analysis of the preceding cases that the Michigan rule of automatic reversal does not serve the best interests of justice and, in many instances, it may very well serve to defeat justice." *Id.* at 161. The dissent in *France* agreed that the previous rule of automatic reversal was too harsh,

> We agree with the majority that where the judge, albeit in violation of this Court's decisions and the court rules, communicates with the jury without first consulting with the lawyers for the parties, a new trial should not be ordered where the terms of the communication were

> stenographically transcribed in the courtroom or the communication was by means of a note or writing that was preserved as part of the record, and it appears from the writing that, assessed in context, there was not any reasonable possibility of prejudice to the complaining party. [*Id.* at170 (Levin, J., dissenting)].

A review of Michigan case law reveals only a handful of cases involving ex parte communications between a judge and prosecutor. In those cases, the communication occurred between the trial litigator and the judge. Nonetheless, precedent exists for examining the record to determine the prejudicial effect of ex parte judge/attorney communications. For example, in *People v Gonzalez*, unpublished per curiam opinion of the Court of Appeals, issued November 9, 2001 (Docket No. 223338), p 1, in denying relief, the Court of Appeals noted that there had been a lack of showing of prejudice as to a claim of ex parte communication between a prosecutor and a judge. (Appendix B).

In *People v Hereford*, unpublished per curiam opinion of the Court of Appeals, issued January 28, 2003 (Docket No. 227296), p 1, (Appendix C) the Court of Appeals considered the effect of an ex parte bench conference between the prosecutor and the trial court during a bench trial when defense counsel was out of the courtroom. The *Hereford* Court concluded,

> We agree with defendant that it was improper to conduct a bench conference without defense counsel's presence. See generally *People v Riggs,* 223 Mich App 662, 677, 568 NW2d 101 (1997) (Sixth Amendment right to counsel attaches at "critical stage" of proceedings); *People v Gonzalez,* 197 Mich App 385, 402, 496 NW2d 312 (1992) (improper ex parte communications deny right to fair trial). However, we conclude that the error was harmless beyond a reasonable doubt. See *People v Watson,* 245 Mich App 572, 585, 629 NW2d 411 (2001) (violation of right of confrontation may not be redressed unless error is harmless beyond a reasonable doubt). [*Hereford* at 4].

In habeas proceedings, the United States Court of Appeals for the Sixth Circuit reviewed the facts of *Hereford* in conjunction with prevailing United States Constitutional considerations. *Hereford v Warren*, 536 F3d 523 (CA6, 2008).

Defendant-Appellant minimizes the scope of the communication in *Hereford*. In *Hereford*, during a break in trial, the prosecutor stepped out of the courtroom to discuss testimony with a co-conspirator to the defendant's alleged robbery. Concerned for the co-conspirator's ability to understand a waiver of his Fifth Amendment rights in light of his cognitive challenges, the prosecutor approached the bench. There, without defense counsel being present, the prosecutor told the court that the witness wanted to testify but that the witness' mother did not feel he had understood the court's questions. The prosecutor requested that the witness be allowed to speak with his mother. The co-conspirator subsequently waived his rights and testified. In the course of the co-conspirator's testimony, despite having been asked on the stand about his most recent contact with the prosecutor and law enforcement, the witness failed to disclose the contact that had occurred earlier that day, of which the court was aware. *Id.* at 526, 533. Following Hereford's conviction, defense counsel became aware of the bench conference only after reviewing video of the proceeding shortly before the original appeal was heard. *Id.* at 525-526.

Conducting a broad review of Supreme Court precedent, the Sixth Circuit held that the absence of counsel during this communication, which the Court categorized as administrative in nature, was subject to a harmless error analysis. *Id.* at 530-531. The Court held,

On appeal, Hereford suggests that because the judge discussed Smith's state of mind with the prosecutor without giving defense counsel an opportunity to respond, the uncertainty of prejudice alone makes his conviction unreliable. Michigan responds that although the communication was improper, it held no significant consequences for Hereford's case because no rights could be asserted or lost. Our review of the trial transcript reveals a *de minimis* communication that was administrative in nature, in which the prosecutor informed the court that, although Smith indicated he wanted to testify, Smith's mother did not think he understood the court's questions, and Smith might benefit from speaking with his mother. Because of the conference's limited purpose (to request time for the witness to speak with his mother) and duration (seconds, not minutes), we find that the state court could reasonably conclude that "significant consequences," *id.* at 312, would not likely turn on counsel's absence from this sort of brief, administrative discussion. In other words, the state court could reasonably conclude that a brief, administrative conference is not of a character to hold "significant consequences for the accused," *Bell,* 535 US at 695–96, 122 S Ct 1843; where "[a]vailable defenses may be irretrievably lost, if not then and there asserted," *Hamilton,* 368 US at 54, 82 S Ct 157; or where "rights are preserved or lost," *White,* 373 US at 60, 83 S Ct 1050. Although courts disfavor ex parte contact between judges and prosecutors, *see Carroll v Princess Anne,* 393 US 175, 183, 89 S Ct 347, 21 L Ed 2d 325 (1968); *United States v Carmichael,* 232 F3d 510, 517 (6th Cir 2000), given the impertinence of this type of brief, administrative bench conference, it fails to qualify as *Cronic* error. [*Id.* at 530; footnote omitted].

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Hereford points to decisions of lower federal courts that condemn prosecutors' ex parte discussions with judges, but a review of those decisions (often involving communications far more egregious than in this case) only bolsters our view that the state court reasonably refused to deem this type of discussion structural error, and that cases where such a label is appropriate will be rare. *See Yohn v Love,* 76 F3d 508, 522 (3d Cir.1996) (no structural error where prosecutor's ex parte discussion with state Supreme Court Chief Justice resulted in the Chief Justice advising the trial court to admit evidence it would have otherwise excluded); *United States v Earley,* 746 F2d 412, 416–18 (8th Cir.1984) (same for ex parte trial brief); *United States v Walsh,* 700 F2d 846, 858 (2d Cir.1983) (same for ex parte proffer of evidence); *United States v DeLeo,* 422 F2d 487, 499 (1st Cir.1970) (same for ex parte discussion about prosecutor's illness). [*Id.* at 531].

In further support of its holding, the Sixth Circuit cited *Rushen v Spain*, 464 US 114 US (1983). There, a defendant's conviction was upheld where the trial judge and a juror had repeated ex parte conversations after the juror recalled a personal connection to a witness following *voir dire*. The communications were not revealed until after the defendant's conviction. The United States Supreme Court upheld the "harmless error" standard. *Id.* at 117-118.

Other state and federal courts throughout the country have declined to order a new trial based solely on the appearance of impropriety where there has been no prejudice to the proceeding. "Although we agree that the alleged ex parte communication created an appearance of impropriety, as no prejudice resulted from the conference, the error was harmless..." *Pack v State*, 725 P2d 870, 871 (1986); see also *People v Sanchez*, 63 Cal 4th 411, 480 (2016), "Any assumed conversation was harmless beyond a reasonable doubt."

As determined in *France*, it is through the consideration of prejudice to the proceedings that one may justly determine whether the remedy for an ex parte communication is a new trial. Or, as articulated in *Hereford v Warren*, "We found the common thread in these decisions to be the likelihood 'that significant consequences might have resulted from the absence of counsel at the state of the criminal proceedings'." *Id.* at 529-530.

The defense has alleged that because the emails revealed something of Judge Bakker's perception of the proofs, Ms. Jipp could have changed strategy midtrial, thus creating prejudice to the proceedings.

First, there is no evidence that Ms. Jipp, litigating the trial, was aware of the communications or could or would have changed strategy if she had been aware. (MT at 21). Under Rule 5.2(a) ("Responsibilities of a Subordinate Lawyer"), "A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person." In other words, misconduct on the part of Ms. Koch should not be imputed to Ms. Jipp, who bears responsibility for her own ethical conduct. For example, while conflict of interest may be imputed to associate attorneys under MPRC 1.10, there is no parallel provision of imputation as to acts of alleged malfeasance.

For example, in *In re Osborne*, 459 Mich 360 (1999), the Michigan Supreme Court considered the necessity of reversal of an order terminating parental rights when the assistant prosecutor at the termination of parental rights hearing was subsequently revealed to have represented the mother as a stand-in attorney at an earlier hearing in the case. He had no recollection of having represented her. *Id.* at 364. The Court in a per curiam opinion held,

> And a problem that has an obvious solution if timely noticed may have quite a different remedy, or no remedy at all, if noticed at a later stage of the proceedings. [Footnote omitted]. *Id* at 368-369.

Ms. Koch herself clearly did not advocate in her responses to Judge Bakker, nor is there anything from which to conclude that she communicated with Ms. Jipp regarding the emails. As the Court of Appeals noted in assessing the belief of Judge Bakker that her communications would provide no tactical or procedural advantage,

Ms. Koch "perceived the questions as solely relating to processes." (*Loew*, __ Mich App __; slip op at 7).

Even if Ms. Jipp had been aware, the communications had no impact on the proceedings. From the beginning of proofs, the People argued that investigative shortcomings by Trooper Desch explained the collection of two items of evidence that were subsequently determined to have no relevance to the case. In addition, the collection of this irrelevant evidence also explained an absence of DNA evidence. Specifically, Trooper Desch testified that Jane Heppe, Defendant's mother-in-law, contacted him very late at night. She indicated that she was driving around Allegan County with bathmats in her possession that might contain Defendant's semen. Trooper Desch testified that Jenna had described the bathmats as "blue". (TTI at 198).

Trooper Desch acknowledged that it was unusual to collect evidence in this way.

> Q. [By Ms. Jipp] Okay... is the way you received these bath mats standard procedure for collecting evidence?
>
> A. [Trooper Desch] It's not often that somebody brings you evidence. Normally it's up to us to go to the scene and collect the evidence.
>
> Q. So ideally, how would you have collected – so you are aware that these bath mats could maybe – these blue bath mats could maybe contain evidence. How would you have ideally gone and collected this evidence.
>
> A. So my – the next step that I would have done in the investigation, is from my interview with Taylor and Angela and the brief interaction with Jenna, I knew the address where the assaults occurred. And I know that there were these blue bath mats that might contain

evidence. It was, you know, pushing 1 a.m., late at night. My shift is off, is over at 2. So there is a couple of reasons why I didn't go immediately to the house. My next step would have been – I did work that next day, starting at 4 p.m. I would have continued the investigation. The next step would have been to talk with Aunt Janie and Uncle Scott and view the – view the venue – the location where the alleged crimes occurred. And at that point, I would have asked Aunt Janie or Uncle Scott, "can I look around and recover these – these blue bath mats that I understand might have evidence."

Q. Okay. Would you have photographed the area where you found the bath mats?

A. Correct. Before seizing evidence, you typically photograph how you initially came upon them, how you initially saw them.

Q. Okay. And if – if these bath mats had been described to you as blue, would you have seized any bath mats, all bath mats, kind of – how would you have known or how would you have proceeded?

A. Knew that the assaults occurred in a bathroom, but with such a – at that point, a vague description, if you want a better word. I would have asked Jane or Scott to show me all of the blue bath mats in this house. Just point them out to me and I would have collected all of them.

Q. Okay. And – and by vague description, you are just simply, because you were only doing a minimal facts interview.

A. Correct.

Q. Okay.

A. We get more details from the interview with Jenna that's not going to happen for, I think it was a week later, so.

Q. Okay. So how long, total, were you at this gas station with Aunt Janie?

A. Five minutes.

Q. Okay. Okay. Did you remember asking her where the bath mats were retrieved?

A. I did not.

Q. Okay. Did you ask her clarifying questions like, "Hey, are there more than one set of bath mats?"

A. I did not.

Q. Okay. Did you ask here when she collected the bath mats?

A. I did not.

Q. Did you ask her whether she had worn gloves to collect the bath mats or –

A. No. I did not ask her that.

Q. Okay. So she hands you this bag and – of bath mats and you don't open it there, is that –

A. I don't remember. I may have looked in. I know I didn't take them out.

****

Q. I am going to show you what's going to be preliminarily marked as People's Exhibit Number 19. If could you describe what I am showing you.

A. It's a bath mat, blue, white, and green in color. Two of them, same style, same color.

Q. All right. And are these the bath mats that were brought to you at Exxon gas station by Jane Heppe?

A. They are.

****

Q. Okay. So you retrieved them from her and you take them back to your facility. What do you do with the rugs, once you get back to post?

A. I package them properly in a paper evidence bag. The one that the – I brought with me today, sealed it, and then they just were stored in our property room until I could collect other evidence to be compared with the rugs.

Q. And – and how would you describe these rugs if you were to give a description?

A. White and green color bath rugs, bath mats.

Q. Did you, prior to processing these, take these rugs to Jenna to verify that these were the rugs that she described?

A. I did not.

Q. Did you take photographs of those rugs and take them to Jenna to verify that those were the rugs she was describing?

A. I eventually took photos. I did not take them to Jenna to verify –

Q. Okay.

A. – they were the same rugs she described as blue rugs.

Q. Okay. So how do you know that these were the rugs that Jenna described?

A. Because I assumed that Aunt Janie, who at the time, I was under the belief she had just learned of this from Jenna that night and that the bath mats might contain D.N.A. or might contain evidence. I assumed that Aunt Janie would bring me the rugs that Jenna described to her.

Q. Okay. So we have no way to know that these were the rugs.

A. Correct

****

Q. Okay. And so then when you came back on duty the next day, did you continue to work and investigate this sexual assault complaint?

A. Correct. It was the next day that I – that I went to Jane and Scott's house.

****

A. Yes. Yeah, it was at that time that I interviewed Jane and Scott in their – in their kitchen.

Q. Okay.

A. And no one else was home. They had said that – or I had heard that Dan had gone on one of his business runs. And Brooke, I heard this from Jane, Brooke went up north – northern Michigan is what I was assuming. So I don't think there was anyone else in the house. I think it was just Jane and Scott.

Q. Okay. Did you happen to kind of survey the home and go into all of the restrooms to look at the bath mats?

A. I did not.

Q. Okay.

A. Nope. I surveyed the room – the house – just the parts of the house, obviously talked in the kitchen. And then Jane did allow me to walk – walk through the living room which you saw. And then the bathroom and that hallway that you also saw. The two bedrooms on either end, no I did not look into those. The bathroom that's been described as near the entryway or whatnot, I did not look into that one.

Q. Okay. Did you photograph the interior when you went in on that particular day?

A. Not at that time, no.

Q. Okay. Do you remember whether there were bath mats in any of the bathrooms and if so, what they looked like?

A. It was just the one bathroom that I looked in. Yeah, I – I couldn't tell you if there was bath mats in that – that one bathroom at that time or not.

****

Q. Okay. Did you interview Brooke Heppe?

A. I did not.

Q. Okay. Were you aware of her relationship to the Defendant at that time?

A. Correct. The night that I took the – took the report, correct, it was told to me that Brooke was Dan's fiancé.

Q. Okay. And was it your understanding that she also resided at Aunt Janie's home at 32nd Street in Hamilton?

A. Correct. It was told to me that first night that – that Dan and Brooke are engaged to marry. They live with Brooke's parents at the 3817, along with their two year old, at the time, child Weston.

Q. So she is a member of his household where repeated sexual assaults occur and you didn't think it was necessary to interview her.

A. It was a judgment call. No, I did not interview her. I – like I said, I was going under the belief that she was still in this relationship with Dan, even after the allegations came out. And I felt that if she had witnessed, you know, seen or heard anything inappropriate, that her still being with Dan, she would not disclose that to me so that was a judgment call on my part and no, I did not interview Brooke.

****

Q. Okay. What – what photographs did you take?

A. Photographs that I took were not the first time that I spoke with Scott and Jane. But I eventually went back to that residence, the venue and took the interior photographs that have already been admitted – admitted into evidence.

Q. Do you remember approximately when you took those photographs?

A. Approximately, yeah, I got this in January, it wasn't probably until June or July. I mean, it will be documented in my report.

Q. Okay.

A. If you want a more specific – but it was months – it was months later... [TTI at 199-211]

Prior to Trooper Desch's testimony and Judge Bakker's first email, Jenna testified that those mats, which were ultimately sent for DNA testing, were not the mats that had been on the bathroom floor during her assaults by Defendant. (TTI at 176-177). It was the People's contention from the beginning that Trooper Desch's gullibility, shortcuts, or misjudgment prevented the correct mats from being collected and tested.

As to whether MSP employs detectives or what glitch in the process caused a victim's medical exam to fall through the cracks, neither had bearing on the proofs.

Ms. Jipp's decision to call Detective Workman was not made on the spur of the moment in response to Judge Bakker's question about detectives at MSP. Months before trial, the People submitted a witness list that included Detective Workman. In addition, Ms. Jipp had announced in her opening and in her witness list for the jury that Workman would be testifying. (TTI at 3, 24; Appendix D). All information there was about the medical exam was elicited the day before Judge Bakker inquired about it. Neither attorney addressed that further in proofs or argument after Detective Workman's testimony concluded. Judge Bakker, an observer, merely chorused Ms. Jipp's refrain. Ms. Jipp's arguments in her opening statement and her examination of Trooper Desch and Detective Workman prompted Judge Bakker's emails **and not the reverse.** Judge Bakker used those established facts merely to segue to discussion of broader, non-case-specific issues.

A trial judge's opinions developed over the course of trial are not themselves valid grounds for alleging bias absent "deep-seated favoritism and antagonism such that the exercise of fair judgement is impossible." *People v Johnson*, 315 Mich App 163, 196 (2016), quoting *People v Jackson*, 292 Mich App 583, 598 (2011) and *People v Wells*, 238 Mich App 383, 391 (1999).

Without question, a criminal defendant is entitled to proceedings before a "neutral and detached magistrate." *People v Cheeks*, 216 Mich App 470, 480 (1996). The substance of the emails indicate no evidence of bias on the part of Judge Bakker.

The Court of Appeals, citing *Grievance Adm'r v Lopatin*, 462 Mich 235, 262-263 (2000), identified the serious risks of ex parte communication as exposing "'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'." *Loew*, slip op. at 7. Ms. Koch did not advocate and there was no suggestion of corruption or improper influence.

The record of the lower court proceedings shows a straightforward trial. As in *Hereford*, it was only after the conclusion of proceedings that the defense discovered the facts that gave rise to their claim on appeal. No ruling on the part of Judge Bakker was alleged to have been erroneous – the other two arguments the defense raised in their motion for new trial and on appeal pertain to issues beyond Judge Bakker's awareness and leave has not been granted regarding them. Judge Bakker's courtroom demeanor and interactions with counsel and instructions to the jury were appropriate and there was no claim or finding by the successor acting circuit judge to the contrary. Further, Judge Baillargeon did not make a finding that Judge Bakker was biased. He stated, "Again, come (sic) back to the point of that appearance and I think that that's an appearance that knowing the individual involved, I think may well be unwarranted, but I know that person; the public doesn't -- or many in the public don't." (MT at 30).

A "party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Cain v Dep't of Corrections*, 451 Mich 470, 497 (1996). The defense failed to overcome that heavy burden. For

example, at one point in the trial, Judge Bakker sua sponte reconsidered a ruling that she had made at pretrial about the admissibility of evidence under Michigan Rule of Evidence 609 against Defendant. While she ultimately determined to allow the ruling to stand, she demonstrated her fidelity to making correct decisions issue by issue. (TTII at 4, 9).

The analysis in *People v Stevens*, 498 Mich 162 (2015), is inapposite to present analysis. The Michigan Supreme Court in *Stevens* articulated a "totality of the circumstances" test for assessing whether judicial conduct had pierced the veil of impartiality. The Court stated, "A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Id.* at 171.

Stevens provides a framework for objectively determining if a judge's conduct may be viewed by a jury as supporting one side versus the other, thereby throwing the weight of the judge's authority and judgment behind that side. Apart from the fact of a defendant's conviction, and because there is no way to surely assess the effect of the judge's conduct on the jury, the Michigan Supreme Court in *Stevens* provided a metric for assessing the likelihood of an impact on a jury. In the present case, the defense has alleged no error as to the trial process in Judge Bakker's administration of the jury trial, evidentiary rulings, decorum, jury instructions, etc. Should *Stevens* provide the correct analysis, in light of there being no evidence of

bias under the totality of the circumstances, reversal of Defendant's conviction is not appropriate.

C. The Court's Four Questions

Analyzing the allegations by reference to ethics opinions risks muddling the issues addressed. For example, as the Court of Appeals found, Judge Bakker made a mistake. Defending this appeal does not mean that she may not be required to address judicial discipline and political consequences. However, Judge Bakker's misjudgment does not merit the reversal of Defendant's conviction.

Question 1. Especially outside the context of ex parte communications with jurors, the categories set forth in Canon (3)(A)(4)(a)(i) are not well defined. As Judge Murray pointed out, because the communications did not relate squarely to scheduling does not remove them from that category. (*Loew*, __ Mich App __; slip op at 7).

While the Court of Appeals cited holdings finding no reversible error where the communications referred to "administrative functioning of the judicial system," the gravamen of the finding was that the communications were administrative in that they "neither related to nor bore on substantive matters in Defendant's trial." Slip op at 6. That appears the most useful distinction. Nonetheless, the issues went to processes. On their face, and as understood by Ms. Koch, also an administrator, these were in the context of broader policy. Further, Judge Bakker, in her administrative capacity, has a legitimate interest in the quality of investigations. (See Canon 3(B)).

Question 2. Certainly one could conceive of facts where an ex parte communication created an appearance of impropriety warranting the reversal of a conviction. *In re Haley*, 476 Mich 180 (2006) and *Liljeberg v Health Servs Acquisition Crop*, 486 US 847 (1988) are both case where the innocence of the conduct in question defies credulity. In *Haley*, one could envision the judge in question being prosecuted potentially for taking bribes. In *Liljieberg*, the judge's contention that he was told repeatedly but forgot that he had a personal interest in the litigation is stunning. The "appearance of impropriety" standard seems a reasonable catchall for those cases where judges can deny actual basis but reasonably appear biased. Here, one need not take the "word" of Judge Bakker that her emails were of an innocent nature. That is clear from their text and their context at trial.

The Court of Appeals held that the graver aspects of ex parte communication, as identified in *Grievance Adm'r v Lopatin*, 462 Mich 235, 262-263 (2000) (further citation omitted), are not present here.

Question 3. The definition of prejudice employed in *France* seems useful to the analysis under the circumstances presented here. Reversible error occurs where there has been any "reasonable possibility of prejudice." This is also consistent with the following from *Liljieberg*,

> As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a). It would be equally wrong, however, to adopt an absolute prohibition against any relief in cases involving forgetful judges. [*Id.* at 223-224].

While a standard beyond that of prejudice or harmless error would be appropriate in a situation of structural error. That is not the error in the present case. *People v Davis*, 509 Mich 52 (2022); *Hereford*, 536 F3d 523.

Question 4. First, there is no need to speculate as to the misconduct in this case. The communications were memorialized and may be discussed in their proper context.

In *Rushen* and *France*, the Courts each noted that they mean to provide analysis that considers "the realities of trial practice" and "realities of courtroom life." *Rushen* at 119; *France*, at 142.

An elected prosecutor is a party to nearly every criminal case in the County. Issues regularly arise in individual cases that inform case processes in the court system going forward and there are frequent administrative meetings to address case flow, personnel issues (tardiness to court, untimely pleadings, etc.). Each draws on particular experiences in specific cases.

Globally, the following demonstrate the lack of reasonable possibility of prejudice:

- Judge Bakker contacted Ms. Koch and not Ms. Jipp.
- Ms. Koch's responses held no aspect of advocacy.
- The questions did not seek information on any fact in issue in the case.
- The questions arose only after the introduction of evidence establishing the facts referenced in the email.
- There were no identified errors in the evidence admitted.

- The matter was heard by a jury.
- The communications themselves did not express bias toward defendant, or toward the circumstances of the criminal acts.
- Defendant was subject to mandatory sentencing.
- The communications were in writing, capable of full consideration.

Lawyer or judges who violate their ethics strictures stand to be castigated, at a minimum, in a disciplinary context. Those consequences are nuanced and calculated to send a clear message to the judges and to the public. Not every violation subject to discipline infuses reversible error into the proceedings. The grant of a new trial under the circumstances presented in this case would be unjust.

The United States Court of Appeals for the Seventh Circuit, noted as follows:

> [O]verturning a jury verdict based purely on the appearance of bias creates a risk that the public will lose confidence in the judicial process... And requiring witnesses to relive this serious crime by testifying at a retrial would pose unwarranted hardship on the witnesses when all evidence suggests the original trial was fair and impartial." *United States v Williams*, 949 F3d 1056, 1066 (2020).

The Court of Appeals stated,

The record does not support even an inference that the e-mails provided any advantage or altered any tactics by the prosecution. It cannot be said that the communications evidence anything more than inquiries regarding the investigation process, and there is nothing beyond rank speculation that the communications caused defendant any prejudice. (*Loew*, __ Mich App __; slip op at 9).

The Court of Appeals correctly found that the lower court clearly erred in reversing Defendant's conviction.

IV. RELIEF REQUESTED

Email communications between Judge Bakker and Ms. Koch provided no advantage to the prosecution, showed no bias on the part of Judge Bakker, and there was no prejudice to Defendant.

WHEREFORE, Plaintiff-Appellee respectfully requests that this Honorable Court deny Defendant-Appellant's application for leave to appeal.

Dated: January 30, 2023

Respectfully submitted,

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MSS/plc