

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

-vs-

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Submitted by:
/s/ Kevin Lyle Travis
Kevin Travis (P77761)
Watson Township Supervisor
1895 118th Ave.
Allegan, MI 49010
(269) 589-5688
supervisor@watsontownship.org

*Authorized Legal Officer of the
Township of Watson*

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**JURISDICTIONAL STATEMENT, QUESTIONS PRESENTED FOR REVIEW, AND
STATEMENT OF FACTS**

Watson Township incorporates by reference the Jurisdictional Statement, Statement of Questions Involved, and the Statement of Facts set forth in the Defendant-Appellant's Application and Leave to Appeal.

INTEREST OF AMICUS CURIAE

The Township of Watson is a general law township located within Allegan County, Michigan and files this brief pursuant to MCR 7.312(H)(2). The individuals responsible for the ex-parte communication during the trial of defendant Loew are both elected by the voters of Allegan County and Watson Township. In this case, the individuals are Chief Prosecutor Myrene Koch and Judge Margaret Zuzich Bakker. The Watson Township Board, by its resolution 02032022-1¹, authorizes this brief pursuant to the Court of Appeals dissenting opinion of learned Judge Riordan and pursuant to the basic tenant that “A fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 US 133, 75 S Ct 623; 99 L Ed 942 (1955).

Context is highly important to this discussion. The ex-parte communication uncovered in the case of Defendant Loew was discovered by FOIA request by prosecutorial candidate C. Michael Villar in the summer of 2020. This Honorable Court should know that Defendant Loew’s case was NOT the only case in which ex-parte communication was uncovered pursuant to Mr. Villars’s FOIA, a fact that he made well known during his campaign and was widely published throughout Allegan County. In fact, there were *several* cases where Judge Bakker and Prosecutor Koch communicated about pending cases or where Prosecutor Koch asked for advice.^{2,3,4}

The Watson Township Supervisor, who is also writing this brief, also submitted his own FOIA request in the summer of 2020.⁵ Upon initial review there was no improper communication,

¹ Exhibit A - Watson Township Resolution

² Exhibit B - Email Communication People v Daniel Robert Loew

³ Exhibit C - Email Communication People v Frederick Mathews

⁴ Exhibit D - Email Communication People v Eric Pierce

⁵ Exhibit E - FOIA request for emails and text messages from Jan. 1, 2011 to March 1, 2018.

however in preparation of this brief additional ex-parte communication was found.^{6,7,8} The remainder of the communication demonstrates how close the bond was between Prosecutor Koch and Judge Bakker. For example:

1. Lunch meetings on July 29, 2016⁹; Nov. 30, 2016¹⁰; Dec. 14, 2016^{11,12}; Oct. 27, 2017¹³; Feb. 2, 2018¹⁴
2. Email from Judge Bakker to – at the time – Chief Assistant PA Roberts Kengis regarding the job performance of Myrene Koch¹⁵
3. Political Grooming^{16,17,18}
4. Discussion of the vacancy of the Allegan County District Court magistrate judgeship¹⁹
5. UofM and MSU Rivalry Game Bets²⁰

⁶ Exhibit F - Email Commentary on APA performance People v Brimhall 16-20456-FH on September 21, 2017 at 3:37

⁷ Exhibit G - Register of actions of People v Travis Brimhall showing September 21, 2017 Jury Trial Whole Day

⁸ A grievance will be forthcoming against Judge Bakker and Prosecutor Koch in light of this discovery pursuant to MRPC 8.3 - though I seriously question whether these oversight bodies will actually hold them accountable. This email is Judge Bakker commenting on the performance of an assistant prosecutor during a trial and that the prosecutor has some "fact problems". This was during the first day of a two-day trial. None of this communication appears "administrative". The judge - ex parte - pointing out tactical errors of an assistant prosecutor on the first day of a trial to the assistant prosecutor's boss could certainly be used to adjust trial strategy on the second day.

⁹ Exhibit H - July 29, 2016 Lunch

¹⁰ Exhibit I - Nov. 30, 2016 Lunch

¹¹ Exhibit J - Dec 14, 2016 Lunch

¹² The December 14, 2016 lunch also makes reference to text messages, which were not provided though requested in the Supervisor's FOIA request

¹³ Exhibit K - Oct. 27, 2017 Lunch

¹⁴ Exhibit L - Feb. 2, 2018 Lunch

¹⁵ Exhibit M - Email Judge Bakker to Roberts Kengis re Myrene job performance

¹⁶ Exhibit N - Encouragement from Roberts Kengis to Myrene to take the advice of his former mentor and prior Chief Assistant Marge Bakker to attend political events

¹⁷ Exhibit O - Update on the appointment to fill the vacancy left by Judge Cronin

¹⁸ Exhibit P - Social invitation by the wife of now Judge Kengis to attend a "Women Who Care" meeting with Judge Bakker and Myrene Koch

¹⁹ Exhibit Q - Discussion of the vacated magistrate judge position in Allegan County District Court

²⁰ Exhibit R - Wager on the UofM v MSU game

These email exchanges seem innocent enough - and who doesn't love a good MSU UofM rivalry game, however, Judge Bakker at one time was the Chief Assistant Prosecutor and both Roberts Kengis and Myrene Koch reported to her as subordinate employees. Judge Bakker initially appointed Ms. Koch as the Chief Prosecutor without consideration of other candidates after Roberts Kengis – formerly the elected Chief Prosecutor – was appointed judge by Governor Snyder. Ms. Koch's appointment as the new Chief Prosecutor appears to show heavy favoritism by Judge Bakker toward Ms. Koch that created the environment that facilitated the ex-parte communication which is the subject of this brief. Public trust and faith in the justice system is lost when personal relationships start to blur the roles between the judicial branch and the executive. Watson Township has an interest that its residents – and the township itself – be treated fairly and within the bounds of the Constitution of the State of Michigan and the United States Constitution. Watson Township also has an interest in the integrity and public confidence in the judicial system within Allegan County.

SUMMARY OF THIS CASE AND THE ARGUMENTS IN THIS BRIEF

Watson Township submits that the able counsel for Mr. Loew has adequately summarized the facts and background of this case and appeal. Watson Township supports the arguments in Daniel Loew's Appellant's brief. However, Watson Township focuses on just one topic in this amicus curiae brief: whether the conduct of Judge Margaret Zuzich Bakker and Chief Prosecutor Myrene Koch have eroded the public confidence and integrity of the legal system.

The heart and essence of this case and this brief is the very integrity of our legal system and the trust and faith that We the People put into it. The email communications that Mr. Villar uncovered not only convinced the Honorable Judge Baillargeon to grant Mr. Loew a new trial, they also showed a pattern of behavior between the Allegan Prosecutor and the Judges of the 48th

Circuit Court in general. These emails were made public during the 2020 primary campaign for Allegan County Prosecutor and became a major focus of the election, an election so contentious that Ms. Koch - the two-term incumbent - won by only 17 votes out of nearly 18,000 votes cast. Because of that hyper focus, news of the ex parte emails and of Mr. Loew's new trial were major news stories in Allegan County.^{21,22,23} Likewise, the Court of Appeals Decision reversing Judge Baillargeon was also a major news story in Allegan County.²⁴

Specifically, Watson Township's brief supports Judge Riordan's reference to *Liljeberg v Health Servs Acquisition Corp*, 486 US 847; 108 S Ct 2194; 100 L Ed 2d 855 (1988) and the three factors set forth therein (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. The Township agrees with Judge Riordan in that injustice will occur in other cases and that the public's confidence in the judicial process will be undermined. The emails which entitled Mr. Loew to get a new trial were not part of the original record – because **by their very nature** they were ex parte and **thus concealed**. Other emails uncovered by FOIA request support the second *Liljeberg* factor as well. The emails uncovered demonstrate that there is a **systematic pattern** of behavior that shows great prosecutor bias by Judge Bakker and Judge Kengis toward Prosecutor Koch; and that the pattern of ex-parte communication in *People v. Loew* is not an isolated event.

The Court of Appeals majority opinion serves to bolster and reinforce mistrust among the public. Watson Township whole-heartedly agrees with the comments of the Honorable Judge

²¹ Exhibit S – Holland Sentinel “Man wins new trial over email exchange between judge, prosecutor”

²² Exhibit T – Holland Sentinel “Allegan man says judge, prosecutor denied him a fair trial”

²³ Exhibit U – Holland Sentinel “Judges recused from hearing man's request for new trial”

²⁴ Exhibit V – Holland Sentinel “Appeals court walks back new trial for man after prosecutor, judge emailed during trial”

Baillargeon during Mr. Loew's bond hearing on remand and cited within Mr. Loew's leave for appeal. As Judge Baillargeon said, the "Court of Appeals opinion, in my opinion, leads – lends further credence to the proposition that the courts should not and cannot police themselves from misconduct or, at the very least, the appearance of misconduct on the part of the judiciary."²⁵ Judge Baillargeon went on to say "with decisions like this, it provides more fuel for the argument that the courts are unwilling to hold their own accountable. This Court will not attempt to undertake **the ethical or intellectual gymnastics employed by the majority when they discuss the case as administrative.**"²⁶

ARGUMENT

I. THE COURT OF APPEALS NEW DEFINITION OF ADMINISTRATIVE PURPOSE CREATES A RISK OF INJUSTICE IN OTHER CASES

As someone trained and educated as a high-school social-studies teacher, I know that by the time a student in Michigan graduates from high school, he or she should have a basic understanding of the three branches of government: legislative, executive, and judicial. Most graduates may even understand that there is supposed to be a separation of powers among these branches. Graduates may also recognize that a judge is properly a member of the judicial branch, and some may even recognize that the police and a prosecutor are part of the executive branch. Certainly, those formerly trained in the law and whom are members of the Michigan Bar should be able to recognize those distinctions. So, what purpose does Judge Bakker – as a member of the judicial branch – have inquiring about the investigative processes of the Michigan State Police, and the **very quality** of that investigation as pertains to a **particular defendant during that**

²⁵ Exhibit W - Bond Hearing Transcript, 11:17-21

²⁶ Id at 11:25-12:3

defendant's trial via an email with the subject line "trial"? The majority opinion's rationale was as follows:

Here, it is undisputed that the trial judge initiated ex parte communications with the elected prosecutor during defendant's trial. **We conclude that the e-mail questions from the judge to the elected prosecutor were clearly ex parte because they did not include defense counsel** (nor, for that matter, the trial prosecutor). However, under Canon 3(A)(4)(a), ex parte communications that relate to administrative matters are not prohibited. **Here, we hold that the e-mails relate to administrative matters because neither related to nor bore on substantive matters in defendant's trial.** Rather, they involved matters of administrative process that did not concern defendant's trial. This is clear from the context of the e-mails, as the judge sought clarification of the MSP's process for investigating allegations of sexual assault—specifically, whether the MSP continued to utilize detectives for this type of investigation. The prosecutor's response the following day reveals that she too considered the inquiry to be process orientated, as she explained that the MSP did not use detectives on these types of cases, and the trooper had received follow-up training. The same holds true for the second inquiry regarding the process of referring victims of sexual assault for medical examinations. Again, the prosecutor's response explained both why no referral occurred for this victim, and the process put in place to ensure no missed referrals occur in the future. 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. Therefore, the communications were not prohibited ex parte communications violative of Canon 3(A)(4).²⁷

So based on this **precedent-setting, published-opinion**, if Judge Bakker were to opine on the performance of an assistant prosecuting attorney before her either during a trial^{28,29} or after³⁰ that too is considered by this panel as "administrative." After all, it's just about the performance of Judge Bakker's former charges "globally" and not about "substantive issues." Perhaps the panel then would also agree that Judge Kengis's comments to Ms. Koch on the performance of his former charges is merely "administrative".³¹

²⁷ Exhibit X - COA Majority Opinion at p. 5

²⁸ Exhibit F - Email Commentary on APA performance People v Brimhall 16-20456-FH on September 21, 2017 at 3:37 PM

²⁹ Judge Bakker also pointed out tactical errors in this ex parte communication "She has some fact problems," which could have been corrected on the second day of trial.

³⁰ Exhibit M - Email Judge Bakker to Roberts Kengis re Myrene job performance

³¹ Exhibit D - Email Communication People v Eric Pierce

In Judge Kengis's ex parte communication – for whom both Judge Bakker and Prosecutor Koch were copied – he expressed that assistant prosecutor Emily Jipp's performance was "Very disappointing," and that what she did was a "blatant violation" because "her current work load prevented her from filing responses." So, with this new **precedent-setting, published-opinion**, because this is communication is about the "global" performance of an assistant prosecutor and not about "substantive issues" it's perfectly fine for the former Chief Prosecutor – now appointed judge – to criticize the performance of his former employees in matters before him during the case and without disclosing them to defense counsel. It must then also be perfectly acceptable for the now Chief Prosecutor to provide an ex parte apology to Judge Kengis on the performance of her employees. After all, according to the Court of Appeals, this communication isn't about specific issues in a trial therefore it is "just administrative." Once again, the communications were not promptly transferred over to defense counsel.

Based on the new **precedent-setting, published-opinion**, a prosecutor can now also ask for ex parte advice from a judge on procedural matters.³² Perhaps outside the context of all of the other ex parte emails between Judge Bakker, Judge Kengis, and Prosecutor Koch, this email on procedural advice and scheduling would be the most benign. Arguably this email is the one ex parte communication that actually fits within the **old pre-Court of Appeals ruling** on "administrative" communication. However, because of all of the other ex parte emails it certainly raises red flags. It is also questionable because Judge Bakker also opined that the opinion of the Honorable Terrence Berg of the United States District Court for the Eastern District of Michigan was "ridiculous in my humble opinion." Perhaps the Court of Appeals would agree that expressing

³² Exhibit C - Email Communication People v Frederick Mathews

such an opinion would not be about “substantive issues” and therefore no harm no foul in the administration of justice.

The above examples - just from the 48th Circuit Court within the span of approximately 5 years - are not an exercise of *reductio ad absurdum* it is the **Pandora’s Box** created by the **precedent-setting, published-opinion** of the Court of Appeals. This rationale poses a very real risk that the denial of a new trial for Mr. Loew will produce injustices in other cases, **because injustice in other cases is already occurring and has occurred.**

So, what purpose does Judge Bakker – as a member of the judicial branch – have inquiring about the investigative processes of the Michigan State Police, and the **very quality** of that investigation as pertains to a **particular defendant during that defendant’s trial** via an email with the **subject line “trial”**? The dissent described administrative as follows:

In my view, an ordinary understanding of the word “administrative” in this context contemplates simple procedural matters concerning **the judicial process itself**, such as the **orderly handling of motions**. See, e.g., *Adesanya v Novartis Pharmaceuticals Corp*, 755 Fed App’x 154, 158 (CA 3, 2018) (explaining that ex parte communications did not violate Code of Conduct for US Judges Canon 3 because “[t]he Magistrate Judge and Appellee’s counsel were simply seeking a way to **manage the numerous pro se discovery requests** Appellants had filed”); *Gerber v Veltri*, 702 Fed App’x 423, 432-433 (CA 6, 2017) (explaining that ex parte communications did not violate Code of Conduct for US Judges Canon 3 because “[t]heir discussion concerned **when, and how, the court should reschedule the appearance of witnesses** slated to testify that day, particularly defendant’s expert Dr. Anderson”).³³

Even the majority’s cited authority for “administrative purposes” appears to coincide with the dissent.

The trial court judge impermissibly communicated with the prosecutor **regarding the oath taken by jurors**. *State v McNeill*, 349 NC 634, 642, 653; 509 SE2d 415 (1998). The court determined the defendant was not entitled to a new trial on this basis because the communication “relate[d] only to the **administrative functioning of the judicial system**.”³⁴ *Id.* at 653. See also *Rodriguez v State*, 919 So 2d 1252, 1275 (Fla, 2005) (The Court held that ex parte communications regarding the subject of the **defendant’s**

³³ Exhibit Y – COA Dissent at p. 6

³⁴ Specifically, the judicial system, and not executive functions such as prosecutorial or law enforcement

upcoming hearing did not violate the defendant's due process rights because the communications were purely administrative in nature)³⁵

In both opinions, the authorities cited deal with "administrative purposes" of the **Judicial Branch of Government**. A judicial administrative purpose as expressed by these cases involve: oaths to jurors; scheduling of hearings; rescheduling the appearance of witnesses; orderly handling of motions; and management of pro se discovery requests. Now, by the **precedent-setting, published-opinion** of the Court of Appeals allows the phrase "administrative purpose" to intrude into the functioning of the **Executive Branch of Government**. This opinion invites ex parte discussion between judges and prosecutors regarding the performance of the police and their investigators and to the performance of the very prosecutor trying the case of a defendant.

There is **zero administrative purpose** for a judge in the judicial branch of government to opine or even care about the performance of a police investigation or the performance of a prosecutor trying a case before them because these are **Executive Branch** functions. Judge Bakker's inquiry into the MSP investigation and the performance of prosecutors during trials, or otherwise, **only served to gratify her own personal biases in favor of the Prosecutor's Office** – "globally". Judge Bakker's bias toward the prosecutor is the very reason why a new trial should be granted in this case as advocated in Judge Riordan's powerful dissent.

The Due Process Clause is also violated when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton v AT Massey Coal Co, Inc*, 556 US 868, 872; 129 S Ct 2252; 173 L Ed 2d 1208 (2009) (quotation marks and citation omitted).

Relatedly, MCR 2.003(C)(1) provides, in relevant part, as follows:

Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

³⁵ Exhibit X – COA Majority at p. 6

- (a) The judge is biased or prejudiced for or against a party or attorney.
- (b) The judge, based on objective and reasonable perceptions, has either
 - (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, [556 US 868]; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or
 - (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

Additionally, Canon 2 of the Michigan Code of Judicial Conduct provides, in relevant part, that “[a] judge must avoid all impropriety and appearance of impropriety.”³⁶

Certainly, when judges within the 48th Circuit can no longer function within their roles within the judicial branch of government and opine on the performance of their former employees in the Prosecutor’s Office regarding matters before them, **the 48th Circuit Court within Allegan County is seriously and fundamentally broken.** The Court of Appeals has signaled that will go through elaborate mental gymnastics to avoid holding elected officials accountable for their behavior, and this decision will only **embolden** such behavior both in Allegan County and elsewhere. Thus, the second *Liljeberg* factor is satisfied because of this dangerous precedent.

II. THE COURT OF APPEALS NEW DEFINITION OF ADMINISTRATIVE UNDERMINES THE PUBLIC CONFIDENCE IN THE JUDICIAL PROCESS

The fact that the Township of Watson authorizes this brief should be – to use a tort’s law term – the *res ipsa loquitur* regarding the undermining of public confidence in the judicial process.³⁷ As a unit of government in Allegan County with a responsibility to our residents, the perfidious betrayal of trust by our elected officials **is an embarrassment to Allegan County.** This **precedent-setting, published-opinion** of the Court of Appeals is what many in our community see as letting the Chief Prosecutor and the former Chief Judge of Allegan County to get away with

³⁶ Exhibit Y – COA Dissent at pp. 1-2

³⁷ Exhibit A - Watson Township Resolution

gamesmanship and systematic unfairness. Anecdotally, many attorneys outside of Allegan County express to this attorney their opinion of how corrupt and backward Allegan County is, and with the troubling emails only uncovered by FOIA request, perhaps that opinion is justified.

With regard to the third *Liljeberg* factor, there is a risk that the public's confidence in the judicial process will be undermined if Mr. Loew does not obtain relief. As Judge Riordan put it,

Although there is no question that judges may have personal relationships with some of the attorneys who appear before them, and may have judicial or legal interpretative philosophies which make certain outcomes seem more or less likely to those appearing before them, a trial judge unilaterally identifying the strengths and weaknesses of a case to one party, but not the other, creates a perception that the judge is not neutral and impartial. **By awarding defendant relief in this case, the judiciary communicates to the public that such conduct by a judge is not acceptable.**³⁸

Even the majority opinion acknowledged that there is a perception of gamesmanship

We accept for purposes of discussion that the trial judge's e-mail communications created an appearance of impropriety, contrary to Canon 2, because the e-mail communications occurred during the trial and did not include defense counsel. As the trial court noted, members of the public may perceive some gamesmanship when a trial judge communicates with the head prosecutor while a criminal trial is underway, and the communications spawned from testimony in the trial. That perception is legally questionable, but is one that we accept for purposes of resolving this matter.³⁹

The Court of Appeals believes that the perception is "legally questionable", however fading trust and undermined public confidence of the judiciary is a bit like hard-core pornography. As Justice Potter Stewart famously said in *Jacobellis v Ohio*, "I know it when I see it". 378 US 184, at 197, 84 S. Ct. 1676; 12 L. Ed. 2d 793 (1964). As a part of Allegan County, Watson Township knows undermined public confidence in the judiciary when we've seen it. Our community does not sit upon an ivory tower or exist within a theoretical legal bubble, and neither does Judge Baillargeon who granted Mr. Loew a new trial and acknowledges that

[I]t's a matter of the public perception of the ethical obligations entailed with the judicial office and I worry that as unintentional as this may be, it could do damage

³⁸ Exhibit Y – COA Dissent at p. 5

³⁹ Exhibit X – COA Majority Opinion at p. 8

to that. And I think it's incumbent on us to really err on the side of making sure that all people understand themselves to be given that opportunity to a full and fair hearing before an impartial judiciary. . . .⁴⁰

Judge Baillargeon was also very perceptive of community sentiment at Mr. Loew's bond hearing in the wake of the Court of Appeals decision. As Judge Baillargeon said the "Court of Appeals opinion, in my opinion, leads – lends further credence to the proposition that the courts should not and cannot police themselves from misconduct or, at the very least, the appearance of misconduct on the part of the judiciary."⁴¹ Judge Baillargeon went on to say "with decisions like this, it provides more fuel for the argument that the courts are unwilling to hold their own accountable. This Court will not attempt to undertake the ethical or intellectual gymnastics employed by the majority when they discuss the case as administrative."⁴² The public understands what's been occurring in this trial both through the campaign of Mr. Villar and in the media. In not holding the Chief Prosecutor or the former Chief Judge accountable by granting Mr. Loew a new and fair trial before a neutral judge *most definitely* undermines public confidence in the judiciary; the third *Liljeberg* factor is met.

CONCLUSION AND RELIEF SOUGHT

The Township of Watson seeks not only a fair trial for Mr. Loew, but the restoration of confidence in our legal system. The second and third *Liljeberg* factors weigh in favor of awarding defendant Loew a new trial 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. The Township of Watson of Allegan County requests that this most Honorable Supreme Court of Michigan restore a sense of confidence and justice within our legal system.

⁴⁰ Exhibit Y – As quoted in the COA Dissent at p. 5

⁴¹ Exhibit W - Bond Hearing Transcript, 11:17-21

⁴² Id. at 11:25-12:3

Dated: April 21, 2022

Respectfully submitted,

/s/ Kevin L. Travis

Kevin Travis (P77761)

Watson Township Supervisor

1895 118th Ave.

Allegan, MI 49010

(269) 589-5688

supervisor@watsontownship.org

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Exhibit W: Bond Hearing Transcript

Exhibit X: COA Majority Opinion

Exhibit Y: COA Dissent

PROOF OF SERVICE

I, Kevin Travis, hereby affirm that on the date stated below I delivered a copy of the foregoing *AMICUS CURIAE* BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI upon the parties below via the MiFILE System, to all email addresses below or, if noted, via US First Class mail, postage prepaid, from Allegan, Michigan on the date below:

Heath M. Lynch P81483
Springstead Bartish Borgula & Lynch, PLLC
Attorney for Defendant/Appellant
60 Monroe Center St NW Ste 500
Grand Rapids, MI 49503-2946
heath@sbllaw.com

MOLLY S SCHIKORA P46997
Allegan County Prosecutor Office
Attorney for Plaintiff/Appellee
113 Chestnut St.
Allegan, MI 49010-1332
mschikora@allegancounty.org

DATED: April 21, 2022

/s/ Kevin L. Travis
Kevin Travis (P77761)
Watson Township Supervisor
1895 118th Ave.
Allegan, MI 49010
(269) 589-5688
supervisor@watsontownship.org

IN THE SUPREME COURT
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DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit A: Watson Township Resolution Re: Amicus Brief

TOWNSHIP OF WATSON
ALLEGAN COUNTY, MICHIGAN
RESOLUTION # 02032022-1

RESOLUTION TO SUBMIT AMICUS CURIAE BRIEF RE PEOPLE V LOEW

Whereas, as a political subdivision of the State of Michigan, Watson Township has the authority to file an amicus curiae brief without leave of the Michigan Supreme Court when submitted by its authorized legal officer. Michigan Court Rule 7.312(H)(2)

Whereas, Mr. Loew was convicted by jury trial in the 48th Circuit Court in Allegan County before Judge Zuzich-Bakker.

Whereas, The Chief Prosecutor Koch and Judge Zuzich-Bakker communicated ex-parte during the course of the jury trial.

Whereas, the ex-parte communication was discovered after a FOIA request against Chief Prosecutor Koch.

Whereas, Judge Baillargeon granted Mr. Loew a new trial based upon the ex-parte communication because the communication between the judge and the prosecutor gave the appearance of impropriety.

Whereas, in a two to one decision of the Michigan Court of Appeals – docket 352056 – the decision of Judge Baillargeon was reversed.

Whereas, Mr. Loew's attorney Heath Lynch plans to appeal the Court of Appeals decision to the Michigan Supreme Court.

Whereas, From Judge Riordan's dissent, "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 US 133, 136; 75 S Ct 623; 99 L Ed 942 (1955).

Whereas, Judge Riordan cited the three factors in *Liljeberg v Health Servs Acquisition Corp*, 486 US 847; 108 S Ct 2194; 100 L Ed 2d 855 (1988) (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.

Whereas, Pursuant to the Michigan Rules of Professional Conduct 8.3, lawyers that learn of another lawyer's misconduct or of a judge's misconduct shall inform the appropriate regulatory body, the Attorney Grievance Commission or Judicial Tenure Commission respectively.

Whereas, the majority opinion's decision that such ex parte communication - though about substantive issues in the case - was administrative in nature goes against the spirit of MRPC 8.3 and has the potential to create injustices in other cases pursuant to the second Liljeberg factor by discouraging the reporting of suspected unethical behavior in the future.

Whereas, there are ample social media posts or communication among Allegan County residents that is indicative that the public lacks confidence in the judiciary in general and the 48th Circuit Court specifically, and that such ex-parte communication is normal or expected or that such FOIA inquires that reveal ex-parte communication are merely personal attacks or "scorched earth" political tactics.

Whereas, Watson Township, on behalf of its residents, has an interest in ensuring that its residents be treated fairly in accordance with the Constitution of the State of Michigan and the Constitution of the United States.

Whereas, Watson Township, as a political subdivision of the State of Michigan in general and Allegan County, specifically, has an interest in ensuring public confidence in the judiciary in general and the 48th Circuit Court of Allegan County specifically,

Therefore, be it resolved, The Watson Township Board authorizes The Watson Township Supervisor – as its authorized legal officer – to submit an Amicus Curiae Brief to the Michigan Supreme Court in favor of granting Mr. Loew a new trial in accordance with the dissenting opinion and applicable court rules.

The Resolution was Moved by Michele Morris

The Resolution was Seconded by Kelli Morris

Upon roll call vote, the vote was as follows:

Supervisor Travis:	<u>Yes</u>	Clerk Morris:	<u>Yes</u>
Treasurer Calder:	<u>Yes</u>	Trustee Harris:	<u>Yes</u>
Trustee Wood:	<u>Yes</u>		

Clerk's Certification

I, Kelli Morris, the duly elected Clerk of Watson Township, hereby certify that the foregoing resolution was adopted by the Township Board of said Township at the regular meeting of said Board on, Thursday, June 4, 2020 at which meeting a quorum was present.

Kelli Morris 2/3/2022
 Kelli Morris, Watson Township Clerk Date

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit B: Ex Parte Email People v Loew

Becky Blaine

From: Myrene Koch
Sent: Wednesday, August 28, 2019 4:49 PM
To: Margaret Bakker
Subject: RE: trial

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.

Myrene K. Koch (P-62570)
Prosecuting Attorney
Allegan County
113 Chestnut Street, Allegan, MI 49010
(269) 673-0280
(269) 673-0599 fax

From: Margaret Bakker
Sent: Wednesday, August 28, 2019 9:03 AM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: RE: trial

I thought Safe Harbor would catch it.

From: Myrene Koch
Sent: Wednesday, August 28, 2019 9:02 AM
To: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: RE: trial

Yes, because the prior APA assigned to the case did not catch that it was missed nor did anyone else who touched the file. As a result, there will now be a checklist for CSC's in files.

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

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

From: Myrene Koch
Sent: Wednesday, August 28, 2019 8:47 AM
To: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: RE: trial

They do but not typically for CSC's. This trooper has been given additional personal training since this investigation.

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

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

RECEIVED by MSC 4/21/2022 5:18:37 PM

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit C: Ex Parte Email People v Mathews

Becky Blaine

From: Myrene Koch
Sent: Wednesday, May 2, 2018 8:48 AM
To: Margaret Bakker
Subject: RE: Frederick Matthews, Allegan County Circuit Court No. 11-017298-FH-Z

Thanks!

*Myrene K. Koch
Prosecuting Attorney
Allegan County
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0280
(269)673-0599 fax*

From: Margaret Bakker
Sent: Wednesday, May 2, 2018 8:47 AM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Cc: Anne Lange <ALange@ALLEGANCOUNTY.ORG>
Subject: RE: Frederick Matthews, Allegan County Circuit Court No. 11-017298-FH-Z

8:30 am.

From: Myrene Koch
Sent: Wednesday, May 2, 2018 8:10 AM
To: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: RE: Frederick Matthews, Allegan County Circuit Court No. 11-017298-FH-Z

What time on May 10th? I forgot to ask that.

Myrene

From: Margaret Bakker
Sent: Wednesday, May 2, 2018 8:05 AM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Cc: Anne Lange <ALange@ALLEGANCOUNTY.ORG>
Subject: RE: Frederick Matthews, Allegan County Circuit Court No. 11-017298-FH-Z

This is ridiculous in my humble opinion but we will set the case for sentencing as soon as possible.

Anne, this needs to be set for sentencing within the next few weeks. We have time to handle it on May 10 if a writ can be done today to have Matthews here for sentencing.

Myrene, can your office get a writ done today? Let us know so we can get a notice out. I'm not sure if we should notice appeal counsel or trial counsel, so let's notice out both.

Marge

From: Myrene Koch
Sent: Tuesday, May 1, 2018 4:56 PM
To: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: FW: Frederick Matthews, Allegan County Circuit Court No. 11-017298-FH-Z

This s the email I received on Frederick Matthews. Please advise.

Thank you,
 Myrene

From: Pallas, John (AG) [mailto:PallasJ@michigan.gov]
Sent: Monday, April 30, 2018 5:38 PM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Cc: Letica, Anica (AG) <LeticaA@michigan.gov>; Touhey, Meagan (AG) <TouheyM1@michigan.gov>; Christensen, Andrea (AG) <ChristensenA1@michigan.gov>
Subject: Frederick Matthews, Allegan County Circuit Court No. 11-017298-FH-Z

Good Afternoon Prosecutor Koch: I apologize for sending you an email after-hours, but were just notified of a decision by the United States District Court for the Eastern District of Michigan concerning a criminal conviction that was obtained in your county. The Honorable Terrence Berg has granted prisoner Frederick Matthews a conditional/unconditional writ of habeas corpus as described below:

- 1) The state must vacate Matthews' first-degree home invasion conviction, enter judgment on the lesser offense of second-degree home invasion, and resentence him within 90 days of the date of the opinion (July 27th) or Matthews can apply for a writ ordering his release from custody (this is the conditional part of the writ)
- 2) The state must *immediately* vacate Matthews' felony-firearm conviction and sentence (this is the unconditional part of the writ which must be acted upon immediately).

At this point, we have not had sufficient time to determine whether this may be a case that merits an appeal to the United States Court of Appeals for the Sixth Circuit. But, in my opinion, in the meantime, we have no choice but to *immediately* vacate Matthews' felony-firearm conviction and sentence or we risk the Court either ordering Matthews' release or sanctioning the State and or the County (if we appeal, we can always have that conviction reinstated). We can await taking any action with respect to Matthews' first-degree home invasion conviction for a bit longer since the court only granted a conditional writ as to that conviction (which will give us more time to determine whether an appeal is merited).

I am traveling over the next two days in order to participate in an oral argument in the Sixth Circuit, but I would be happy to discuss this matter with you or whomever you designate as I travel. I can be reached on my cell phone at (517) 331-7951. Please also feel free to call and discuss this matter with my First Assistant Anica Letica at (517) 373-4875. In the meantime, we will internally be discussing whether an appeal is merited. Your opinion matters on this point and we would like to know what you think of the attached opinion and its reasoning.

I am sorry to deliver this kind of news by email, but unfortunately the federal court's timing did not leave us any choice.

Thank you.

John

John S. Pallas
Division Chief
Criminal Appellate Division
Department of the Michigan Attorney General
525 W. Ottawa Street
P.O. Box 30217
Lansing, MI 48909
Telephone: (517) 373-4875
Fax: (517) 373-4916

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IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff/ Appellee,

-VS-

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

MSC NO.: 164133

COA NO.: 352056

Circuit Ct. No.: 18-021709-FC

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit D: Ex Parte Email People v Pierce

Becky Blaine

From: Myrene Koch
Sent: Thursday, February 20, 2020 4:32 PM
To: Roberts Kengis; Judith Kasson
Cc: Margaret Bakker
Subject: RE: People V Eric Pierce 19-23192

I completely apologize. It is unacceptable to not file responses and then cite those reasons for the lapse in duty. I appreciate the insight. I am going through the file and docket now. In looking at the docket, I thought it was scheduled for 2/20 then a stip was signed to move it to 2/24 back in January. I am still looking but haven't yet found why it was moved back. Would you be willing to take a look at that please? I will meet with Emily once I have reviewed everything. Again, I am sorry. This is not the performance I expect from my office, nor will it be accepted.

Thank you,
Myrene

Myrene K. Koch (P-62570)
Prosecuting Attorney
Allegan County
113 Chestnut Street, Allegan, MI 49010
(269) 673-0280
(269) 673-0599 fax

From: Roberts Kengis
Sent: Thursday, February 20, 2020 10:44 AM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>; Judith Kasson <JKasson@ALLEGANCOUNTY.ORG>
Cc: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: People V Eric Pierce 19-23192

Myrene and Judy,

This case was scheduled for motion hearing this morning, and Robert Baker filed numerous motions including discovery, suppress evidence, motion for bill of particulars and motion to admit prior sex acts. D is charged with multiple counts of CSC 1st, 3rd, GBH, and HO 4th. No responses were filed by Emily Jipp to any of the motions, and on the record she stated her current work load prevented her from filing responses. Very disappointing. I thought you should know. The hearing was adjourned for other reasons. Emily said she'd file responses, Baker objected based upon the deadline, and I enforced the deadline and said no responses will be accepted by the court. If a motion were earlier filed requesting an extension, I would probably be open to that, but this was a blatant violation.

Rob

Judge Roberts Kengis

48th Circuit Court
113 Chestnut St.
Allegan MI 49010
(269) 673-0300

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff/ Appellee,

-vs-

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit E: FOIA request for emails and text messages from Jan. 1, 2011 to March 1, 2018

Records Located on County Website

Any public records available to the general public on the County website at the time the request is made are exempt from any labor charges to separate exempt information from nonexempt information.

If the County knows or has reason to know that all or a portion of the requested information is available on its website, the County must notify the requestor in its written response that all or a portion of the requested information is available on its website. The written response, to the degree practicable in the specific instance, must include a specific webpage address where the requested information is available. On the detailed cost itemization form, the County must separate the requested public records that are available on its website from those that are not available on the website and must inform the requestor of the additional charge to receive copies of the public records that are available on its website.

If the County has included the website address for a record in its written response to the requestor and the requestor thereafter stipulates that the public record be provided to him or her in a paper format or other format, including digital media, the County must provide the public records in the specified format (if the County has the technological capability) but may use a fringe benefit multiplier greater than 50%, not to exceed the actual costs of providing the information in the specified format.

Request for Copies of Records on County Website

I hereby stipulate that, even if some or all of the records are located on the County website, I am requesting that the County make copies of those records on the website and deliver them to me in the format I have requested in this form. I understand that some FOIA fees may apply.

Requestor's Signature:

Date:

Overtime Labor Costs

Overtime wages shall not be included in the calculation of labor costs unless overtime is specifically stipulated by the requestor and clearly noted on the detailed cost itemization form.

Consent to Overtime Labor Costs

I hereby agree and stipulate to the County using overtime wages in calculating the following labor costs as itemized in the following categories:

1. Labor to copy 2. Labor to locate 3a. Labor to redact 3b. Contract labor to redact
 6b. Labor to copy records already on County website

Requestor's Signature:

Date:

Request for Discount: Indigence

A public record search must be made and a copy of a public record must be furnished without charge for the first \$20 of the fee for each request by an individual who is entitled to information under the FOIA and who submits an affidavit stating that the individual is indigent and receiving specific public assistance, or, if not receiving public assistance, stating facts showing inability to pay the cost because of indigence.

If a requestor is ineligible for the discount, the County shall inform the requestor specifically of the reason for ineligibility in its written response. An individual is ineligible for this fee reduction if the individual has previously received discounted copies of public records from the County twice during that calendar year, or the individual requests the information in conjunction with outside parties who are offering or providing payment or other remuneration to the individual to make the request. The County may require a statement by the requestor in the affidavit that the request is not being made in conjunction with outside parties in exchange for payment or other remuneration.

Office Use: Affidavit received Eligible for discount Ineligible for discount

I am submitting an affidavit and requesting that I receive the discount for indigence for this FOIA request:

Requestor's Signature:

Date:

Request for Discount: Nonprofit Organization

A public record search must be made and a copy of a public record must be furnished without charge for the first \$20 of the fee for each request by a nonprofit organization formally designated by the state to carry out activities under subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act and the Protection and Advocacy for Individuals with Mental Illness Act, if the request is 1) made directly on behalf of the organization or its clients; 2) is made for a reason wholly consistent with the mission and provisions of those laws under section 931 of the Mental Health Code, 1974 PA 258, MCL 330.1931; and 3) is accompanied by documentation of its designation by the state, if requested by the County.

Office Use: Documentation of state designation received Eligible for discount Ineligible for discount

I stipulate that I am a designated agent for the nonprofit organization making this FOIA request and that this request is made directly on behalf of the organization or its clients and is made for a reason wholly consistent with the mission and provisions of those laws under section 931 of the Mental Health Code, 1974 PA 258, MCL 330.1931:

Requestor's Signature:

Date:

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff/ Appellee,

-vs-

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit F: Ex Parte Email People v Brimhall

Becky Blaine

From: Myrene Koch
Sent: Thursday, September 21, 2017 4:46 PM
To: Margaret Bakker
Subject: RE: trial

Thank you, I think so too from the pieces I have been able to watch.

From: Margaret Bakker
Sent: Thursday, September 21, 2017 3:37 PM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: trial

Jessica is doing a very good job. She has some fact problems, but she is handling it well.

*Margaret Zuzich Bakker
Chief Judge
48th Circuit Court
113 Chestnut
Allegan, MI 49010
269 673-0300*

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff/ Appellee,

-vs-

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit G: Register of Actions People v Brimhall

Case Details

Additional Resources ▾

Case ID 2016-0000020456-FH	Court Location 48th Circuit Court - Allegan	PIN 16881-16
Case Entitlement STATE OF MI V TRAVIS DEE BRIMHALL		
Judge of Record BAKKER,MARGARET ZUZICH,		
Date Filed 11/15/2016		
Case Status CLOSED		
Closed Date 11/21/2017		
Due Date 06/22/2018		
Balance		

Parties (2)

Party Name BRIMHALL, TRAVIS, DEE	Party Type/Number DEFENDANT - 1		
Age 37 (1985)			
Attorney Name FREDRICK WALTER JENSEN JR.			
Alternate Name(s)			
Party Action(s)			
Category	Action	Action Date	Action Due Date
FIN ORDERS DUE DATE	ADD/CHANGE FIN ORDER DUE DATE	11/20/2017	06/22/2018
Party Name BRIMHALL, PATRICIA, ANN	Party Type/Number BONDSMEN - 1		
Attorney Name			
Alternate Name(s)			

Charges (3)

Count

1

Offense Date
10/18/2016

Current Charge

POLICE OFFICER - ASSAULTING/RESISTING/OBSTRUCTING CAUSING INJURY (75081D2)

Original Charge

POLICE OFFICER - ASSAULTING/RESISTING/OBSTRUCTING CAUSING INJURY (75081D2)

Officer/Agency or Petitioner

Charge Level

Amended or Reduced

Attempted, Conspired, Solicited

Notice

Arrestment Date

10/20/2016

Disposition Date

09/22/2017

Disposition

GUILTY

Sentencing Date

11/20/2017

License Suspension Clearance Fee Due

Count 2	Offense Date 10/18/2016
Current Charge INDECENT EXPOSURE (750335A)	
Original Charge INDECENT EXPOSURE (750335A)	
Officer/Agency or Petitioner	
Charge Level Misdemeanor	
Amended or Reduced	
Attempted, Conspired, Solicited	
Notice	
Arraignment Date 10/20/2016	
Disposition Date 09/22/2017	
Disposition GUILTY	
Sentencing Date 11/20/2017	
License Suspension Clearance Fee Due	

Count 3	Offense Date 10/18/2016
Current Charge DISORDERLY PERSON - OBSCENE CONDUCT (7501671F)	
Original Charge DISORDERLY PERSON - OBSCENE CONDUCT (7501671F)	
Officer/Agency or Petitioner	
Charge Level Misdemeanor	
Amended or Reduced	
Attempted, Conspired, Solicited	
Notice	
Arraignment Date 10/20/2016	
Disposition Date 09/22/2017	
Disposition GUILTY	
Sentencing Date 11/20/2017	
License Suspension Clearance Fee Due	

Bonds (1)

Bond Type
 CASH BOND **CLOSED**
Bond Amount
 \$500.00
Participant
 D1-BRIMHALL,TRAVIS,DEE

Posted By
 BRIMHALL,PATRICIA,ANN
Receipt
Bond Ordered Date
 11/15/2016
Judge Setting Bond
 BAKKER,MARGARET ZUZICH
Bond Posted
 11/15/2016
Balance
 \$0.00
Bond Closed Date
 02/05/2018

Bond Action(s)

Action	Action Date	Amount	Check Number	Payee
SET BOND	11/15/2016	\$500.00		
POST BOND	11/15/2016	\$500.00		
APPLIED BOND TO FINES & COSTS	02/05/2018	\$500.00		

Hearings (7)

Hearing Type
 SENTENCING
Hearing Date
 11/20/2017
Hearing Officer
 BAKKER, MARGARET ZUZICH

Hearing Type
MISCELLANEOUS HEARING
Hearing Date
11/13/2017
Hearing Officer
BAKKER, MARGARET ZUZICH

Hearing Type
JURY TRIAL WHOLE DAY
Hearing Date
09/22/2017
Hearing Officer
BAKKER, MARGARET ZUZICH

Hearing Type
JURY TRIAL WHOLE DAY
Hearing Date
09/21/2017
Hearing Officer
BAKKER, MARGARET ZUZICH

Hearing Type
MISCELLANEOUS HEARING
Hearing Date
09/15/2017
Hearing Officer
BAKKER, MARGARET ZUZICH

Hearing Type
MISCELLANEOUS HEARING
Hearing Date
06/13/2017
Hearing Officer
BAKKER, MARGARET ZUZICH

Hearing Type
MOTION HEARING

Hearing Date
02/08/2017

Hearing Officer
BAKKER, MARGARET ZUZICH

Sentencing (3)

SENTENCING
11/20/2017 - Count - 1
Incarceration Type
JAIL

Probation Term
36 MONTH(S)
Begins On
11/20/2017

COMMUNITY SERVICE/JAIL/PRISON

Location

Minimum Term
10 MONTH(S)

Credit Time Served
4 DAY(S)

Community Service In Lieu of Jail

Optional Term

Incarceration Weekend Service

No

Community Service

Jail/Prison Suspended

No

Fines Suspended

No

VEHICLE IMMOBILIZATION/FORFEITURE

Immobilize Vehicle Ordered

Start Date

Vehicle Forfeited

No

PROBATION/REHABILITATION

Probation Officer

Rehabilitation

Curfew Time

LICENSE/CCW INFORMATION

License Suspended/Revoked

Days Suspended

Restricted

SENTENCING

11/20/2017 - Count - 2

Incarceration Type

JAIL

Probation Term

Begins On

11/20/2017

COMMUNITY SERVICE/JAIL/PRISON

Location

Minimum Term

4 DAY(S)

Credit Time Served

4 DAY(S)

Community Service In Lieu of Jail

Optional Term

Incarceration Weekend Service

No

Community Service

Jail/Prison Suspended

No

Fines Suspended

No

VEHICLE IMMOBILIZATION/FORFEITURE

Immobilize Vehicle Ordered

Start Date

Vehicle Forfeited

No

PROBATION/REHABILITATION

Probation Officer

Rehabilitation

Curfew Time

LICENSE/CCW INFORMATION

License Suspended/Revoked

Days Suspended

Restricted

SENTENCING

11/20/2017 - Count - 3

Incarceration Type

JAIL

Probation Term

Begins On

11/20/2017

COMMUNITY SERVICE/JAIL/PRISON

Location

Minimum Term

4 DAY(S)

Credit Time Served

4 DAY(S)

Community Service In Lieu of Jail

Optional Term

Incarceration Weekend Service

No

Community Service

Jail/Prison Suspended

No

Fines Suspended

No

VEHICLE IMMOBILIZATION/FORFEITURE

Immobilize Vehicle Ordered

Start Date

Vehicle Forfeited

No

PROBATION/REHABILITATION

Probation Officer

Rehabilitation

Curfew Time

LICENSE/CCW INFORMATION

License Suspended/Revoked

Days Suspended

Restricted

Financial Orders (4)

Payor

BRIMHALL,TRAVIS,DEE - D 1

Assessment Date

11/20/2017

Financial Order Description

ATTORNEY FEE

Joint/Several

No

Order Amount

\$100.00

Amount Paid

\$100.00

Payor

BRIMHALL,TRAVIS,DEE - D 1

Assessment Date

11/20/2017

Financial Order Description

CIRCUIT COURT COST

Joint/Several

No

Order Amount

\$150.00

Amount Paid

\$150.00

Payor

BRIMHALL,TRAVIS,DEE - D 1

Assessment Date

11/20/2017

Financial Order Description

CRIME VICTIM RIGHTS

Joint/Several

No

Order Amount

\$130.00

Amount Paid

\$130.00

Payor

BRIMHALL,TRAVIS,DEE - D 1

Assessment Date

11/20/2017

Financial Order Description

STATE MINIMUM COSTS

Joint/Several

No

Events (88)



Event Date

06/22/2018

Description

COURT ORDERED PAID

Party/Count

D1

Event No./Clerk

78

Judge

BAKKER,MARGARET ZUZICH,

Receipt Number

149277

Amount

\$48.00

Event Date

05/09/2018

Description

PETITION AND ORDER FOR AMENDMENT OF ORDER OF PROBATION

Party/Count

D1

Event No./Clerk

77

Judge

BAKKER,MARGARET ZUZICH,

Event Date

03/06/2018

Description

ORDER OF PROBATION

Party/Count

D1

Event No./Clerk

68

Judge

BAKKER,MARGARET ZUZICH,

Event Date
02/05/2018

Description
APPLIED TO FINES & COSTS

Party/Count
D1

Event No./Clerk
67

Judge
BAKKER,MARGARET ZUZICH,

Receipt Number
145885

Amount
\$500.00

Event Date
02/02/2018

Description
COURT ORDERED PAID

Party/Count
D1

Event No./Clerk
66

Comment
APPLY BOND

Judge
BAKKER,MARGARET ZUZICH,

Receipt Number
145885

Amount
\$500.00

Event Date
11/21/2017

Description
FINAL ORDER/JUDGMENT

Party/Count
D1

Event No./Clerk
63

Judge
BAKKER,MARGARET ZUZICH,

Event Date
11/20/2017

Description
SENTENCING

Party/Count
D1/1

Event No./Clerk
59

Comment
DEFENDANT TO COMPLETE ALL

Judge
BAKKER,MARGARET ZUZICH,

Description
SENTENCING

Party/Count
D1/1

Event No./Clerk
59

Comment
TREATMENT PROGRAMS AS DIRECTED

Judge
BAKKER,MARGARET ZUZICH,

Description
SENTENCING

Party/Count
D1/1

Event No./Clerk
59

Comment
BY PROBATION AGENT. MUST

Judge
BAKKER,MARGARET ZUZICH,

Description
SENTENCING

Party/Count
D1/1

Event No./Clerk
59

Comment
COMPLETE CBT PROGRAMMING. MAY

Judge
BAKKER,MARGARET ZUZICH,

Description
SENTENCING

Party/Count
D1/1

Event No./Clerk
59

Comment
BE RELEASED EARLY INTO

Judge
BAKKER,MARGARET ZUZICH,

Description
SENTENCING

Party/Count
D1/1

Event No./Clerk
59

Comment
ALTERNATIVE DIRECTIONS ONLY

Judge
BAKKER,MARGARET ZUZICH,

Description
SENTENCING

Party/Count
D1/1

Event No./Clerk
59

Description
ADD/CHANGE FIN ORDER DUE DATE

Party/Count
D1

Event No./Clerk
81

Event Date
11/13/2017

Description
MISCELLANEOUS HEARING

Party/Count
D1

Event No./Clerk
56

Comment
DEF TESTED POSITIVE. DEF

Judge
BAKKER,MARGARET ZUZICH,

Description
MISCELLANEOUS HEARING

Party/Count
D1

Event No./Clerk
56

Comment
TAKING TEST WITHIN 24 HOURS.

Judge
BAKKER,MARGARET ZUZICH,

Description
MISCELLANEOUS HEARING

Party/Count
D1

Event No./Clerk
56

Comment
MATTER ADJOURNED. SENTENCING

Judge
BAKKER,MARGARET ZUZICH,

Description
MISCELLANEOUS HEARING

Party/Count
D1

Event No./Clerk
56

Comment
RESCHEDULED.

Judge
BAKKER,MARGARET ZUZICH,

Description
REMOVE SCHEDULED EVENT

Party/Count
D1

Event No./Clerk
57

Comment
SET NEXT DATE: SENT 11/13/2017 9:00 AM BAKKER COURTROOM: 1

11/13/17

Judge

BAKKER,MARGARET ZUZICH,

Description

NOTICE SENT FOR

Party/Count

D1

Event No./Clerk

58

Judge

BAKKER,MARGARET ZUZICH,

Next Hearing

11/20/2017 9:00 AM - SENTENCING

Hearing Officer - BAKKER,MARGARET ZUZICH,

Location - 1

Event Date

09/22/2017

Description

SET CASE ON CALENDAR

Party/Count

D1

Event No./Clerk

49

Comment

SET NEXT DATE: SENT 11/13/2017 9:00 AM BAKKER COURTROOM: 1

Judge

BAKKER,MARGARET ZUZICH,

Description

JURY TRIAL WHOLE DAY

Party/Count

D1

Event No./Clerk

51

Comment

LOG: CLOSING ARGUMENTS, JURY

Judge

BAKKER,MARGARET ZUZICH,

Disposition

GUILTY

Description

JURY TRIAL WHOLE DAY

Party/Count

D1

Event No./Clerk

51

Comment

DELIBERATIONS. FOUND DEFENDANT

Judge

BAKKER,MARGARET ZUZICH,

Disposition

GUILTY

Description

JURY TRIAL WHOLE DAY

Party/Count

Event No./Clerk

D1 51

Comment

GUILTY OF ALL THREE CHARGES.

Judge

BAKKER,MARGARET ZUZICH,

Disposition

GUILTY

Description

JURY TRIAL WHOLE DAY

Party/Count

D1

Event No./Clerk

51

Comment

MATTER ADJOURNED FOR

Judge

BAKKER,MARGARET ZUZICH,

Disposition

GUILTY

Description

JURY TRIAL WHOLE DAY

Party/Count

D1

Event No./Clerk

51

Comment

SENTENCING.

Judge

BAKKER,MARGARET ZUZICH,

Disposition

GUILTY

Event Date

09/21/2017

Description

JURY TRIAL WHOLE DAY

Party/Count

D1

Event No./Clerk

50

Comment

DAY 1 OF 2 DAY JURY TRIAL.

Judge

BAKKER,MARGARET ZUZICH,

Description

JURY TRIAL WHOLE DAY

Party/Count

D1

Event No./Clerk

50

Comment

WITNESS LIST AND 404B EVIDENCE

Judge

BAKKER,MARGARET ZUZICH,

Description

JURY TRIAL WHOLE DAY	
Party/Count D1	Event No./Clerk 50
Comment DISCUSSED PRIOR TO JURY	
Judge BAKKER,MARGARET ZUZICH,	
Description JURY TRIAL WHOLE DAY	
Party/Count D1	Event No./Clerk 50
Comment SELECTION. VOIR DIRE COMPLETED	
Judge BAKKER,MARGARET ZUZICH,	
Description JURY TRIAL WHOLE DAY	
Party/Count D1	Event No./Clerk 50
Comment PRELIMINARY INSTRUCTIONS READ.	
Judge BAKKER,MARGARET ZUZICH,	
Description JURY TRIAL WHOLE DAY	
Party/Count D1	Event No./Clerk 50
Comment EXHIBITS SUBMITTED, TESTIMONY	
Judge BAKKER,MARGARET ZUZICH,	
Description JURY TRIAL WHOLE DAY	
Party/Count D1	Event No./Clerk 50
Comment HEARD. MATTER ADJOURNED FOR	
Judge BAKKER,MARGARET ZUZICH,	
Description JURY TRIAL WHOLE DAY	
Party/Count D1	Event No./Clerk 50
Comment THE DAY.	
Judge	

BAKKER,MARGARET ZUZICH,

Event Date
09/15/2017

Description
MISCELLANEOUS HEARING

Party/Count
D1

Event No./Clerk
48

Comment
LOG: SETTLEMENT CONFERENCE.

Judge
BAKKER,MARGARET ZUZICH,

Description
MISCELLANEOUS HEARING

Party/Count
D1

Event No./Clerk
48

Comment
NO OTHER COURT NOTES GIVEN.

Judge
BAKKER,MARGARET ZUZICH,

Event Date
08/08/2017

Description
PROOF OF SERVICE

Party/Count
D1

Event No./Clerk
43

Judge
BAKKER,MARGARET ZUZICH,

Event Date
07/12/2017

Description
PROOF OF SERVICE

Party/Count
D1

Event No./Clerk
41

Judge
BAKKER,MARGARET ZUZICH,

Next Hearing

09/21/2017 9:00 AM - JURY TRIAL
Hearing Officer - BAKKER,MARGARET ZUZICH,
Location - 1

Description

SET CASE ON CALENDAR

Party/Count

D1

Event No./Clerk

35

Comment

(2ND DAY OF 2 DAY JURY TRIAL)

Judge

BAKKER,MARGARET ZUZICH,

Next Hearing

09/22/2017 9:00 AM - JURY TRIAL
Hearing Officer - BAKKER,MARGARET ZUZICH,
Location - 1

Description

MISCELLANEOUS HEARING

Party/Count

D1

Event No./Clerk

40

Comment

LOG: SETTLEMENT CONFERENCE.

Judge

BAKKER,MARGARET ZUZICH,

Description

MISCELLANEOUS HEARING

Party/Count

D1

Event No./Clerk

40

Comment

MATTER NOT SETTLED. TRIAL

Judge

BAKKER,MARGARET ZUZICH,

Description

MISCELLANEOUS HEARING

Party/Count

D1

Event No./Clerk

40

Comment

ADJOURNED TO SEPT 22 AND 23.

Judge

BAKKER,MARGARET ZUZICH,

Event Date 05/26/2017	
Description PROOF OF SERVICE	
Party/Count D1	Event No./Clerk 30
Comment FIRST AMENDED WITNESSES TO BE	
Judge BAKKER,MARGARET ZUZICH,	
Description PROOF OF SERVICE	
Party/Count D1	Event No./Clerk 30
Comment CALLED BY THE PEOPLE FOR CASE	
Judge BAKKER,MARGARET ZUZICH,	
Description PROOF OF SERVICE	
Party/Count D1	Event No./Clerk 30
Comment IN CHIEF	
Judge BAKKER,MARGARET ZUZICH,	

(2 DAY JURY TRIAL)

Judge

BAKKER,MARGARET ZUZICH,

Description

SET CASE ON CALENDAR

Party/Count

D1

Event No./Clerk

20

Comment

SET NEXT DATE: TRLJ 06/27/2017 9:00 AM BAKKER COURTROOM: 1

Judge

BAKKER,MARGARET ZUZICH,

Description

SET CASE ON CALENDAR

Party/Count

D1

Event No./Clerk

21

Comment

(2ND DAY OF 2 DAY JURY TRIAL)

Judge

BAKKER,MARGARET ZUZICH,

Description

SET CASE ON CALENDAR

Party/Count

D1

Event No./Clerk

21

Comment

SET NEXT DATE: TRLJ 06/28/2017 9:00 AM BAKKER COURTROOM: 1

Judge

BAKKER,MARGARET ZUZICH,

Description

PROOF OF SERVICE

Party/Count

D1

Event No./Clerk

22

Judge

BAKKER,MARGARET ZUZICH,

Description

MOTION HEARING

Party/Count

D1

Event No./Clerk

24

Comment

LOG: MOTION FOR DISCOVERY AND

Judge

BAKKER,MARGARET ZUZICH,

Description

MOTION HEARING

Party/Count

D1

Event No./Clerk

24

Comment

MOTION FOR CHANGE OF VENUE.

Judge

BAKKER,MARGARET ZUZICH,

Description

MOTION HEARING

Party/Count

D1

Event No./Clerk

24

Comment

DISCOVERY: THERE IS A TASER

Judge

BAKKER,MARGARET ZUZICH,

Description

MOTION HEARING

Party/Count

D1

Event No./Clerk

24

Comment

READOUT/PHOTOGRAPHS OF DEPUTYS

Judge

BAKKER,MARGARET ZUZICH,

Description

MOTION HEARING

Party/Count

D1

Event No./Clerk

24

Comment

INJURIES--HAVE NOT YET BEEN

Judge

BAKKER,MARGARET ZUZICH,

Description

MOTION HEARING

Party/Count

D1

Event No./Clerk

24

Comment

MADE AVAILABLE TO DEFENDANT.

Judge

BAKKER,MARGARET ZUZICH,

Description

MOTION HEARING

Party/Count

D1

Event No./Clerk

24

Comment

P.A.-REQUESTED BUT DEPUTY IS

Judge

BAKKER,MARGARET ZUZICH,

Description

MOTION HEARING

Party/Count

Event No./Clerk

D1	24
Comment ON MEDICAL LEAVE. PRIOR ACTS	
Judge BAKKER,MARGARET ZUZICH,	
Description MOTION HEARING	
Party/Count D1	Event No./Clerk 24
Comment INTENT ADDRESSED. ARGUED A	
Judge BAKKER,MARGARET ZUZICH,	
Description MOTION HEARING	
Party/Count D1	Event No./Clerk 24
Comment MOTION TO CHANGE VENUE-DENIED.	
Judge BAKKER,MARGARET ZUZICH,	
Description MOTION HEARING	
Party/Count D1	Event No./Clerk 24
Comment COPY OF VIDEO ACCEPTED AS	
Judge BAKKER,MARGARET ZUZICH,	
Description MOTION HEARING	
Party/Count D1	Event No./Clerk 24
Comment EVIDENCE TO MAINTAIN. SET	
Judge BAKKER,MARGARET ZUZICH,	
Description MOTION HEARING	
Party/Count D1	Event No./Clerk 24
Comment MATTER FOR 2 DAY TRIAL.	
Judge BAKKER,MARGARET ZUZICH,	

Event Date
02/07/2017

Description
PROOF OF SERVICE

Party/Count
D1

Event No./Clerk
18

Judge
BAKKER, MARGARET ZUZICH,

Event Date
01/13/2017

Description
PROOF OF SERVICE

Party/Count
D1

Event No./Clerk
11

Judge
BAKKER, MARGARET ZUZICH,

Description
PROOF OF SERVICE

Party/Count
D1

Event No./Clerk
14

Judge
BAKKER, MARGARET ZUZICH,

Event Date
12/28/2016

Description
NOTICE SENT FOR

Party/Count
D1

Event No./Clerk
9

Comment
(15 MIN) (DISCOVERY, 404B,

Judge
BAKKER,MARGARET ZUZICH,

Next Hearing
02/08/2017 9:15 AM - MOTION HEARING
Hearing Officer - BAKKER,MARGARET ZUZICH,
Location - 1

Description
NOTICE SENT FOR

Party/Count
D1

Event No./Clerk
9

Comment
CHG OF VENUE)

Judge
BAKKER,MARGARET ZUZICH,

Next Hearing
02/08/2017 9:15 AM - MOTION HEARING
Hearing Officer - BAKKER,MARGARET ZUZICH,
Location - 1

Event Date
12/13/2016

Description
PROOF OF SERVICE

Party/Count
D1

Event No./Clerk
8

Judge
BAKKER,MARGARET ZUZICH,

Event Date
11/17/2016

Description

SCHEDULING ORDER AND NOTICE OF CRIMINAL PRETRIAL CONFERENCE

Party/Count

D1

Event No./Clerk

4

Judge

BAKKER,MARGARET ZUZICH,

Description

WRITTEN WAIVER OF ARRAIGNMENT

Party/Count

D1

Event No./Clerk

5

Judge

BAKKER,MARGARET ZUZICH,

Event Date
11/16/2016

Description

SET CASE ON CALENDAR

Party/Count

D1

Event No./Clerk

3

Judge

BAKKER,MARGARET ZUZICH,

Next Hearing

12/28/2016 1:00 PM - PRETRIAL HEARING

Hearing Officer - BAKKER,MARGARET ZUZICH,

Location - 1

Event Date
11/15/2016

Description
RETURN TO CIRCUIT

Party/Count
D1

Event No./Clerk
1

Judge
BAKKER, MARGARET ZUZICH,

Next Hearing
11/28/2016 11:00 AM - ARRAIGNMENT
Hearing Officer - BAKKER, MARGARET ZUZICH,
Location - 1

Program/Results
DC PRELIM EXAM HELD

Description
BOND POSTED

Party/Count
BND1

Event No./Clerk
2

Judge
BAKKER, MARGARET ZUZICH,

Receipt Number
136158

Amount
\$500.00

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit H: Lunch email July 29, 2016

Becky Blaine

From: Margaret Bakker
Sent: Friday, July 29, 2016 11:51 AM
To: Myrene Koch
Subject: RE:

Can't today....got to get this divorce trial done and then I am getting out of here, my sister in law is visiting.

Margaret Zuzich Bakker
Chief Judge
48th Circuit Court
113 Chestnut
Allegan, Michigan 49010

From: Myrene Koch
Sent: Friday, July 29, 2016 11:50 AM
To: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: RE:

Lunch?

Myrene K. Koch
Assistant Prosecuting Attorney Allegan County
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0280
(269) 673-0599 fax

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From: Margaret Bakker
Sent: Friday, July 29, 2016 11:18 AM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: RE:

Judge Baillargeon.

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit I: Lunch email November 30, 2016

Becky Blaine

From: Margaret Bakker
Sent: Wednesday, November 30, 2016 10:28 AM
To: Myrene Koch; Judy Hughes Astle
Subject: lunch

I am not sure if I will be able to go to lunch today, but if I get lucky and finish up my hearing, are you available for lunch? Subway or UP north?

Margaret Zuzich Bakker
Chief Judge
48th Circuit Court
113 Chestnut
Allegan, Michigan 49010

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit J: Lunch email December 14, 2016

Becky Blaine

From: Myrene Koch
Sent: Wednesday, December 14, 2016 11:27 AM
To: Margaret Bakker
Subject: RE: lunch

Mugshots. 12p.

*Myrene K. Koch
Assistant Prosecuting Attorney Allegan County
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0280
(269) 673-0599 fax*

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From: Margaret Bakker
Sent: Wednesday, December 14, 2016 11:08 AM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: lunch

I am in court, so email me (not text) on where you are going for lunch.

Margaret Zuzich Bakker
Chief Judge
48th Circuit Court
113 Chestnut
Allegan, Michigan 49010

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit K: Lunch email October 27, 2017

Becky Blaine

From: Margaret Bakker
Sent: Friday, October 27, 2017 11:15 AM
To: Myrene Koch
Subject: lunch? Subway?

*Margaret Zuzich Bakker
Chief Judge
48th Circuit Court
113 Chestnut
Allegan, MI 49010
269 673-0300*

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit L: Lunch email February 2, 2018

Becky Blaine

From: Myrene Koch
Sent: Friday, February 2, 2018 11:42 AM
To: Margaret Bakker
Subject: RE: lunch

Ok, I can leave now.

Myrene

From: Margaret Bakker
Sent: Friday, February 2, 2018 11:41 AM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: lunch

Lunch now? Mugshots?

*Margaret Zuzich Bakker
Chief Judge
48th Circuit Court
113 Chestnut
Allegan, MI 49010
269 673-0300*

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit M: Email on Myrene Koch's job performance

Becky Blaine

From: Margaret Bakker
Sent: Wednesday, March 23, 2016 4:43 PM
To: Myrene Koch; Roberts Kengis
Subject: RE: APA Koch

Chicken

Margaret Zuzich Bakker
Chief Judge
48th Circuit Court
113 Chestnut
Allegan, Michigan 49010

From: Myrene Koch
Sent: Wednesday, March 23, 2016 4:39 PM
To: Roberts Kengis <RKengis@ALLEGANCOUNTY.ORG>; Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: RE: APA Koch

Umm, I am NOT getting in the middle of this one. I was lucky with pleas today. That's all.

Myrene

Myrene K. Koch
Assistant Prosecuting Attorney Allegan County
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0280
(269) 673-0599 fax

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From: Roberts Kengis
Sent: Wednesday, March 23, 2016 2:20 PM
To: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>

Cc: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>

Subject: RE: APA Koch

She can have my job any time, and I can have yours. Good?

Roberts Kengis

Chief Assistant Prosecuting Attorney
Allegan County, Michigan

113 Chestnut Street
Allegan MI 49010
269-673-0280

From: Margaret Bakker

Sent: Wednesday, March 23, 2016 2:10 PM

To: Roberts Kengis

Cc: Myrene Koch

Subject: APA Koch

Ms. Koch successfully completed pretrials at 2:05 pm, which included processing three pleas, and setting one matter for plea.

I believe you should strive to meet her high standards.

Respectfully yours,

Marge

Margaret Zuzich Bakker
Chief Judge
48th Circuit Court
113 Chestnut
Allegan, Michigan 49010

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit N: Email Encouragement from Roberts Kengis to Myrene to take the advice of his former mentor and prior Chief Assistant Marge Bakker to attend political events

Becky Blaine

From: Myrene Koch
Sent: Monday, April 18, 2016 8:55 AM
To: Roberts Kengis
Cc: Margaret Bakker
Subject: RE: Invitation to attend event with speaker Patty Birkholz

I know and I would have gone to this; however, I have to go to [REDACTED]

Myrene

Myrene K. Koch
Assistant Prosecuting Attorney Allegan County
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0280
(269) 673-0599 fax

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From: Roberts Kengis
Sent: Friday, April 15, 2016 3:30 PM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Cc: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: FW: Invitation to attend event with speaker Patty Birkholz

Myrene,

I'm telling you what a former Chief Assistant used to tell me: "you need to start going to these!"

Rob

Roberts Kengis

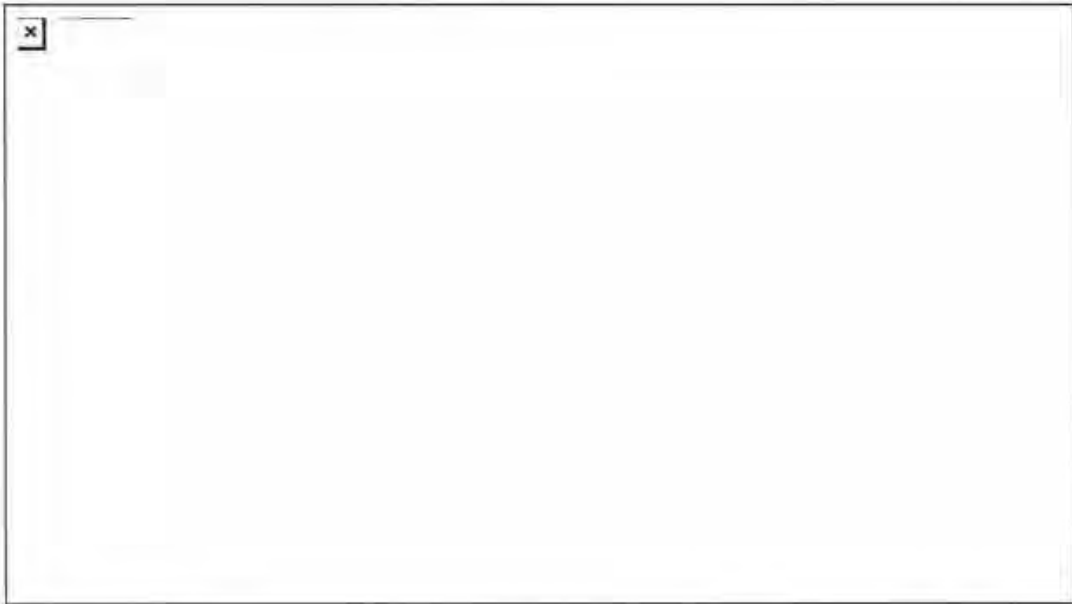
Chief Assistant Prosecuting Attorney
Allegan County, Michigan

113 Chestnut Street
Allegan MI 49010
269-673-0280

From: Allegan County Republican Women's Club [<mailto:alleganwomengop@gmail.com@mail75.atl51.rsgsv.net>] **On**
Behalf Of Allegan County Republican Women's Club
Sent: Friday, April 15, 2016 2:45 PM
To: Roberts Kengis
Subject: Invitation to attend event with speaker Patty Birkholz

RECEIVED by MSC 4/21/2022 5:18:37 PM

You're Invited!



April 18

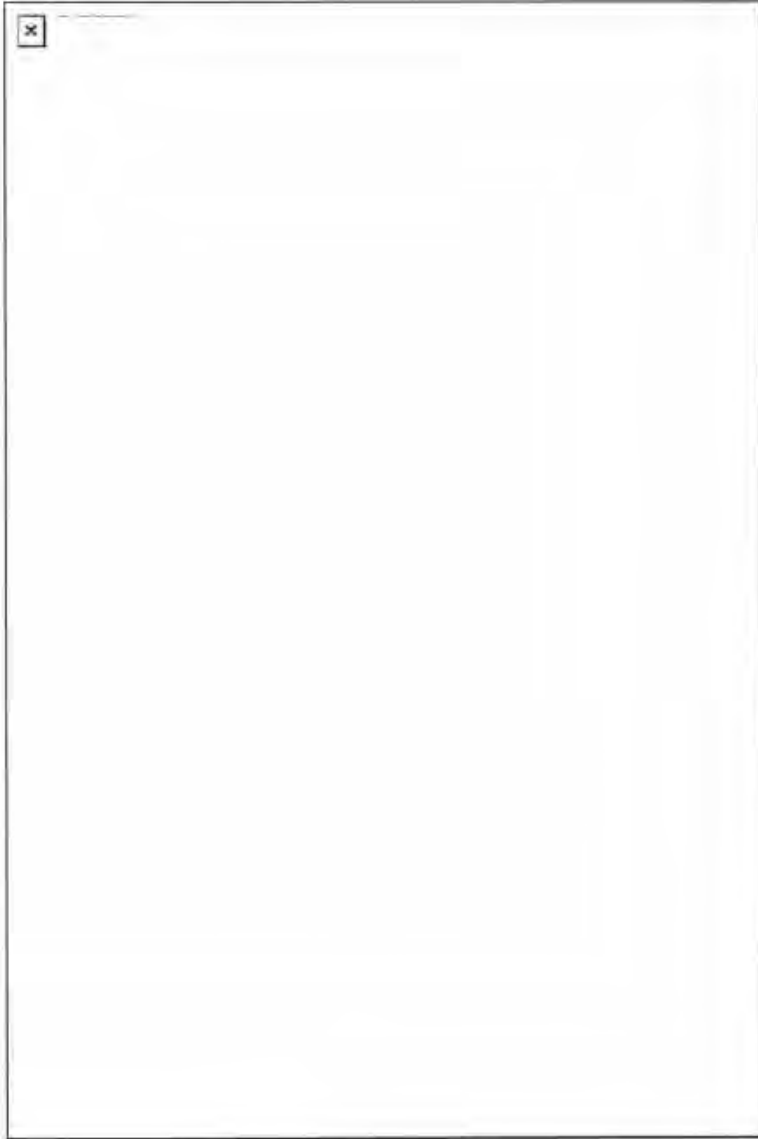
6 pm Order Food & Social (Off the menu)

7 pm Speaker Patty Birkholz

Saugatuck Brewing Company

2948 Blue Star Highway in Douglas

<http://www.saugatuckbrewing.com>



Patty Birkholz
West Michigan Director of the Michigan League of Conservation Voters
Former Director of the Office of the Great Lakes
Former State Senator
Former State Representative

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit O: Update on the appointment to fill the vacancy left by Judge Cronin

Becky Blaine

From: Myrene Koch
Sent: Tuesday, February 27, 2018 10:07 AM
To: Roberts Kengis; Margaret Bakker; Shelley Kengis
Subject: RE: gov gone

At the interview, I remember Mr. Weber stating the Governor was going to be travelling this week but they were still hopeful for a decision sooner rather than later. We will see. 😊

Myrene

*Myrene K. Koch
Chief Assistant Prosecuting Attorney
Allegan County
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0280
(269)673-0599 fax*

From: Roberts Kengis
Sent: Monday, February 26, 2018 5:06 PM
To: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>; Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>; Shelley Kengis <shelkengis@hotmail.com>
Subject: gov gone

Paige just told me she heard Gov Snyder is in DC for governor's conference this week, so I googled it. <https://www.nga.org/cms/WinterMeetings>

Looks like we may be waiting until next week.

Rob

Roberts Kengis

Allegan County Prosecuting Attorney
113 Chestnut St.
Allegan MI 49010
(269) 673-0280
rkengis@allegancounty.org

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
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DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit P: Social invitation by the wife of now Judge Kengis to attend a "Women Who Care" meeting with Judge Bakker and Myrene Koch

Becky Blaine

From: Myrene Koch
Sent: Tuesday, February 9, 2016 1:44 PM
To: 'Shelley Kengis'; Margaret Bakker
Subject: RE: meeting tonight

I cannot attend tonight; however, please let me know next month's date. I would like to join as a member,

Have a great trip, be safe,
Myrene

Myrene K. Koch
Assistant Prosecuting Attorney Allegan County
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0280
(269) 673-0599 fax

This email and any attached documents may contain confidential information, belonging to the sender that is legally privileged. This information is intended only for the use of the individual or entity named above. The authorized recipient of this information is prohibited from disclosing this information to any other party. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or action taken in reliance on the contents of these documents is strictly prohibited. If you have received this email in error, please notify the sender immediately and delete all copies of the email from your system.

From: Shelley Kengis [mailto:shelkengis@hotmail.com]
Sent: Tuesday, February 09, 2016 7:10 AM
To: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>; Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: meeting tonight

Hello beautiful ladies! Due to the weather changing this afternoon, we are leaving for the conference this afternoon. I wasn't sure if either of you were planning on going to the Women Who Care meeting in Allegan tonight, but I won't be able to.

Thanks and I hope you have a wonderful week!

Shelley

IN THE SUPREME COURT
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DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit Q: Discussion of the vacated magistrate judge position in Allegan County District Court

Becky Blaine

From: Myrene Koch
Sent: Friday, July 29, 2016 11:50 AM
To: Margaret Bakker
Subject: RE:

Lunch?

Myrene K. Koch
Assistant Prosecuting Attorney Allegan County
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0280
(269) 673-0599 fax

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From: Margaret Bakker
Sent: Friday, July 29, 2016 11:18 AM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: RE:

Judge Baillargeon.

Margaret Zuzich Bakker
Chief Judge
48th Circuit Court
113 Chestnut
Allegan, Michigan 49010

From: Myrene Koch
Sent: Friday, July 29, 2016 11:16 AM
To: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: RE:

Curious, who selects the candidate?

Myrene K. Koch
Assistant Prosecuting Attorney Allegan County
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0280
(269) 673-0599 fax

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From: Margaret Bakker
Sent: Thursday, July 28, 2016 4:01 PM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: RE:

August 31.

Margaret Zuzich Bakker
Chief Judge
48th Circuit Court
113 Chestnut
Allegan, Michigan 49010

From: Myrene Koch
Sent: Thursday, July 28, 2016 4:00 PM
To: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: RE:

Kirby is leaving???

From: Margaret Bakker
Sent: Thursday, July 28, 2016 11:42 AM
To: Myrene Koch
Subject:

You could apply for Kirby's job...less stress....but you would be bored.

Margaret Zuzich Bakker

Chief Judge
48th Circuit Court
113 Chestnut
Allegan, Michigan 49010

RECEIVED by MSC 4/21/2022 5:18:37 PM

IN THE SUPREME COURT
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Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit R: Wager on the UofM v MSU game

Becky Blaine

From: Myrene Koch
Sent: Thursday, October 5, 2017 2:17 PM
To: Margaret Bakker; Roberts Kengis
Subject: RE: the bet

I am ok with that deal. But remember, there is ALWAYS the extra of a little fun decoration and clothing 😊

From: Margaret Bakker
Sent: Thursday, October 5, 2017 2:15 PM
To: Roberts Kengis <RKengis@ALLEGANCOUNTY.ORG>; Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: RE: the bet

ok

From: Roberts Kengis
Sent: Thursday, October 5, 2017 2:15 PM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>; Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: the bet

So here's my proposal regarding the big game. If MSU wins I buy lunch for both of you. If Michigan wins you both buy me lunch. I know, sounds like a good deal for you, BUT, here's the catch. If I buy, we go to Mugshots. If you buy, we go to Redtail! Deal??

Rob

Roberts Kengis

Allegan County Prosecuting Attorney
113 Chestnut St.
Allegan MI 49010
(269) 673-0280
rkengis@allegancounty.org

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
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Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit S: Holland Sentinel "Man wins new trial over email exchange between judge, prosecutor"

COURTS

Man wins new trial over email exchange between judge, prosecutor

Carolyn Muyskens cmuyskens@hollandsentinel.com

Published 5:00 p.m. ET Oct. 30, 2020

ALLEGAN — The discovery of emails sent between the Allegan County prosecutor and a judge during a trial have resulted in a judge ordering a new trial for an Allegan County man.

In the emails, unearthed during Allegan County Prosecutor Myrene Koch's re-election campaign by her political opponent, Judge Margaret Bakker appears to discuss the case of Daniel Loew with Koch while Loew's trial was occurring in her courtroom.

Loew was convicted of five counts of criminal sexual misconduct during the August 2019 trial and sentenced to at least 20 years in prison. The victim was 13 at the time of the first reported assault.

Judge William Baillargeon granted Loew's motion for a new trial after a Thursday hearing, saying such one-sided communications, called *ex parte* communications, between the judge and the prosecutor give the appearance of impropriety.

In the first email, sent in the afternoon on the first day of trial with the subject line "trial," Bakker wrote to Koch: "This trooper didn't do a very good investigation. Don't they have detectives with MSP anymore?"

Koch responded the next morning, "They do but not typically for CSC's. This trooper has been given additional personal training since this investigation."

Bakker wrote back three minutes later, "One more question ... this victim was not referred for a medical, do you know why?"

The two then exchanged several emails about the lack of a medical exam for the victim.

Generally, *ex parte* communications, or communications between a judge and only one party in a legal matter, are prohibited by ethics codes for judges and attorneys because they can give an unfair advantage to one side in a case.

"Maybe it wasn't the case, but it creates the appearance of coaching, or at least flagging, 'This is something you're going to need to address,' and that's my worry," Baillargeon said.

Although the case was tried by assistant prosecuting attorney Emily Jipp, Loew's attorney Heath Lynch argued that it's impossible to know whether Koch, Jipp's supervisor, shared the communications with Jipp and whether trial strategy was altered due to what Bakker wrote in the emails.

"This isn't a harmless exchange about the general conduct of the trial," Lynch said. "This goes into specific issues, specific matters of testimony, the way the investigation was conducted. We cannot know from the record whether any strategic decisions were made in the course of the conduct of this trial by the prosecutor's office. All we know is that there was a whole lot of talk about it."

Koch told The Sentinel she never discussed the emails with Jipp.

"I can very clearly tell you that I never had a conversation with Ms. Jipp about the communications with the judge," Koch said.

"I was not attempting, by any means, to discuss the nature of that particular case, or trying to influence the judge in any way."

Koch said the emails were about agency process and procedure, not about the case in question. Koch told Bakker in the exchange about the lack of medical exam for the victim that her office had instituted a checklist for prosecuting criminal sexual misconduct cases to make sure that such exams aren't missed in future cases and explained why she believed other agencies might have missed it.

Baillargeon, in Thursday's hearing, said he didn't believe Bakker intended to influence the prosecutor's office through the emails but said even the appearance of bias could damage the reputation of the judiciary in a political climate where public trust in institutions is suffering.

"I don't believe that to be the type of person she is," Baillargeon said. "However, we live in a day right now, just looking around in our community, of all of these conspiracy theory issues, going from wild fantasy to just utter horror grotesqueness.

"The public has an enormous sense of distrust, and I think it's really incumbent upon the judiciary to hold ourselves to a much higher standard, and the judicial canon of ethics requires that we avoid even the appearance of impropriety."

Lynch echoed Baillargeon's comments about public trust in the judiciary.

"All of us should be able to have confidence that whether it's ourselves, our family or our friends who are charged with crimes, that those cases will be adjudicated by judges who are impartial, who will give us a fair opportunity to defend ourselves and who will not in any way cross the line into involving themselves in prosecutorial functions," Lynch said.

The emails were made public by Koch's challenger in the August Republican primary, private practice attorney Michael Villar, who lost the election by a handful of votes.

Villar told The Sentinel he filed complaints about Bakker and Koch with the Michigan Judicial Tenure Commission and Attorney Grievance Commission, respectively, after obtaining the emails through a Freedom of Information Act request.

AGC investigations are confidential, and investigations of the Judicial Tenure Commission only become public if the commission decides to proceed with a formal complaint against the judge, typically reserved for allegations of serious misconduct.

Koch said her office is exploring appealing the Loew decision to a higher court. Her office's argument Thursday was that the email exchange had no impact on the outcome of the trial.

"This case was decided by a jury, and they found the defendant guilty based on the evidence," Koch said. "None of the communications influenced the decision of the jury."

Loew has been incarcerated in the Michigan Department of Corrections since he was sentenced in November.

— Contact reporter Carolyn Muyskens at cmuyskens@hollandsentinel.com and follow her on Twitter at [@cjmuyskens](https://twitter.com/cjmuyskens).

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

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Plaintiff/ Appellee,

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MSC NO.: 164133
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Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit T: Holland Sentinel "Allegan man says judge, prosecutor denied him a fair trial"

COURTS

Allegan man says judge, prosecutor denied him a fair trial

Audra Gamble audra.gamble@hollandsentinel.com

Published 12:01 p.m. ET Aug. 18, 2020

ALLEGAN COUNTY — An Allegan County man convicted of criminal sexual conduct has requested a new trial, claiming Judge Margaret Zuzich Bakker and Prosecutor Myrene Koch did not give him a fair trial.

Complaints have been filed against both Bakker and Koch by Attorney Mike Villar for alleged inappropriate ex parte communication in cases, which occurs when a judge and a lawyer have communication outside of the courtroom that the other party's attorney is not present for.

Villar ran against Koch for the county prosecutor spot and lost by fewer than 20 votes. He has since requested a recount of the ballots.

The man requesting a new trial, Daniel Albert Loew, was convicted by a jury of five criminal sexual conduct crimes. He was sentenced last November to at least 20 years in prison.

The crimes stemmed from Loew's repeated rapes of his wife's younger cousin, who said she was 13 at the time of the first assault in 2015.

Loew, 26, now wants a new trial without Bakker or Koch involved.

In emails sent during Loew's trial obtained by Villar through the Freedom of Information Act, Bakker wrote to Koch: "(T)his trooper didn't do a very good investigation. Don't they have detectives with MSP anymore?"

Bakker also asked via email why the victim in the case had not been given a medical exam.

Loew's attorneys have called for an evidentiary hearing to determine whether these emails caused Loew's due process rights to be violated and if he was deprived of his right to a fair trial. The attorneys have also filed a motion for a new trial.

According to the 48th Circuit Court, the motion will be heard at 4:30 p.m. Aug. 25.

— Contact editor Audra Gamble at audra.gamble@hollandsentinel.com. Follow her on Twitter @SentinelAudra.

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
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Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit U: Holland Sentinel "Judges recused from hearing man's request for new trial"

COURTS

Judges recused from hearing man's request for new trial

Carolyn Muyskens cmuyskens@hollandsentinel.com

Published 6:00 p.m. ET Sept. 11, 2020

ALLEGAN — Two Allegan County judges have recused themselves from hearing the case of Daniel Loew, who is asking for a new trial after emails between the judge and the Allegan County Prosecuting Attorney were released during the prosecutor's re-election campaign.

In August 2019, Loew was convicted by a jury of multiple rapes of a relative of his wife, a girl who was 13 at the time of the first assault.

He was sentenced last November to at least 20 years in prison.

During the runup to the primary election in August, prosecutorial candidate Michael Villar accused his opponent, incumbent prosecutor Myrene Koch, of inappropriate ex parte communications with Judge Margaret Bakker. Ex parte translates from Latin to mean "out of the party"; in the context of the legal system, it is communication about a case between a judge and one side's attorney that occurs without the other party's counsel present.

Through a Freedom of Information Act request, Villar obtained emails sent during Loew's case between Koch and Bakker in which Bakker wrote to Koch regarding the police: "(T)his trooper didn't do a very good investigation. Don't they have detectives with MSP anymore?"

Bakker also asked why the victim in the case had not been given a medical exam.

Loew's attorneys are alleging prosecutorial misconduct occurred based on the emails, which they say they learned of in June. They claim that Loew did not receive a fair trial.

Loew is now asking for a new trial.

Allegan County Circuit Court Judge Roberts Kengis was asked to disqualify himself from the case and agreed to do so in a hearing Thursday.

Kengis was the chief prosecuting attorney when Loew was charged with criminal sexual conduct in 2018.

In August, Bakker also recused herself from hearing the motion for a new trial.

Kengis said during Thursday's hearing that the hearing would likely be reassigned next to a judge in Allegan County's 57th District Court.

Villar lost the primary election in August and a recount of votes conducted last week affirmed that Koch had won re-election by 19 votes.

— Contact reporter Carolyn Muyskens at cmuyskens@hollandsentinel.com and follow her on Twitter at [@cjmuyskens](https://twitter.com/cjmuyskens).

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

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DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit V: Holland Sentinel "Appeals court walks back new trial for man after prosecutor, judge emailed during trial"

COURTS

Appeals court walks back new trial for man after prosecutor, judge emailed during trial

**Sarah Leach**

The Holland Sentinel

Published 12:54 p.m. ET Jan. 17, 2022 | Updated 1:33 p.m. ET Jan. 17, 2022

ALLEGAN — A man convicted of criminal sexual conduct doesn't deserve a new trial, despite learning that an Allegan County judge was sharing her opinion of the case through emails with the head prosecutor.

Daniel Loew was granted a new trial more than a year ago, but a 2-1 opinion from the Michigan Court of Appeals, now reverses that decision.

The discovery of the emails between County Prosecutor Myrene Koch and Judge Margaret Bakker showed the two discussing the case while Loew's trial was occurring in Bakker's courtroom.

The emails were unearthed by Koch's political opponent during her re-election campaign in summer 2020.

More: Man wins new trial over email exchange between judge, prosecutor

More: Judges recused from hearing man's request for new trial

More: Allegan man says judge, prosecutor denied him a fair trial

The new decision reverses Allegan District Court Judge William Baillargeon's decision to grant Loew's motion for a new trial in November 2020, saying such one-sided communications, called *ex parte* communications, between the judge and the prosecutor gave the appearance of impropriety.

In the emails, Bakker wrote to Koch: "This trooper didn't do a very good investigation. Don't they have detectives with MSP anymore?"

Koch responded, "They do but not typically for CSC's. This trooper has been given additional personal training since this investigation."

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

The two then exchanged several emails about the lack of a medical exam.

Generally, *ex parte* communications — between a judge and only one party in a legal matter — are prohibited by ethics codes for judges and attorneys because they can give an unfair advantage to one side in a case.

"Maybe it wasn't the case, but it creates the appearance of coaching, or at least flagging, 'This is something you're going to need to address,' and that's my worry," Baillargeon said.

Loew was convicted of five counts of criminal sexual misconduct during the August 2019 trial and sentenced to at least 20 years in prison. The victim was 13 at the time of the first reported assault.

Although the case was tried by assistant prosecuting attorney Emily Jipp, Loew's attorney Heath Lynch argued it's impossible to know whether Koch, Jipp's supervisor, shared the communications with Jipp and whether trial strategy was altered due to what Bakker wrote in the emails.

"This isn't a harmless exchange about the general conduct of the trial," Lynch said. "This goes into specific issues, specific matters of testimony, the way the investigation was conducted. We cannot know from the record whether any strategic decisions were made in the course of the conduct of this trial by the prosecutor's office. All we know is that there was a whole lot of talk about it."

Koch told *The Sentinel* she never discussed the emails with Jipp.

Justices Christopher Murray and Jane Markey were in the majority, saying the emails didn't provide an advantage to the prosecution.

In the majority opinion, Murray wrote that while the appeals court recognized the communications were *ex parte*, such communications "between a sitting judge and a prosecutor do not warrant a new trial so long as the communications focus on administrative or procedural (i.e., non-substantive) matters."

Dissenting Justice Michael Riordan said reasonable minds could conclude that Bakker was biased in favor of the prosecution.

In his dissenting opinion, Riordan wrote: "The email communications ... were critical of certain weaknesses in the investigation that could conceivably lead to an acquittal. While the prosecutor may argue that this was not the trial judge's intent, a reasonable mind, upon reviewing the emails, may conclude that the trial judge was partial in favor of the prosecution, did not want to see weaknesses in its case exploited, and was actively attempting to assist the prosecution's case."

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The emails were made public by Koch's challenger in the August Republican primary, private practice attorney Michael Villar, who lost the election by a handful of votes.

At the time, Villar said he filed complaints about Bakker and Koch with the Michigan Judicial Tenure Commission and Attorney Grievance Commission, respectively, after obtaining the emails through a Freedom of Information Act request.

AGC investigations are confidential, and investigations of the Judicial Tenure Commission only become public if the commission decides to proceed with a formal complaint against the judge, typically reserved for allegations of serious misconduct.

On Jan. 1, the Michigan Supreme Court announced Judge Roberts Kengis would replace Bakker in supervising the 48th Circuit Court. Bakker, who remains on the bench, served in the role for 11 years.

IN THE SUPREME COURT
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DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit W: Bond Hearing Transcript

STATE OF MICHIGAN

57TH DISTRICT COURT - ALLEGAN COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff

File No. 2018-21709-FC

vs.,

DANIEL ALBERT LOEW,

Defendant.

VIDEO PROCEEDINGS VIA ZOOM - MOTION HEARING

BEFORE THE HONORABLE WILLIAM A. BAILLARGEON - DISTRICT JUDGE

Allegan, Michigan - Thursday, January 20, 2022

APPEARANCES:

For the Plaintiff:

MOLLY S. SCHIKORA(P46997)
ASSISTANT PROSECUTING ATTORNEY
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0233

For the Defendant:

HEATH M. LYNCH(P81483)
SPRINGSTEAD, BARTISH, BORGULA, AND LYNCH
60 Monroe Center, Northwest
Suite 500
Grand Rapids, Michigan 49503
(616) 458-5500

TRANSCRIBED BY:

Rebecca Taflinger, CER 9379
324 West Burr Oak Street
Centreville, Michigan 49032
(269) 625-0068

TABLE OF CONTENTS

WITNESSES: PEOPLE

PAGE

None

WITNESSES: DEFENDANT

None

EXHIBITS:

Identified Received

None

1 Allegan, Michigan

2 Thursday, January 20, 2020, at 12:04 p.m.

3 THE COURT: This--okay. That's fine. All right.
4 So, let's call the matter of the People of the State of
5 Michigan v Daneil Albert Loew, in file 2018-21709-FC. Let's
6 have appearances, please.

7 MS. SCHIKORA: Good afternoon. Molly Schikora,
8 Assistant Prosecuting Attorney.

9 MR. LYNCH: Good afternoon, Your Honor. Attorney
10 Heath Lynch on behalf of Mr. Loew, who is also present via
11 Zoom per the Court's instructions.

12 THE COURT: All right. Very good. And Mr. Loew,
13 you are muted right now. You could just unmute yourself for
14 a moment and identify yourself, if you would. You are still
15 muted, sir. There should be a little microphone icon there,
16 sir, for you to just click on. Just a--once you click on
17 that once, it should--just don't double click because it
18 will put it back on. There should be a microphone down at
19 the bottom and--or at the bottom--bottom bar, there should
20 be an indication about audio, joining audio. There you go.
21 State your name.

22 MR. LOEW: Can you guys hear me now?

23 THE COURT: State your name.

24 MR. HEATH: Yes.

25 MR. LOEW: Daniel Albert Loew.

1 THE COURT: Okay. Now, you can mute yourself
2 again if you'd like. And we'll begin. Thank you, sir. Ms.
3 Schikora?

4 MS. SCHIKORA: Thank you, Your Honor.

5 THE COURT: We have two--we have two motions here,
6 so yours is identified as "Emergency Motion," so we're
7 proceed with you first.

8 MS. SCHIKORA: Thank you. Your Honor, do you
9 anticipate hearing both at--today?

10 THE COURT: What's that?

11 MS. SCHIKORA: Were--were you planning on
12 addressing both...

13 THE COURT: I'm going to address both of them.

14 MS. SCHIKORA: ...motions today?

15 THE COURT: Yeah.

16 MS. SCHIKORA: All right. Thank you. I certainly
17 understand Mr. Lynch's argument as it was delineated in his
18 answer to my motion. I would submit that the procedural
19 posture of the case has changed based on the judgement of
20 the Court of Appeals.

21 I would note that one thing that Mr. Lynch didn't
22 mention is that the decision of the Court of Appeals is
23 finding precedent on every court in every case except for in
24 this particular case pending the weigh in, if that happens
25 by the Michigan Supreme Court. So, at this juncture, I

1 would submit that under MCL 770.12, this is no longer the
2 prosecution's appeal. It was in that context that this was
3 judged a consideration for pretrial release. I would
4 submit, under 770.8, that is no longer discretionary.

5 I would tell the Court that regardless, as you analyze
6 conditions of bond, under MCR 6.106(1)(b), and I have
7 addressed this, I know, in written motions in the past, the
8 Michigan Supreme Court held--has held that in the context of
9 CSC one, where a defendant has been convicted by a jury,
10 notwithstanding at grant of a new trial, the proof of guilt
11 is considered to be evident for purposes of pretrial release
12 consideration.

13 So, based on that, based on the fact that, as I say,
14 the procedural posture of the case has changed, I believe
15 that there is an enhanced risk of flight by defendant. I
16 would submit that, as a habitual offender third,
17 notwithstanding the facts of this particular case, he is
18 likely to hurt people. And would ask that the Court revoke
19 his bond, even if it is merely for him to be remanded to the
20 county jail versus the MDOC. Thank you.

21 THE COURT: I--I have to--you say, "...likely to
22 hurt people...", he's been on bond now for an extended period
23 of time. Has there been any indication of any incident of
24 any sort of injury, or even threat, or hint of that even?

25 MS. SCHIKORA: Your Honor, my argument that he is

1 likely to hurt somebody is based on the circumstances of the
2 present offense, including the fact that it merited a
3 sentence of 20 to 40 years in prison, as well as the fact of
4 his past criminal activity. So, I would submit, to the
5 extent that his past conduct is an indicator of future
6 conduct. The fact that he has not, that I'm aware of, hurt
7 anybody during this period that he's been on bond, I am
8 arguing it's not dispositive of--of that issue.

9 THE COURT: But the answer to my question, though,
10 is...

11 MS. SCHIKORA: No.

12 THE COURT: ...no, right? There has...

13 MS. SCHIKORA: That's right.

14 THE COURT: ...been no...

15 MS. SCHIKORA: That's right.

16 THE COURT: ...indication?

17 MS. SCHIKORA: Correct.

18 THE COURT: All right. Mr. Lynch.

19 MR. LYNCH: Thank you. And good afternoon, Your
20 Honor. I appreciate Ms. Schikora's acknowledgment of the
21 argument that we made in our recent motion to the Court. Of
22 course, procedurally now, this is a bit--a bit messy.

23 Just to make sure that the Court has everything on the
24 record that it needs to, originally, we had filed a motion
25 to amend the bond conditions while the appeal was pending.

1 Then, the Court of Appeals made its decision. Ms. Schikora,
2 then, responded to our motion to amend, opposing it. And
3 then, of course, we filed a motion for bond in the wake of
4 the Court of Appeals decision, and then Ms. Schikora filed
5 the Emergency Motion that we're being heard on today. Is
6 that--is that a complete recitation of the record as the
7 Court has it, Your Honor?

8 THE COURT: It sounds like what I have.

9 MR. LYNCH: Okay. Well, I want to make sure that
10 I'm clear because Ms. Schikora's citation, MCL 770.12, while
11 not necessarily inappropriate, it is the first time that I'm
12 hearing. She cited...

13 THE COURT: As it is...

14 MR. LYNCH: the 770...

15 THE COURT: ...the same for me. That's--it took me
16 a little bit by surprise.

17 MR. LYNCH: Right. And so--and so, to the extent
18 the Court's inclined at all to move in that direction, we
19 would appreciate, at least, the opportunity to actually
20 respond to that new argument. That's new as of about seven
21 minutes ago. But let's just keep the motions as they are
22 and our motion as it is.

23 In terms of Mr. Loew's situation, as the Court knows,
24 right now the Court of Appeals has made its decision on this
25 Court's order from back in November after oral argument in

1 October of 2020, both vacating Mr. Loew's conviction and
2 granting a motion for a new trial. The Court of Appeals
3 enters this--enters its opinion. Which, of course, it's no
4 surprise to anybody, Mr. Loew will appeal to the Michigan
5 Supreme Court or at least file an application for leave to
6 appeal.

7 But, in terms of the Court of Appeals decision, the
8 Court of Appeals decision puts us firmly in Michigan Court
9 Rule 7.215, which we cited in the motion that we filed. And
10 this is not, necessarily, the substance of the Court's
11 decision, as much as it is the--the efficacy of the Court's
12 decision. As we cited in the rule, the judgement--the
13 opinion is a judgement, and that judgement has--has a time
14 period under which the rules and the law provide it's
15 effective. And here, there is--there is a judgement that
16 was entered that is not effective until after the
17 disposition of the case by the Supreme Court as Mr.--as Ms.
18 Schikora acknowledged.

19 There are, of course, other circumstances in which a
20 judgement of the Court of Appeals can be effective, but none
21 of those apply here. So, what we are simply saying is the
22 judgement that the Court of Appeals entered was to reverse
23 this Court's decision granting motion for a new trial.
24 What--the Court of Appeals, to the extent it had any opinion
25 on the vacation of the conviction that this Court entered,

1 the trial court, it was silent on that issue. The Court of
2 Appeals has the ability, under 7.215(F)(2) to--to decide
3 that its judgement has immediate effect, which might, if it
4 had happened, provide Ms. Schikora with a hook to argue that
5 the judgement vacating or--or--or--I'm apologize--reversing
6 this court's granting of a new trial, be effect
7 immediately--effective immediately.

8 The Court of Appeals simply said at the end of its
9 opinion in this matter, that the trial court's order
10 granting a new trial is reversed. Period. It said nothing
11 at all about the part of this Court's order vacating the
12 conviction. It said nothing at all, at least nothing that
13 we have, that the judgement was to take immediate effect.
14 Therefore, under MCR 7.215(F), we don't have a judgement
15 that is yet effective. And so, we submit that under these
16 circumstances, Your Honor, as we briefed, that--that we have
17 an opportunity to put this before the Supreme Court. And
18 either in the--in the event that we were to not file an
19 appeal by the deadline, or the Supreme Court decides one way
20 or the other, that's when we have an effective judgement.

21 We will not blow our deadline. We will be filing that
22 appeal--that application for a leave to appeal, and we
23 expect that Ms. Schikora's Office will, as it has all along,
24 litigate that with us. But until that happens, we don't
25 have an effective judgement and we have a defendant, as this

1 Court rightly noted, who has been a model citizen out on
2 bond. He works fulltime. He is supporting his
3 family--his--his young family. We've had no--no reports of
4 any issues whatsoever.

5 This Court--this Court granted him bond on the basis of
6 a criminal history that, while is undeniable, does not show
7 any propensity to--to--for him to act out in violence as to
8 other people. He is doing well on bond, and he has been.
9 He is continuing to pursue vindication in this matter
10 through the efforts of my firm. And we're not stopping now.

11 As the Court probably saw, there was a very strong
12 dissenting opinion in this matter as well. We will be
13 pursuing this further, and we ask that the Court allow Mr.
14 Loew to remain on bond pursuant to the court rules and the
15 criminal authorities while that's happening. Thank you,
16 Your Honor.

17 THE COURT: Ms. Schikora, anything further?

18 MS. SCHIKORA: Your Honor, in terms of the
19 argument that there is nothing in Mr. Loew's criminal
20 history that suggests that he would be--that he has any
21 propensity toward violent behavior, I would cite, as I have
22 previously in bond hearings before this Court in this
23 matter, that he--for one of his past offenses, shot up a--a
24 house and this current offense occurred over a period of
25 three years. Thank you.

1 THE COURT: Okay. All right. The people seek a
2 motion to revoke bond and remand the defendant to prison.
3 The defendant seeks to continue bond and actually to be
4 allowed to work in specific occasions outside the state of
5 Michigan. The people argue that the defendant is not
6 entitled to a bond on appeal of his conviction pursuant to
7 770.9b(2) and (3)(a). Now, they are indicating yet .12 as
8 well. I haven't really had a great deal of an opportunity
9 to look into that, however, I think it's a--for the purposes
10 that we're here today, I think it's appropriate that we just
11 go ahead and proceed.

12 This Court does not find that the defendant is
13 appealing that conviction. The defendant is appealing the
14 Court of Appeals decision pertaining to the new trial and
15 the defendant appealing that matter that was overturned by
16 a--this Court's decision, which was overturned by the Court
17 of Appeals very recently. Unfortunately, that Court of
18 Appeals opinion, in my opinion leads--lends further credence
19 to the proposition that the courts should not and cannot
20 police themselves from misconduct or, at the very least, the
21 appearance of misconduct on the part of the judiciary.

22 And it is not so much that it doesn't have the means to
23 address these things, but that--that with decisions like
24 this, it provides more fuel for the argument that the courts
25 are unwilling to hold their own accountable. This Court

1 will not attempt to undertake the ethical or intellectual
2 gymnastics employed by the majority when they discuss the
3 case as administrative, but it should, at least, be pointed
4 out that the comment pertaining to the conversations that
5 took place, if those conversations would have taken place in
6 the hallway, that there would be little to discuss.

7 First of all, I disagree with that in that these
8 conversations did not take place in the hallway, but they
9 took place from the courtroom while this specific case was
10 being tried and specific testimony about this specific case
11 was being heard. Even if those conversations were being
12 held in the hallway, I still consider specific conversations
13 about specific aspects of a specific case to be ex parte
14 communication. Failure to embrace this, you know, creates a
15 very worry concern that the judiciary does not hold itself
16 to the highest standards and casts a very real doubt, at
17 least, to the appearance of impropriety as to whether or not
18 there are going to enforcing anything pertaining to that.
19 The judiciary espouses holding itself to the highest
20 standards and with this opinion, I fear they undermine that
21 proposition.

22 As far as bond is concerned in this matter, I hold that
23 this matter is on appeal to the--the question of a new trial
24 and not on an appeal for the conviction. And in so doing,
25 bond will be continued for another six months pending

1 defendant's application to the Supreme Court. I do not,
2 however, amend bond to allow out of state travel. There are
3 conditions that I have placed on this individual's bond
4 that--not only conditions on their actions, but interactions
5 with others that I believe would be difficult for us to
6 monitor outside the state. You can submit an order, Mr.
7 Lynch.

8 MR. LYNCH: Will do so, Your Honor.

9 MS. SCHIKORA: Thank you, Your Honor.

10 THE COURT: Mr. Loew, you can leave the court.
11 Contact your attorney if you have any questions.

12 MR. LYNCH: Thank you, Your Honor.

13 MR. LOEW: Thank you.

14 (At 12:20 p.m., proceedings concluded)

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I certify that this transcript is a true and accurate transcription to the best of my ability of the video proceeding in this case before the Honorable William A. Baillargeon on January 20, 2022, as recorded by Carole Carr.

DVD video proceedings were recorded via Zoom and provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceeding or the for the content of the DVD provided.

February 18, 2022

Rebecca Taflinger

Rebecca Taflinger, CER 9379
324 West Burr Oak Street
Centreville, Michigan 49032
(269) 625-0068

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit X: COA Majority Opinion

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee/Cross-Appellant,

v

DANIEL ALBERT LOEW,
Defendant-Appellant/Cross-Appellee.

FOR PUBLICATION
January 13, 2022
9:15 a.m.

No. 352056
Allegan Circuit Court
LC No. 18-021709-FC

Before: MURRAY, C.J., and MARKEY and RIORDAN, JJ.

MURRAY, C.J.

Following a jury trial, defendant was found guilty of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(f) (defendant causes personal injury to the victim and uses force or coercion), one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(f) (personal injury to victim and force or coercion), one count of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a) (sexual penetration involving victim at least 13 years of age and under 16 years of age), and one count of CSC-III, MCL 750.520d(1)(b) (penetration by force or coercion). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to 240 to 480 months' imprisonment for the CSC-I convictions and to 240 to 360 months' imprisonment for the CSC-II and CSC-III convictions. Defendant appealed his convictions and sentences to this Court. He also moved for a new trial in the trial court on the basis of judicial misconduct, ineffective assistance of counsel, and prosecutorial misconduct. The prosecution filed a cross-appeal after the trial court granted defendant a new trial on the basis of judicial misconduct. For the reasons set forth in this opinion, we reverse the trial court's order granting defendant a new trial.

I. BASIC FACTS

The relevant events began in December 2015, when the victim was 13 years old. At the time, defendant and the victim's cousin, Brouke Loew, were dating. Defendant, Brouke, and their infant son lived with Brouke's parents, Jane and Scott Heppes, at the Heppes' rural Allegan County home. Near the end of December 2015, Brouke's parents hosted a wedding reception for the

victim's father and his new wife. The reception was held in a detached garage, and wedding guests did not have access to the Heppes' house.

Sometime during the evening, Brouke asked the victim to go to the house to help defendant unload groceries. The victim was in the kitchen when defendant called the victim to the bathroom so he could "show [her] something." The victim went to the bathroom where defendant closed and locked the door. According to the victim, defendant undressed her and forced her to engage in penile-vaginal sex on the bathroom floor. Defendant ejaculated on the floor before exiting the bathroom. The victim remained in the bathroom where she felt cramping in her stomach and had vaginal bleeding.

After the victim's father became incarcerated in early 2016, Jane volunteered to take the victim and her sisters to see their father on the weekends. The victim and her sisters would usually stay Friday evenings at the Heppes' house and would get up early Saturday mornings to travel to the prison for the visits. On those weekends, the victim and her younger sister would sleep on the living room couches. After everyone was asleep, the victim would wake up to defendant "touching me, my thighs, my boobs, my butt, everywhere, all over my body." Defendant would walk the victim to the bathroom where he would make her engage in penile-vaginal sex. The victim described that defendant would ejaculate on the floor or on the bathroom rugs. During one encounter, the victim stated defendant grabbed her by the hair and "pushed [her] head to the ground with his hand." As a result, the victim's eyes became swollen and irritated.

These incidents mostly occurred in the bathroom at the Heppes' house; however, the victim also recounted one episode of penile-vaginal sex at the home she once shared with her father and another incident where defendant forced the victim to perform fellatio in his pickup truck. After completing the fellatio, the victim asked defendant when he would stop forcing himself on her, to which defendant replied: "If you tell anyone, you don't want to know what happens." Nevertheless, the victim disclosed the abuse to her father during a prison visit in January 2018. The victim's older sister learned of the disclosure and reported it to the Michigan State Police (MSP).

After the MSP investigated the circumstances of the crimes, defendant was subsequently charged, convicted and sentenced as noted. This appeal followed. Before this Court could consider defendant's appeal, however, defendant learned of e-mails between the trial judge and the Allegan County elected prosecutor, who was not the trial prosecutor. The dates and times of the e-mail exchanges indicated the e-mails were sent and received while defendant's trial was ongoing. Consequently, defendant moved the trial court for a new trial alleging judicial misconduct arising from the e-mail exchanges. Defendant alternatively argued a new trial was warranted because defense counsel was ineffective and because the prosecutor committed misconduct by eliciting perjured testimony. The trial court¹ granted defendant a new trial on the basis that the e-mail communications created the appearance of impropriety, but denied the motion

¹ On defendant's motion, the case was reassigned to a different trial court judge. For purposes of this opinion, we will refer to the judge who presided over the trial as the "trial judge" and the judge who decided the motion for new trial as the "trial court."

on the basis of ineffective assistance of counsel and prosecutorial misconduct.² The prosecution filed a cross-appeal to this Court contesting the trial court's grant of a new trial. We now turn to a review of that challenge.

II. ANALYSIS

A. JUDICIAL MISCONDUCT

The prosecution contends the trial court abused its discretion in granting defendant a new trial because the e-mails between the trial judge and the elected prosecutor did not violate the Code of Judicial Conduct, Canons 2 and 3(A)(4), did not cause defendant any prejudice, and therefore did not violate his right to due process of law.

Under MCR 6.431(B), a trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." We review a trial court's decision to grant a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). Our review "examine[s] the reasons given by the trial court for granting a new trial. This Court will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief." *Id.* (citations omitted). "The question whether judicial misconduct denied defendant a fair trial is a question of constitutional law that this Court reviews *de novo*." *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015).

Before addressing the legal merits of this argument, we set out below the factual underpinnings for the argument. As noted, this issue arises from e-mail exchanges between the trial judge and the elected prosecutor (who, again, was not handling the trial), which took place during two of the three days of defendant's trial. Before the first e-mail exchange took place, the assistant prosecutor made her opening statement, and put the jury on notice that the investigation by the MSP trooper was somewhat flawed:

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

Then, during the direct exam of the MSP trooper, which commenced at 3:11 p.m., the trial prosecutor questioned the trooper about the investigation, and how he did not ideally handle the

² This was defendant's second motion for a new trial. Defendant's first motion was denied by the trial judge.

collection of the mats, and what he would have done differently had the investigation gone correctly. The trooper's trial testimony, after cross-examination, concluded just prior to 3:47 p.m.

The first e-mail from the trial judge to the elected prosecutor occurred at 3:41, and stated:

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

The elected prosecutor did not immediately respond, as her responding e-mail was sent at 8:47 a.m. the next day, and stated:

They do but not typically for CSC's [sic]. This trooper has been given additional personal training since this investigation.³

At 8:50 a.m. that same day, the trial judge responded with another question on a different subject:

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

Twelve minutes later the elected prosecutor responded, and the following exchange occurred:

Yes, because the prior [assistant prosecuting attorney] to the case did not catch that it was missed nor did anyone else who touched the file. As a result, there will now be a checklist for CSC's [sic] in files.

Trial Judge: I thought Safe Harbor would catch it.

[Elected Prosecutor]: 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.

According to defendant and the trial court, defendant's due process right to a fair trial was violated because the trial judge's e-mail questions to the elected prosecutor were ex parte communications that exhibited at least the appearance of impropriety, contrary to the Code of Judicial Conduct, and caused him prejudice.

The Fourteenth Amendment to the United States Constitution provides that states may not "deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am

³ The judge's questions apparently arose from a concern regarding the investigation by MSP Trooper Eric Desch. Trooper Desch reported he collected the bathroom rugs where the sexual assaults occurred during a 1 a.m. meeting with Jane at a gas station. The trooper admitted during questioning that he never confirmed with the victim that these were the rugs from the subject bathroom. Trooper Desch also stated he never took pictures of the subject bathroom until several months after the victim first disclosed the abuse, nor did he attempt to interview defendant or Brouke.

XIV; see also Const 1963, art I, § 17 (“No person shall . . . be deprived of life, liberty or property, without due process of law.”). A person is entitled to due process of law prior to being deprived of one’s liberty, which “in a criminal trial [includes], . . . a neutral and detached magistrate.” *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). “ ‘Due process requires that an unbiased and impartial decision-maker hear and decide a case.’ ” *TT v KL*, 334 Mich App 413, 431; 965 NW2d 101 (2020) (quotation marks and citation omitted). Consequently, a judge should act neither as an advocate nor an adversary in any criminal proceeding, as the hallmark of the judiciary is impartiality. See e.g., *Stevens*, 498 Mich at 178 (quotation marks and citation omitted) (“The right to an impartial judge is so fundamental that without this basic protection, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.”). A judge is presumed unbiased, and “[a] defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality.” *People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011).

We first turn to the two canons raised by the parties, Code of Judicial Conduct Canons 2 and 3(A)(4), and consider whether the communications violated either canon. Because a violation of the judicial canons alone cannot constitute a constitutional violation, if we conclude a violation of either canon occurred, we will then turn to whether defendant was prejudiced by those communications. See *People v Aceval*, 282 Mich App 379, 390; 764 NW2d 285 (2009), and *Estate of Trentadue ex rel Aguilar v United States*, 397 F3d 840, 865 (CA 10, 2005) (citing *Simer v Rios*, 661 F2d 655, 679 (CA 7, 1981)) (“not all ex parte proceedings violate due process or even raise a serious constitutional issue”), and *Alexander Shokaf, Inc v Comm’r*, 34 F3d 1480, 1484-85 (CA 9, 1994) (no due process violation where ex parte communications did not unfairly prejudice party).

1. EX PARTE COMMUNICATIONS

Ex parte communications by judges are specifically addressed by the Code of Judicial Conduct, which states:

(4) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

(a) A judge may allow ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided:

(i) the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties and counsel for parties of the substance of the ex parte communication and allows an opportunity to respond.⁴ [Code of Judicial Conduct, Canon 3(A)(4) (footnote added).]

Here, it is undisputed that the trial judge initiated ex parte communications with the elected prosecutor during defendant's trial. We conclude that the e-mail questions from the judge to the elected prosecutor were clearly ex parte because they did not include defense counsel (nor, for that matter, the trial prosecutor). However, under Canon 3(A)(4)(a), ex parte communications that relate to administrative matters are not prohibited. Here, we hold that the e-mails relate to administrative matters because neither related to nor bore on substantive matters in defendant's trial. Rather, they involved matters of administrative process that did not concern defendant's trial. This is clear from the context of the e-mails, as the judge sought clarification of the MSP's *process* for investigating allegations of sexual assault—specifically, whether the MSP continued to utilize detectives for this type of investigation. The prosecutor's response the following day reveals that she too considered the inquiry to be process orientated, as she explained that the MSP did not use detectives on these types of cases, and the trooper had received follow-up training. The same holds true for the second inquiry regarding the *process* of referring victims of sexual assault for medical examinations. Again, the prosecutor's response explained both why no referral occurred for this victim, and the process put in place to ensure no missed referrals occur in the future. 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. Therefore, the communications were not prohibited ex parte communications violative of Canon 3(A)(4).

This conclusion is consistent with decisions from our sister states that have concluded ex parte communications between a sitting judge and a prosecutor do not warrant a new trial so long as the communications focus on administrative or procedural (i.e., non-substantive) matters. For example, the North Carolina Supreme Court rejected a defendant's argument that he was entitled to a new trial, in part, because the trial court judge impermissibly communicated with the prosecutor regarding the oath taken by jurors. *State v McNeill*, 349 NC 634, 642, 653; 509 SE2d 415 (1998). The court determined the defendant was not entitled to a new trial on this basis because the communication "relate[d] only to the administrative functioning of the judicial system." *Id.* at 653. See also *Rodriguez v State*, 919 So 2d 1252, 1275 (Fla, 2005) (The Court held that ex parte communications regarding the subject of the defendant's upcoming hearing did not violate the defendant's due process rights because the communications were purely administrative in nature).

We recognize the danger that ex parte communications can have on a pending case, and/or on the integrity of the judiciary:

⁴ Likewise, the Michigan Rules of Professional Conduct restrict a lawyer's ability to communicate with others, stating: "A lawyer shall not . . . (b) communicate ex parte with such a person concerning a pending matter, unless authorized to do so by law or court order." MRPC 3.5.

Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. Ex parte conversations or correspondence can be misleading; the information given to the judge “may be incomplete or inaccurate, the problem can be incorrectly stated.” At the very least, participation in ex parte communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, ex parte communication is an invitation to improper influence if not outright corruption. [*Grievance Adm’r v Lopatin*, 462 Mich 235, 262-263; 612 NW2d 120 (2000) (quoting Shaman, Lubet & Alfini, *Judicial Conduct and Ethics* (3d ed), § 501, pp 159-160).]

None of these concerns are present here. The communications did not relate to a substantive matter that was to be resolved in defendant’s trial, as the communications related exclusively to how investigations are conducted and when and how victims are referred for medical treatment. We likewise reject the notion that the communications can be read as an attempt by the trial judge to “tip-off” the prosecutor about deficiencies in the case, as the e-mails reflect three direct questions about processes, with the answers revealing that the prosecutor perceived the questions as solely relating to processes.⁵ That these e-mails do not fit squarely into scheduling or other such administrative matters does not take these e-mails out of that category, as they did not relate to substantive matters in defendant’s trial.

Even though the ex parte communications were not related to the merits of defendant’s case, the trial judge was still required to comply with subsections (a)(i) and (ii) of Canon 3(A)(4). The record supports the inference that the trial judge did not consider the e-mails to be advantageous to either party, but the record also supports the conclusion that the trial court did not disclose the e-mails to the parties, as required by subsection (a)(ii). Thus, the trial judge did not comply with the disclosure requirements of Canon 3(A)(4)(a)(ii).

2. THE APPEARANCE OF IMPROPRIETY

This leaves us with the question of whether, as the trial court found, the trial judge’s communications created the appearance of impropriety. The Code of Judicial Conduct, Canon 2, provides that “[a] judge must avoid all impropriety and appearance of impropriety.” There can be no doubt that “there may be situations in which the appearance of impropriety on the part of a judge . . . is so strong as to rise to the level of a due process violation,” *Cain v Dep’t of Corrections*, 451 Mich 470, 512-513 n 48; 548 NW2d 210 (1996), and that a showing of actual bias is not necessary where “ ‘experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’ ” *Crampton v Dep’t of State*, 395 Mich 347, 351; 235 NW2d 352 (1975), quoting *Withrow v Larkin*, 421 US 35, 47; 95 SCt 1456;

⁵ Had the trial judge asked these questions to the prosecutor in the hallway at the end of the first day of trial, rather than asking them in an e-mail from the bench, there would be little to discuss. After all, there is no prohibition in a judge asking questions to the elected prosecutor about processes used in criminal investigations, and the most common arena for questions like this to arise are from what occurs during trials.

43 L Ed2d 712 (1975). We hold that even if there was an appearance of impropriety in the e-mail exchange from the bench, defendant has not established prejudice.

We first question whether Canon 2 can even be considered, as the Supreme Court has repeatedly held that the “appearance of impropriety” standard does not govern when specific court rules or canons pertain to a subject. *In re Haley*, 476 Mich 180, 194-95; 720 NW2d 246 (2006) (“We decline to allow general allegations of impropriety that might overlap specifically authorized or prohibited behavior and conduct to supersede canons that specifically apply to the conduct in question.”). See also *Adair v State, Dept of Ed*, 474 Mich 1027, 1039, 1051, 1053; 709 NW2d 567 (2006) (“The ‘appearance of impropriety’ standard is relevant not where there are specific court rules or canons that pertain to a subject, such as judicial disqualification, 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.”). Under *In re Haley* and *Adair*, the “appearance of impropriety” standard does not govern because the specific prohibition in Canon 3(A)(4) controls. The challenged actions relate exclusively to the ex parte communications between the trial judge and elected prosecutor, and Canon 3(A)(4) specifically covers that topic. Nevertheless, we will resolve the issue because it was the sole basis for the trial court’s decision, and it is a large part of the dissent’s focus.

We accept for purposes of discussion that the trial judge’s e-mail communications created an appearance of impropriety, contrary to Canon 2, because the e-mail communications occurred during the trial and did not include defense counsel. As the trial court noted, members of the public may perceive some gamesmanship when a trial judge communicates with the head prosecutor while a criminal trial is underway, and the communications spawned from testimony in the trial. That perception is legally questionable, but is one that we accept for purposes of resolving this matter.

Even accepting that the trial judge’s communications created the appearance of impropriety, defendant was still not entitled to a new trial because the trial judge’s conduct did not “influence[] the jury” in any way. *Stevens*, 498 Mich at 171. A defendant must overcome a significant hurdle to show judicial bias when the alleged misconduct occurred outside the presence of a jury. *United States v Morrow*, 977 F2d 222, 225 (CA 6, 1992) (The Court found that the threat of prejudice is diminished when an otherwise inappropriate judicial act or remark is made outside of the jury’s presence); *United States v Smith*, 706 Fed Appx 241, 254 (CA 6, 2017).

Because the judge’s questions to the elected prosecutor did not relate to or bear on any substantive matter at trial, nor was the jury ever aware of the e-mails, we conclude the judge’s e-mail questions to the elected prosecutor did not influence the jury in any way. Moreover, defendant’s arguments in the motion for new trial, which were premised on conjecture that the prosecuting attorney received an unfair tactical advantage from these e-mails, provided no specific instance or actual evidence showing defendant was prejudiced by the judge’s conduct. While defendant argues that the prosecution received an unfair tactical advantage because the communications could have altered the prosecution’s theory of the case, that argument is difficult to accept because the prosecuting attorney raised the problems with the MSP investigation during opening statements, which occurred before the first e-mail was sent. So too did the trooper’s testimony concerning some of the problems with the investigation. The prosecution’s opening statement is consistent with its closing arguments, in which the prosecuting attorney again

acknowledged the inadequacies of the investigation. 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 evidenced anything more than inquiries regarding the investigation process, and there is nothing beyond rank speculation that the communications caused defendant any prejudice. Consequently, the trial judge's e-mail exchange with the elected prosecutor did not violate defendant's due process rights, and the trial court abused its discretion in granting the motion for new trial.

Our divergence with the dissent comes down to several disagreements. First, we simply do not read into these short e-mails an intent by the judge to assist the prosecution in presenting its case, and nor did the trial court. To read these e-mails in such a way is unreasonable given the actual words of the e-mails and the responses from the prosecutor, which reveal an understanding that the questions related to administrative processes in general, not about how the case itself was proceeding. Additionally, to read these e-mails in the way the dissent does gives no credence to the presumption of impartiality, as the dissent places the worst possible gloss into the meaning of the e-mails. Second, the dissent overlooks the fact that the trial prosecutor already raised the issue of the trooper's partially deficient investigation, as well as the trooper's testimony, both of which occurred before the first email was sent. Indeed, the dissent concedes that it is merely speculating about whether the trial prosecutor altered her strategy in light of the e-mails, yet the record unequivocally shows that this was not the case. Third, we see no possibility of prejudice to defendant when neither trial attorney nor the jury knew of the e-mails.

We cannot accept the legal conclusion that questions sent from a trial court to an elected prosecutor about how certain aspects of a criminal investigation are handled—questions that neither the trial attorney, defense attorney, nor jury were aware of—necessitate a new trial because the e-mails were sent during trial. We agree that the timing was poor, but other than the timing, nothing within the e-mails or what actually occurred at trial warrants the conclusion that a new trial was warranted.

Because judicial misconduct was not a proper basis on which to grant defendant a new trial, we must address defendant's remaining arguments that he was entitled to a new trial on the basis of ineffective assistance of counsel and prosecutorial misconduct.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues he was denied the effective assistance of counsel because his trial attorney failed to adequately investigate and challenge the case against him.

The question of whether a defendant is denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.* To the extent we must engage in statutory interpretation, our review is de novo. *People v Cannon*, 206 Mich App 653, 654-655; 522 NW2d 716 (1994).

A fundamental rule of statutory interpretation is to determine the purpose and intent of the Legislature in enacting a provision. The Legislature is presumed to have intended the meaning it plainly expressed. Where the language of a statute

is clear, there is no need for interpretation and the statute must be applied as written. [*Id.* at 655 (citations omitted).]

Trial counsel is presumed effective and defendant must overcome a strong presumption that a trial counsel's performance was sound trial strategy. *Id.* at 278. To succeed on an ineffective assistance of counsel argument, a defendant must show (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) "that he was prejudiced by counsel's performance." *People v Cooper*, 309 Mich App 74, 80; 867 NW2d 452 (2015) (quotation marks and citations omitted). This second prong requires defendant to show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* This Court will not "substitute [its] judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

"Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). A trial counsel's failure to conduct a reasonable investigation may constitute ineffective assistance of counsel. *People v Trakhtenberg*, 493 Mich 38, 51-55; 826 NW2d 136 (2012). "Counsel always retains the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 52 (quotation marks and citation omitted). "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

Defendant's motion for new trial argued there were two reasons he was denied effective assistance of counsel—first, because defense counsel failed to investigate the victim's assertions of fact regarding the color scheme of the bathroom where the sexual assaults occurred, and second, because counsel failed to investigate and present evidence of the victim's prior allegation of sexual assault by another individual. According to defendant, information about the victim's prior sexual assault allegation was essential to impeach the victim's credibility. We address each argument in turn.

1. COLOR SCHEME OF THE BATHROOM

Defendant's first argument arises from the victim's testimony regarding the color scheme of the bathroom where the sexual assaults took place. During trial, the victim testified defendant first sexually assaulted her on the evening of her father's wedding in December 2015. In describing the bathroom on that day, the victim said, "the walls were orange. And there was an orange shower curtain. And there was flowers, it was a flower[-]themed bathroom There was . . . an orange rug in front of . . . the toilet." As discussed, the sexual assaults resumed when the victim began her Friday night ritual of sleeping over at the Heppes' home, some months after the first sexual assault. By this time, the victim reported the bathroom décor had changed to "a peacock theme, it was . . . blue." The victim described the new bathroom rugs as "[l]ight blue . . . with . . . yarn on top."

Defense counsel made several challenges to the victim's description of the bathroom. For instance, on cross-examination, defense counsel asked the victim to confirm the bathroom rugs

given to Trooper Desch by Jane “were absolutely never in [the] bathroom.” Defense counsel also called witnesses whose descriptions of the bathroom differed from the victim’s. For example, Jane testified the décor was changed from orange-to blue-themed in “like 2012, 2013, somewhere in there,” before the December 2015 sexual assault. Brouke also testified the color scheme changed from orange to “teal-y blue” in about 2013.

According to defendant, his counsel should have more vigorously investigated the victim’s report that the bathroom was orange-themed in December 2015 when the first sexual assault took place. Specifically, defendant pointed out that Brouke had pictures on her laptop “complete with electronic date and time stamp” showing the bathroom was blue-themed in December 2015, and his counsel dismissed the importance of the photographs and refused to offer them into evidence. Counsel proceeded in this manner even though, defendant argues, the photographs were essential to his case because counsel could have impeached the victim’s testimony with these photographs, resulting in a “domino effect” to her credibility. The trial court disagreed with defendant’s position, noting there were a number of issues with these photographs, including admissibility and foundation.

We conclude that defense counsel’s actions neither fell below an objective standard of reasonableness, nor prejudiced defendant as a result of counsel’s actions. As noted, defense counsel recognized the discrepancies regarding the color scheme of the bathroom, as defense counsel not only challenged the victim regarding her description of the bathroom, but also called two witnesses who testified the bathroom redecoration predated the December 2015 sexual assault. Because defense counsel attempted to counter the victim’s description of the bathroom, defendant’s argument that defense counsel should have *also* sought to introduce photographic evidence of the bathroom décor, impermissibly asks us to apply the “benefit of hindsight” and second-guess trial strategy—something this Court will not do. *Unger*, 278 Mich App at 242-243.

In furtherance of this conclusion, we note that while defendant’s arguments focus heavily on the discrepancies in witness testimony, they do not account for the consistencies amongst the witnesses. While the victim testified that the *first* sexual assault took place when the bathroom was orange, she also testified many other assaults took place when the bathroom was blue. The victim’s description that the bathroom was eventually changed to “a peacock theme, it was blue,” is largely consistent with the testimony from Jane and Brouke, each of whom testified the bathroom had a blue, peacock theme. Though there were discrepancies in the testimony, counsel was not ineffective because he in fact highlighted the discrepancies. “[I]t is the role of the jury, not this Court, to determine the weight of the evidence or the credibility of witnesses.” *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). On this record, it appears the jury either concluded that the discrepancies about the bathroom décor did not exist or did not detract from the other evidence indicating defendant’s guilt. Therefore, the trial court correctly rejected this argument.

2. PRIOR SEXUAL ASSAULT ALLEGATIONS

We next address defendant’s argument that he was denied effective assistance of counsel because of defense counsel’s failure to investigate and enter into evidence a prior allegation by the victim of a sexual assault by another individual. According to defendant, evidence of this prior allegation was critical because it showed the victim was not a virgin before the alleged sexual

assaults and because it was evidence the victim suffered from anxiety and depression before the alleged assaults by defendant. By failing to admit this evidence, defendant argues, his counsel was unable to effectively impeach several prosecution witnesses. The trial court disagreed, concluding that the evidence was inadmissible because “[defense counsel] might have thought that it might have been detrimental to the . . . interests of the defendant.”

Defendant’s argument on this point holds no merit. Michigan’s rape-shield law states:

(1) Evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim’s past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [MCL 750.520j.]

The evidence at issue—the victim’s allegation of sexual assault by another individual—does not fall under either of the statutory exceptions to the statute. By the statute’s plain language, evidence of the victim’s prior allegations of sexual assault was inadmissible at trial. “Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion.” *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). Consequently, defense counsel was not ineffective for failing to offer into evidence the victim’s prior allegation of sexual assault.

C. PROSECUTORIAL MISCONDUCT

Defendant also argues the prosecutor committed misconduct⁶ when the prosecutor elicited “false and misleading” testimony from witnesses. “We review de novo claims of prosecutorial misconduct to determine whether [a] defendant was denied a fair and impartial trial.” *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005).

When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context. Further, the propriety of a prosecutor’s remarks depends on the particular facts of

⁶ While “we recognize that the phrase ‘prosecutorial misconduct’ has become a term of art in criminal appeals, we agree that the term ‘misconduct’ is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor’s conduct violates the rules of professional conduct or constitutes illegal conduct.” *Cooper*, 309 Mich App at 87-88. The arguments here, which allege that the prosecutor garnered false testimony, would under *Cooper* be an argument for a finding of prosecutorial misconduct (as opposed to error) for if true, the prosecutor would be acting contrary to ethical rules. See Michigan Rules of Professional Conduct, Rule 3.3(a)(3).

each case. Prosecutors are free to argue the evidence and any reasonable inferences arising from the evidence, and need not confine argument to the blandest of all possible terms. [*Id.* at 451 (quotation marks and citations omitted).]

“It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant’s due process protections guaranteed under the Fourteenth Amendment.” *Aceval*, 282 Mich App at 389. The focus of this inquiry looks to whether the testimony affected the outcome of the trial, and not to the “blameworthiness of the prosecutor.” *Id.* at 390.

Defendant’s arguments are premised on the same set of facts as his second argument alleging ineffective assistance of counsel. That is, defendant contends (1) the prosecutor knew about the prior allegations of sexual assault by the victim and proceeded to garner false testimony that the victim was a virgin at the time of the first sexual assault, and (2) the prosecutor sought false testimony that the victim suffered mental health conditions resulting from the sexual assaults by defendant. According to defendant, the victim’s mental health conditions arose after the other sexual assault and not from any sexual assault by defendant. We reject these arguments.

First, defendant erroneously alleges prosecutorial misconduct because the prosecutor told the jury the victim lost her virginity on the night of the first sexual assault. This is a meritless argument because the victim’s virginity is not a critical element of the charged offenses.⁷ Accordingly, it does not matter whether jury members believed whether the victim was a virgin

⁷ Again, defendant was convicted of one count of CSC-I, MCL 750.520b(1)(f), which states, “an actor may be found guilty under MCL 750.520b(1)(f) if the actor (1) causes personal injury to the victim, (2) engages in sexual penetration with the victim, and (3) uses force or coercion to accomplish the sexual penetration.” *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004). Defendant was also convicted of one count of CSC-II under MCL 750.520c(1)(f), which provides:

(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

* * *

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v). [*People v Alter*, 255 Mich App 194, 202; 659 NW2d 667 (2003), citing MCL 750.520c(1)(f).]

Defendant also received two convictions of CSC-III under MCL 750.520d(1)(a) and (b). Under MCL 750.520d(1)(a), “[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist: (a) That other person is at least 13 years of age and under 16 years of age.” *In re Tiemann*, 297 Mich App 250, 262; 823 NW2d 440 (2012) (emphasis omitted). “The required elements [of MCL 750.520d(1)(b)] are: (1) defendant engaged in sexual penetration with the victim, and (2) force or coercion is used to accomplish the sexual penetration.” *Eisen*, 296 Mich App at 333.

because that question was not outcome determinative. See *Aceval*, 282 Mich App at 389. Further, there was no testimony or evidence presented that the victim was a virgin before the alleged assault. Indeed, the only time the jury heard a report that the victim was a virgin was during the prosecution's opening and closing arguments, but, as stated, the trial court instructed the jury that the lawyers' statements and arguments are not evidence. Again, juries are presumed to follow instructions, and we discern no error on this basis. *Graves*, 458 Mich at 486.

We also reject defendant's argument that the prosecutor committed misconduct by eliciting perjured testimony about the victim's mental health. Specifically, defendant alleges the prosecutor sought false testimony from several witnesses who testified the victim suffered from mental health conditions for a period of time after the sexual assaults by defendant ended. Perjury has been defined as "a willfully false statement regarding any matter or thing, if an oath is authorized or required." *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). As noted, a prosecutor's "knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *Aceval*, 282 Mich App at 389. Thus, to prove prosecutorial misconduct on the basis of perjury, a defendant must show two things—first that a witness knowingly made a false statement, and second, that the prosecutor knowingly elicited the false statement. Defendant's argument fails on each of these requirements. Indeed, defendant makes no assertion the witnesses themselves made "willfully false statement[s]" to the trial court. *Lively*, 470 Mich at 253. Moreover, defendant does not present any evidence the prosecutor knowingly sought false testimony. *Aceval*, 282 Mich App at 389. While defendant surmises "the prosecutor's office possessed information . . . that directly contradicted the testimony of its most important witness," defendant presents no evidence to this effect. There is simply nothing on this record from which we could conclude the prosecutor suborned perjury amounting to prosecutorial misconduct. Thus, we reject defendant's argument on this basis.

III. CONCLUSION

The trial court's order granting defendant a new trial is reversed.

/s/ Christopher M. Murray
/s/ Jane E. Markey

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF
MICHIGAN,

AMICUS CURIAE BRIEF OF THE
TOWNSHIP OF WATSON, ALLEGAN
COUNTY, MI

Plaintiff/ Appellee,

-vs-

MSC NO.: 164133
COA NO.: 352056
Circuit Ct. No.: 18-021709-FC

DANIEL ALBERT LOEW

Defendant/ Appellant.

AMICUS CURIAE BRIEF OF THE TOWNSHIP OF WATSON ALLEGAN COUNTY MI

Exhibit Y: COA Dissent

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

DANIEL ALBERT LOEW,

Defendant-Appellant/Cross-Appellee.

FOR PUBLICATION

January 13, 2022

No. 352056

Allegan Circuit Court

LC No. 18-021709-FC

Before: MURRAY, C.J., and MARKEY and RIORDAN, JJ.

RIORDAN, J. (*dissenting*).

I respectfully dissent.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 US 133, 136; 75 S Ct 623; 99 L Ed 942 (1955). Thus, "the Due Process Clause clearly requires . . . a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v Gramley*, 520 US 899, 904-905; 117 S Ct 1793; 138 L Ed 2d 97 (1997). The Due Process Clause is therefore violated when the judge is actually biased against the defendant. See *id.* The Due Process Clause is also violated when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton v AT Massey Coal Co, Inc.*, 556 US 868, 872; 129 S Ct 2252; 173 L Ed 2d 1208 (2009) (quotation marks and citation omitted).

Relatedly, MCR 2.003(C)(1) provides, in relevant part, as follows:

Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a) The judge is biased or prejudiced for or against a party or attorney,

(b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, [556 US 868]; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or

(ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

Additionally, Canon 2 of the Michigan Code of Judicial Conduct provides, in relevant part, that “[a] judge must avoid all impropriety and appearance of impropriety.”

An appearance of impropriety by a presiding trial judge, i.e., a violation of Canon 2, does not necessarily result in a violation of due process. See *Cain v Dep’t of Corrections*, 451 Mich 470, 512 n 48; 548 NW2d 210 (1996) (“We acknowledge there may be situations in which the appearance of impropriety on the part of a judge or decisionmaker is so strong as to rise to the level of a due process violation. However, this case does not present such a situation.”).¹ Consequently, while a defendant is automatically entitled to relief regardless of prejudice when the judge was actually biased, see *Arizona v Fulminante*, 499 US 279, 309; 111 S Ct 1246; 113 L Ed 2d 302 (1991), or when the circumstances suggested “the probability of actual bias [rising] to an unconstitutional level,” see *Caperton*, 556 US at 887, a defendant is not automatically entitled to relief for the mere appearance of impropriety, see *Cain*, 451 Mich at 512 n 48. See also *In re Bergeron*, 636 F3d 882, 883 (CA 7, 2011) (“Actual bias would entitle the losing party to a new trial, but the mere appearance of bias would not . . .”).²

In this case, the trial court apparently granted defendant a new trial on the basis that the original trial judge violated the Canon 2 prohibition against an appearance of impropriety.³ I agree with the trial court that the original trial judge’s e-mail communications created an appearance of impropriety. “An appearance of impropriety may arise when the conduct of a judge would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.” *TT v KL*, 334 Mich App 413, 433; 965 NW2d 101 (2020) (quotation marks and citation omitted). The e-mail communications occurred between the trial judge and the county prosecutor (the official in charge of the prosecutor’s office), after the second witness in the trial testified, and were critical of certain weaknesses in the investigation

¹ Of course, those trial judges having an appearance of impropriety are required to disqualify themselves before or during trial. See MCR 2.003(C)(1)(b). But that is a separate question from whether a defendant is entitled to relief following a conviction before a trial judge with an appearance of impropriety, which is the issue before us now.

² In *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015), our Supreme Court created an intermediate principle under which the appearance of bias *before the jury* is tantamount to an “actual bias” structural error under cases such as *Fulminante*. See *Stevens*, 498 Mich at 190. *Stevens* does not govern here because the e-mail communications were not presented to the jury.

³ In its opinion from the bench, the trial court did not make a finding regarding bias—and in fact implied that the original trial judge was not consciously biased—but stated that it would grant a new trial “pursuant to this appearance -- the breach [sic] of the appearance.” Given that the trial court moments before referenced “the judicial canon of ethics” prohibiting “even the appearance of impropriety,” the most reasonable conclusion is that the trial court ordered a new trial because the original trial judge violated the Canon 2 prohibition against an appearance of impropriety.

that could conceivably lead to an acquittal.⁴ While the prosecutor may argue that this was not the trial judge's intent, a reasonable mind, upon reviewing the e-mails, may conclude that the trial judge was partial in favor of the prosecution, did not want to see weaknesses in its case exploited, and was actively attempting to assist the prosecution's case. Moreover, because the e-mail communications occurred during the trial, a reasonable mind could conclude that the trial judge would not, and could not, otherwise set aside her partiality until the proceedings were concluded. Thus, these facts show that the e-mail communications created an appearance of impropriety by the trial judge, contrary to Canon 2.

Having concluded that the trial judge violated the Canon 2 prohibition against an appearance of impropriety, and by logical extension violated MCR 2.003(C)(1)(b) because she failed to disqualify herself for that reason, the next question is whether defendant is entitled to a new trial on this basis. In this regard, I am guided by the decision of the United States Supreme Court in *Liljeberg v Health Servs Acquisition Corp*, 486 US 847; 108 S Ct 2194; 100 L Ed 2d 855 (1988). In that case, a trial judge presided over a matter in which it was subsequently discovered that he possessed an indirect property interest in the outcome. *Id.* at 850. The issue before the Court was whether the trial judge violated 28 USC 455(a), which provides that “[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned,” and if so, whether the original judgment must be vacated.⁵ *Id.* The Court first concluded that the trial judge did violate 28 USC 455(a), *id.* at 861, and then explained that the decision whether to vacate the original judgment should be determined by application of the following test:

We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other

⁴ I acknowledge that the recipient of the e-mails was the county prosecutor, not the assistant prosecutor who was actually trying the case. However, I find this distinction to be largely irrelevant because “assistant prosecutors act on behalf of the elected county prosecutor and are supervised by him [or her].” *People v Doyle*, 159 Mich App 632, 644; 406 NW2d 893 (1987). See also MCL 49.42 (“Any such assistant prosecuting attorney shall hold his office during the pleasure of the prosecuting attorney appointing him, perform any and all duties pertaining to the office of prosecuting attorney at such time or times as he may be required so to do by the prosecuting attorney . . .”). Indeed, the county prosecutor signed her name to the felony information against defendant. Further, the elected county prosecutor is listed as the prosecuting attorney of record on the Register of Actions in this matter.

⁵ Although 28 USC 455(a) does not expressly use the language “appearance of impropriety,” the Court implied that the statute is essentially an “appearance of impropriety” statute. See *id.* at 858 (“We must first determine whether § 455(a) can be violated based on an appearance of partiality, even though the judge was not conscious of the circumstances creating *the appearance of impropriety* . . .”) (emphasis added).

cases, and the risk of undermining the public's confidence in the judicial process. [*Id.* at 864.]⁶

Particularly relevant to the case at hand, in *United States v Orr*, 969 F3d 732 (CA 7, 2020), the defendant argued that he was “entitled to a new trial because the trial judge’s ex parte communications with the prosecuting U.S. Attorney’s Office violated 28 U.S.C. § 455(a), the judicial recusal statute.” *Id.* at 738. In response, the prosecution conceded that the trial judge violated 28 USC 455(a) but nonetheless argued that any error was harmless. *Id.* The United States Court of Appeals for the Seventh Circuit set forth the following principles governing the case:

Not every violation of § 455(a) warrants a drastic remedy, like a new trial. Mere appearance of impropriety is not enough for reversal and remand—a party must show a risk of harm. To determine whether Judge Bruce’s violation is harmless, we consider the three factors announced in [*Liljeberg*]: (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. [*Id.* (quotation marks and citations omitted).]⁷

This Court may use federal caselaw interpreting federal statutes as persuasive authority when interpreting state-law analogues. See *Garg v Macomb Co Comm’y Mental Health Servs.*, 472 Mich 263, 283; 696 NW2d 646 (2005). Because 28 USC 455(a) is a federal analog to MCR 2.003(C)(1)(b), and because Michigan apparently does not have any state caselaw bearing on the issue at hand, I believe that the *Liljeberg* framework is appropriate to apply here.

With regard to the first *Liljeberg* factor, there is some risk of injustice to defendant if a new trial is not ordered. The trial judge’s improper communications with the county prosecutor concerned the procedures used by law enforcement, in particular the Michigan State Police, for investigating allegations of sexual assault. The communications also were relevant to the credibility of the officer who investigated the allegations at issue. In particular, after the second prosecution witness testified, the trial judge questioned why the victim was not medically examined and expressed her displeasure at certain stages of the State Police investigation. Conceivably, this may have led to the trial prosecutor addressing these weaknesses later in trial or during closing argument when she would not otherwise have done so. These facts tend to show injustice to defendant if a new trial is not ordered. On the other hand, I acknowledge that there is some prejudice to the prosecution if a new trial is ordered, namely, the fact that the victim and other witnesses would be required to testify again and the fact that prosecution would have to

⁶ The Court ultimately concluded that the original judgment should be vacated and a new trial conducted. *Id.* at 862, 869.

⁷ The court ultimately concluded that the first and third *Liljeberg* factors weighed in favor of a new trial and thus vacated the defendant’s conviction. *Id.* at 742. See also *United States v Williams*, 949 F3d 1056, 1058 (CA 7, 2020) (conducting a similar *Liljeberg* analysis when the defendant argued that he was entitled to a new trial because the trial judge “had engaged in ex parte communications with members of the United States Attorney’s Office for the Central District of Illinois”).

undergo the expenses of a presumably multiday trial. On balance, I believe that the first *Liljeberg* factor is neutral.

With regard to the second *Liljeberg* factor, a denial of relief to defendant would tend to produce injustice in future cases. If defendant does not obtain a new trial in this case, other trial judges in future cases would not be deterred from engaging in ex parte communications with the prosecution during trial concerning the strengths and witnesses of the prosecution's case. The general prohibition against ex parte communications is intended to discourage such favoritism. See *Grievance Adm'r v Lopatin*, 462 Mich 235, 262; 612 NW2d 120 (2000) (“Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge.”) (citation omitted). In other words, awarding defendant relief may prevent injustice in future cases. See *United States v Atwood*, 941 F3d 883, 885 (CA 7, 2019) (“As in *Liljeberg*, we think that enforcing § 455(a) in this case may prevent a substantive injustice in some future case—here, by encouraging judges to exercise caution in their communications.”) (quotation marks and citation omitted).

With regard to the third *Liljeberg* factor, there is a risk that the public's confidence in the judicial process will be undermined if defendant does not obtain relief. Although there is no question that judges may have personal relationships with some of the attorneys who appear before them, and may have judicial or legal interpretative philosophies which make certain outcomes seem more or less likely to those appearing before them, a trial judge unilaterally identifying the strengths and weaknesses of a case to one party, but not the other, creates a perception that the judge is not neutral and impartial. By awarding defendant relief in this case, the judiciary communicates to the public that such conduct by a judge is not acceptable. As the trial court explained when awarding defendant a new trial in the matter before us:

[I]t's a matter of the public perception of the ethical obligations entailed with the judicial office and I worry that as unintentional as this may be, it could do damage to that. And I think it's incumbent on us to really err on the side of making sure that all people understand themselves to be given that opportunity to a full and fair hearing before an impartial judiciary. . . .

Accordingly, because the second and third *Liljeberg* factors weigh in favor of awarding defendant relief, I would affirm the trial court's grant of a new trial 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.⁸

The parties and the majority place significant emphasis upon Canon 3 of the Code of Judicial Conduct, which generally prohibits ex parte communications that concern “substantive matters” but does not prohibit ex parte communications with “administrative purposes.” I question

⁸ I acknowledge that defendant did not argue in the trial court, and does not argue on appeal, that he is entitled to relief under MCR 2.003(C)(1)(b). However, given that the trial court awarded him a new trial because the trial judge violated the Canon 2 prohibition against an appearance of impropriety, I believe that consideration of the court-rule analogue is appropriate and necessary for resolution of this appeal.

whether the majority is correct to conclude that the e-mail communications were “administrative” in nature because they addressed the internal investigatory procedures of the Michigan State Police. In my view, an ordinary understanding of the word “administrative” in this context contemplates simple procedural matters concerning the judicial process itself, such as the orderly handling of motions. See, e.g., *Adesanya v Novartis Pharmaceuticals Corp*, 755 Fed App’x 154, 158 (CA 3, 2018) (explaining that ex parte communications did not violate Code of Conduct for US Judges Canon 3 because “[t]he Magistrate Judge and Appellee’s counsel were simply seeking a way to manage the numerous pro se discovery requests Appellants had filed”); *Gerber v Veltri*, 702 Fed App’x 423, 432-433 (CA 6, 2017) (explaining that ex parte communications did not violate Code of Conduct for US Judges Canon 3 because “[t]heir discussion concerned when, and how, the court should reschedule the appearance of witnesses slated to testify that day, particularly defendant’s expert Dr. Anderson”). The trial judge’s commentary to the county prosecutor regarding the internal investigatory procedures of the State Police, a law enforcement agency independent of the judicial branch of government, addressed the substance of the trial itself as the comments directly implicated the plausibility of the victim’s allegations. In other words, the weaknesses of the investigation might tend to weigh against a guilty verdict. This, I believe, means that the e-mail communications involved “substantive matters” and were therefore prohibited by Canon 3.

In any event, I find the discussion of Canon 3 to be largely irrelevant to the case at hand. Contrary to the majority, I do not read *People v Aceval*, 282 Mich App 379; 764 NW2d 285 (2009), as standing for the proposition that a defendant may be entitled to relief if he or she shows any violation of the Code of Judicial Conduct and prejudice therefrom. Rather, *Aceval* stated that “[a]ssuming that the acts of the trial judge and the prosecutor in this case violated Michigan’s Rules of Professional Conduct, MRPC 3.4, and Code of Judicial Conduct, Canon 3, and were clearly opprobrious, the remedy for their wrongs is accomplished in other forums, such as the Attorney Discipline Board and the Judicial Tenure Commission.” *Id.* at 392. “These codes . . . do not confer upon a defendant any type of constitutional right or remedy.” *Id.* In other words, while a violation of the Code of Judicial Conduct might tend to show a violation of due process, a defendant cannot be entitled to relief solely for a violation of the Code of Judicial Conduct. Compare *Treadaway v State*, 308 Ga 882, 888-889; 843 SE2d 784 (2020) (explaining that even if the trial judge violated the Code of Judicial Conduct by an ex parte contact, the defendant was still not entitled to relief because he did not show that the process was “fundamentally unfair”). That is, a defendant cannot maintain a freestanding claim that the trial judge violated the Code of Judicial Conduct but instead must show that a substantive law was violated as well.⁹ Here,

⁹ The majority reasons that defendant cannot show prejudice for the alleged violation of Canon 3 because the trial prosecutor’s opening statement acknowledged deficiencies in the police investigation, thus showing that the trial judge did not signal anything new to the prosecutor’s office through the e-mails. I agree with the majority that the trial prosecutor noted the lack of DNA evidence and the questionable handling of the bathroom rugs by the detective in her opening statement. However, the majority’s focus on this type of “prejudice” misses the mark. As explained herein, the proper “prejudice” analysis includes the prejudice not only to defendant, but other parties in future cases and the judiciary as a whole. See *Orr*, 969 F3d at 738 (“To determine

defendant's entitlement to relief does not specifically arise under the Code of Judicial Conduct, but under MCR 2.003(C)(1)(b).¹⁰

Accordingly, I respectfully dissent and would affirm the trial court's grant of a new trial.¹¹

/s/ Michael J. Riordan

whether Judge Bruce's violation is harmless, we consider the three factors announced in [*Liljeberg*]").

¹⁰ The majority questions whether the general Canon 2 "appearance of impropriety" standard is even relevant here because the Canon 3 prohibition against certain ex parte communications is more specific to the case at hand. I respectfully disagree. While it is certainly true that, for example, a judge who violates the Canon 3 prohibition against certain ex parte communications may only be sanctioned for a violation of Canon 3 and not Canon 2 as well, see *In re Haley*, 476 Mich 180, 194-195; 720 NW2d 246 (2006), that is not the question before us. Rather, the question before us is whether the trial judge violated MCR 2.003(C)(1)(b), and if so, whether defendant is entitled to relief. Indeed, Canon 3 provides that "[a] judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(C)."

In other words, if the general Canon 2 "appearance of impropriety" standard is not relevant here, then even a judge who violates the Canon 3 prohibition against certain ex parte communications would not be required to recuse himself or herself unless that violation rises to the level of a due-process violation as otherwise outlined in MCR 2.003(C)(1)(a)-(b).

¹¹ Having concluded that defendant is entitled to a new trial because of the appearance of impropriety by the trial judge, I need not address his alternate arguments in favor of a new trial.