State of Arizona

COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaints 18-177 and 18-221

Judge:	Michael R. Bluff
Complainants:	Self-Report Matthew D. Cochran

ORDER

The complainant in Case No. 18-221 alleged that in two separate criminal matters, a superior court judge failed to uphold the law, failed to promote confidence in the judiciary, failed to remain fair and impartial, was not competent, failed to afford all parties notice and an opportunity to be heard, and engaged in improper ex parte communication. The judge also self-reported his conduct to the commission in Case No. 18-177.

In 2016, Judge Bluff presided over a probation violation matter (*State v. Larry Ludwig*). Mr. Ludwig admitted to violating his probation, and the matter was set for a disposition hearing. Without giving notice to either the prosecutor or Mr. Ludwig's defense attorney, Judge Bluff had Mr. Ludwig brought before him. During this hearing, Judge Bluff expressed to Mr. Ludwig his desire to reinstate him on probation, however, he had concerns about the restitution being paid, and thus, needed to hear evidence that Mr. Ludwig could pay the restitution if reinstated. This incident was brought to the attention of the Hon. David L. Mackey, Presiding Judge of the Yavapai County Superior Court. Judge Mackey admonished Judge Bluff for his conduct, and Judge Bluff informed Judge Mackey he would not repeat this conduct. The Yavapai County Public Defender's Office chose not to file a judicial conduct complaint at that time, believing the misconduct would not be repeated.

In 2018, Judge Bluff handled another probation violation matter (*State v. Jacquelyn Barnett*). At the revocation arraignment, Judge Bluff agreed to release Ms. Barnett from custody to a specific address. Later, the jail contacted Judge Bluff's judicial assistant to advise that they would not be able to release Ms. Barnett to the specific address as it was incorrect. According to Judge Bluff, he instructed his judicial assistant to advise Ms. Barnett's counsel of this matter and

that Judge Bluff would see Ms. Barnett the following morning. Ms. Barnett's attorney stated he never received any notification. The following day, Judge Bluff saw Ms. Barnett in court without her counsel present or counsel for the state, and he revoked her release conditions. Prior to the next hearing date, Ms. Barnett's counsel sought a change of judge for cause. Judge Mackey conducted the hearing on the change of judge, and made specific findings that Judge Bluff obtained and used information from an outside source in making his decision on release conditions, and that Judge Bluff could no longer preside over the matter in a fair and impartial manner.

Judge Bluff's conduct in the aforementioned matters violated the following provisions of the Code of Judicial Conduct:

> ● Rule 1.1: A judge shall comply with the law, including the Code of Judicial Conduct.
>
> ● Rule 1.2: A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
>
> ● Rule 2.2: A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."
>
> ● Rule 2.5(A): A judge shall perform judicial and administrative duties competently, diligently, and promptly.
>
> ● Rule 2.6(A): A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.
>
> ● Rule 2.9:
>
> (A) 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 or their lawyers, concerning a pending or impending matter . . .
>
> (B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of the matter, the judge shall make provision to promptly notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

This order may not be used as a basis for disqualification of a judge.

(C) Except as otherwise provided by law, a judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

Accordingly, Judge Michael R. Bluff is hereby publicly reprimanded for his conduct as described above and pursuant to Commission Rule 17(a). The record in this case, consisting of the complaint in Case No. 18-221, the judge's response in Case No. 18-221, the judge's self-report in Case No. 18-177, and this order shall be made public as required by Rule 9(a).

Commission members Gus Aragòn, Peter J. Eckerstrom and George H. Foster, Jr., did not participate in the consideration of this matter.

Dated: September 18, 2018

FOR THE COMMISSION

/s/ Louis Frank Dominguez

Hon. Louis Frank Dominguez
Commission Chair

Copies of this order were distributed to all
appropriate persons on September 18, 2018.

This order may not be used as a basis for disqualification of a judge.

Self-Report
6-8-18
18-177

MICHAEL R. BLUFF
JUDGE
DIVISION 7

TELEPHONE
(928) 567-7775
FAX (928) 567-7774

Arizona Superior Court

2840 NORTH COMMONWEALTH DRIVE
CAMP VERDE, ARIZONA 86322

June 8, 2018

Ms. Margaret H. Downie, Executive Director
Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, AZ 85007

Subj: Self-Report

Dear Ms. Downie:

As a result of a recent Change of Judge proceeding held pursuant to Ariz.R.Crim.Pro. Rule 10.1, it is apparent I may have violated the Rules of Judicial Conduct prohibiting *ex parte* communication with a represented party. The case has since been reassigned to another Division.

The events which form the basis of the original Change of Judge proceeding are set forth below. These events also support defense counsel's claim that I violated Rule 2.9 regarding Ex Parte Communication.

1. On April 30, 2018, I conducted a Revocation Arraignment in State v. Jacquelyn L. Barnett (CR20178-0198). Ms. Barnett was present in custody and represented by Mr. Matthew Cochran. The State was represented by Mr. Michael Morrison.

   Myself and both counsel had a discussion about the fact that Ms. Barnett had not kept the Probation Department advised of her current address. I stated I would release Ms. Barnett from custody provided she could provide a valid address where she would be residing until her case was resolved. After some discussion, Ms. Barnett indicated she would be residing with a friend and gave a specific address in Cottonwood where she would be staying. I then signed an order modifying her release conditions reflecting that she would be staying with that individual at the address listed on her Felony Release Condition form. (See Attachment #1)

2. Later that afternoon, my Judicial Assistant ("JA") received a call from the jail indicating that they were not going to release Ms. Barnett because they had received information from Ms. Barnett's friend that the physical address on the release orders were incorrect. While the Felony Release Conditions indicated an "OR" release with the address given to me by counsel earlier that morning, the separate Order Modifying Release issued by the Courtroom Clerk was more specific. It stated that Ms. Barnett was to reside with the friend at the address given. Apparently after the friend contacted the jail and informed them the address was incorrect it prompted the jail to place a hold on her release until I could clarify the two orders.

3. Because Ms. Barnett was represented by counsel, I instructed my JA to contact Mr. Cochran's office and let him know that there was a problem with the jail and that I would have her brought before me the following morning on my 8:30 a.m. Initial Appearance Calendar to resolve the address problem. While my JA has no specific recollection of who she spoke with at the Public Defender's Office that afternoon, she does recall me telling her to place the call and that she in fact did call.

4. The following morning, May 1st, I called Ms. Barnett's case. Her attorney was not present. I advised her of the problem with the address and that I would not authorize the jail to release her unless I had a valid address. Ms. Barnett was understandably upset. I am including a copy of the transcript of that hearing for the Commission's use. (See Attachment #2)

   Once off the bench, I instructed my JA to contact defense counsel and advise him of the address problem and see if he could assist in clearing it up. I was advised that counsel was upset I had communicated with his client outside his presence and that he was requesting a copy of any recordings of the proceedings. I then instructed my JA to set an accelerated hearing on the case for the next available calendar setting which was May 7, 2018.

5. On May 7th, I called Ms. Barnett's case with both counsel present. Defense counsel then filed a Notice of Change of Judge directly with the Courtroom Clerk. I then forwarded the case to my Presiding Judge as required by the Rule 10.1(b)(2).

I readily admit that I communicated with Ms. Barnett, a party represented by counsel, without her attorney being present. I also acknowledge that it was wrong for me to consider information my JA received from the jail and then use that information to essentially modify Ms. Barnett's release conditions without prior notification to counsel and giving them an opportunity to provide input.

Frankly, a somewhat similar incident occurred several years ago when I informed a probationer in court, but outside the presence of his counsel, that he needed to provide a full explanation of his work history as part of his portion of the Probation Department's Dispositional Report. That prior incident was discussed with my Presiding Judge at the time and I believe I had taken steps to prevent it from reoccurring. Unlike the current matter, I had failed to take steps to contact the defendant's attorney prior to speaking with him.

The reasons for my actions in the present matter, while admittedly wrong, were to get Ms. Barnett released from custody as soon as possible but at the same time still have a valid address where she could be located. Her history of not keeping the Probation Department advised of her whereabouts was conveyed to both counsel during the April 30th hearing as part of an off the record bench conference requested by defense counsel. After speaking to her the following morning, I again instructed by JA to get her attorney on the phone and have him obtain a good address where she could be released to. In hindsight, I should have simply continued the hearing on the morning of May 1st and reset it once counsel was present.

Be assured I am in no way placing blame on the jail staff or my JA. It was my decision to inappropriately communicate with Ms. Barnett outside the presence of her attorney. While my actions were clearly wrong and in violation of Rule 2.9 of the Rules of Judicial Conduct, my objective was to get Ms. Barnett released from custody.

Hopefully this information places my conduct in full context, although I recognize that the consequences for my conduct will be up to the Commission. Regardless of the outcome, it will not occur in the future.

If you have questions or need additional information concerning the circumstances of what occurred, please contact me. Thank you.

Very truly yours,

Michael R. Bluff

Cc: Judge David L. Mackey, Presiding Judge

Comp
7-11-18
18-221

YAVAPAI COUNTY PUBLIC DEFENDER

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Kennedy C. Klagge
Public Defender

July 11, 2018

Arizona Commission on Judicial Conduct
1501 W. Washington St. Suite 229
Phoenix, AZ 85007

RE: Hon. Michael R. Bluff, Judge of the Superior Court, Yavapai County

Dear Arizona Commission on Judicial Conduct,

I write to the Commission to report violations of the Code of Judicial Conduct by the Hon. Michael R. Bluff of the Yavapai County Superior Court, Division Seven. Based upon the incidents detailed below I am mandated to report the violations per Arizona Rule of Professional Conduct 8.3(b).

Judge Bluff's misconduct involves the probation violation matters in State v. Jacquelyn Barnett, V1300CR201780198, and State v. Larry Ludwig, V1300CR201680246. I was counsel of record at the relevant times both probation violation matters.

State v. Larry Ludwig, V1300CR201680246

FACTS

On September 7, 2016, Mr. Ludwig appeared before the Hon. Michael R. Bluff on an Initial Appearance on a Petition to Revoke Probation. Judge Bluff appointed the Public Defender's Office to represent Mr. Ludwig on the Petition to Revoke Probation. *See Exhibit 1 (9/7/2016 Minute Entry).* On September 8, 2016, the Public Defender's Office filed a Notice of Appearance and indicated the case was assigned to Matthew D. Cochran. *See Exhibit 2 (9/8/2016 Notice of Appearance).* On September 9, 2016, Mr. Ludwig appeared with Counsel before Judge Bluff on a restitution hearing in the matter. *See Exhibit 3 (9/9/2016 Restitution Hearing Minute Entry).* On that same date, a Revocation Arraignment was held and a Probation Violation Management Conference was set for September 26, 2016. *See Exhibit 4 (9/9/2016 Minute Entry on Revocation Arraignment).* On September 26, 2016 Mr. Ludwig appeared with Counsel for the Probation Violation Management Conference, where he entered an admission to violating his probation. A Disposition Hearing was set for October 17, 2016. *See Exhibit 5 (9/26/2016 Minute Entry Admission Hearing).*

At the Disposition Hearing on October 17, 2016, the parties made their statements and Mr. Ludwig allocated. The parties also reviewed and read the Dispositional Report that included that the victim had "opted in" to all proceedings. *See Exhibit 6 (10/17/2016 Minute Entry) and Exhibit 7 (Dispositional Report, dated October 11, 2016).* Judge Bluff indicated he wanted more time to think about the case to determine if he would reinstate Mr. Ludwig on probation. Mr. Ludwig agreed to continue the Disposition to October 24, 2016.

On October 18, 2016, I received a phone call from Mr. Ludwig who indicated he was just seen for a hearing by Judge Bluff. It was clear the appearance was not about a new matter but involved the matter in which I represented Mr. Ludwig, as previously appointed by the Court.

Based upon this information, I contacted Judge Bluff's court reporter to determine the cost of the transcript of the hearing. The court reporter informed me she did not record the hearing. I then filed a motion to get a copy of the FTR gold recording. *See Exhibit 8 (Motion for Clerk of Court to Disclose FTR Gold Recording, dated October 18, 2016).* It was clear that no official record was made of Mr. Ludwig's appearance until I requested the FTR Gold recording be made part of the official record.

On this recording, Mr. Ludwig was called to the podium wearing his jail clothes. Judge Bluff told Mr. Ludwig that he knows that his attorney and the attorney for the State were not present. Judge Bluff indicated that he is leaning towards reinstating Mr. Ludwig on probation and that his primary motivation was for Mr. Ludwig to pay the court-ordered restitution. Mr. Ludwig responded by telling Judge Bluff about his plans for employment if reinstated. *See Exhibit 9 (FTR Gold Recording and Transcript of 10/18/2016 hearing).*

In response to this occurrence, the Hon. John D. Napper, then the Yavapai County Public Defender, met with the Hon. David L. Mackey and told Judge Mackey what had occurred and that we would be sending a letter detailing our concerns about what occurred along with a copy of the FTR Gold recording of the hearing. Judge Mackey indicated that once he received the letter he would speak to Judge Bluff about what had occurred. The decision was made to *not* file a judicial complaint at the time because the State was not upset by what occurred and this Office believed it was an isolated mistake. (If you need more details about these interactions, please contact the Hon. John D. Napper of the Yavapai County Superior Court, Division Two.) Please find the letter attached in which I explained to Judge Mackey that such hearing was held *ex parte* as no representative of the State of Arizona was present; it was held in violation of Mr. Ludwig's Sixth Amendment Right to Counsel; and it was held in violation of the Arizona Victim's Bill of Rights as the victim had "opted in" for post-conviction matters and had attended most, if not all, of the hearings in the probation violation proceedings. *See Exhibit 10 (Letter to Judge Mackey dated October 31, 2016).*

On May 22, 2018, a hearing on a Motion for Change of Judge for Cause (Rule 10.1) was held in State v. Jacquelyn Barnett, V1300CR201780198. The issues in the Barnett matter were so

similar that during the 10.1 hearing, Judge Mackey made a record referencing the situation in State v. Ludwig. (*Details of State v. Barnett detailed later in this complaint.*) Judge Mackey stated, "I want to make the State aware – what perhaps, I believe, Mr. Cochran is probably aware of – is the Court had been made aware of a situation sometime last year where a similar incident happened with respect to Judge Bluff's scheduling a hearing on a represented Defendant without notifying Defense Counsel or the State. And I had addressed that with Judge Bluff and thought that that would be the last time that that would occur. Based upon the allegation, apparently it didn't." *See Exhibit 11 (Transcript of 10/22/2018 10.1 hearing in State v. Barnett, p. 4 line 20 – p. 5 line 4).*

APPLICABLE RULE AND ANALYSIS

Judge Bluff's conduct violated several rules of the Code of Judicial Conduct.

Canon 1 of the Code of Judicial Conduct states: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."1

Rule 1.1 of the Canon states: "A judge shall comply with the law, including the Code of Judicial Conduct."

Judge Bluff failed to comply with the law as the October 18, 2016 hearing was held in violation of Mr. Ludwig's right to Counsel in the Sixth Amendment to the Constitution of the United States and Article 2, Section 24 of the Constitution of the State of Arizona. Additionally, the hearing was held *ex parte*, directly in violation of the Code of Judicial Conduct. Lastly, the hearing was held in violation of Victim's Rights pursuant to Article 2, Section 2.1 of the Constitution of the State of Arizona and Rule 39 of the Arizona Rules of Criminal Procedure.

Rule 1.2 of the Canon states: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

Judge Bluff's wanton disregard for vital Constitutional safeguards on October 18, 2016 erodes the public's confidence in the judiciary's independence, integrity, and impartiality. Furthermore, these actions are actual impropriety. Comment 5 to Rule 1.2 states: "Actual improprieties include violations of law, court rules, or provisions of this code." Judge Bluff violated the law by speaking to Mr. Ludwig without his counsel present, and for holding the hearing without counsel for the State present and without notice to the opted-in victim.

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1 All references to Arizona Code of Judicial Conduct were obtained from the Arizona Courts website, Commission on Judicial Conduct tab, and the Arizona Code of Judicial Conduct available there for download. Arizona Supreme Court Rule 81, Rules of the Supreme Court, Amended November 24, 2009.
http://www.azcourts.gov/azcjc/constitutionrulesandPolicies.aspx

State v. Jacquelyn Barnett, V1300CR201780198

FACTS

Despite Judge Mackey addressing Judge Bluff after the incident in the Ludwig matter, Judge Bluff again held a hearing with a represented Defendant with no notice to Defense Counsel or Counsel for the State.

On April 24, 2018, Ms. Barnett appeared before the Hon. Michael R. Bluff for her Initial Appearance after her arrest on a warrant related to a Petition to Revoke Probation. At that hearing, the Hon. Michael R. Bluff appointed the Yavapai County Public Defender to represent Ms. Barnett. *See Exhibit 12 (Minute Entry for Initial Appearance on April 24, 2018).* On that same day, Counsel Undersigned filed a Notice of Appearance noticing his representation of Ms. Barnett. *See Exhibit 13 (Notice of Appearance, dated April 24, 2018).*

An Arraignment on the Petition to Revoke was held in front of the Hon. Michael R. Bluff on April 30, 2018. *See Exhibit 14 (Minute Entry for Arraignment on Petition to Revoke, dated April 30, 2018).* At the Arraignment, Counsel Undersigned and Counsel for the State approached the bench to discuss the matter off the record. Judge Bluff told the parties that if Ms. Barnett could provide an address where she would be staying, he would release her on her own recognizance, pending resolution of the Petition to Revoke Probation. Undersigned Counsel conferred with Ms. Barnett and then advised the Court that Ms. Barnett would be staying at 921 N. 5th Street in Cottonwood, Arizona. *See Exhibit 15 (Transcript from Arraignment of Petition to Revoke on April 30, 2018).* The Hon. Michael R. Bluff granted Ms. Barnett's release on her own recognizance. *See Exhibit 16 (Felony Release Conditions and Release Order, and Order Modifying Release Conditions, dated April 30, 2018).* A Probation Violation Management Conference was set for May 14, 2018. *See Exhibit 14.*

On May 1, 2018, Ms. Barnett, while still in custody, was brought by the Yavapai County Sheriff's Office, at the direction of the Hon. Michael R. Bluff, for a hearing. *See Exhibit 17 (05/01/2018 Minute Entry) and Exhibit 18 (Transcript of May 1, 2018 hearing).* Ms. Barnett's Counsel and Counsel for the State were not notified and, therefore, not present at that hearing.

During that hearing Judge Bluff addressed Ms. Barnett, "You were brought back today because we were – the Court was notified that the address you gave us is not an address that you will be residing at. So can you tell me if I release you where you're going to be residing?" (*Exhibit 18, p. 2 lines 10-15.)* Ms. Barnett responded, "Yes. The residence I gave you was the one that I knew I was going to check in at until I could get a proper address. So was the address I gave you in Clarkdale." (*Exhibit 18, p. 2 lines 16-22.)* The transcript goes on for a total of four pages which are all questions from the Hon. Michael R. Bluff, and Ms. Barnett answering them. It is only on page 4 lines 2-3 that Judge Bluff stated, "The person that called said you cannot reside at that address." This information was not from the State or from the Defense. Judge Bluff never stated the specific source information or the identity of the person that called the Court.

After this hearing occurred, Ms. Barnett called Defense Counsel from the jail. It was clear that Judge Bluff spoke to Ms. Barnett without Counsel or the State present. While still on the phone with Ms. Barnett, Counsel's assistant entered his office and informed him that Judge Bluff's Judicial Assistant (JA) had called. Counsel's assistant stated the JA informed her that Judge Bluff requested the JA to give Defense Counsel a "courtesy call" to inform that he did not release Ms. Barnett from custody. After that, email communications occurred between Counsel and the JA, with the State's attorney being carbon copied on each one. This exchange is attached. *See Exhibit 19 (Emails between Defense Counsel and Division 7's JA on May 1, 2018).*

Judge Bluff then accelerated the Probation Violation Management Conference from May 14 to May 7, 2018. *See Exhibit 20 (Notice Setting Probation Review Hearing, dated May 3, 2018).* On May 4, 2018, Defense Counsel filed a Notice of Change of Judge for Cause. *See Exhibit 21 (Notice of Change of Judge for Cause Pursuant to Arizona Rule of Criminal Procedure 10.1, dated May 4, 2018).* At the hearing on May 7, 2018, Defense Counsel informed Judge Bluff that he filed a Notice of Change of Judge for Cause. *See Exhibit 22 (5/7/2018 Minute Entry). See also Exhibit 23 (Transcript from May 7, 2018 hearing).* Later that day, Judge Bluff referred the matter to the Presiding Judge. *See Exhibit 22 (Notice Referring Case to Presiding Judge, dated May 7, 2018, filed May 8, 2018).*

A May 16, 2018 Hon. David L. Mackey temporarily assigned the case to himself for determination on the Motion for Change of Judge for Cause and set the hearing for May 22, 2018. *See Exhibit 24 (Amended Order Temporarily Reassigning Matter).* On May 17, 2018, Hon. Michael R. Bluff was served with a subpoena to appear at the May 22, 2018 hearing. *See Exhibit 25 (Subpoena for Hon. Michael R. Bluff).* On May 17, 2018, Counsel from the Attorney General's Office filed an Objection to Subpoena; Motion for Protective Order; Motion to Quash Subpoena representing Hon. Michael R. Bluff. *See Exhibit 26 (Objection to Subpoena; Motion for Protective Order; Motion to Quash Subpoena).* On that same day, without a response from Defendant the Hon. David L. Mackey granted the Motion to Quash. *See Exhibit 27 (Email from Judicial Assistant in Division 1) and Exhibit 28 (Order Quashing Subpoena).* On May 18, 2018, a Motion for Reconsideration was filed. *See Exhibit 29 (Motion for Reconsideration on Objection to Subpoena; Motion for Protective Order; Motion to Quash Subpoena).* The Motion for Reconsideration was deemed moot after the Hearing on the Motion for Change of Judge for Cause.

On May 22, 2018, a hearing occurred on the Motion for Change of Judge for Cause. *See Exhibit 30 (Minute Entry from Hearing on Motion for Change of Judge for Cause, dated May 22, 2018).* In granting the Motion for Change of Judge for Cause, Judge Mackey made the factual findings that the information Judge Bluff relied upon in revoking Ms. Barnett's release did not come from the Yavapai County Attorney's Office, the Yavapai County Public Defender's Office, or the Yavapai County Adult Probation Office. *See Exhibit 11 (P. 13 line 1 – p. 14 line 2).*

APPLICABLE RULES AND ANALYSIS

Canon 2 of the Code of Judicial Conduct states: "A judge shall perform the duties of judicial office impartially, competently, and diligently."

Rule 2.2 of the Canon states: "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." The hearing held on May 1, 2018 was held in violation of the law, specifically the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and Article 2, Sections 4, 10, and 24 of the Constitution of the State of Arizona. As detailed above, this hearing violated several clearly delineated Constitutional rights held by Ms. Barnett. Additionally, it was patently unfair to Ms. Barnett for a judge, with all the powers, respect, and responsibility bestowed to that position, to question an in-custody Defendant without her court-appointed counsel present.

Rule 2.5 of that Canon states in pertinent part: (A) A judge shall perform judicial … duties, competently, diligently, and promptly." Comment four of that rule gives more meaning to the rule. Comment four states in pertinent part, "In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard ...". The Hon. Michael R. Bluff violated this rule by not having Ms. Barnett's counsel present for the hearing to formulate responses to the Court on Ms. Barnett's behalf. Additionally, the Hon. Michael R. Bluff gave no regard to the State's right to be heard as no representative of the State of Arizona was present at the hearing.

Rule 2.6 of that Canon states in pertinent part: " (A) A judge shall accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." First, the Hon. Michael R. Bluff did not allow Ms. Barnett (a person with a legal interest) to have her lawyer be heard at the May 1, 2018 hearing. Second, the Hon. Michael R. Bluff, did not allow the State of Arizona (an entity with a legal interest), through its lawyer, to be heard at the hearing on May 1, 2018.

Rule 2.9 of that Canon states in pertinent part: "(A) 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 or their lawyers, concerning a pending on impending matter …".

Hon. Michael R. Bluff initiated the ex parte communication. He had Ms. Barnett brought over from the jail, spoke with her, and questioned her without the presence of Counsel for the State of Arizona. The Hon. Michael R. Bluff considered communications made to him outside of the presence of both the State and the Defendant in revoking Ms. Barnett's release. At no time in the transcript does the Hon. Michael R. Bluff indicate from whom, or about what the information, was obtained. It was not from the State, from the Defense, or from the Adult Probation Department. Thus, it is safe to surmise the source of the information was just as Judge Bluff stated on page 4, lines 2-3 of Exhibit 18, that a person called and said Ms. Barnett cannot reside at that address. The Court accepted this anonymous and non-specific information outside the

presence of all parties and considered it when revoking the previously granted modification of release conditions.

In Part (B) of Rule 2.9 the Code of Judicial Conduct states: "If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of the matter, the judge shall make provision to promptly notify the parties of the substance of the communication and provide the parties with an opportunity to respond." The Hon. Michael R. Bluff gave no such notice to Ms. Barnett's Counsel nor to the State of Arizona.

Part (C) of Rule 2.9 states in pertinent part: "Except as otherwise provided by law, a judge ... shall consider only the evidence presented and any facts that may properly be judicially noticed." When Judge Bluff considered the information provided by the anonymous person who contacted him, he clearly violated this Rule.

Judge Bluff violated Rule 2.9 when he considered information not properly before him when he revoked Ms. Barnett's release and continued to violate Rule 2.9 when he did not promptly notify the State of Arizona and Defense Counsel.

Canon 1 of the Code of Judicial Conduct states: "A judge shall uphold and promote the independence ... of the judiciary, ... and shall avoid impropriety and the appearance of impropriety."

Rule 1.1 of that Canon states: "A judge shall comply with the law, including the Code of Judicial Conduct."

As listed above, the Hon. Michael R. Bluff failed to comply with the requirements of three Amendments to the Constitution of the United States, several Sections of Article 2 of the Constitution of the State of Arizona, and the Rules of the Code of Judicial Conduct.

Rule 1.2 of the Canon states: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

Judge Bluff's wanton disregard for vital Constitutional safeguards on May 1, 2018 erodes the public's confidence in the judiciary's independence, integrity, and impartiality. Furthermore, these actions are actual impropriety. Comment 5 to Rule 1.2 states: "Actual improprieties include violations of law, court rules, or provisions of this code." Judge Bluff violated the law by speaking to Ms. Barnett without her counsel present, questioning her while in custody without advising her of her right to counsel and her right to remain silent, and by revoking her previously granted release without Due Process of law.

Conclusion

Based upon the above, I respectfully ask this Commission to do what is appropriate to ensure that the Hon. Michael R. Bluff will respect the Constitutional Rights of people who are accused of a crime, to respect the roles of Counsel in criminal litigation, respect the Canons of the Arizona Code of Judicial Conduct to ensure confidence in the judiciary, and to faithfully follow the laws of the State of Arizona.

Sincerely,

YAVAPAI COUNTY PUBLIC DEFENDER

Matthew Cochran
Deputy Public Defender

cc: State Bar of Arizona, 4201 N. 24th St., Suite 100 Phoenix, AZ 85016

lesp

2018-221

MICHAEL R. BLUFF
JUDGE
DIVISION 7

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Arizona Superior Court

2840 NORTH COMMONWEALTH DRIVE
CAMP VERDE, ARIZONA 86322

JUL 27 2018

July 24, 2018

Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, AZ 85007

Subj: Response to Complaint No. 18-221

Dear Mr. Chairman and Members of the Commission:

Thank you for the opportunity to respond to the complaint filed by Mr. Cochran on behalf of his clients, Mr. Larry Ludwig and Ms. Jacquelyn Barnett. I fully acknowledge in both cases that I communicated with Mr. Cochran's clients outside his presence, and in Ms. Barnett's case, changed her release conditions without input from either the State or Mr. Cochran. However, I hope my explanation of both events places my actions in context. I leave for the Commission's determination the extent to which my actions violated the various provisions of the Ethical Rules cited by Mr. Cochran.

State v. Larry Ludwig (Case #V1300CR20168-0246)

I do not dispute the factual summary set forth in Mr. Cochran's complaint or the content of Exhibits[1] Nos. 1 through 10. The complaint correctly notes that after accepting the probationer's admission to a probation violation, I set the matter for disposition on October 17, 2016. At that hearing, I decided I needed more time to consider the probation department's Dispositional Report and Mr. Ludwig's written statement before deciding whether or not to reinstate his probation. The Disposition hearing was reset to October 24th.

Repayment of victim restitution was a significant consideration for me in determining whether or not to reinstate Mr. Ludwig's probation. The victim, Ms. Donna Cress, attended a restitution hearing (Exhibit #3) and provided a written

[1] The Exhibits referred to in this letter are those included in the original Complaint.

statement that was included as the last page in the Dispositional Report (Exhibit #7). The victim was interested in recovering as much restitution as possible during any probation reinstatement period.

After the hearing on October 17th, I felt it was necessary to clarify with Mr. Ludwig that he needed to be prepared to discuss his future employment and his ability to pay some amount towards restitution if reinstated. I was concerned I had not made that point clear during the October 17th hearing. As a result, I made the ill-fated decision to have him brought from the jail up to my courtroom the following morning and speak with him about the upcoming Dispositional Hearing scheduled for October 24th.

Honestly, I made the decision without giving it much thought. My sole intention was to ensure the probationer was prepared to address what I would be most concerned with at the next hearing, namely repayment of restitution. We had already continued the Disposition hearing once. As such, I wanted Mr. Ludwig to be prepared to answer my questions about employment and not have him feel like I was catching him off guard. The transcript of the hearing (prepared from the FTR Gold Recording) accurately recounts my two-minute conversation with this probationer. (Exhibit #9). As the transcript shows, the discussions were more of a monologue, not a dialogue. I intentionally did not ask Mr. Ludwig questions or solicit responses from him. I was instead telling him what I needed him to convey to me later at his Disposition hearing.

I was unaware of the conversations between the Public Defender's Office and Judge Mackey at the time (Exhibit #20) or the hearing before Judge Mackey (Exhibit #11) so I cannot respond to Mr. Cochran's summary of those discussions or the content of those Exhibits. However, Judge Mackey and I spoke about the matter sometime later. I told him I realized it was a mistake to speak with Mr. Cochran's client, regardless of my motives, and that it would not be repeated.

My actions involving Mr. Ludwig were a mistake, plain and simple. In hindsight, I should have issued a written notice to the parties advising them of my concerns and allowing the probationer an opportunity to prepare a strategy in consultation with his attorney to fully address my concern at Disposition. My decision to speak with him in the absence of his lawyer prevented that.

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Again, I do not dispute the majority of the factual summary set forth in Mr. Cochran's complaint or the content of Exhibits Nos. 12 through 20. Also, my explanation of what occurred in this case is set forth in my Self-Report letter dated June 8, 2018. Instead of repeating what was provided in the June 8th letter, I wish to incorporate the letter as part of my response to Ms. Barnett's case.

On Monday, April 30, 2018, Ms. Barnett was present in Court with counsel for a Revocation Arraignment. I entered denials on Ms. Barnett's behalf to the allegations in the Petition to Revoke Probation and spoke to both counsel at the bench about releasing her from custody if she could provide a stable residential address.

On the afternoon of April 30th, my Judicial Assistant received a call from the jail staff stating that the person who lived at the address given by Ms. Barnett was at the jail to pick her up. However, that person told the jail that the address shown on the Order Modifying Release Conditions (Exhibit #16) was incorrect. The jail staff informed my JA that they would not release Ms. Barnett with what they considered to be conflicting court orders and that they needed another order from me clarifying her release conditions.

What may not be readily apparent from the Exhibits attached to the complaint is that at my direction, my JA contacted the Public Defender's Office shortly after receiving the call from the jail on the afternoon of April 30th. While she does not recall who she spoke with, my JA advised the person that the jail was having a problem with Ms. Barnett's release orders and that I would have her brought before me the following morning at 8:30 a.m. on my regular Initial Appearance Calendar to address the matter. On the morning of May 1st, her attorney, Mr. Cochran was not present. Ms. Barnett was then seen by me and the transcript of that appearance is accurately transcribed in Exhibit #18.

Clearly I spoke with Ms. Barnett without her attorney, Mr. Cochran being present. As I stated in my earlier letter, in hindsight I should have postponed Ms. Barnett's appearance and reset the matter. However, at the time I had no reason to believe Mr. Cochran was unaware of the hearing and I assumed he would be present to resolve the address issue.

Also, it did not immediately dawn on me to postpone the hearing because during my regular morning initial appearance calendar I regularly speak to in-custody defendants who are represented by counsel. Although the Public Defender and County Attorney are aware of the standard time for my initial appearance calendar, they elect for budgetary reasons not to attend those hearings. With rare exceptions, neither side appears for initial appearance hearings in either the Superior or Justice Courts in Yavapai County. As such, it was normal for me to conduct my morning hearings without counsel present.

I conduct 7 to 15 Initial Appearances each day. Many of those appearances are for represented defendants who failed to appear for a previous court hearing in another Division. Others are post-sentencing matters like arrest warrants on Petitions to Revoke Probation where the original attorney has not withdrawn. I do not postpone these IA hearings and reset them with notice to counsel. Instead, I verify their identity, their address, confirm they have counsel, set the next court date and often modify their release conditions based on the information I have before me. I have never considered this a violation of the *ex parte* communication rule.

It is also not unusual for my JA to contact the Public Defender's Office and the County Attorney's Office to schedule and coordinate hearings. Often my JA simply contacts their office and informs counsel of when the hearing will take place, especially on something of immediate concern as in this case. This has been a common practice in my Division for over 7 years and no party has suggested it constitutes an ethical violation.

Be assured I am not attempting to justify my actions in this case because I did modify Ms. Barnetts' release conditions based on information provided to me by jail staff. I fully recognize now that that was improper. I simply offer the above explanation to clarify why the ex parte communication issue did not immediately come to mind.

In summary, my actions in the first case involving Mr. Ludwig were wrong and should not have occurred. I believe the second case involving Ms. Barnett is not simply a repeat of the first. My office contacted the Public Defender's Office immediately upon learning there was a problem with Ms. Barnett's address and I assumed Mr. Cochran would appear the following morning to help resolve the problem. I was also attempting to assist the jail staff with a problem that was preventing an inmate from being released from custody.

The lesson for me in all of this is act slower, regardless of the perceived urgency of the problem. I could have done many things differently at several points in the process. For example, I could have not tried to solve a jail problem. Instead, I could have had my JA direct them to contact the County Attorney's office and have them file a pleading on behalf of the jail requesting clarification of my release orders. Alternatively, I could have waited and addressed the issue at Ms. Barnett's next scheduled court hearing two weeks later. However, these courses of action would have delayed Ms. Barnett's release from custody.

Hindsight is always perfect. Looking back, I would not have taken the actions I did. However, I would offer in mitigation that in both cases I was only trying to assist a defendant in the hopes of a better outcome for them.

Finally, my Judicial Assistant is available to speak with an investigator from the Commission or provide a written statement if that is needed.

Thank you again for giving me the opportunity to explain my actions.

Respectfully,

Michael R. Bluff