STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of William A. Carter

ANSWER
File Nos. 2018/A-0202 &
2019/A-0086

As and for his answer to the Formal Written Complaint, Respondent respectfully shows and alleges as follows with respect to each paragraph of the Formal Written Complaint:

1. Admits.

2. Lacks knowledge or information sufficient to admit or deny.

3. Lacks knowledge, information or specific facts sufficient to admit or deny.

4. Admits.

CHARGE I

5. Admits that in January 2018, Respondent, in response to a motion made by the defendant's lawyer in *People v. Richard Quinn*, called the Albany County Correctional Facility and spoke to Lt. Ronald Murray about specific procedures for recording inmate telephone calls at the Albany County Correctional facility as described in the Formal Written Complaint. Respondent failed to notify the parties about this ex parte contact. Respondent denies that the information which he received from Lt. Murray was material to the legal issues which were actually raised at oral argument and at trial by the defendant, an alleged violation of equal protection. This argument, which concerned equal protection of all inmates from having their phone calls recorded, regardless of the specific procedures at any particular correctional facility, was clearly argued in the defendant's moving papers, attached to the Formal Written Complaint and quoted below:

> *14. Generally, the only difference between a detained pre-trial suspect and a pre-trial suspect at liberty is that one can afford to post bail, and one cannot...Thus, the government has free and unfettered access to a pre-trial suspect's communications based solely on his lack of economic resources, whereas a wealthy pre-trial suspect has no fear of such governmental intrusion in the absence of a warrant issued upon probable cause...The result is an arbitrary discrimination against indigent pre-trial suspects, which violates the equal protection clause of the New York State and Federal Constitution.*
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> * * *

11. Often the People justify this practice on the basis of consent because the inmate is warned that the call may be recorded and monitored and thus has no expectation of privacy. However, there is "a major distinction between prison authorities having access to prisoners' phone calls for purposes of prison security and discipline, and the prosecutors of that pre-trial prisoner having the same access for purposes of gaining advance knowledge of the pre-trial prisoner's strategy and potential witnesses" Johnson, 27 NY3d at 209...

(Exhibit A attached to the Formal Written Complaint, Affirmation of Defense Attorney Kelley, page 3, paragraph 11, 14).

6. Admits. Paragraph 7 of the Prosecutor's response to the motion in limine attached to the Formal Written Complaint states in part as follows:

I have spoken to Marcus Decker, a Sergeant with the Albany County Sheriff's Office, who is familiar with the practices of the Correctional Facility. Sergeant Decker advised me that warnings are conspicuously posted in the phone area that inmates' calls are subject to monitoring and recording. They are also included in the handbook provided to inmates upon reception into the facility. (Exhibit B, page 2, paragraph 7)

* * *

Both the First and Second Departments have recently considered the question and have universally held that jail calls are admissible evidence, and have rejected challenges to admissibility based on a number of constitutional salvos (See People v. Diaz, 149 AD3d 974, 976 [2nd Dept. 2017]).

7. Admits. Respondent denies knowledge or information sufficient to form a belief as to what witnesses might have been called if a fact-finding hearing had actually been held.

8. Admits.

9. Admits.

10. Admits.

11. Admits. The following statement was made by defense attorney Kelley during oral argument, according to a transcript of the proceeding attached to the Formal Written Complaint as Exhibit D:

*Ms. Kelley: ...I would just note that as far as I can tell, there have been no cases so far that deal with this specific issue that I'm raising in terms of equal protection...I would also argue that the People v. Diaz, (*concerning the specific warning given at the jail that inmate phone calls are being recorded*), that the People rely on, again, does not deal with the specific arguments that I'm raising*

in my motion with respect to the equal protection issue. So, I would argue that the holdings in that case, to the extent the People are asking them to be binding upon this court...that they are not the same arguments that I'm here raising.

12. Admits that Respondent considered the information provided to him by Lt. Murray in the sense that it confirmed the same information provided to him by the prosecution and the defense attorney, both of whom had spoken to Lt. Murray before the oral argument and both of whom appeared to agree with Murray's description of the procedures at the Albany County Correctional Facility for handling inmate phone calls. Respondent denies that he considered the information provided by Lt. Murray in issuing his decision, denial of the defense motion to preclude the phone conversations, because Lt. Murray's information was not relevant to or raised in the Defendant's equal protection argument.

13. Admits.

14. Admits.

15. Admits.

16. Admits.

17. Admits that Respondent inadvertently engaged in an improper ex parte communication with Lt. Murray in violation of the Rules Governing Judicial Conduct.

As and for an Affirmative Defense to Charge I and by way of Mitigation, Respondent alleges:

A. In 2016, the Court of Appeals decided *People v. Johnson*, 27 NY 3d 199, in which the Court rejected a claim by the defendant that the prosecution's ability to access recordings of the defendant's calls from the correctional facility detrimentally impacted the defendant's right to counsel under the 6th Amendment. Judge Piggot wrote a concurring opinion in the *Johnson* case, raising serious concerns about the ability of a prosecutor to access defendant's phone calls from the correctional facility. The majority opinion stated that while its review of the issue in *Johnson* was limited to a claimed violation of the right to counsel, which it rejected, "*our resolution of the narrowly drawn issues presented on this appeal should not be interpreted as this Court's approval of these practices*" Id. at 208. The *Johnson* decision seemed to invite further exploration of the right of the prosecution to access the defendant's recorded phone conversations under a different theory. The motion brought in the *Quinn* case by the defendant, appeared to be just such a response to this invitation – a test case focusing on the equal protection argument, rather than the denial of counsel argument. The equal protection argument did not depend on the practices of any specific correctional facility, but rather, on the unequal treatment of inmate defendants who were too poor to afford bail, versus defendants who

could afford to be released on bail and thus were not subjected to having their phone calls recorded and made available to the District Attorney.

B. The motion in the *Quinn* case was brought on very short notice in relation to the trial date. The moving papers were filed on Wednesday January 10, 2018, and oral argument was scheduled for Friday January 12, 2018, with the possibility of a fact-finding hearing being held sometime after, if necessary. The *Quinn* trial was scheduled to start on Tuesday, January 16, 2018. Respondent realized that if he could not decide the motion after hearing oral argument on Friday, he would probably have to postpone the *Quinn* trial, at considerable inconvenience to the defendant, witnesses and lawyers. Respondent very much wished to avoid this postponement.

C. As Respondent reviewed the *Quinn* motion, he realized that the motion was conclusory, with few facts connecting it to the specific practices of the Albany County Correctional Facility. This was unusual in his experience, where challenges to the admission of evidence usually revolved around specific facts. There was some suggestion in the moving papers that the District Attorney had "unfettered access" to inmate phone calls and that it was possible that legal calls with counsel could be accessed. However, it was not clear if these allegations related specifically to the defendant's calls in the Quinn case. Not initially realizing that this was a test case about the law, based on an equal protection argument, Respondent did not understand what specific jail procedures the defendant claimed were being violated. He believed that his best opportunity to clarify the relevant factual issues was at oral argument.

D. In order to prepare himself to ask relevant questions at oral argument to clarify the factual issues, and perhaps avoid a postponement of the trial, Respondent spontaneously decided to call the facility and obtained from Lt. Murray a description of the procedures routinely used at the correctional facility to handle inmate phone calls. In making this call, Respondent initiated an ex parte contact, which was improper. He did not understand this at the time, because he thought of ex parte contacts as discussions with interested parties about the merits or facts of a case and not general discussions with neutral officials about routine court or jail procedures. This is the reason Respondent told Lt. Murray that he did not want to talk about the defendant or his case. At no time did respondent discuss the defendant's case or the defendant with Lt. Murray. He now understands that he was wrong and has apologized repeatedly for his mistake and misunderstanding of the scope of the rule against ex parte contacts.

E. After Respondent received additional papers from the Defense and the Prosecution, and heard oral argument, he realized that: 1) both the prosecution, the defense and Lt. Murray were in agreement about the procedures used at the Albany County Correctional Facility; there was no dispute about the procedures used for inmate telephone calls and 2) the facts about the facility's procedure were irrelevant to the motion, because the motion now before the Court challenged all recordings of inmate phone calls in all New York correctional facilities as a matter of law, based on an equal protection argument. As a result, Respondent was able to rule on the motion after oral argument in favor of the District Attorney, based on the then well-settled precedent that inmate phone calls were

admissible. In sum, the defense had not established the equal protection argument sufficiently to overcome the very strong precedent favoring admission, which is also why this prong of the motion to set aside the verdict was denied. Afterwards, Respondent gave no more thought to his conversation with Lt. Murray, which in his mind was irrelevant to the motion he had just decided; a purely legal argument not specific to the *Quinn* case. Respondent did not tell the parties about his ex parte contact with Lt. Murray because he did not realize that his conversation was an ex parte contact, or that he had done anything improper.

F. Prior to the oral argument in the *Quinn* case on January 12, 2018, the assistant district attorney interviewed Lt. Murray and learned that Respondent had spoken ex parte with him about the procedures at the correctional facility. The District Attorney's office did not inform Respondent about this conversation; nor did they express to Respondent any objection to Respondent's ex parte contact with Lt. Murray or ask Respondent to disqualify himself from the *Quinn* case either before the argument or afterwards because of his conversation with Lt. Murray; nor did the District Attorney ask to call any witnesses to dispute any information given to Respondent by Lt. Murray or for any other reason. No witness testimony was requested by either side.

G. The defense attorney also interviewed Lt. Murray prior to the oral argument and, as a result, in her supplemental motion papers and at oral argument, appeared to be saying the exact same thing about the procedures at the Albany County Correctional Facility that was being said by the Assistant District Attorney and Lt. Murray. There was no dispute as to the procedures used at the Albany County Correctional Facility and the defense argument focused instead on the equal protection issue.

H. Respectfully, had the District Attorney's office promptly objected to Respondent's ex parte contact it would have alerted Respondent that his call to Lt. Murray was improper and he would have promptly informed both parties about his conversation and offered to recuse himself. Respondent's misunderstanding of the scope of the ex parte prohibition and the failure of the District Attorney to promptly object to his conversation with Lt. Murray arguably contributed to Respondent's failure to promptly notify both sides, at a time when the ex parte contact could have been addressed within the existing litigation as suggested by rule 100.3(B)6(a) of the Rules Governing Judicial Conduct.

I. The District Attorney's office waited approximately 6 months before filing a complaint with the Commission. Upon receiving the complaint, the Commission's staff interviewed the Defendant's attorney and, in the process, disclosed to her Respondent's ex parte communication. Respondent only realized that his contact with Lt. Murray was improper after receiving the Commission's complaint. Thus, defense counsel and Respondent learned at approximately the same time that the Commission considered Respondent's ex parte contact with Lt. Murray to be improper, some 6 months after the trial.

J. The defense attorney promptly told the defendant's appellate counsel about Respondent's ex parte contact. Appellate counsel decided not to include the ex parte communication in the appeal because, 1) Respondent's understanding of jail procedures appeared to be the

same as the defense understanding; the defense was not prejudiced and 2) the communication did not appear to be relevant to the equal protection argument that the defense was making. The supervisor of the defense trial attorney notified Respondent that appellate counsel had been advised of the ex parte communication.

K. The Commission investigation presented the question as to whether Respondent should now give formal notice to the parties about the ex parte contact some 6 months after the fact and after the trial had been concluded. The Rules Governing Judicial Conduct do not specify any requirement of notification to the parties following an ex parte contact, except in paragraph 100.3(B)6(a) where the rules suggest that certain "scheduling and administrative" ex parte contacts (not applicable here) would be proper if the parties were "promptly" notified, and that notification of the parties would otherwise be "*practical and appropriate.*" Factors suggesting that formal notification in the *Quinn* case, six months after the trial was concluded, would not be "*practical and appropriate*" include: 1) both parties already knew about the ex parte contact, and were free to make any argument they wished; 2) it was impossible that the notification could be "prompt" so that the issue could be dealt with within the context of the existing litigation and an opportunity for response provided (See Rules Governing Judicial Conduct 100.3(B)6(a)); 3) both parties and Respondent had interviewed Lt. Murray, the potential witness, and all had the same understanding of the procedures at the correctional facility; no party was prejudiced; 4) The subject of the ex parte contact was not directly relevant to any issues in the case (i.e. the specific procedures at the Albany County Correctional Facility were not directly relevant to the Defendant's equal protection argument); 5) even though the defense knew about Respondent's ex parte contact prior to filing its appellate brief, the issue of respondent's misconduct was not included in the appeal, indicating that the Defendant did not consider the ex parte contact relevant to the decisions; and 6) any official attempt to notify the Defendant's attorney of the ex parte contact, (notwithstanding that the Defense Attorney already knew about the ex parte contact), could well be interpreted by the District Attorney as an attempt to interfere in the appellate process, in that Respondent, as judge, would be suggesting to the defense an appealable issue. The issue of disclosure could not be submitted to the Advisory Committee on Judicial Ethics for an advisory opinion because the Committee will not accept for an advisory opinion any issue that is the subject of a complaint before the Commission. Respondent discussed the ex parte communication with his Administrative Judge upon receipt of the initial complaint and was not advised to make this disclosure. On advice of Counsel, Respondent decided not to further complicate the appeal of the *Quinn* case, by issuing a formal and arguably redundant notification to the parties of the ex parte contact that could have suggested bias on his part. Notification was no longer "practical or appropriate" (See Rules Governing Judicial Conduct 100.3(B)6(a)).

L. Respondent respectfully notes, that the issue of disclosure of the ex parte communication has been repeatedly raised by the Commission staff. The first occasion was in the initial interrogatory wherein Respondent explained his reasons for not making the disclosure and offered to make the disclosure if the Commission thought it appropriate to do so under the circumstances. On May 6, 2019, Respondent appeared with counsel at an investigative appearance. At the conclusion of the interview by Commission staff,

respondent was again asked if he had made a disclosure to the parties and appellate counsel of the ex parte communication. Respondent once again replied that he had not but would do so if the Commission thought that it was appropriate under the circumstances. Commission staff declined to make such a recommendation. In a letter dated October 2, 2019, Respondent was again asked in a letter from Commission staff if he had yet disclosed the ex parte communication to the parties. Respondent replied that he had not and again explained why he believed that under the circumstances of the *Quinn* case, where all parties were aware of the ex parte communication, it was not "practical or appropriate" and further, that he was acting on the advice of legal counsel. To date, Commission staff has never cited to any authority for the proposition that disclosure to the parties under the particular circumstances of this case is required.

CHARGE II

18. Admits that his secretary, to whom he delegated the responsibility of preparing his quarterly reports, failed to include undecided appeals and post-conviction motions, because the secretary was not aware that these matters had to be reported.

19. Admits.

20. Admits that he delegated preparation of the Quarterly reports to his secretary but denies that he purposely failed to review the reports. Respondent's secretary and law clerk informed him that there were no undecided matters that had to be included on the Quarterly reports when he inquired about their status.

21. Admits.

22. Admits.

23. Admits that Respondent's secretary made an inadvertent mistake in not including undecided appeals and post-conviction motions on the Quarterly reports but denies that this mistake and Respondent's failure to identify it as a mistake, is misconduct.

As and for an Affirmative Defense to Charge II, and by way of Mitigation, Respondent asserts:

A. The amended Quarterly reports covered the first 10 quarters when Respondent began his term in County Court. During this time, there were a total of 16 cases with undecided motions or appeals that should have been reported. This occurred over a period of 30 months. The first quarter of 2017 was the only quarter where there were more than 3 undecided matters that were reportable. In that quarter, there were 4 undecided cases. These 4 cases were inherited from Judge Stephen W. Herrick upon his retirement and were already pending when Respondent began his term in County Court. The remaining 12 of the 16 cases originated with the Respondent. After that first quarter, there was only one quarter with 3 reportable matters. For each of the remaining eight quarters, there were only 1 or 2 undecided matters that were reportable. There were, unfortunately, several more complicated matters that remained undecided and were reportable on consecutive reports. Specifically, *People v R* [redacted] was reportable on the third and fourth quarterly reports for 2017; *People v J* [redacted] *S* [redacted] was reportable on the first and second quarterly reports for 2018; *Five Corners v Valentino* was reportable on the third and fourth quarterly reports for 2018 and the first quarterly report for 2019.

B. Respondent is usually prompt in deciding cases on his docket. He is consistently one of the most productive judges in terms of cases disposed of within Standards and Goals as well as on the Quarterly report. It should be noted that, since this reporting error was discovered, there have been no reportable undecided matters for the Quarterly report. There is no reason to sanction a judge on such a technical mistake; not all mistakes are the result of misconduct. It is respectfully submitted, that Respondent and his staff were transitioning from the procedures utilized in City Court to those of County Court. For the most part, no instruction was given to him or his staff on county court procedures. Furthermore, regarding Respondent's work performance, his Administrative Judge stated in a letter to the Commission,

> *"In my capacity as Administrative Judge and Supervising Judge, I directly supervised Judge Carter since he took the bench in 2002.*
>
> *I know Judge Carter to be diligent, thoughtful and always mindful of his obligation to provide full and timely justice. He has always maintained a large inventory of cases and it has been the rare occasion where he has more than a few cases go over standards and goals. I know that is a direct result of a conscious effort on his part, exercised every day, to provide timely disposition of the cases assigned to him.*
>
> *Also, I should note that whenever an issue arose where I needed a judge to step in and assist, Judge Carter was first on the scene."*

C. It is Respondent's practice, like most judges, to have his law clerk perform legal research and draft a decision before submitting the matter to Respondent for review, discussion and editing of the final draft. While respondent drafts many of his own decisions and

orders and issues oral decisions from the bench, post-conviction matters are assigned to his law clerk to prepare. Respondent's law clerk was formerly employed by the Appellate Division, Third Department and is very knowledgeable and skilled in these matters. In each of the 16 cases which were delayed beyond 60 days, Respondent's law clerk (who suffers from a debilitating medical condition requiring surgery in the very near future) was delayed in submitting a draft decision to Respondent. Although Respondent regularly inquired of his law clerk as to her progress on these matters, each time he was assured that the work was being performed and was not overdue. Regrettably, this was not the case and he was unaware that his law clerk had fallen behind. Under these circumstances and the relatively small number of cases spread out over a thirty-month period, this should not be considered misconduct.

D. Although Respondent has been the subject of Commission discipline in the past, neither of the charges here reflect violations of the prior discipline.

WHEREFORE, Respondent believes that the within charges should be dismissed with a letter of caution.

Dated: January 17, 2020
Albany, New York

WILLIAM A. CARTER, JCC

VERIFICATION

William A. Carter, being duly sworn, deposes and says:

I am the Respondent. I have read the foregoing answer and know the contents thereof. The same are true to my knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters, I believe them to be true. To the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of these papers or the contentions therein are not frivolous as defined in subsection (c) of section 130-1.1 of the Rules of the Chief Administrator (22 NYCRR).

WILLIAM A. CARTER

Sworn to before me this
17th day of January 2020

Notary Public Saratoga County
Exp. 9/10/2022
Reg. No. 01HI4971644

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THOMAS A. BRESLIN
District Administrative Judge
Third Judicial District

BETH A. DIEBEL, ESQ.
District Executive

CHRISTY Q. BASS
Deputy District Executive

January, 17 2020

Re: Judge William Carter
Albany County Court Judge

Dear Sir/Madam::

I have been the Administrative Judge for the Third Judicial District for the last 6 years and prior to that served as the Supervising Judge of criminal courts of this district for the preceding 15 years.

In my capacity as Administrative Judge and Supervising Judge, I directly supervised Judge Carter since he took the bench in 2002.

I know Judge Carter to be diligent, thoughtful and always mindful of his obligation to provide full and timely justice. He has always maintained a large inventory of cases and it has been the rare occasion where he has more than a few cases go over standard and goals. I know that is a direct result of a conscious effort on his part, exercised every day, to provide timely disposition of the cases assigned to him.

Also, I should note that whenever an issue arose where I needed a judge to step in and assist, Judge Carter was always first on the scene.

Thank you for taking the time to read this letter and please let me know if there is any additional information I might provide.

Sincerely,

Hon. Thomas A. Breslin
Supreme Court Justice