

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

DETERMINATION

MICHAEL A. GARY,

a Judge of the New York City Criminal
Court and an Acting Justice of the
Supreme Court, 2nd Judicial District,
Kings County.

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Leslie G. Leach¹
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Mark Levine and Erica K. Sparkler, Of Counsel)
for the Commission

Greenberg & Wilner, LLP (by Harvey L. Greenberg) for the Respondent

¹ Judge Leach was appointed to the Commission on September 12, 2016. The vote in this matter was taken on August 11, 2016.

The respondent, Michael A. Gary, a Judge of the New York City Criminal Court and an Acting Justice of the Supreme Court, 2nd Judicial District, Kings County, was served with a Formal Written Complaint dated February 29, 2016, containing one charge. The Formal Written Complaint alleged that after being informed that a defendant had threatened a witness, respondent threatened to hold an assistant district attorney in contempt, to declare a mistrial with prejudice and to impose sanctions on the District Attorney's Office if the defendant was arrested before the trial concluded. Respondent filed a verified Answer dated March 22, 2016.

On July 27, 2016, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On August 11, 2016, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the New York City Criminal Court since 1987 and an Acting Justice of the Supreme Court, 2nd Judicial District, Kings County, since 1994. His current term expires on December 31, 2020. Respondent was admitted to the practice of law in New York in 1975.

2. As set forth below, while presiding over the trial in *People v Kevin Bartholomew* on March 13 and 14, 2014, respondent, without basis in law, threatened to:

(1) hold an assistant district attorney in contempt of court if the defendant was arrested for threatening a witness in the case, (2) declare a mistrial with prejudice if the defendant was arrested, and (3) impose financial sanctions upon the District Attorney's Office if a mistrial was declared because of the arrest. Respondent also yelled and acted in a discourteous manner toward the assistant district attorney.

3. In March 2014 respondent presided over a jury trial in *People v Kevin Bartholomew*, in which the defendant was charged with raping his daughter.

4. On Wednesday March 12, 2014, Assistant District Attorney ("ADA") Lisa Nugent called Joleane Joseph, the defendant's former girlfriend and mother of his minor son, to testify. Ms. Joseph testified on direct examination and was cross-examined through the afternoon session. She returned the next day and was cross-examined for the morning session on March 13th.

5. Ms. Joseph completed her testimony before court was recessed for lunch. Toward the end of the luncheon recess, and before trial resumed, there was an off-the-record conference during which ADA Nugent informed respondent that the defendant, who was free on bail, had allegedly approached Ms. Joseph as she was leaving the courthouse during the lunch break and said to her, "You're dead." ADA Nugent also informed respondent that Ms. Joseph had been taken to the 84th Precinct stationhouse to make a complaint against the defendant.

6. During the conference, respondent spoke to ADA Nugent in a raised voice and threatened to hold her in contempt if the defendant was arrested for threatening

Ms. Joseph.

7. On the record, ADA Nugent summarized the threat the defendant had allegedly made against Ms. Joseph. Respondent directed that the defendant was not to be arrested for making a threat while the rape trial was ongoing. Addressing ADA Nugent, respondent continued, “Because if he is, then I will hold you in contempt for violating my direct order.”

8. Respondent also said that if the defendant was arrested, defense counsel “will make a motion for a mistrial ... [a]nd it is very, very likely that I will grant that mistrial motion with prejudice.” Respondent asked ADA Nugent, “Do you understand what with prejudice means?”

9. Respondent then told ADA Nugent to notify her supervisors to “coordinate with the police personnel from the 84th Precinct ... such that nothing happens to this man until this case is over.”

10. After calling her supervisor, ADA Nugent advised respondent, “We have no control over ... the police department.” Respondent replied, “Don’t give me any BS about you have no control over the police department You can certainly tell a detective or police officer investigating that on the orders of the DA’s Office, no arrest is to be made until it is authorized by your office.”

11. ADA Nugent requested the defendant’s remand on the rape charge in light of his threat to the witness. Respondent denied the request, and the trial resumed.

12. The next day, Friday March 14, 2014, during a morning recess of the

trial, respondent raised the issue of the defendant's arrest again, stating:

"Let's make something crystal clear, People. Today is Friday. We are going to finish the People's case now with this last witness. The defense case is supposed to start on Monday. If you were to have ... Mr. Bartholomew arrested any time between now and Monday ... Mr. Bartholomew ... would not be in a position to prepare his defense.

* * *

If there is a mistrial, if this case has to be delayed because you have unnecessarily and unjustifiably prevented the defendant from seeing his attorney and preparing his defense and this matter has to be adjourned, I will consider, one, financial sanctions against your office. And number two, I will certainly consider a mistrial with prejudice."²

13. ADA Nugent's supervisor, ADA Coleen Balbert, then approached the bench and told respondent that the District Attorney's Office would not advise the Police Department to refrain from arresting the defendant. Respondent directed ADA Balbert to have the detective or a supervising officer in the courtroom at 2:15 that afternoon.

14. After the lunch recess, ADAs Nugent and Balbert returned to the courtroom accompanied by Lieutenant Joseph LaBella and Detective William Bush.

² While the Administrator takes no position on whether the defendant should or should not have been remanded, respondent avers and the trial transcript corroborates that he had the following concerns. Had the defendant been remanded on Thursday March 13, the Department of Corrections would have had to insure his presence in court for the resumption of trial on Friday March 14. However, such remand would have meant his continued incarceration over the weekend, likely at Riker's Island, which would likely have impeded his ability to meet with counsel to prepare for the commencement of his defense on Monday March 17. Any custodial movement of the defendant associated with his arrest and processing on the new charge may have further impeded his ability to meet with counsel for trial preparation purposes. In addition, at the time of these discussions on March 13 and 14, respondent considered that the defendant had not formally been charged with threatening his girlfriend and had been coming to court as required while out on bail throughout the course of this case.

ADA Balbert stated that, according to Police Department policy, the defendant should have been arrested in connection with threatening the witness.

15. Respondent acknowledged on the record that he had no authority to order the Police Department to refrain from arresting the defendant. However, he beseeched the officers not to arrest the defendant until after the trial concluded. Respondent explained his concern that an arrest might require a mistrial and cause the victim to have to testify again about being raped by her father.

16. Lieutenant LaBella did not want to interfere with the felony rape trial and agreed with defense counsel that the defendant would not be arrested before the conclusion of the trial, but would surrender to the police after the verdict.

17. On March 18, 2014, the defendant was found guilty and was remanded pending sentence.

18. Although the police intended and were prepared to arrest the defendant promptly for threatening Ms. Joseph's life, they delayed doing so because of respondent's statements. Respondent sentenced the defendant to 15 years in prison and 20 years of post-release supervision. After sentence was imposed, the police arrested and charged the defendant with menacing, a B misdemeanor, having a maximum possible sentence of 90 days in jail. However, the Kings County District Attorney's Office chose not to prosecute the defendant on the menacing charge and it was dismissed for failure to prosecute. Notably, the prosecution had never requested an Order of Protection on behalf of Joleane Joseph in the three years this case had been pending trial, nor did they do so at

the time they represented she had been allegedly threatened by the defendant Mr. Bartholomew.

Additional Factors

19. Respondent acknowledges that it was wrong and without basis in law to threaten to (A) hold the prosecutor in contempt if the defendant was arrested, (B) declare a mistrial with prejudice if the defendant was arrested and (C) impose financial sanctions upon the District Attorney's Office if a mistrial was declared because of the defendant's arrest.

20. Consistent with his statements on the record in the *Bartholomew* case, respondent testified under oath during the Commission's investigation that he was motivated by his concerns (A) to conclude the case and avoid a mistrial and (B) to spare the young victim from having to testify again at a retrial. In doing so, he conceded in his testimony that he spoke in a rash fashion to the prosecutor. Furthermore, respondent believed a mistrial would result if the trial was delayed by the defendant's arrest on the menacing charge because, as evidenced in the trial record and respondent's Answer, two jurors reported to the Court Officer that they would not be able to return after Monday, March 17th, and only one alternate juror remained.

21. As the *Bartholomew* trial transcript demonstrates, respondent acknowledged contemporaneously and on his own that he could not directly order the police not to arrest the defendant. When the two police officers involved in this matter came into respondent's court, respondent expressed his preference that the police not

arrest the defendant until after the trial was concluded, and he explained why he was making this unusual request. However, respondent did not order them to postpone the arrest.

22. Lieutenant LaBella, the supervising police officer in this matter, testified under oath during the Commission's investigation that, in postponing the arrest as requested by respondent, the police acted in a manner they considered appropriate under the circumstances, *i.e.*, agreeing to delay the arrest and to facilitate the defendant's surrender through an agreement with defense counsel, which is not unusual. Lieutenant LaBella also testified that while respondent's request to postpone the arrest was unusual and caused the police some concern, respondent did not control their actions.

23. Respondent never held ADA Nugent or anyone else in contempt in connection with the *Bartholomew* case.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.3(B)(3) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

On several occasions over two days, respondent threatened to use his judicial power to punish an assistant district attorney and her office though he lacked any

lawful basis to do so. After learning that the defendant had allegedly threatened a witness who had just completed her testimony, respondent repeatedly told the ADA that he would hold her in contempt and would consider granting a mistrial with prejudice if the defendant was arrested before the trial concluded. He underscored his threats with a snide question (“Do you understand what with prejudice means?”), derided the ADA’s statement that her office had no control over the police department, and made clear that he would hold her personally responsible if an arrest was made. The next day, with a supervisor present, respondent reiterated his threat of a mistrial with prejudice and warned that he would consider financial sanctions against her office if a mistrial occurred.

Respondent has explained that he was motivated by concern to avoid a mistrial so that the young victim would not have to testify again, and that he was also concerned that an immediate arrest and incarceration would impede the defendant’s ability to assist in preparing his defense. Nevertheless, baseless threats of contempt and sanctions against an attorney cannot be justified. Such behavior is inconsistent with the high standards of judicial decorum required of every judge (Rules, §100.3[B][3]; *see Matter of Hart*, 2009 NYSCJC Annual Report 97; *Matter of Shkane*, 2009 NYSCJC Annual Report 170).

The fact that respondent did not act on his threats does not excuse the misconduct (*Matter of Hart, supra; Matter of Waltemade*, 37 NY2d [nn], [iii] [Ct on the Judiciary 1975][judge engaged in misconduct by inappropriately threatening lawyers and witnesses with “sanctions” and contempt, notwithstanding that his threats were never

followed by a contempt citation or other disciplinary action]). As the record indicates, respondent never had occasion to carry out his threats since the police agreed to delay the arrest after respondent made a direct plea. In any event, regardless of whether he intended to follow through on the threats he made, the threats were inappropriate since he had no lawful basis to act on them. Such statements to a prosecutor – especially by a judge who “yelled” and spoke in “a raised voice” – are highly intimidating and could only be perceived as a serious warning of very significant consequences, including a mistrial with prejudice in a case involving a serious crime. As respondent has acknowledged, his discourteous conduct was inconsistent with the required standards of judicial behavior.

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

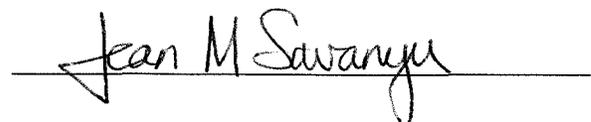
Mr. Belluck, Mr. Harding, Judge Acosta. Mr. Cohen, Ms. Corngold, Mr. Emery, Judge Klonick, Mr. Stoloff and Judge Weinstein concur.

Judge Leach did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: October 3, 2016

A handwritten signature in black ink that reads "Jean M. Savanyu". The signature is written in a cursive style and is positioned above a solid horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct