

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

INQUIRY CONCERNING JUDGE A.P. FULLER

APPEAL FROM THE REPORT OF
THE COMMISSION ON JUDICIAL
QUALIFICATIONS FOR THE STATE
OF SOUTH DAKOTA

JUDGE FULLER'S BRIEF IN SUPPORT OF PETITION
FOR MODIFICATION OR REJECTION OF THE
RECOMMENDATION OF THE JUDICIAL QUALIFICATIONS
COMMISSION AND REQUEST FOR APPOINTMENT OF REFEREE

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PRELIMINARY STATEMENT

This Brief is respectfully submitted by Judge A.P. Fuller in support of his Petition for Modification or Rejection of the Recommendation of the Judicial Qualifications Commission and Request for Appointment of Referee.

Throughout this Brief, Judge A.P. Fuller will be referred to as "Judge Fuller." The Judicial Qualifications Commission for the State of South Dakota will be referred as "Commission."

Reference to the Commission's Complaint dated September 7, 2010, which was received into evidence as Exhibit A, will be denoted by "Complaint," followed by the paragraph number and/or exhibit number. Reference to the Answer dated October 15, 2010, will be denoted by "Answer," followed by the paragraph number. Reference to the transcript of the Show Cause Hearing held on September 30, 2010, will be denoted by "SC" followed by the page number. Reference to the transcript of the hearing held on December 13, 2010, will be denoted by "HT" followed by the page number. Reference to the exhibits received by the Commission at the two hearings, will be by their assigned letter. Reference to the Appendix to this brief will be denoted by "App." followed by the assigned exhibit letter.

JURISDICTIONAL STATEMENT

The Rules of Procedure of the Judicial Qualifications Commission provide that, "[w]ithin thirty days of service of the commission's findings, conclusions and recommendation, the judge may file an original and five copies of a formal petition with the Supreme Court for modification or rejection of the commission's recommendation." SDCL 16-1A, Appx., III, 28(a). The Unanimous Findings of Fact and Conclusions of Law of the Commission, together with the Commission's Certification, recommending retirement or removal, were served on January 28, 2011.

LEGAL ISSUES

- I. Whether Judge Fuller was afforded the due process to which he is entitled under the Rules of Procedure of the Judicial Qualifications Commission, when the Commission relied upon evidence that did not relate to the factual allegations of the Complaint and evidence that was not disclosed to Judge Fuller prior to the hearing.

Evidence was presented at the hearing which did not relate to the factual allegations of the Complaint. With regard to some of the evidence, Judge Fuller had no notice at all. Nonetheless, subsequent to the hearing, the Commission permitted the amendment of the Complaint to conform to the evidence and virtually all of this evidence became a part of the Commission's findings. Judge Fuller

believes this was a violation of the rules, which afford him the reasonable opportunity to defend against the charges and, with regard to amendments, reasonable time both to answer the amendment and to prepare and present a defense against the matters charged thereby.

SDCL 16-1A, Appx., III, 6(b).

SDCL 16-1A, Appx., III, 10(a).

SDCL 16-1A, Appx., III, 12.

SDCL 16-1A, Appx., III, 14.

II. Whether Judge Fuller was afforded the due process to which he is entitled under the Rules of Procedure of the Judicial Qualifications Commission, when the Presiding Judge of the Seventh Circuit failed to recuse himself from the proceedings.

The Commission that heard the evidence and recommended Judge Fuller's retirement or removal included the Honorable Jeff W. Davis, who is the Presiding Judge in the Seventh Judicial Circuit. The evidence at the hearing demonstrates that Judge Davis had an obligation to disqualify himself from participating in the investigation of Judge Fuller's conduct under the standards provided in Canon 3 E of the Judicial Code.

SDCL 16-1A, Appx., I, 3.

SDCL 16-2, Appx. Canon 3.E.

III. Whether the Commission's recommendation for Judge Fuller's retirement or removal is excessive.

While there is no apposite authority from this jurisdiction on the appropriate recommendation for conduct of the nature described in the Complaint, decisions from other jurisdictions suggest that the Commission's recommendation is excessive.

In re Woodard, 919 So.2d 389 (Fla. 2006).

In Re Disciplinary Proceeding Against Eiler, 236 P.3d 873 (Wash. 2010).

IV. Whether the Court should appoint a referee to take testimony and make findings and recommendations.

SDCL 16-1A, Appx. III, 29.

STATEMENT OF THE CASE

On May 19, 2010, a complaint alleging that Judge Fuller violated the Code of Judicial Conduct was filed by Pennington County State's Attorney Glenn A. Brenner, Rapid City Chief of Police Steve Allender, and Pennington County Sheriff Don Holloway. (Complaint, Ex. 1) The May 19, 2010, complaint was filed with the Commission and asserted that Judge Fuller violated Canons 1, 2, and 3 of the Code of Judicial Conduct through statements made by him during an April 28, 2010, proceeding. (Complaint, ¶ 4, Ex. 1) The Complaint was served on Judge Fuller on or about June 24,

2010. (Complaint, ¶ 2) Judge Fuller's June 28, 2010 response acknowledged his wrongdoing by indicating "[t]he allegation is correct." (Complaint, ¶ 5)

The Commission commenced an investigation into Judge Fuller's judicial demeanor. (Complaint, ¶ 10) Attorney Daye Nelson was hired to complete the investigation. Id. Attorney Nelson interviewed court system employees, lawyers, and law enforcement officers as part of his investigation. (Complaint, ¶ 11; Ex. 4) Attorney Nelson's investigation report was submitted to the members of the Commission on or about August 7, 2010. Id.

Following the investigation, formal proceedings were instituted in September, 2010. The Commission's Notice of Formal Proceedings and Complaint, dated September 7, 2010, were served on Judge Fuller on or about September 8, 2010. (SC 10) On September 9, 2010, the Commission served an Order to Show Cause, commanding Judge Fuller to appear before the Commission and show cause why the Commission should not recommend to this Court that he be suspended from office, with compensation, while this matter was pending. On September 30, 2010, the hearing on an Order to Show Cause was held. Following the hearing, the Commission recommended that this Court suspend Judge Fuller with pay during these proceedings. This Court entered an Order of Temporary Suspension on October 6, 2010.

Judge Fuller served an Answer on or about October 15, 2010. The Commission served Notice of Formal Hearing on November 23, 2010, setting a formal hearing on the allegations of the Complaint for December 13, 2010. The hearing occurred as scheduled.

Following the hearing, by a letter dated December 14, 2010, counsel for the Commission moved the Commission to allow the Complaint to be amended to conform to the proof presented at the hearing. Judge Fuller's attorneys objected to the motion on various grounds in a letter dated December 15, 2010. In its December 29, 2010 letter, the Commission granted the motion to amend.

In the same letter, the Commission enclosed its proposed findings, conclusions, and recommendations, and noted that Judge Fuller's proposed findings and conclusions were rejected. On January 20, 2011, Judge Fuller served objections to the findings and conclusions. On January 28, 2011, the Commission served its Report and Certification.

STATEMENT OF FACTS

A. General background.

Judge Fuller is the fourth of five generations of lawyers in his family. (HT 340) His daughter, Alecia, is the fifth generation and practices law in Rapid City. Id. He graduated from law school in 1968 and began his legal

career as an associate with the Morgan & Fuller law firm in Mitchell. (T301-302) In July, 1971, he moved to Lead, South Dakota, where he practiced law until he became a judge.

(T302)

Judge Fuller was appointed to the bench of the Seventh Judicial Circuit in the State of South Dakota in March, 2003. (T303) He completed that term and was re-elected after a contested race against, among others, Lara Roetzel in 2006. (T86) Other than this case, Judge Fuller has never had a complaint brought against him which required him to appear before the Commission, and has never been disciplined by the Commission in any fashion. (T360-361)

Numerous allegations were lodged in the Complaint against Judge Fuller, and, as it turned out, additional allegations were brought on for the first time at the December 13, 2010 hearing without any notice. A great deal of these unnoticed allegations and the evidence presented in support of them were included in the Commission's findings. Each of the allegations, both noticed and unnoticed, will be discussed in turn.

B. Allegations of the Complaint against Judge Fuller.

Judge Fuller did not dispute the factual accuracy of following allegations in the Complaint. (HT 13)

1. April 28, 2010 Adjudicatory Hearing comments.

The allegation which started this matter stemmed from comments Judge Fuller made in an April 28, 2010, juvenile proceeding. The Complaint alleges that Judge Fuller made inappropriate comments and used a disgusted tone of voice following a Rapid City Police Officer's testimony. (Complaint, ¶ 8, Ex. 3) Judge Fuller inquired as to why the officer stopped the vehicle; following the officer's response, Judge Fuller uttered the statement, "bunch of racists." (Complaint, ¶ 3, Ex. 3) Notably, the Honorable Thomas L. Trimble heard testimony concerning the same stop in conjunction with an adult defendant who was in the vehicle, and found that there was no probable cause.

2. July 13, 2010 discussion with Heidi Linngren.

On July 13, 2010, prior to a proceeding in his Court, Judge Fuller had an informal discussion with Assistant Attorney General Heidi Linngren. (Complaint, ¶ 14; Ex. D; SC 36-38) During this discussion, Judge Fuller indicated that he was the subject of a complaint with the Commission. Id.

3. Reference to juveniles.

Judge Fuller used the phrase "my little pecker-heads" when referring to juvenile court. (Answer, ¶ 16; T59)

4. **Comments and gestures toward an attorney.**

During a bench trial approximately three and one half years ago, Judge Fuller gave the "bird" to an attorney from the bench, and called one of the attorneys appearing before him an "asshole" while in chambers. (Complaint, ¶ 17; SC 49-50) The attorney, Bart Banks, testified that he recognized both things as being in jest or part of the banter back and forth between he and the judge. (SC 49-51) During that same trial, Judge Fuller indicated to counsel he thought the South Dakota Supreme Court made an incorrect decision on the case which had been reversed and remanded to him for re-trial. (Answer, ¶ 18)

5. **Ex parte communication.**

Finally, in a civil proceeding, Judge Fuller initiated ex parte contact with one of the attorneys in the case to inform him of a case that was adverse to his client's position. (Complaint, ¶ 20; HT 247-48) The information was later shared with the other attorneys involved in the case. Id.

C. Commission's findings against Judge Fuller which related to conduct which was not set forth in the Complaint against him.

While the Complaint set forth the preceding five categories of misconduct, the hearing that took place featured a barrage of misconduct which was not properly alleged.

1. 2004 Conduct toward Fall River court personnel.

Only a part of this conduct was laid out in Nelson's report, and no allegation in the Complaint was directed to this conduct. It was not alleged to constitute a violation of the Judicial Canons. Foster testified at the hearing and claimed that Judge Fuller used the word "goddamn" when referring to personnel or the schedule. (HT 20; 25-26) She also testified about what she claimed was a hostile work environment and its impact on her deputy clerks, and that she reported the situation to the Seventh Circuit Court Administrator (HT 21-24; Ex. E) The full page memo the clerk of courts wrote to the court administrator never mentions the use of profanity. (Ex. E) There is no evidence that the court administrator or the presiding judge ever brought these matters to Judge Fuller's attention. (HT 56) In fact, Judge Fuller testified that they were not brought to his attention. (HT 401)

There was also testimony presented at the hearing that Judge Fuller was overheard in chambers yelling and swearing and using the "F" word, apparently in a private conversation. (HT 26-27) This was neither mentioned in Nelson's Report nor alleged in the Complaint.

2. **Swearing at a lawyer in open court in Fall River County.**

According to Foster, Judge Fuller told an attorney who was trying to argue her point "to shut the damn statutes, he had already made his decision and he didn't need to be told what the law was." (HT 27-28) This was neither mentioned in Nelson's Report nor alleged in the Complaint, and allegedly happened more than six years ago.

3. **Conduct toward the Custer County Clerk of Courts.**

Although this conduct was laid out in Nelson's report, no allegation in the Complaint was directed to this conduct, and it was not alleged to constitute a violation of the Judicial Canons. Deb Salzsieder testified that Judge Fuller became red faced, angry and pointed his finger at her and told her, "you will do as you are told." (SC 63-64) The incident occurred in 2007. (SC 62) Salzsieder reported to the court administrator that she preferred not to work with Judge Fuller because of his treatment but acknowledged that she would do as she was told, since it was her job. Id. There is no evidence the court administrator or any presiding judge mentioned these complaints to Judge Fuller.

4. **Treatment of court services officers.**

Although this conduct was laid out in Nelson's report, no allegation in the Complaint was directed to this

conduct, and it was not alleged to constitute a violation of the Judicial Canons. The Commission found that Judge Fuller dealt with Court Service Officers quite often in an irritated, stern voice in open Court and became disrespectful, demeaning and rude toward them. (HT 34-35) With regard to these Complaints, there was no testimony presented which demonstrated that Judge Fuller was told that court services officers were displeased with him or that they perceived him to be rude, demeaning or disrespectful prior to the proceedings instituted against him. Court Services Officers also had expressed concern for their safety in his Courtroom, based upon the number of people in the Courtroom and the logistics. (HT 37-38)

5. Comment about hanging Indians.

This conduct was not laid out in Nelson's report, no allegations of the Complaint were directed to this conduct, and it was not alleged to constitute a violation of the Judicial Canons. The Commission found that Judge Fuller was heard to describe portraits of Native Americans in his Courtroom in the following terms: "This is where I hang my Indians." (HT 57-58) Interestingly, the testimony concerning this comment came from Jeffrey Krattenmaker, the Court Administrator for the Seventh Judicial Circuit, who not only

exhibited a willingness to give negative testimony concerning Judge Fuller, but also took it upon himself to gather evidence which could be used against him.

Judge Fuller was referring to pictures in his courtroom that had to be taken down and put back up because audio video equipment was behind them. (HT67) The testimony indicated that Judge Fuller's court was not in session when he made the comment; and that he immediately recognized the off-color nature and inappropriateness of the comment after he made it. (HT 352-353) Judge Fuller also testified at the hearing about his respect for Native American leaders. Id.

6. **Solicitation of funds from Krattenmaker.**

There was testimony at the hearing that Judge Fuller requested that Mr. Krattenmaker make a \$1,000 contribution toward his re-election campaign. (HT 64-65) This conduct was not laid out in Nelson's report, no allegations of the Complaint were directed to this conduct, and it was not alleged to constitute a violation of the Judicial Canons. In fact, while the report alludes to the fact that Mr. Krattenmaker told Nelson something about election misconduct, Nelson specifically indicated that he believed the matter to be beyond the purview of the Commission and included nothing about the matter in his report. When

counsel for Judge Fuller attempted to interview Mr. Krattenmaker regarding the allegations, he refused to discuss the election, saying the topic would not be a part of the hearing. The allegations were leveled for the first time at the hearing with no notice of the specific allegations and no ability to defend against them. Judge Fuller unequivocally denies this allegation.

7. **Lara Roetzel's Testimony.**

Although the conduct described by Ms. Roetzel that follows was laid out, in part, in Nelson's report, no allegations of the Complaint were directed to this conduct, and it was not alleged to constitute a violation of the Judicial Canons. The Commission found Ms. Roetzel's testimony concerning a number of things credible. The Commission made these credibility findings despite the fact that Ms. Roetzel gave Nelson information that was proven to be false. According to Nelson's report, Roetzel stated that "she recalls that during a DWI jury trial of Defendant Red Star Fox Horn Judge Fuller referred to the State's expert chemist as a 'hired whore' or 'state whore', in front of the jury and on the record." (Complaint, Ex. 4) Judge Fuller never made that statement and Roetzel had the transcript to prove that he never made the statement. (HT 90-103; Ex. H) On cross-examination, Roetzel did not set the record straight that nothing of the sort occurred. (HT 102-103)

a. Probable Cause license plates
comments.

There was testimony, which Judge Fuller refuted, that in extra judicial comments to Ms. Roetzel regarding his probable cause license plate (P-r-o-b-c-o-z) he stated, "let the sons-of-bitches remember that when they pull me over," referring to law enforcement. (HT 75) The evidence showed that the license plate in question was actually a gift from Judge Jack Delaney and the van was the most prized possession his deceased brother owned. (HT 215-16; 355-56)

b. Polygraph "order."

The Commission found that Judge Fuller either ordered or directed a juvenile defendant and juvenile victim in a juvenile rape adjudication to be polygraphed, claiming in an angry tone of voice that it was very unfair for him to have to make a decision based only on the testimony that he heard in Court. (HT 80-82) The testimony indicates, however, that Judge Fuller never "ordered" a polygraph, and no Order or transcript corroborating this assertion was introduced as evidence. (HT 313-315; 319).

c. Judicial evaluation.

Ms. Roetzel also testified about her "impression" from a conversation she claimed to have with Judge Fuller concerning a judicial evaluation that he had on his wall. (HT 83-84) She could not recall anything specific. Id. In

contrast, Marshall Young, who conducted the survey and met with Judge Fuller to go over the results, specifically recalled Judge Fuller's "positive approach" to the negative review which ended up forming the basis for Judge Young's support of Judge Fuller in the next election. (Ex. L, ¶¶ 8-10) Judge Young also recalled that Judge Fuller had primarily positive comments and seemed to be well-liked by those who responded to the survey. Id. at ¶¶ 6-7.

8. Deputy States' Attorneys' complaints.

The Commission found that many of the Deputy State's Attorneys who had appeared in Judge Fuller's Courtroom continually complained about how they were treated and felt they were not treated with respect. (HT 107-109) No specific instances of Judge Fuller's treatment of the deputies were alleged in the Complaint.

9. Comment to Intern.

Judge Fuller, at a break during a legal proceeding in his Courtroom, made a statement to a student intern, now a third year law student, that the legal profession was better off before women belonged and that he had wished that the profession would go back the way it was in 1916 or 1918. (HT 126; Ex. I) In reality, Judge Fuller made the comment as a joke. (HT 320) His daughter, Alecia, is a lawyer. Id. This conduct was not laid out in Nelson's report, no

allegations of the Complaint were directed to this conduct, and it was not alleged to constitute a violation of the Judicial Canons.

10. Civil attorneys' complaints.

The Commission also made findings about a trial lawyer who participated in a jury trial during which Judge Fuller treated opposing counsel with disrespect. (SC 56-60) In that trial Judge Fuller expressed irritation with opposing counsel and displeasure with him before the jury. He became very upset with opposing counsel and told opposing counsel that when he practiced law "he considered the judge an enemy, so, don't let me push you guys around." (SC 57-58) Judge Fuller also treated another attorney impatiently, aggressively, and in a rude and condescending manner, such that it caused his clients to believe that they would not be treated fairly and upset them very much. (HT 263-65) Neither of these findings involve matters alleged in the Complaint.

11. Powdered Wig.

Perhaps the most exaggerated of all of the unnoticed allegations against Judge Fuller was the accusation that he wore a powdered wig in Court and mounted a piece of art with judges wearing powdered wigs as a way of thumbing his nose at these proceedings. As indicated by the testimony, the wig was given to Judge Fuller by Judge

Delaney who had worn it in conjunction with a play. (HT 310) Judge Fuller wore the wig one time in 2003, prior to the start of juvenile court - on Halloween. (HT 310) Also, the artwork was given to him by Pat Economos, a lawyer in Mitchell, South Dakota, and it bore no relationship to these proceedings. (HT 348-49)

ARGUMENT

I. The presentation of evidence of misconduct not properly alleged in the Complaint violates the Rules governing the Judicial Qualifications Commission.

In four separate places within the rules governing judicial discipline, the drafters require proper notice of the allegations against the judge accused of violating the Code of Judicial Conduct, and a reasonable opportunity for the judge to defend against those allegations. The rules also require that the Commission's findings be tailored to address the allegations of the Complaint and the Answer thereto. Although the Complaint essentially alleged five areas of misconduct, the hearing that Judge Fuller was afforded on December 13, 2010, was not confined to those allegations and exhibited all the precision of a shotgun blast. Witness after witness testified to matters which were tangentially referenced in Nelson's report or not mentioned at all. These matters, which were not alleged to constitute the violations of the judicial code and to which

Judge Fuller was not permitted an opportunity to properly respond, nevertheless made their way into the Commissions' findings.

The plain language of the rule requires that the complaint specify the charges against the judge and the facts which support those charges. "The notice and complaint *shall specify* in ordinary and concise language the charges against the judge and the alleged *facts* upon which such charges are based, and it shall advise the judge of the judge's right to file a written answer to the charges against the judge within thirty days after service of notice and complaint upon the judge." SDCL 16-1A, Appx., III, 6(b) (Emphasis added.) Although it probably goes without saying, this language is mandatory. SDCL 16-1A, Appx., I, 1 ("In these rules, unless the context or subject matter otherwise requires . . . 'shall' is mandatory and 'may' is permissive.").

The requirement of specificity in the Complaint is inextricably tied to the procedural rights of the accused judge. "In the formal proceedings, a judge shall have the right to be represented by counsel, the reasonable opportunity to defend against the charges by the introduction of evidence, and the right to examine and cross-examine witnesses." SDCL 16-1A, Appx., III, 10(a) (Emphasis

added.). Similarly, the rules provide that "the commission shall afford the judge complained against a reasonable opportunity to state the judge's position with respect to the allegations against the judge." SDCL 16-1A, Appx., III,

13.

Only a few of the incidents outlined in Nelson's report were selected as the content of the formal Complaint against Judge Fuller. The obvious inference from the specification of those things was that they comprised the allegations of violations of the code. Accordingly, Judge Fuller prepared an Answer which addressed those allegations, and prepared to defend against or answer for those allegations at the hearing.

Judge Fuller recognizes that the rules permit amendment of the Complaint to conform to the evidence. But two points bear mentioning in this regard. First, to the extent the content of Nelson's report was thought to constitute a violation of the judicial code, the drafter of the Complaint had that information available at the time he put the Complaint together. See Complaint, Ex. 4. If the matters outlined in Nelson's report were thought to constitute a violation, they surely could have been specified well in advance of the hearing, just the same as the five items that were actually laid out.

Second, with regard to items not specified in Nelson's report, Judge Fuller had no meaningful way of addressing those allegations. The rule provides: "In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present a defense against the matters charged thereby."

SDCL 16-1A, Appx., III, 12. A clear example of the violation of this rule comes in Mr. Krattenmaker's testimony. Judge Fuller's claimed solicitation of a contribution from him was not described in Nelson's report. Krattenmaker refused to discuss the matter with Judge Fuller's counsel when they interviewed him, claiming to rely upon the advice of his counsel, when it was actually the attorney hired to represent the Commission. (HT 66) If this allegation involved something that was thought to constitute a violation of the judicial code, it should have been brought to Judge Fuller's attention well before the hearing.

Without notice of the specific charges, Judge Fuller's ability to defend was compromised. Rather than a hearing addressed to the specific allegations of the Complaint, the hearing became an ambush. Some of the allegations he had never heard before (e.g. soliciting funds from Krattenmaker), some of the allegations were wildly exaggerated (e.g. powdered wig), some of the allegations

were refuted (e.g. swearing at the clerks in Fall River County), and at least one of the allegations was proven to be outright false (reference to the state chemist as a "hired whore" or the "state's whore"). With regard to nearly all of the allegations, prior to these proceedings, Judge Fuller had never been confronted about his wrongdoing.

The report that was ultimately certified by the Commission was not confined to findings on the five areas of misconduct in the Complaint. It went well beyond what was properly charged. This, too, was a violation of the rules, which provide that "[a]t the conclusion of the hearing, the commission shall promptly prepare a report which shall contain its findings of fact and its recommendations on the issues presented by the notice and complaint of formal proceedings and the answer thereto, if any." SDCL 16-1A, Appx., III, 14.

Now that Judge Fuller knows what is actually being asserted as his misconduct, he submits it is appropriate for this Court to appoint a referee so that all of the conduct relied upon by the Commission in its findings can be addressed in a manner that is fair.

II. It was inappropriate for Judge Davis to serve on the Judicial Qualifications Commission for this matter, and it was incumbent upon him to disqualify himself.

As the presiding judge in the Seventh Judicial Circuit, Judge Davis undoubtedly heard about the complaints

of court personnel, court services officers, and attorneys about Judge Fuller's conduct. With regard to certain instances of Judge Fuller's claimed misconduct, Judge Davis was directly consulted. As such, it was not appropriate for him to be a part of the group that decided Judge Fuller's fate. His ability to, while deliberating, provide anecdotal evidence or comment on the credibility of witnesses that worked for him is blatantly unfair.

Judge Davis was ethically required to step down in this matter:

A commissioner shall disclose to other commissioners all personal and business relationships with . . . a judge whose conduct is being investigated that may directly or indirectly influence the commissioner's decision. If a substantial conflict of interest is apparent, the commissioner shall disqualify himself from voting on further consideration of any affected . . . judges and shall disqualify himself from participating in the investigation of a judge's conduct under the standards provided in Canon 3 E of the Judicial Code.

SDCL 16-1A, Appx., I, 3. (Emphasis added.)

Canon 3 E provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has . . . personal knowledge of disputed evidentiary facts concerning the proceeding." SDCL 16-2, Appx., Canon 3 (E).

The comments to this Canon make clear that "a judge is

disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply." SDCL 16-2, Appx., Canon 3(E), commentary. (Emphasis added.)

✓ One of the findings made by the Commission relates to Judge Fuller either ordering or directing a juvenile defendant and juvenile victim in a juvenile rape adjudication to be polygraphed. Judge Fuller testified about his contact with Judge Davis on this matter at the hearing:

I was - I was very emotionally involved in these two young people that I was going to have to make a decision based upon a he said/she said, and two witnesses were credible. I talked to Judge Davis about it because of that, because I was having a real problem.

And Judge Davis suggested, Well, you could, if you wanted to, you could recuse yourself right now, and they'd have to retry it to another judge.

(HT 314)

Similarly, Judge Fuller spoke with Judge Davis about the Pennington County State's Attorneys systematically filing affidavits asking for Judge Fuller's removal from their cases. (SC 87) Ultimately, Judge Davis took Judge Fuller off of criminal cases, and assigned him a larger percentage of civil cases, because it became too hard to manage. (SC 88)

These incidents show that Judge Davis was quite familiar with some of the complaints the Pennington County

State's Attorneys had against Judge Fuller. Other testimony at the hearing further suggests that Judge Davis should have disqualified himself. Mr. Krattenmaker testified that, as the Seventh Circuit's court administrator, he serves under the presiding judge. (HT 54) Mr. Krattenmaker also testified that, when he received complaints concerning a judge, it was his practice to turn them over to the presiding judge. (HT 55-56) For instance, with regard to the complaints from Carol Foster about the Fall River County personnel, Mr. Krattenmaker testified as follows:

Because it was a complaint involving a judge, I would have turned this over to Presiding Judge Trimble at the time. He and I discussed the comments that Carol made. We discussed the tendency to micromanage and the tendency to bully some of the staff, and as such, that's generally the way a court administrator and presiding judge work with another one (sic).

Id. (Emphasis added.)

Mr. Krattenmaker went on to describe, at length, what he perceived to be Judge Fuller's misconduct. Interestingly, Mr. Krattenmaker went out of his way to conduct his own investigation and even furnished the Commission with photographs he took of Judge Fuller's courtroom. (HT 61; 65; Ex. F, G) He also gave testimony that intended to give the Commission the impression that Judge Fuller wore a powdered wig in Court "a few times"; and mounted a picture of judges wearing powdered wigs subsequent

to the start of these proceedings. (HT 60-62) Given Mr. Krattenmaker's testimony concerning his handling of complaints about judges, the obvious offense he took to the way Judge Fuller went about things, and his willingness to gather evidence and do whatever he could to make Judge Fuller look bad, it is not unreasonable to assume that Mr. Krattenmaker conveyed his ill will to Judge Davis.

The impropriety of Judge Davis sitting in judgment serves as a further reason for this Court to appoint a referee to objectively consider the evidence.

III. The Commission's recommendation for removal or retirement grossly exceeds the punishments handed down by similar tribunals in other jurisdictions.¹

Judge Fuller does not dispute that the misconduct specifically described in the Complaint constitutes violations of Judicial Canons 1, 2, and 3. However, the punishment recommended by the Commission for his violations is too harsh when weighed against the punishments handed down by other tribunals considering equally or more egregious conduct.

Additionally, when determining the discipline to be imposed on a judge, "[m]itigating circumstances can be considered." Cynthia Gray, Grounds for Judicial Discipline,

¹ This section of the brief will be addressed to the specific allegations of misconduct alleged in the Complaint which are claimed to be violations of the code.

Judicial Conduct Reporter, Vol. 29, No. 2 (Summer 2007).²

Some mitigating factors include: (1) acceptance of responsibility and demonstration of remorse, (2) self-enrollment in judicial training, (3) newness to the bench, (4) family issues, and (5) apology to parties involved. Cynthia Gray, Discipline for Delay, Judicial Conduct Reporter, Vol. 31, No. 4 (Winter 2010).

Judge Fuller submits that many of these factors would apply here. First, the judge testified at the hearing about his remorse for his actions, acknowledging the shame he feels for what he has done. (HT 331) In fact, he has already written apology letters to the people affected by his action. (HT 308) Second, he has sought help, and is willing to seek more help. Dr. Harold Arnio, a licensed psychologist, testified about Judge Fuller seeking him out for a psychological evaluation and counseling. (HT 131-33) Judge Fuller also enrolled in an Anger Management Program at Behavior Management Systems in Rapid City. (HT 175) Bob Holmes testified that Judge Fuller underwent these sessions "with a very high level of attention, and with a very excellent result in terms of self-awareness, behavior change." (HT 176) Finally, three different judges, John

² The Judicial Conduct Reporters cited herein are in the Appendix to this brief as Exhibit I.

Simko, Wally Ecklund and Dave Gienapp, testified that they would be willing to serve as "mentors," so to speak, in order to assist Judge Fuller going forward. (HT 220, 238, 297)

Judge Fuller submits that the authority that follows, together with the mitigating factors outlined above, support a lesser punishment than removal from office.

A. Judge Fuller's comments at the April 28, 2010 hearing do not warrant removal from office.

Misconduct of the nature described in the Complaint is more akin to that of judges who were censured, publicly reprimanded, or publicly admonished, not removed from office. For example, in In the matter of Uplinger, App. Ex. A, the New York State Commission on Judicial Conduct censured Uplinger for exhibiting rude and demeaning conduct toward witnesses. See also Recent Cases: Judicial Demeanor, Judicial Conduct Reporter, Vol. 28, No. 1 (Spring 2006).³ Uplinger "sternly admonished two witnesses who had been unavailable to testify earlier, threatened to hold them in contempt, and ordered them to be confined in a witness room until they testified, forbidding them from using the bathroom facilities without permission." Id. Uplinger also repeatedly interrupted the victim of an assault by stating, "I don't believe half of anything you said so I'd appreciate

³ This decision is also available at <http://www.scjc.state.ny.us/Determinations/U/uplinger.htm>.

it if you'd sit down." Id. During Uplinger's sentencing of the defendant, she compared the victim to "a fictitious pathological liar played by John Lovitz on the television program 'Saturday Night Live,' using a mocking voice that was intended to be an impression of the character." Id. As a mitigating factor, the New York State Commission on Judicial Conduct noted that Uplinger voluntarily attended an educational session regarding control in the courtroom. Id.

Judge Fuller, similar to Uplinger, attended anger management counseling. Judge Fuller's voluntary attendance of counseling should have been considered as a mitigating factor when determining his punishment.

The same Judicial Conduct Reporter discussed the Florida Supreme Court's public reprimand of a judge "for, in addition to other misconduct, beginning the call early and starting a small claims case in the absence of one party's counsel; despite the disarray in the trial schedule caused by hurricanes, the judge issued a bench warrant with a \$100,000 bond when an expert witness in a case failed to appear; and repeatedly exhibited rudeness and impatience with counsel, witnesses, and parties." In re Woodard, 919 So.2d 389 (Fla. 2006) (App. Ex. B). The Woodard court ordered Woodard to complete anger management counseling. Id.

In Public Admonishment of Moruza, App. Ex. C, the California Commission of Judicial Performance publicly admonished Moruza for making statements that were "impatient, discourteous, inappropriately personal, undignified, and demeaning." See Cynthia Gray, Demeanor in Domestic Violence Cases, Judicial Conduct Reporter, Vol. 32, No. 1 (Spring 2010).⁴ Moruza's statements included a comment that a domestic violence case was a "crazy waste of time" and that the judge lived longer than the prosecutor so she knew "a lot more about relationships and life and the court system." Id. Moruza opined that pursuing the case amounted to "stupidity." Id.

In August, 2010, the Supreme Court of Washington suspended a judge for five days without pay. In Re Disciplinary Proceeding Against Eiler, 236 P.3d 873 (Wash. 2010) (App. Ex. D). Eiler was first reprimanded in 2005 for improper judicial demeanor. Id. at 875. The first judicial conduct proceeding resulted in the requirement that Eiler participate in ethics training, behavioral therapy, and refrain from engaging in similar conduct in the future. Id. The complaints about Eiler's demeanor on the bench continued, which led to a second judicial conduct proceeding.

⁴ This decision is also available at: http://cjp.ca.gov/userfiles/file/Public_Admon/Moruza_Pub_Adm_12-16-08.pdf.

However, the second judicial conduct proceeding prompted the Washington State Commission on Judicial Conduct to recommend that Eiler be suspended without pay for ninety days. Id. The suspension was a result of ten cases in which Eiler demonstrated "a pattern or practice of rude, impatient, undignified, and intimidating treatment of pro se litigants, attorneys, and court personnel." Id. The Supreme Court of Washington disagreed with the commission and suspended her for only five days. Id. at 883.

Finally, a recent decision handed down by the Minnesota Board on Judicial Standards is also helpful. While this decision has not yet been reported in the Judicial Conduct Reporter, it was the subject of an article in the September 29, 2010, issue of the Minneapolis Star Tribune. Judge Stephen Aldrich was publically reprimanded by the Board for numerous conduct-related issues. Randy Furst, Judge Chastened For Court Remarks, Star Tribune, September 29, 2010 (App. Ex. E). The public reprimand was issued because Aldrich had been the subject of a previous private reprimand. Id.

In the Aldrich case, the judge, during the course of proceedings in a murder case, "belittled possible witnesses, prematurely commented on the integrity or dependability of potential evidence, and invited a lawyer

representing one of the parties to contact the judge on an unrelated and undisclosed matter." Id. He further suggested, in open court, that the prosecutor acted disrespectfully "by attempting to obtain favorable publicity." Id. Finally, he referred to several possible witnesses as "a bunch of drunkards" and added that the case involved, "Idiocy; somebody died, and we're supposed to do something with the bodies afterwards." Id.

Judge Fuller recognizes that his demeanor during the juvenile proceeding was unacceptable and inappropriate, however, demeanor is something he can change. Due to numerous mitigating factors present here, Judge Fuller respectfully requests that this Court consider the Minnesota and California Commissions' punishment in Aldrich and Moruza or the Supreme Court of Washington's punishment in Eiler as guidance, and modify or reject the Commission's recommendation.

B. Judge Fuller's use of the phrase "my little peckerheads" when referring to juveniles does not warrant removal from office.

Judge Fuller's use of an inappropriate phrase showed "an obvious lack of concern for . . . the dignity of the judicial proceedings." However, Judge Fuller did not use the inappropriate phrase to humiliate juveniles appearing before him. Rather, he acknowledges that the comments

were inappropriate and were intended only as a smart aleck remark. (HT 345)

Judge Fuller's inappropriate comments can be compared to inappropriate comments made by judges who were censured, publicly reprimanded, or publicly admonished, not removed from office. For example, in In Re Moore, App. Ex. F, the Washington State Commission on Judicial Conduct publicly admonished Moore for "impatient, undignified, and/or discourteous demeanor in three cases." See Recent Cases: Judicial Demeanor, Judicial Conduct Reporter, Vol. 28, No. 1 (Spring 2006).⁵ In the first case, Moore used inappropriate humor by commenting on a defendant's personal circumstances during a hearing. Id. In the second case, Moore reprimanded an alleged victim of domestic violence in a loud and harsh manner for interrupting a hearing. Id. In the third case, Moore mocked the comments of a defendant's mother and girlfriend. Id.

The Moore case stands for the fact that several inappropriate attempts at humor or inappropriate comments do not warrant removal from office. Although Judge Fuller recognizes that his use of the phrase "my little pecker-heads" is unacceptable and inappropriate, he respectfully

⁵ This decision is also available at:
<http://www.cjc.state.wa.us/Case%20Material/2006/4411%20Moore%20Stipulation%20FINAL.pdf>.

requests that the Commission consider the Washington State Commission's punishment in Moore and reprimand or censure him for his misconduct.

c. Judge Fuller's inappropriate gesture to an attorney and his indication that the South Dakota Supreme Court made an incorrect decision do not warrant removal from office.

Judge Fuller's actions can be compared to violations made by the judge in In Re Wulle, App. Ex. G.⁶ The Washington State Commission publicly censured Wulle for repeatedly using profanity and expletives when interrupting a discussion at a U.S. Department of Justice conference.

Wulle raised his middle finger at a team member, made racial remarks, and yelled "fuck you" during the conference. Id. The Washington State Commission noted that "[Wulle] failed to demonstrate an appreciation for the seriousness of his actions, never apologized, dismissed concerns about his behavior, minimized his responsibility, or blamed others."

Id.

Judge Fuller has "demonstrated an appreciation for the seriousness of his actions" and has not "minimized his responsibility, or blamed others." The context of this allegation should also be considered. Bart Banks is an

⁶ This decision is also available at:
<http://www.cjc.state.wa.us/Case%20Material/2007/5202%20Wulle%20Stip%20final.pdf>

attorney that Judge Fuller holds in high esteem, noting that he "think[s] the world of Bart Banks," (HT 346) He testified at the hearing that, while the gesture of flipping the bird was only intended as a smart aleck remark, the action was rude and should not have happened. Id. As made clear in prior judicial conduct precedent, mitigating factors are very important when determining punishment. Judge Fuller should receive no more punishment than Wulle.

D. Judge Fuller's ex parte contact with an attorney does not warrant removal from office.

Removing a judge from office for an ex parte communication is very uncommon. Most cases involving ex parte communication involve censure, temporary suspension, or public reprimand. See e.g. Ex Parte Communications: Recent Cases, Judicial Conduct Reporter, Vol. 29, No. 4 (Winter 2008) (citing In re Lewis, Utah Supreme Court August 31, 2007) (Lewis was censured for contacting defense counsel and changing the defendant's sentence without telling the prosecutor); Inquiry Concerning Morales, App. Ex. H, Arizona Supreme Court January 22, 2007 (Morales was censured for meeting with a defendant and her daughter four times and giving legal advice in Spanish and English)⁷).

⁷ This decision is also available at:
http://www.azcourts.gov/portals/37/complaints/2006_complaints/06-275%20Final.pdf.

Judge Fuller's ex parte communication, coupled with his other misconduct, does not warrant removal of office. It was a situation where Judge Fuller simply informed counsel of an *unfavorable* decision, which was later brought up in open court. (HT 248) Judge Fuller's ex parte communication is less egregious than the ex parte communications that have consistently resulted in public reprimand or public censure, not removal.

E. Judge Fuller disclosed the fact that he was under investigation by the Commission, however, the violation does not warrant removal of office.

Judge Fuller acknowledges that he disclosed the fact that he was under investigation by the Commission. Judge Fuller believed that the provision on confidentiality was in place for his benefit and to protect him from unnecessary public humiliation. Certainly, from the language, "[a]ll proceedings . . . shall be kept confidential until . . . the accused requests that the matter be public . . .," it can be inferred that the confidentiality requirement is meant to protect the accused. Otherwise, it would not be logical to allow the accused to waive confidentiality.

Further, it does not appear that the South Dakota Rules of Procedure of the Judicial Qualifications Commission define who the confidentiality requirement is meant to

protect. Although, South Dakota requires confidentiality by "all parties", other states only require the confidentiality to apply to commission members and staff. Confidentiality of Complaints, Judicial Conduct Reporter, Vol. 30, No. 2 (Summer 2008). Some courts go so far to say that a confidentiality requirement is in violation of the First Amendment. Doe v. Judicial Qualifications Commission, 748 F. Supp. 1520 (S.D. Florida 1990). South Dakota is in the minority in requiring a judge to keep judicial conduct proceedings confidential. Most states leave the determination up to the judge, either by applying the requirement to only commission members and staff or by allowing the judge to waive the confidentiality requirement in writing.

Confidentiality of Complaints, Judicial Conduct Reporter, Vol. 30, No. 2 (Summer 2008).

IV. If the Court is unwilling to reject or modify the Commission's recommendation, this matter should be considered by a referee.

While Judge Fuller believes that rejection or modification of the Commission's recommendation is appropriate, he also recognizes that this Court has other options at its disposal to ensure that these proceedings are handled fairly. The rules authorize this Court to refer this matter for further findings. Specifically, SDCL 16-1A, Appx., III, 29²⁹ provides:

Based upon the report and recommendations of the commission, the Supreme Court may establish such procedure as it deems appropriate, including referral of said matter for the taking of testimony and making of findings and recommendations. Such reference may be to any circuit court judge in the state or to a referee or referees deemed to be qualified to serve in that capacity. Upon consideration of the commission's findings, conclusions and recommendation, the judge's petition to modify or reject such recommendation, if any, and the report of the referee, if any, the Court shall render such judgment as the matter requires.

In reality, the appointment of a referee is really the only option that affords Judge Fuller, or any judge for that matter, impartial consideration. To analogize, the procedure allowing the Commission to consider the initial complaint against Judge Fuller, bring a formal investigation, hire an attorney, bring formal proceedings against him, and then sit in judgment of him, is like having the State's Attorney file charges, sit as the judge in a criminal case, and then render a life sentence.

Given the procedural shortcomings outlined in Sections I and II, and the severity of the punishment recommended, Judge Fuller submits that the referral of this matter is not only appropriate, but necessary if considerations of fairness are weighed.

CONCLUSION

For all of the foregoing reasons, Judge Fuller respectfully urges the Court to reject or modify the

Commission's recommendation. Alternatively, Judge Fuller has submitted sufficient reasons for the Court to refer this matter to a referee. If the Court chooses to refer this matter to a referee, Judge Fuller asks that, upon final consideration of everything before the Court, the Commission's recommendation be rejected or modified.

Respectfully submitted this 18th day of February, 2011.

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