Appeal to the Committee on Judicial Conduct and Disability of the Judicial Council of the District of Columbia Circuit Ruling in the Matter of Judge Jones (DC-13-90021)

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal is from the August 12, 2014 Order of the Judicial Council of the D.C. Circuit adopting the Report of the Special Committee (the "Report") and dismissing DC-13-90021, a Complaint of Judicial Misconduct filed against Judge Edith Jones of the Fifth Circuit Court of Appeals. This appeal is brought pursuant to Rule 22 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

On June 4, 2013, a broad coalition of civil rights organizations, legal ethicists and others[1] filed a judicial-misconduct complaint against Judge Edith Jones of the Fifth Circuit Court of Appeals. The Complaint asserted that at a February 2013 talk at University of Pennsylvania School of Law, sponsored by the student chapter of Federalist Society, Judge Jones made statements that violated the Code of Judicial Conduct and constituted misconduct under the Rules for Judicial-Conduct, including the fundamental duty of impartiality.

The statements made by Judge Jones that are the gravamen of the Complaint included the following:

- Certain "racial groups like African Americans and Hispanics are predisposed to crime," are "'prone' to commit acts of violence," and get involved in more violent and "heinous" crimes than people of other ethnicities;
- Mexican Nationals would prefer to be on death row in the United States rather than serving prison terms in Mexico;
- Defendants' claims of racism, innocence, arbitrariness, and violations of international law and treaties are really nothing more than "red herrings" used by opponents of capital punishment;
- Claims of "mental retardation" by capital defendants are also red herrings, and the fact such persons were convicted of a capital crime is in itself sufficient to prove they are not in fact "mentally retarded"; and
- The imposition of a death sentence provides a positive service to capital-case defendants because the defendants are likely to make peace with God only in the moment before their imminent execution.

The documents submitted in support of the Complaint included the affidavits of

[1] Complainants included the Mexican Capital Legal Assistance Program, the League of United Latin American Citizens (LULAC); the NAACP (Austin Branch); the National Bar Association (Dallas Affiliate – J.L. Turner Legal Association); the Texas Civil Rights Project; legal ethics experts, and law professors specializing in the area of judicial ethics.

six people who attended and witnessed the lecture: a lawyer and five students of the University of Pennsylvania School of Law. The attorney affidavit was drafted from contemporaneous notes. The student affidavits corroborated and underscored the fact of the above statements, and added the students' individual memories, reactions, and impressions. Moreover, the student affidavits were clear that the nature and impact of Judge Jones statements – particularly those regarding race – were deeply dismaying to many in the audience.

In response to the Complaint, on July 12, 2014, Judge Jones (reportedly) submitted the following:

- A letter "in which she denied engaging in the alleged misconduct";
- The handwritten notes she brought to the lecture;
- Her "ex post recollections of the lecture";
- Various related news articles, blog posts, and legal documents

In addition, the Committee (reportedly) received the following materials from "third parties supporting Judge Jones":

- A declaration from a student attendee, submitted after a solicitation for same was sent out by the Federalist Society chapter president;
- A character reference from a Texas criminal defense attorney;
- A letter from 62 former law clerks of Judge Jones; and
- A separate letter from a former law clerk of Judge Jones

Id. Finally, a committee of the Circuit Council (reportedly) held a hearing in January 2014 at which Judge Jones testified, and Special Counsel wrote a report reflecting the results of his investigation.

Complainants *have never seen* any of the above materials, were not allowed to attend or testify at the hearing or question Judge Jones, and have never seen the transcript of the hearing testimony, or special counsel's report. Although complainants asked for copies once the existence of those documents was revealed, and the Rules allow disclosure with the permission of the defending judge, Judge Jones would not authorize such disclosure.

It is nonetheless clear from the itemization of the materials submitted that aside from Judge Jones' own recollections and denials, the only piece of evidence that contradicted the facts set forth in the six affidavits provided by complainants was the one declaration solicited by the Federalist Society after the complaint was filed – thus written at least four months after the lecture.

Regardless, it is on the basis of this evidence – crediting Judge Jones' denials and evidence never disclosed to complainants and rejecting the sworn evidence from student attendees – that the Report found that Complainants failed to meet their burden of proof. The Report also asserted in multiple instances that there is "no" evidence in

support of a particular assertion – when the sworn affidavits submitted by complainants provide exactly that, yet the Report entirely ignored that evidence.

In light of these findings – the foundation for the dismissal of the Complaint - the relative weight of the evidence bears repeating: complainants submitted six affidavits compiled shortly after the subject lecture took place. The only evidence contradicting complainants' assertions about the specifics, tenor or impact of Judge Jones' lecture are her belated self-serving recollections, statements, and testimony, and the one affidavit the lecture hosts managed to obtain.

The Report went to pains to state that:

> We have no doubt that suggesting certain racial or ethnic groups are 'prone to commit' acts of violence or are 'predisposed to crime' would 'reflect adversely on [a] judge's impartiality,' reduce 'public confidence in the integrity and impartiality of the judiciary,' and 'have a prejudicial effect on the administration of the business of the courts.' Such comments would therefor violate both the Code of Conduct and the Judicial-Conduct Rules.

Report p. 26.[2] The Report took similar pains to conclude that if Judge Jones made the statements alleged by complainants concerning claims of intellectual disability, and comments regarding pending cases displaying her partiality, she would have violated the Code and Rules for Judicial-Conduct:

> If she had [made statements that denigrated Mexican nationals (or Mexican-Americans) themselves], such comments would constitute misconduct.

Report p. 37. As the Report further stated:

> We have no doubt that, if a judge were to say that all claims of intellectual disability are invalid or abusive, or were to "express[] disgust at the use of mental retardation as a defense in capital cases," there would be good reason to doubt that judge's ability to decide such cases such cases impartially.

Report p. 30 (citing Canon 3A(3), cmt.).

> Although we find that a number of matters involving those individuals were pending or impending, and that some of the judge's comments may have been on the merits of those matters, we conclude that the comments did not violate

[2] Although the Report goes on to find that "it is clear that Judge Jones used the question-and-answer period to clarify that she did not adhere to such views" and deems that "voluntary corrective action that acknowledges and remedies the problems raised by the complaint," that finding is both internally inconsistent, contradicted by the student affidavits, and not supported by the available decisions discussing what qualifies as "corrective action."

> Canon 3A because the scholarly presentations exception applies. We also conclude that the comments did not denigrate public confidence in the judiciary's integrity or impartiality, and thus did not violate Canon 2A or constitute misconduct

Report p. 51.

Thus, the Council's decision repeatedly acknowledged that if the allegations alleged in the Complaint (and supported by six affidavits from attendees at the lecture) are true, multiple ethical violations occurred. Given the danger of that acknowledgement, the Report relied upon by the Council nonetheless found through sleight of hand that complainants did not meet their burden of proof. The Report then concluded that even IF complainants' allegations were true, and thus established ethical violations, one of various exceptions apply. As detailed below, application of those exceptions to these circumstances is only possible only by again skewing the weight of the evidence.

Lastly, the Council's decision failed to recognize or address the damage done to the public's faith in the fairness and impartiality of the judiciary. The affidavits from the five law students who attended Judge Jones' talk vividly demonstrated that result. Judge Jones' comments shocked and appalled them, as well as numerous people in the audience – in particular people of color. Those demoralizing statements included her comments reflecting prejudgment of cases and issues that come before her, and her offensive and pernicious stereotypes concerning African Americans and Mexicans.

In short, the procedure followed in this matter has been egregiously one-sided and fundamentally unfair to Complainants. The nature of the complaints raised – pre-judgment of issues, lack of impartiality, and the application of stereotypes based on race that are the foundation for the most deep-seated problems in our criminal justice system – amplify the injustice of this process. For a federal judge to be able to make such comments without consequence is dispiriting at best. In the context of increasing questions about the ability of our criminal justice system to operate free of race bias, thus far this case is a debilitating reaffirmation of these problems. At its core, the decision of the Council serves to undermine any faith the public may have in the fairness and impartiality of the judiciary, the federal judicial discipline system, or a system free of race bias.

Complainants respectfully request that this Committee rectify the evident procedural deficiencies and the evidentiary and substantive errors. Public respect for the federal judicial discipline system requires no less.

I. PROCEDURAL HISTORY

The Complaint was filed in the Fifth Circuit Court of Appeals on June 4, 2013. On June 6, Chief Judge Stewart of the Fifth Circuit requested that the matter be transferred to a judicial council of another district. On June 12, 2013, Chief Justice

Roberts granted that request, and transferred the case to the Judicial Council of the District of Columbia Circuit.

On July 19, 2013, the D.C. Judicial Council assigned the matter to a Special Committee. On August 9, 2013, that Committee appointed Special Counsel Bellin to investigate the Complaint's allegations. Special Counsel Bellin submitted a Report (the "Bellin Report") to the Committee, which then held a hearing (in January 2014) at which the testimony of two witnesses – one of which was Judge Jones – was heard. *See* Report at p. 5.

The Special Committee subsequently submitted its Report of its findings and recommendation, which the Judicial Council of the D.C. Circuit accepted, dismissing the Complaint on August 12, 2014.

This appeal is timely filed pursuant to Rule 22 of the Rules of Judicial-Conduct and Judicial-Disability. Only the issues briefed are being appealed.

II. THE EVIDENCE CLEARLY WEIGHED IN COMPLAINANTS' FAVOR.

In support of the Complaint, Complainants submitted six affidavits from people who attended Judge Jones' lecture, and two affidavits of judicial ethics experts discussing Judge Jones' violations of the Judicial Conduct Code.

Of the six affidavits Complainants submitted, one was from an experienced and highly respected Philadelphia attorney, who based his affidavit on his own recollections as well as contemporaneous notes taken by an Assistant Federal Defender also in attendance at the lecture. The remaining five attendee-affiants were students of the University of Pennsylvania School of Law. All were highly credentialed; some are now graduates.[3] Four of those affiants are African American. Each student affiant carefully reviewed the initial attorney affidavit recalling details of Judge Jones statement; when appropriate they added details or independent recollections. Among the details that the students added were their own reactions to Judge Jones' statements – "shock," "dismay," "disgust" – and their recount of the reactions of other students and colleagues in attendance at the lecture. The affidavits were careful and detailed. While the attorney was asked to testify at the evidentiary hearing, the students were not.

According to the Report, Judge Jones submitted:

[3] The Report described these affiants as "six people who attended Judge Jones' lecture" Report at p. 2. In contrast, the Report described the singular attendee affidavit submitted in support of Judge Jones as "a declaration from a recent graduate of the University of Pennsylvania Law School." Report at p. 4. The bias in that comparative characterization is evident.

- A response to the Complaint, including a letter "in which Judge Jones denied engaging in the alleged misconduct";
- The handwritten notes Judge Jones brought to the lecture;
- Judge Jones' "ex post recollections of the lecture" (which were at least 20 pages in length);
- Various related news articles, blog posts, and legal documents
- An additional letter containing an excerpt from a report of the Defender Services Committee of the Judicial Conference of the United States.

See Report at p.5. The Council did not provide Complainants with a copy of any of these materials.[4]

The Report also stated that the Committee received the following materials from "third parties supporting Judge Jones":

- A declaration from a student who attended the lecture, drafted after a solicitation for declarations was sent out by the Federalist Society chapter president after the Complaint was filed, submitted to Judge Jones' attorney;
- A character reference from Gerald Goldstein, a Texas criminal defense attorney;
- A letter from 62 former law clerks of Judge Jones;
- A separate letter from a former law clerk of Judge Jones

Report at pp. 4; 22. Complainants have seen none of these materials.

The Report stated that Special Counsel reviewed, in addition to the above submissions, the following:

- A transcript of a hearing in January 2014 at which Judge Jones testified;
- A student text message exchange at the time of the lecture quoting Judge Jones;
- A student email to a fellow attendee after the Complaint was filed;
- The handwritten notes of an Assistant Federal Defender present at the lecture and summary of same;
- The electronic notes (made on a cell phone) of another Assistant Federal Defender; and
- A text message to a legal blog and email to a fellow student by the same student who submitted the declaration in response to the Federalist Society chapter president's solicitation.

Report at pp. 5; 22. Again, Complainants have seen none of these materials. The Report also stated that Special Counsel interviewed 45 people "including most of the

[4] After the Council's ruling, Complainants requested copies of Special Counsel's Report, the transcript of the hearing, and the materials submitted by and in support of Judge Jones. That request was relayed to Judge Jones, as required by Rule 23(g). Judge Jones refused permission to permit release of any of the requested materials to complainants.

attendees at the lecture." Complainants have never seen the results of those interviews, or Special Counsel's report, which the Council repeatedly cited and relied upon.

A more one-sided, unbalanced process is difficult to imagine. But what Complainants do know, and what is undisputed even by the Council's recitation of the evidence, is that the vast bulk of the eyewitness, on-site evidence is against Judge Jones. Inexplicably and unjustifiably, the Council simply rejected that evidence.

III. THE JUDICIAL COUNCIL REPEATEDLY RELIED SOLELY ON JUDGE JONES' STATEMENTS AND RECOLLECTIONS TO CONCLUDE THAT COMPLAINANTS DID NOT MEET THEIR BURDEN OF PROOF.

The Ruling below – relying on the Report of the Special Committee – repeatedly found that Complainants failed to meet their burden of proof. To do so, the Report relied almost exclusively on Judge Jones' self-serving, stale statements, ignored the evidence reflected in Complainant's disinterested affidavits, and refused to allow Complainants to testify.

Thus, the Council unquestioningly accepted Judge Jones' recollections, letter and testimony denying she said anything racially biased or reflecting her partiality with respect to topical issues raised in capital appeals. The recollections and letter were written approximately five months after the subject lecture; the testimony was given almost a year later. The only other document submitted on Judge Jones' behalf was a single affidavit written at least four months after the lecture. While the Report stated that the special investigator talked to "almost everybody" in attendance, nothing in the Report indicated those conversations turned up evidence contradicting the Complainants' affidavits.

Thus, the only evidence bearing upon the content and tenor of Judge Jones' lecture, and the impressions she left and the effects of her comments are Complainants' six affidavits, Judge Jones inevitably self-serving recollections (set forth in various forms), and the single student affidavit (written months after the lecture) submitted on Judge Jones' behalf. In any fair adjudication, the weight and preponderance of the evidence would be clear – in Complainants' favor.

At other times the Report simply ignored evidence, finding "no evidence" of a material assertion in the Complaint when, in fact, the supposedly absent evidence was clearly reflected in the student affidavits submitted by Complainants.[5]

[5] Examples of this pattern are detailed below. The level of disrespect and disregard this shows toward the students and their credibility is remarkable. It also echoes the manner in which the Report failed to meaningfully address how Judge Jones' conduct and statements overall undermined public faith in the fairness and integrity of the judiciary – an independent basis for a violation of the Code of Judicial Conduct and ethical canons. *See* Canon 2 and commentary.

At other points it is entirely unclear what the Report relied upon to reach a particular conclusion, as it merely cited to the Bellin report, which Complainants have never seen.

This consistent, pervasive pattern of undue, unquestioning deference to Judge Jones and rejection of Complainants' evidence is the central theme for all of the Special Committee's pivotal factual findings. That approach profoundly undermines basic notions of judicial accountability and fair adjudication.

IV. JUDGE JONES' COMMENTS THAT AFRICAN AMERICANS AND HISPANICS ARE MORE PRONE TO VIOLENT AND HEINOUS CRIMES

The Report acknowledges, as it must, that Judge Jones' comments about race as alleged by Complainants violated numerous provisions of the Judicial Conduct Code and Rules:

> We have no doubt that suggesting certain racial or ethnic groups are 'prone to commit' acts of violence or are 'predisposed to crime' would 'reflect adversely on [a] judge's impartiality,' reduce 'public confidence in the integrity and impartiality of the judiciary,' and 'have a prejudicial effect on the administration of the business of the courts.' Such comments would therefor violate both the Code of Conduct and the Judicial-Conduct Rules.

Report p. 26. Yet – relying on Judge Jones' denials that she made any such comments – the Report found that Complainants failed to meet their burden of proof. The discussion was conflated and circular, ignored evidence in complainants' favor, and gave utmost deference to Judge Jones' denials. Neither the facts nor the law support such findings or conclusions.

In discussing the comments made by Judge Jones about African Americans and Hispanics and tendencies toward violence, the Report discussed at length Judge Jones' denials. *See* Report p. 24. It then noted in one short paragraph the evidence in support of that portion of the Complaint's allegations:

> The witnesses interviewed by the Special Counsel generally did not recall the exact language Judge Jones used during her lecture that related to race. Special Counsel Report 18. Some witnesses said she did use the phrase "prone to commit"; others thought that she did not use the phrase, and that they would have remembered if she had. *Id.* at 17-19; *see also* Bookman Hr'g Tr. 13 ("I can't say for certain exactly the words that she said initially."). Four witnesses took notes contemporaneously: two students noted the phrase in a text message between them; two assistant federal defenders did not include it in their handwritten notes.

Report p. 25. As the citations were only to page numbers within the Bellin report, and "witnesses interviewed," the nature and reliability of the underlying evidence are unknown.[6] While apparently Bellin's report stated "some witnesses said she did use the phrase 'prone to commit;'" and others thought she did not," there is no indication who those witnesses are, or when the relevant statements were made. The contemporaneous notes that *were* mentioned include text messages exchanged at the time of the lecture that *specifically and affirmatively note Judge Jones use of the phrase "prone to commit*," and notes of Assistant Federal Defenders that (apparently) do not mention the phrase – nor deny its existence.[7] Report p. 25.

Moreover, *the Report failed entirely to mention the sworn affidavits of student attendees, executed shortly after the lecture, which specifically stated that Judge Jones made the statements alleged.*

> I am African American, am interested in the places where race and law intersect, and paid close attention when she began to discuss issues of race. Judge Jones said that some racial groups are "prone" to commit acts of violence.

Exhibit C, #13.

> She said that certain racial groups like African Americans and Hispanics are pre-disposed to crime, that an awful lot of Hispanics are involved in drug trafficking, and that certain races happen to engage in violent crime more than others.

Exhibit F, #11.

Lastly, the Report relied in part on a purported distinction between saying a racial group is "prone" to commit violent crimes and citing to "statistical figures concerning African Americans and crime." Report p. 24. Setting aside the separate dangers and statistical validity of such bald statements, Judge Jones in fact – by her own admission and by way of explanation – acknowledged stating that "sadly some groups seem to commit more heinous crimes." This statement is not supported by the statistics, and indicates a belief in propensity – precisely the sort of statement alleged by Complainants. That this was Judge Jones' "explanation" of the intent of her statements does nothing to mitigate the offensive and problematic nature of the original statements.

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[6] A fundamental problem with this entire process is that Complainants-Appellants are put in the impossible position of having to appeal secret evidence (albeit unconvincing, even as vaguely characterized). That difficulty further underscores the need for a reversal of the Council's decision. The pervasive secrecy and nondisclosure unavoidably undermines confidence in the fairness of this process.

[7] One would think that a contemporaneous text message – particularly considered in conjunction with multiple affidavits affirming Judge Jones' language – would be substantial proof – particularly when the only affirmative proof to the contrary is Judge Jones' own denials.

A. The Report's Erroneous Finding That Judge Jones' Response During the Q&A after the Lecture Mitigated Any Initially Offensive Statements To Permit The Conclusion That – Even If She Did Say "African Americans And Hispanics Are "Prone" To Violent Crime – Her Comments Did Not After All Evince Bias Or An Inability To Be Impartial.

The Report acknowledged that any statements that "certain racial or ethnic groups" are "prone" or "predisposed" to crime or certain types of crime would "no doubt" reduce "public confidence in the integrity and impartiality of the judiciary." But then the Report concluded that the audience – including the student affiants – just didn't understand Judge Jones' remarks – and the Report accepted, without question, her version of what happened in the question-and-answer period:

> More important, whatever she said initially, it is clear that Judge Jones used the question-and-answer period to clarify that she did not adhere to such views (citing to Part III.B's discussion of "corrective action that acknowledges and remedies the problems raised by the complaint.'");
>
> It appears likely that Judge Jones did suggest that, statistically, African-Americans and/or Hispanics are "disproportionately" involved in certain crimes and "disproportionately" present in federal prisons.
>
> We recognize that, without an explanation or qualification, saying that certain groups are "more involved in" or "commit more of" certain crimes can sound like saying those groups are "prone to commit" such crimes. [8]
> But we must consider Judge Jones' comments in the context of her express clarification during the question-and-answer period that she did not mean that certain groups are "prone" to criminal behavior.

Based on those findings, the Report finally concluded: "in that context, whether or not her statistical statements are accurate, or accurate only with caveats, they do not by themselves indicate racial bias or an inability to be impartial."

As detailed above, the evidence refutes these conclusions. Once again, the Report rejected the sworn testimony of witnesses, and instead accepted Judge Jones' denials. While the Report stated that "the witnesses agree that she made clear during the question and answer period that followed that she did not mean to suggest that certain races were 'prone' to criminal behavior," that remark twisted the words of the student affiants to mean that they agreed with the Report's conclusions that saying that "sadly

[8] It is difficult not to understand this comment as anything but illogical and condescending. It discounted and then dismissed the students' memories, perceptions, and abilities to make distinctions between "prone / predisposed" and a discussion of statistics.

some groups commit more heinous crimes" is the same as mentioning statistical analysis.[9]

The affiants said no such thing. *See, e.g.*, Exhibit A, #27 ("'sadly' people from these racial groups do get involved in more violent crime"); Exhibit B, #27 ("She did say 'Sadly, some groups seem to commit more heinous crimes than others.'"); Exhibit C, #13 (same and "In answering [this affiant's question], "she said that she did not mean that it was a matter of their biology, but rather that it was a 'statistical fact' that *certain races are more likely to commit* certain violent crimes") (emphasis added); Exhibit E, #13 (same; "Although she used the term 'sadly', it was clear to me that she was not sad at all about her belief that certain groups commit more violent crimes than others").

The Report's statement that the witnesses "agreed" that she "made clear" during the Q&A that she was only talking about statistical evidence is simply wrong, and a misstatement of the evidence.

B. Judge Jones' Response During the Q&A did not Amount to "Corrective Action" Contemplated by the Rules.

To the degree the Report suggested that Judge Jones' statements during the Q&A amounted to "corrective action," the Report was incorrect. In fact, her remarks were not the sort of "corrective action" contemplated by Rule 11(d)(2), the commentary to the Rule, or the relevant rulings.

Rule 11(d)(2) states that a complaint may be dismissed if "the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint." An apology is one example of corrective action. Judicial-Conduct Rule 11, cmt. *See also In re Charges of Judicial Misconduct*, 465 F.3d 532, 547 & n.6 (2d Cir. Jud. Council 2006); *In re Charges of Judicial Misconduct*, 404 F.3d 688, 696-97 (2d Cir. Jud. Council 2005); *see also In re Cudahy* 294 F.3d 947, 953-54 (7th Cir. Jud. Council 2002).

Judge Jones has neither admitted nor apologized for her comments – in the Q&A or elsewhere. Indeed, she has sought to keep these proceedings as secret as possible. She has

[9] Citing Special Counsel's Report, the Report stated that "Indeed, the Assistant Federal Defender told the Special Counsel that she 'felt the media coverage suggesting otherwise – and highlighting the 'prone' language – was unfair to Judge Jones." Report, p. 26. Undersigned counsel's conversation with the AFD in question made clear that this quote, taken out of context, did not reflect the intent of her statements. Special counsel's use of a single statement made by a witness in the course of a lengthy interview highlights the problems of this secretive process, in which Complainants were denied access to the interview transcripts (including the person interviewed), and the notes collected from the witness. Here, this allowed mischaracterization of the witness's statements and the clear concern she expressed that Judge Jones's comments reflected views that were deeply biased and troubling.

refused to permit disclosure of the materials relied upon by the special counsel, the Committee, or the statements she made at the evidentiary hearing. Her behavior is a far cry from that discussed in the relevant rulings, and does not amount to corrective action.

Here, Judge Jones' public statements insulted and understandably offended audience members, particularly persons of color. As the Commentary to Rule 11 states, in that context of "particularized harm," "appropriate corrective action should include steps taken by the judge to *acknowledge and redress the harm*, if possible, such as by an apology . . . or a pledge to refrain from similar conduct in the future." That has not happened. Just the opposite—Judge Jones denied that she did anything wrong. Moreover, as the Commentary continues, "[v]oluntary corrective action should be proportionate to *any plausible allegations of misconduct* in the complaint." The Report simply ignored the applicable legal standard for corrective action in these circumstances.

C. Judge Jones Statements That Claims Of Discrimination Based On Race In Death Penalty Appeals Are "Red Herrings."

The Report stated that Judge Jones acknowledged that she said that a charge that the death penalty is administered in a racially discriminatory manner is a "red herring." Report, p. 18. The Report later found that "the evidence also shows" that Judge Jones' "used the term 'red herring' to signify her view that [such a challenge] is nonviable." Report, p. 28; *see also* Report p. 24 ("she states that she used the term only to mean that such complaints are not well taken from a practical or legal standpoint, in light of the Court's decision in *McCleskey [v. Kemp*].").

First, the Report's justification of Judge Jones' characterization of race claims entirely misconstrued the phrase "red herring." The standard, accepted meaning of the idiom is "something that distracts attention from the real issue." Merriam Webster online, available here: http://www.merriam-webster.com/dictionary/red%20herring. That meaning – something intended to distract – is hardly the same as something that is "nonviable."

Second, interpreted accurately and consistently with the evidence, Judge Jones' characterization of race claims as mere "distractions," dramatically evinced her inability to be impartial when such claims come before her. While her recollections apparently attempt to explain away this comment by citation to *McCleskey*, there are of course numerous other claims asserting race bias that are both legally and factually viable.

VI. JUDGE JONES COMMENTS ON CLAIMS OF INTELLECTUAL DISABILITY AS "RED HERRINGS."

The Report initially described Judge Jones' comments about claims of intellectual disability as follows:

> In her remarks, Judge Jones discussed defendants' subsequent reliance on *Atkins [v. Virginia]* to avoid the imposition of death sentences. In that context, she discussed cases that illustrated what she regarded as tension between the commission of a crime warranting the death penalty, and the diminished mental capacity that requires relief from a death sentence under *Atkins*.

Report, p. 28. The Report cited no evidence to support this characterization of Judge Jones' remarks, and was a far cry from the description provided by attendee affiants. Ins o doing, the Report again credited Judge Jones' version and rejected the sworn testimony of disinterested attendees at the lecture. Thus, the Report stated:

> Judge Jones strongly denies that she said that "it is a 'disservice'" to the mentally retarded to exempt them from the death penalty." Jones Recollections 21; Jones Hr'g Tr. 9. Witnesses diverge as to whether they specifically recall Judge Jones using those words. Most do not remember either way. A few recall her using the word "disservice" in that context, while others state that they do not and would remember if she had. *See* Special Counsel Report 23-24. In the absence of a recording, we are unable to find by a preponderance that the judge made that statement.

Id. at p. 29. The Report ignored the sworn testimony of the attendees:

> In the context of talking about this case and others involving claims of mental retardation, Judge Jones commented that she believes it may do a disservice to the mentally retarded to exempt them from death sentencing.

Exhibit A, #18.

> At one point she said that it is a "disservice" to the "mentally retarded" to exempt them from capital sentencing, which was very surprising to hear.

Exhibit E, #8. While Special Counsel's report apparently stated that there were witnesses who stated they did not remember Judge Jones' use of the term "disservice" and "would remember if she had," there is no indication of which witnesses made these statements, when, or their reliability. Similarly, the Report stated:

> We are also unable to find by a preponderance that Judge Jones literally expressed "disgust" at the use of mental retardation as a defense in capital cases, or said that capital defendants who raise such claims "abuse the system." No affiant or witness reports that she spoke those words, and we are also unable to find by a preponderance that Judge Jones literally expressed "disgust" at the use of mental retardation as a defense in capital cases, or said that capital defendants who raise such claims "abuse the system." No affiant or witness reports that she spoke those words. . . .

Report, p. 30. In fact, the affidavits used exactly those words:

> In describing above what Judge Jones said about these cases, I am not able to capture the complete outrage she expressed over the crimes or the disgust she evinced over the defenses raised, particularly by the defendants who claimed to be mentally retarded.

Exhibit A, #19. *See also* Exhibit B, #18 ("She expressed disgust at the use of mental retardation as a defense in capital cases"); Exhibit C, #9 (expressing distrust of the validity of claims of mental retardation, and that defendants might be "feigning mental impairment to avoid execution")

The Report's repeated disregard of the sworn evidence is remarkable. That consistent neglect of the evidence in the record threatens to undermine any possible confidence in or respect for this disciplinary process or the result in this case.

Indeed, the Report acknowledged – as it must - that the conduct reported by the sworn testimony was judicial misconduct:

> We have no doubt that, if a judge were to say that all claims of intellectual disability are invalid or abusive, or were to "express[] disgust at the use of mental retardation as a defense in capital cases," there would be good reason to doubt that judge's ability to decide such cases impartially.

Report p. 30 (citing Canon 3A(3), cmt.). Had the Report acknowledged the content of the attendee affidavits, or conducted a fair weighing of the credibility of the evidence, the Council would have been forced to conclude that Judge Jones' comments regarding the intellectually disabled violated the Judicial Code of Ethics. *See Id.* at fn 12.

VII. JUDGE JONES' COMMENTS THAT CLAIMS OF INNOCENCE ARE "RED HERRINGS."

After reviewing Judge Jones' statements and recollections, the Report initially concluded that "we agree with the Special Counsel that it is implausible that Judge Jones labeled actual innocence itself as a 'technicality.' The Report declined to find that Judge Jones was dismissive of such claims in the absence of a recording of the lecture. Once again, the Report rejects wholesale the sworn testimony that contradicted Judge Jones' denials:

> Actual innocence was another red herring. She said most people were guilty, no system worked perfectly, and there were always going to be a couple of cases that were decided improperly . . . In fact, all of the cases she knew of that had been reversed were reversed on technicalities.

Exhibit A, #29.

> Judge Jones also said that the cases in which the Innocence Project got its clients released did not turn out that way because of the facts or because the defendants were innocent but rather because of technicalities. . . . She was very dismissive of claims of innocence. She did not take seriously the possibility that innocent people had been sentenced to death. . . . Judge Jones included in her definition of "technicalities" cases in which the state withheld evidence and cases of actual innocence.

Exhibit B #13; 29; 30.

> Judge Jones characterized actual innocence as another "red herring". . . . She did say that all of the innocence cases had been reversed on technicalities.

Exhibit C, #15. See also Exhibit D, #13 ("Judge Jones also characterized actual innocence and arbitrariness as red herrings"); Exhibit E, #15 (same).

The evidence in the record makes plain Judge Jones' view that claims of actual innocence were "red herrings" (distractions), and that cases of actual innocence were in fact reversed on "technicalities." Quite simply, the evidence reveals her bias. In no way do her views promote public confidence in the integrity and impartiality of the judiciary. See Canon 3A(3).

VIII. JUDGE JONES' COMMMENTS REGARDING FOREIGN NATIONALS AND CLAIMS BASED ON INTERNATIONAL LAW.

Concerning the allegations of Judge Jones' remarks regarding foreign nationals and international law claims, the Report found no basis for a conclusion of misconduct. To reach that conclusion, the Report (1) relied on a misapprehension of the common meaning of "red herring" and (2) ignored the central aspect of the claim: that Judge Jones' statements evince her lack of impartiality when adjudicating claims based on foreign citizenship (violation of a prisoner's rights to be informed that they are entitled to the assistance of their consulate). Her statements about "Hispanics" – which includes Mexican Nationals – being more prone to violent crime and drug trafficking similarly show a marked lack of impartiality. *See* Complaint p. 9.

On Judge Jones characterization as "red herrings" of claims that prisoners were not advised of their right to consult with their consulate, the Report found that her views "express[] the views of a majority of the Supreme Court. As such, Judge Jones' contention that a defense based on a defendant's inability to consult with consular officials has been unlikely to succeed cannot be considered misconduct." Report p. 36.

However, as discussed above, calling an argument a distraction (a "red herring") is very different from saying the argument is "unlikely to succeed." Although the Supreme Court has indeed weighed in on whether claims based on treaty violations trump state

procedural default rules, or are rights enforceable in post-conviction proceedings without Congressional action, those are very different matters. The fact remains that treaties are the law of the land, and violations of the Vienna Convention that are not hampered by default are potentially valid constitutional violations that courts can and sometimes must adjudicate. For Judge Jones to peremptorily dismiss them as a "distraction" reveals her inability to be impartial.[10]

The Report deferred once again to Judge Jones' denials concerning her remarks about Mr. Ibarra. In fact, as established by the evidence in the record, she stated that Mr. Ibarra, a Mexican national and appellant in a case pending before her, would rather be on death row in the U.S. than in prison in Mexico. Report p. 37. This now-familiar absolute deference is belied by the evidence and documents submitted by Complainants. See Exhibit A, #32, Exhibit F, #14.

Lastly, the Report found that "no affiant or witness stated that Judge Jones denigrated Mexican nationals (or Mexican Americans) themselves. If she had, such comments would constitute misconduct." Report p. 37. This conclusion ignored Judge Jones' statements regarding race and propensity, which specifically discussed Hispanics being involved in drug trafficking, and in more violent crimes. *See supra*; Exhibit A, #28 (Judge Jones' statement that it was a "'fact' that there were an awful lot of Hispanics involved in drug trafficking, which in turn involved a lot of violent crime"); Exhibit B, #28 ("Judge Jones did say that a lot of Hispanics were involved in drug trafficking"). *See also* Exhibit C, #13; Exhibit D, #12, Exhibit E, #13.

As shown by the sworn testimony, Judge Jones denigrated persons of Mexican origin (as well as other Latino people), including Mexican Americans. For the Report to conclude that "no affiant or other witness stated that Judge Jones denigrated Mexican nationals" is bewildering at best, and belies the sworn testimony to the contrary.

IX. JUDGE JONES' COMMENTS ON INDIVIDUAL CASES PENDING IN FRONT OF HER – INCLUDING THOSE INVOLVING CLAIMS OF DISCRIMINATION, INTELLECTUAL DISABILITY, AND INTERNATIONAL LAW ISSUES.

The Report addressed four issues concerning Jones's alleged comments regarding individual cases pending before her: (1) whether the cases were pending when she gave the lecture; (2) whether her comments were on the merits; (3) whether the "scholarly exception" to the general prohibition on commenting on the merits of pending cases applied; and (4) whether – regardless of the application of the exception – the comments "denigrate public confidence in the judiciary's integrity and impartiality." Report p. 50. Although the report concluded that Judge Jones did indeed comment on

[10] Judge Jones' statement that "the Mexican government might claim to object to one of their nationals facing the death penalty in the United States but Mexico certainly wasn't about to provide any of their own citizens with the kind of legal protections the person would get in the United States," Exhibit A, #32, is only further evidence of her disregard for Mexico and Mexicans, and the validity of claims of consular rights violations.

pending cases (which she denied), it concluded that the scholarly presentations exception applied, and that her comments did not denigrate public confidence.[11]

The Report concluded that matters were pending or impending in five of the cases Judge Jones discussed during her lecture: Marcus Druery, Larry Swearingen, Elroy Chester, Ramiro Ibarra, and Carlos Trevino. *See* Report pp. 52–59. The Report concluded that Judge Jones' comments on Druery and Swearingen were not on the merits. *Id*. at 60-62. However, the Report noted that the claims raised in an impending matter in Swearingen's case were based on allegations of innocence and state misconduct – both issues Judge Jones discussed. To conclude that her discussion of Mr. Swearingen's case bore no connection to her condemnation of claims of innocence as "red herrings" – and thus were not on the merits then on appeal – is simply disingenuous.

With respect to the Chester case, the Report found that "because the point Judge Jones was making [in her lecture regarding the disposition of Atkins claims] hewed so closely to what she said in her *Chester* opinion, it is hard to determine that she was discussing the merits of an impending the case rather than reciting the 'disposition' of an earlier version of the same case." Report p. 63. However, the Report did not resolve that issue; instead the Report concluded it need not do so because the exception for scholarly presentations applied. *Id.* The Report reached a similar conclusion on the Ibarra and Trevino cases.

On the Ibarra case, Judge Jones apparently acknowledged discussing issues raised by Mr. Ibarra – including claims of mental retardation and consular rights violations – but apparently contended that this was merely a "report," not a "comment on the merits." *Id*. at 64. As with Swearingen, this simplistic analysis failed to recognize the interrelationship between her general commentary and degradation of just the sort of claims raised by Mr. Ibarra. Moreover, while the Report noted that there was a petition for rehearing *en banc* pending in Mr. Ibarra's case at the time of the lecture, the Report dismissed the significance of that pending petition, characterizing it as raising only a challenge "to the panel's determination that Ibarra's ineffective assistance claim had been procedurally defaulted." *Id.* The Report ignored the salient fact that Mr. Ibarra's claim of trial ineffectiveness was intertwined with his claims of intellectual disability and consular rights violations. Thus, those related, intertwined issues could well come back before Judge Jones if and when the case returns to the Fifth Circuit Court of Appeals.

In short, Judge Jones comments (1) directly addressed the merits of pending cases, (2) described the facts of those cases as examples of the capital-defense issues that she

[11] Complainants submit that Judge Jones's denial that she made any comments on the merits on any pending cases – see Report at p.49 – and the Council's findings to the contrary should have been considered in the evaluation of her denials regarding her other statements. This is the one instance in which the Report at least indirectly acknowledges that she testified falsely – yet in every other instance accepted her version of events, despite the sworn statements contradicting her.

discussed and denigrated as "red herrings," or (3) discussed cases involving issues inextricably related to the issues she analyzed so dismissively. Thus, the Report's conclusion that her comments were not on the merits is both illogical and unsupported by the factual record.

Ultimately, the Report concluded that if Judge Jones commented on the merits of cases pending or impending before her, the scholarly presentation exception applied to avoid a finding of misconduct. Report pp. 65-68.

The Report also considered whether Judge Jones' comments regarding individual cases violated Canon 2A (judges must act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) or Judicial Conduct Rule 3(h)(2) (conduct that has a "prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.") The Report concluded that as "Judge Jones' position on those issues (about which she indicated a merits view) also had already been expressed in her published opinions," no misconduct occurred. Report, p. 70.

On that point, the Report failed in two respects. First, it again failed to recognize the obvious connection between the substantive issues that she discussed at the lecture and the discussion of the specific, pending cases that raised those same issues. Second, the Report disregarded the evidence concerning how her conduct would inevitably "lower confidence in the courts" and fail to promote "confidence in the integrity and impartiality of the judiciary." The shock and dismay that the attendees expressed at her comments strongly refute the Report's flawed and unrealistic view of how observers would or should react—as discussed in the next section. Again, the Report labored mightily—but illogically and implausibly—to exonerate Judge Jones and avoid the obvious finding that she violated the Judicial Conduct Rules.

X. THE INEVITABLE EFFECTS OF JUDGE JONES' COMMENTS AND LECTURE

The affidavits from attendees are categorical that Judge Jones' comments diminished confidence in and respect for the judiciary's integrity and impartiality:

> As an African American male, and as someone who is interested in the areas where race and law intersect, I was made uncomfortable by her comments on race and found them offensive.

Exhibit B, #35.

> From speaking with others after the lecture and observing the reactions of others during her remarks, she upset and offended many of the attendees in the room tremendously.

Exhibit C, #14.

> The people I was sitting next to looked at one another and me and conveyed our surprise at these remarks on the issues of race. The looks on the faces of many of the attendees of all races was one of surprise and dismay. People sitting next to and near me looked at me and each other, conveying our surprise at how out of touch, insensitive and dismissive she seemed on issues of race. Based on these observations as well as comments I heard after the lecture, it was clear to me that many students were offended by Judge Jones' remarks. . . .

Exhibit D, #12. *See also* Exhibit E, #14; #18 ("The reaction in the room when she made these remarks [about race] was one of shock, surprise and offense. As a judge, she came off sounding distasteful and tactless); Exhibit F, #11.

> In describing above what Judge Jones said about these cases, I am not able to capture the complete outrage she expressed over the crimes or the disgust she evinced over the defenses raised, particularly by the defendants who claimed to be mentally retarded.

Exhibit A, #19. See also Exhibit B, #18 ("she expressed disgust at the use of mental retardation as a defense in capital cases.").

> At one point she said that it is a "disservice" to the "mentally retarded" to exempt them from capital sentencing, which was very surprising to hear. Judge Jones was clearly unhappy with how these defendants were using "mental retardation" to claim exemption from the death penalty.

Exhibit E, #8. See also Exhibit D, #9.

> She said that reversals of those who were allegedly innocent were really based on "technicalities", not innocence. She was unapologetic when making these comments. I found her remarks on this issue highly offensive and disrespectful of those who had been wrongly convicted and sentenced to death.

Exhibit E, #15.

> It was clear that Judge Jones was disgusted by the gruesomeness of these killings. I was surprised at how personal and emotional these particular arguments were. They seemed less analytical than a judge should approach a case. I drew from her remarks that her emotions and beliefs drove the results in some of these cases.

Exhibit F, #7. See also Exhibit E, #6; Exhibit C, #8-9;

Despite the unanimous and unequivocal statements of those who heard Judge Jones' remarks, the Report concluded that without a recording "we are unable to determine the nature of Judge Jones' tone or demeanor and so are unable to make a finding based on a preponderance of the evidence." Report, p.48. Courts and fact-finders normally

decide cases without a "recording" of prior statements. To manufacture a requirement that Complainants produce a recording was to create a patently unfair, impossible burden of proof. This Committee should not accept or countenance this novel and wholly inequitable burden—particularly when the Complainants were not allowed to testify or even attend any evidentiary hearing.

While the Report noted that several affidavits "found fault with the judge's tone," the only citation in support of the assertion that there were "others who did not" were to the undisclosed Special Counsel's report, and the one declaration submitted on Judge Jones' behalf – also unseen and undisclosed. *See Id*. On that basis the Report found the evidence "conflicting," and that, therefore, Complainants failed to meet the necessary burden of proof to prevail on the claim.

As throughout the Report, the purported "weighing of the evidence" amounted to no more than accepting what Judge Jones said and rejecting all contradictory evidence. That weighing of (or disregarding) the evidence was deeply disrespectful of the disinterested law students in attendance at the lecture who submitted sworn affidavits.

The Complainants' sworn evidence made clear that Judge Jones's remarks damaged attendees' trust and confidence in the integrity and impartiality of the judiciary. If the situation is not corrected through the present appeal, many future litigants will have exactly the same reaction. If this Committee does not act to reverse the Council's decision, the inevitable and unfortunate result will be to reinforce and compound that injury and to further undermine public respect for our federal judiciary and our system of justice.

Respectfully Submitted,

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