

OCT 13 2011

CLERKS & JUDICATION BUREAU
SYRACUSE OFFICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

Presiding:
Hon: John C. Cherundolo, JSC

In Re:

JOHN DOE,

Petitioner,

vs.

NOTICE OF ENTRY

NEW YORK STATE COMMISSION
ON JUDICIAL CONDUCT,

Index No. 2011-0421
RJI No. 33-11-0221

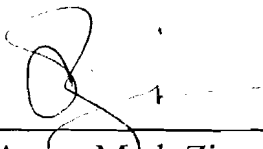
Respondent.

To: Heather R Rubinstein, Esq
Assistant Attorney General
Attorney for NYS Commission of Judicial Conduct
Via Email Heather.Rubinstein@oag.state.ny.us

*By Mail @
615 Erie Blvd West
Syracuse NY 13204*

PLEASE TAKE NOTICE: on September 27, 2011, Judge Cherundolo executed the attached Order, and it was duly filed in the Onondaga County Clerks Office on October 6, 2011.

Dated: October 11, 2011


Aaron Mark Zimmerman, Esq.
Zimmerman Law Office
Attorney for Petitioner
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STATE OF NEW YORK
SUPREME COURT
COUNTY OF ONONDAGA

In Re:

JOHN DOE,

Petitioner,

vs.

NEW YORK STATE COMMISSION
ON JUDICIAL CONDUCT,
Respondent.

Presiding:

Hon: John C. Cherundolo, JSC

ORDER

Index No. 2011-0421

RJI No. 33-11-0221

~~The court originally heard and considered a Verified Petition dated January 20, 2011~~
together with all supporting papers and then issued an Order to Show Cause and Temporary
Restraining Order dated February 7, 2011; respondent submitted a Verified Answer and
Return dated February 18, 2011; the court received, reviewed and made part of the record
respondent's Memorandum of Law dated February 18, 2011, and petitioner's Memorandum
of Law dated February 22, 2011; the court issued a Written Decision dated April 26, 2011;
and executed an Order dated May 12, 2011, which Order was filed on the Onondaga
County Clerk's office on May 17, 2011. In essence, the May 12, 2011 Order dismissed the
Verified Petition, unsealed the record and vacated the Temporary Restraining Order;

Petitioner served and filed a Notice of Appeal dated June 3, 2011; and in addition
by Notice of Motion dated June 6, 2011 moved the court to renew and to reargue the merits

of the original motion; the Motion to Renew and/or Reargue was supported by the Affirmation of petitioner's Attorney Aaron Zimmerman dated June 6, 2011; respondent filed opposing papers consisting of the Affirmation of Assistant Attorney General Heather R. Rubinstein dated June 20, 2011, and the Affidavit of Robert H. Tembeckjian dated June 17, 2011; petitioner's Attorney Aaron Zimmerman filed a reply affirmation dated June 27, 2011;

Petitioner's application for relief was returnable at a Motion Term of this court held on June 30, 2011 in Syracuse, New York; at that time the court heard oral arguments from ~~Attorney Aaron Zimmerman on behalf of petitioner; and from Assistant Attorney General Heather R. Rubinstein on behalf of respondent, New York State Commission on Judicial Conduct [hereafter Commission];~~

NOW UPON due deliberation of the above referenced documents and oral argument of counsel; and the court having made issued an oral decision and oral rulings from the Bench, it is hereby

1. ORDERED, that the court's oral Bench Decision of June 30, 2011 which has been transcribed shall be attached hereto as a decision and an explanation supporting this ordering document; and it is further

2. ORDERED, petitioner's motion to renew is granted; and petitioner's motion to reargue is granted; and it is further

3. ORDERED, that consistent with the concepts of Judiciary Law §4, 12 NYCRR §7000.8, 22 NYCRR §216.1, and based on the court's inherent powers, as identified in Matter of Hynes v Karassik 47 NY2d 659, 664 (1979), the Clerk of this Court shall immediately seal all papers, documents, and proceedings relating to this matter; further, no documents, information or detail shall be released to any entity, other than one of the parties or party's counsel, without further order of this court; and it is further

4. ORDERED, that consistent with the concepts Judiciary Law §45 and 12 NYCRR §7000.8, the Commission, its Administrator and Counsel Robert H. Tembeckjian, and all of its Commissioners, attorneys, representatives, employees and agents shall immediately seal and keep confidential all papers, documents, and proceedings relating to this matter; further, no public statements may be made by or on behalf of the Commission; and no documents, information or detail regarding this matter shall be released to any entity, other than one of the parties or party's counsel, without further order of this court; And to the extent the Commission has previously released, published or distributed any papers, documents, or otherwise disclosed information regarding these proceedings the Commission shall make a good faith effort to recall said documents and disclosures without identifying the motivation for such recall; and it is further

5. ORDERED, that the caption of this matter shall be styled as "John Doe v New York State Commission on Judicial Conduct" and all references to petitioner shall be as "John Doe," it being a fictitious name for petitioner who is a duly elected town justice in the State of New York; and it is further

6. ORDERED, that the Temporary Restraining Order originally issued by this court on February 7, 2011 is hereby reinstated in its entirety; and the Commission is hereby restrained from taking any acts in furtherance of prosecuting petitioner pursuant to the Formal Complaint dated May 20, 2010 [hereafter the Formal Complaint], without further ~~order of this court; and it is further~~

7. ORDERED, that within 60 days, the parties shall confer and submit the court, separately and/or jointly, the following documents, summaries, schedules, memoranda of law, reports, and otherwise respond to the following mandatory directives:

- a] Copies of all records from petitioner's town court relating to each matter upon which the Commission bases its Formal Complaint. The records regarding each such matter shall be segregated by name of each defendant and shall include all of the original charging instrument(s); the court's internal notes and documents; plea details; and information regarding dispositions, including the ultimate plea(s) or finding(s) of guilt; and the fines, surcharges

and sanctions imposed.

These documents and records should contain factual information describing the actions and activities taken by petitioner and petitioner's town court personnel regarding each such matter (collectively these are hereafter identified as the Underlying Matters).

- b] A spread sheet, or other summary, identifying each of those Underlying Matters where there was involvement, contact or other communication with ~~the District Attorney; in what manner the District Attorney was involved;~~ and identifying those Underlying Matters where the District Attorney was not involved.

These documents and records should contain factual information showing the District Attorney's involvement, if any, in each such matter.

- c] A spread sheet, or other summary, identifying each of those Underlying Matters where the defendant was represented by an attorney, in what manner the attorney was involved, had contact or other communication with the court; and identifying those Underlying Matters where the defendant was not represented by an attorney.

These documents and records should contain factual information showing defense counsel's involvement, if any, in each such matter.

- d] A spread sheet, or other summary, identifying for each Underlying Matter the original charge(s) [that is a listing of every ticket and charge issued to the individual defendant], together with a listing of the possible range of fines, surcharges, penalties and sanctions for each original charge; then, what the final disposition of each charge was, and the manner in which the fine, surcharge or other sanction imposed was inconsistent with the applicable statute and/or regulation. ~~To the extent there was an inconsistency, the specific statute and/or regulation shall be identified, together with the amount or nature of the inconsistency.~~

These documents and records should contain factual information showing the complexity or lack of complexity of the State's fine, surcharge and sentencing system; as well as the extent to which petitioner's sentencing errors deviated from the State mandated parameters, if any, in each such matter; and, if the sentence imposed took into account that several matters were consolidated and resolved by an agreed plea to a lesser number of charges.

- e] A spread sheet, or other summary, identifying for each Underlying Matter

where it is alleged there was an error committed by the clerk(s) and/or administrative personnel of the petitioner's town justice court. The Commission is to provide factual specifications of each alleged error committed by petitioner's town justice court's clerks and/or administrative personnel. In addition, for each such Underlying Matter, the Commission shall file factual specifications, if any, as to petitioner's active or direct involvement in said clerk and/or administrative personnel's error(s). To the extent the Commission's Formal Complaint against petitioner is based on an allegation of a so-called "general failure to supervise" the clerks and administrative personnel of the town's justice court, the Commission shall affirmatively detail the minimum acceptable standard of conduct to be employed by the State's town judges in overseeing and supervising the court's clerks and administrative personnel.

These documents and records should contain factual information showing petitioner's involvement, if any, in the errors committed by the court's clerks and/or administrative personnel; and the existing legal and factual standard, if any exists, regarding the manner in which the State's town judges are required to monitor, supervise or oversee the actions of the court's clerks and administrative personnel; and to determine if said standards have been previously published or otherwise disseminated to the State's town judges.

f] A spread sheet or other summary shall be submitted identifying each reporting requirement for the State's town justice courts, to whom each report is to be submitted [eg. Department of Motor Vehicles, NYS Comptroller, Office of Court Administration, and Unified Court System]; and the interval timing requirements for each report. If any such required report was subject to an audit, a copy of such audit shall also be submitted; and if no such audit was undertaken an affidavit of that fact shall be submitted. The Commission's Formal Complaint covers petitioner's activities from January 1, 2006 through May 30, 2008. Copies of all reports submitted by or on behalf of petitioner's town court are to be submitted.

These documents and records should contain factual information as to the purpose of the reports; who receives the reports; to what extent, if any, the reports are audited; and to what extent, if any, feedback is provided to the State's town judges. In addition, the documents and records should contain factual information as to what checks and balances are in place to assist the State's town judges in avoiding sentencing mistakes and to protect the citizens from such unintended errors. To the extent necessary, the parties shall cite statutes, regulation, and/or directives; and otherwise describe the oversight process employed by the Office of Court Administration, the Unified Court System and/or otherwise as to how the State's town courts and its judges are

administratively overseen and monitored.

- g] A report describing if Office of Court Administration, and/or the Unified Court System, or any entity affiliated with the State's town justice courts requires, allows or recommends the use or implementation of computer software programs designed to prevent, limit or otherwise alert the responsible individuals that a proposed fine, surcharge or other sanction is outside the parameters authorized by statute and/or regulation.

These documents and records should contain factual information identifying if any computerized system is required, allowed or is available to assist the State's town justice courts in avoiding sentencing errors.

- h] A spread sheet or other summary shall be submitted identifying every written complaint, censure, warning, or admonishment given to petitioner by any agency, or entity to whom petitioner's town court submits reports. A copy of said complaint(s) shall be submitted, and if no such complaint(s) have been issued an affidavit of that fact shall be submitted to the court.

These documents and records should contain factual information as how and if petitioner was on actual or constructive notice that the quality or quantity

of his judicial actions were in any fashion sub-par.

- i] A spread sheet or other summary shall be submitted identifying every written complaint, censure, warning, or admonishment given to petitioner by the Office of Court Administration or Unified Court System regarding the quantity or quality of petitioner's judicial activities. A copy of said complaint(s) shall be submitted and if no such complaints have been issued an affidavit of that fact shall be submitted to the court.

These documents and records should contain information as how and if petitioner was on actual or constructive notice that the quality or quantity of his judicial actions were in any fashion sub-par.

- j] The Commission shall submit factual specifications for each Underlying Matter describing how each of petitioner's individual errors identified in the Formal Complaint constituted unethical judicial misconduct, including what aspect of petitioner's actions showed and otherwise constituted *mens rea*.

These documents and records should contain factual information as how and/or in what fashion petitioner's errors were based on intentional misconduct or other volitional action, as opposed to unknowing errors based

on misapplying and/or misapprehension of fact and/or law.

- k] The Commission shall submit a report and/or memoranda of law describing the Commission's position on its authority to intervene in a town judge's actions and decisions allowing multiple charges to be reduced to a single charge; and the Commission's authority to intervene in the plea bargain process, including the judge's ability to impose fines and surcharges.

These documents and records should contain factual information as how and/or in what fashion the Commission has authority to intervene in the day-to-day operations of the State's town justice courts.

- l] The Commission shall submit a report and/or memoranda of law describing the Commission's position on where the line is to be drawn between when one or more sentencing errors by a town judge calls for administrative action by the Office of Court Administration and/or Unified Court System; and conversely, when the judge's sentencing error(s) constitutes unethical judicial misconduct over which the Commission has jurisdiction to prosecute. In this submission, the Commission shall describe what level of *mens rea* is required before a judge can be prosecuted for unethical judicial misconduct as a result of a sentencing error. The Commission shall also identify how and in what

manner a judge can be charged with *mens rea* if the judge did not have knowledge of prior sentencing errors

These documents and records should contain factual information as how and/or in what fashion the Commission has authority to intervene in the day-to-day operations of the State's town judges; and when one or more mere administrative error(s) converts into a chargeable an act of unethical judicial misconduct.

- m] The Commission shall submit a report and/or memoranda of law describing the Commission's authority to intervene in a town judge's acts of allowing and accepting a defendant to plea bargain one or more traffic related infractions and/or misdemeanors down to one or more VTL §1101 dispositions; and to what extent, if any, the Commission has authority to intervene when a town judge equitably imposes a fine, surcharge and/or other sanction for a VTL §1101 disposition.

These documents and records should contain factual information as how and/or in what fashion the Commission has authority to intervene in the day-to-day operations of the State's town justice courts. Even though the Commission has not, as yet, issued a Formal Complaint [See 12 NYCRR

§7000.1 (g)] against petitioner for his previously allowing and accepting plea bargains to VTL §1101 dispositions, the Commission has likewise not issued a finding or other final determination on this issue. It is manifestly unjust and inequitable, for the Commission to commence an Investigation [See 12 NYCRR §7000.1 (j)] of a sitting town judge regarding potential charges of unethical judicial misconduct, but not to timely issue a Dismissal [See 12 NYCRR §7000.1 (f)], or other formal determination stating that the Investigation is closed with a finding of no cause for action. In this case, the existing record before the court shows petitioner, solely as a result of the Commission's Investigation immediately issued a Local Rule refusing to accept or approve plea bargained VTL §1101 dispositions. Even though the Investigation has been completed, the Commission has failed to either Dismiss its Investigation on this issue or file a Formal Complaint. While the VTL §1101 issue is not part of the pending Formal Complaint dated May 20, 2010, the court *sua sponte* directs the Commission to disclose and describe its practices and procedures for closing or otherwise Dismissing a matter once an Investigation is commenced, as the Commission's practices and procedures clearly impact the day-to-day functioning of the States' town justice courts.

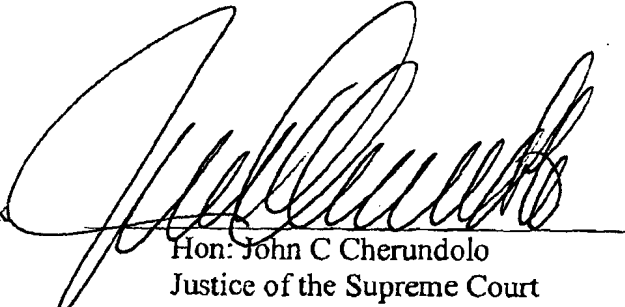
n] The Commission shall submit a report and/or memoranda of law describing the Commission's position relative to the Commission's authority to intervene

in a town judge's acts of allowing and accepting a plea bargain whereby multiple traffic related infractions and/or misdemeanors are reduced to a single or lesser number of charges; and to what extent, if any, the Commission can intervene when a town judge equitably imposes a fine, surcharge and/or other sanction.

These documents and records should contain factual information as how and/or in what fashion the Commission has authority to intervene in the day-to-day operations of the State's town justice courts.

ENTER

Dated: September 27 2011
At: Syracuse, New York



Hon: John C Cherundolo
Justice of the Supreme Court

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STATE OF NEW YORK : FIFTH JUDICIAL DISTRICT

SUPREME COURT : COUNTY OF ONONDAGA

-----x

ANDREW N. PIRAINO, :Index No. 33-11-221

Plaintiff,

-vs-

MOTION TERM

NEW YORK STATE COMMISSION
ON JUDICIAL CONDUCT,

Defendant. :

-----x

June 30, 2011

Onondaga County Courthouse
401 Montgomery Street
Syracuse, New York 13202

B E F O R E:

HONORABLE JOHN C. CHERUNDOLO,

Justice of the Supreme Court

1 A P P E A R A N C E S:

2

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Attorneys for Plaintiff
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1 *Piraino v. NYS Commission Motion Term*

2 THE CLERK: Piraino versus New York State.
3 Counsel, note your appearances.

4 MR. ZIMMERMAN: Aaron Zimmerman on behalf
5 of Judge Piraino.

6 MS. RUBINSTEIN: Heather Rubinstein on
7 behalf of the Respondents, Your Honor.

8 THE COURT: I want this transcribed.

9 MR. ZIMMERMAN: If the Court please, this
10 is a motion to renew and reargue. The papers are
11 complete. Unless the Court has questions, I will
12 rest on the papers.

13 THE COURT: Mr. Zimmerman, I guess the
14 only question that I have is that you've given me
15 this booklet that was the original batch of papers
16 that you submitted; is that right?

17 MR. ZIMMERMAN: Yes, Judge.

18 THE COURT: And I've gone through this
19 several times. And I'm just trying to refresh my
20 recollection because I don't have the whole --
21 actually, I didn't get the State's original papers
22 as part of this motion. But all I see here that
23 was attached was schedule B-1. I didn't see any
24 of the other schedules. I did have the other
25 schedules when we talked originally.

1 *Piraino v. NYS Commission Motion Term*

2 MR. ZIMMERMAN: What I did, Your Honor, so
3 we can be working off the same documents is I have
4 my motion papers to renew and reargue. And then
5 as a courtesy to the Court, rather than get a
6 certified copy from the County Clerk's office, I
7 simply had my staff make a photocopy of what I
8 think was part of the original motion papers.

9 It's possible that some of the papers that
10 were in the original motion are not physically
11 before you, Your Honor.

12 THE COURT: Okay. All right. Maybe you
13 will remember. Did I have all of the -- because
14 all I'm looking at is schedule B-1.

15 MS. RUBINSTEIN: I believe they were not
16 submitted with the original motion. They were --
17 that the Respondent submitted it in response.

18 THE COURT: You did?

19 MS. RUBINSTEIN: I do believe so, Your
20 Honor. I didn't bring the entire file with me.

21 THE COURT: You don't have it with you?

22 MS. RUBINSTEIN: I did not bring it.

23 MR. ZIMMERMAN: It's my recollection that
24 all of the original exhibits to the formal
25 complaint were made part of the original motion

1 *Piraino v. NYS Commission Motion Term*

2 papers.

3 THE COURT: All right. I have some
4 questions that -- thank you, Mr. Zimmerman.
5 I'm -- I read the motion to reargue and I have
6 several concerns. All right. And why don't you
7 come up to the podium so we make sure we get this
8 on the record.

9 MS. RUBINSTEIN: Yes.

10 THE COURT: Not you, Mr. Zimmerman. You
11 can stay there or move so you can hear and see.
12 Uhm, my first question that I have deals with that
13 part of my original order that was the relieving
14 the temporary restraining order and vacating that
15 and unsealing the records.

16 Since that time, at least as according to
17 the documents submitted to me, there has been
18 apparently some sort of a campaign that Mr.
19 Tembeckjian has undertaken to publicize this, or
20 at least I see that he's been active in getting
21 the word out, both from the website where
22 everything was published on the website that
23 happened here in court, and also talking with the
24 papers. And in one case, the people incorrectly
25 charged where the Commission published on its

1 *Piraino v. NYS Commission Motion Term*

2 website a list of the people incorrectly charged,
3 and how he's never seen somebody who's been
4 involved in this many cases as a Judge.

5 That's what all about -- I have a real
6 concern about that, you know, and I'm bothered by
7 it. So from the context of a motion to renew,
8 obviously this is new stuff that has come about,
9 and I am concerned about it, and maybe I want to
10 get your read on that. What are we doing here?

11 MS. RUBINSTEIN: The Respondent's
12 position, Your Honor, with regard to what's been
13 made public is that it was public due to the
14 litigation. The fact that the underlying record
15 was unsealed makes it public record. That nothing
16 other than what was made public record was
17 disclosed on the website.

18 Respondents put all their litigation, which
19 is made public, on their website. This particular
20 litigation is no different than what they do in
21 the ordinary course of their business.

22 THE COURT: So whatever -- whenever there
23 is a case, Mr. Tembeckjian and somebody from the
24 Commission goes around saying things, "I've never
25 seen a Judge with so many mistakes in cases." Is

1 *Piraino v. NYS Commission Motion Term*

2 that par for the course? Is that what you are
3 telling me?

4 MS. RUBINSTEIN: If the press has
5 inquiries, I believe they respond, Your Honor.

6 THE COURT: All right. That bothers me.
7 Okay. I'm going to grant the motion to renew and
8 to the extent that I'm going to reinstate the seal
9 in this record. And I'm going to reinstate the
10 temporary restraining order.

11 And I'm going to order that Mr. Tembeckjian
12 and the Commission not publically discuss this in
13 any way and that they not publically disclose any
14 documents in any way.

15 And I am uniquely concerned because I don't
16 remember seeing the full list of people in the
17 first, and I haven't checked downstairs to see
18 what was filed with the order, but I will check
19 that because I now understand that all 900 names
20 were published and that was made public.

21 MS. RUBINSTEIN: Respondent would just
22 like to note their objection for the record, Your
23 Honor.

24 THE COURT: I got it. You can object, and
25 I'm sure you will. But I think that this needs to

Piraino v. NYS Commission Motion Term

1
2 be resealed. I think it's been misused by the
3 Commission, or at least Mr. Tembeckjian, and I'm
4 not sure what else is out there and what other
5 public statements he's made or not made, and I
6 don't know what he is making now.

7 I want in my order that he stop. Okay. I
8 don't want any more public statements about this
9 man. And I think the matter should be resealed.
10 I'm going to order that it be resealed.

11 I'm going to -- with regard to the original
12 order, I'm going to ask that an amended order be
13 submitted that specifically reinstates the seal,
14 reinstates the temporary restraining order. And
15 ask the Court to seal all papers of the
16 proceeding, including those that were originally
17 made public.

18 From my perspective, I'm very much concerned
19 about the use of that, what was made of it by the
20 Commission and Mr. Tembeckjian. And that is a
21 concern to me. I know your position, counsel, is
22 that I got it right the first time, and I may
23 have. I haven't really decided whether I have or
24 not yet, but I do have some concerns and the
25 allegation by Mr. Zimmerman in the motion to renew

1 *Piraino v. NYS Commission Motion Term*

2 is that I really didn't understand or didn't
3 appreciate either the facts and/or the law. While
4 I think I'm pretty familiar with the law,
5 reviewing my original decision and reviewing the
6 notes I guess that I was initially wowed by the
7 number of cases that were involved that were
8 presented where the Commission said there was an
9 error made.

10 And I guess that because of the admission
11 made by Piraino -- Mr. Piraino that I really
12 didn't dig below the admission and/or look into
13 the various issues that were involved in that to
14 see whether there was adequate mens rea or not to
15 deal with admission or to bring the Commission
16 into play here.

17 And I have a concern about that. Because as
18 I reflect on it going back and not arguing the
19 same thing again, but looking at what I actually
20 had a handle on and didn't have a handle on, I
21 guess what I did not have a handle on, and quite
22 frankly, what I don't remember seeing as there was
23 Exhibit B-1, is the complete record of every item
24 that is claimed that the Judge has done wrong, and
25 the reason why it is felt that that forms the

1 *Piraino v. NYS Commission Motion Term*

2 subject of an ethical review.

3 And I've had the chance to relook at the
4 papers. I looked at Mr. Zimmerman's new papers,
5 and I'm still not clear in my own mind because I
6 don't have that information what it is here that
7 is claimed to get this to the point, that it's an
8 ethical case rather than an administrative error
9 case or a mistake of law case, and I'm bothered by
10 that.

11 I'm bothered by that to a great degree.
12 Particularly when I see a complaint by the
13 Commission on the number of cases that are
14 involved. Rereading the original papers, I noted
15 that there were several occasions, and there may
16 be more than several, only several talked about,
17 where Judge Piraino really disagreed with the
18 Commission. Pointed out mistakes that the
19 Commission had made with regard to their
20 assessment.

21 And I am very much concerned about the scope
22 and extent of that as far as the number of tickets
23 that were issued, and how many tickets were dealt
24 in plea, what the end result was of all that, and
25 how that all relates into this as well.

1 *Piraino v. NYS Commission Motion Term*

2 So I just want to be sure that I understand
3 the Commission's deal here or claim here. As I
4 understand it, because I read a newspaper article
5 that said this, Mr. Tembeckjian does not feel that
6 the Judge actually profited from any of the
7 wrongdoing here. Is that right? I read that in
8 the newspaper that he said that.

9 MS. RUBINSTEIN: I -- Your Honor, I did
10 not actually read -- I didn't read the newspaper
11 article. I apologize, Your Honor.

12 THE COURT: I'm asking you there is no --
13 of all of the stuff that was done leading up to
14 the complaint, all the investigation, there was
15 nothing as I understand it that showed that Judge
16 Piraino profited at all from any of these alleged
17 mistakes. Is that right?

18 MS. RUBINSTEIN: That's my understanding,
19 Your Honor. But our position would be that the
20 petition had --

21 THE COURT: I'm trying to get whether
22 that's your understanding.

23 MS. RUBINSTEIN: That's my personal
24 understanding, Your Honor.

25 THE COURT: And because that's what he

1 *Piraino v. NYS Commission Motion Term*

2 said to the newspapers, Mr. Tembeckjian said to
3 the newspaper, so there's not a profit motive to
4 all this. This is just a matter of mistake and a
5 mistake of either a mistake of law and/or
6 administrative mistake; is that right?

7 MS. RUBINSTEIN: We would argue, Your
8 Honor, the same argument we made in our original
9 papers which is that we have jurisdiction with
10 this regard.

11 The entire petition was the argument was he
12 didn't have jurisdiction over this issue. We
13 would argue we do have jurisdiction. That was
14 really the sole argument of my petitioner in his
15 original papers and the Court, we would submit.

16 THE COURT: If there were other arguments,
17 I agree they were subtle and I didn't get them.
18 In rereading them, I think there were other
19 arguments that I missed and maybe you missed, too.

20 MS. RUBINSTEIN: I don't believe there
21 were, Your Honor. If there were, they were
22 addressed in our original pleadings. And we would
23 submit, Your Honor, that the Court did get it
24 correct the first time.

25 THE COURT: I may have. I'm not saying I

1 *Piraino v. NYS Commission Motion Term*

2 didn't. I'm trying to get to what it is that is
3 the ethical violation that the Commission is
4 stating here that gives them jurisdiction.

5 MS. RUBINSTEIN: We submit, Your Honor,
6 that's the whole point. This is just an
7 allegation at this point. The Commission itself
8 has not made a finding because it hasn't gone
9 before the Judge within the Administration
10 Commission.

11 THE COURT: I got that. There's enough to
12 get them to the complaint stage?

13 MS. RUBINSTEIN: Correct.

14 THE COURT: You went through a year of
15 discovery, and the Judge cooperated. Brought all
16 the records, everything he brought to you.
17 Everybody looked at it. The depositions.
18 Discussions on the record. And at the end of all
19 of that, and I saw the complaint, I'm trying to
20 get to an understanding of the ethical violations
21 that the Commission is claiming here.

22 MS. RUBINSTEIN: I believe it's in the
23 complaint that the Commission filed against Judge
24 Piraino in its pleadings.

25 THE COURT: That's it?

1 *Piraino v. NYS Commission Motion Term*

2 MS. RUBINSTEIN: Correct.

3 THE COURT: Okay.

4 MS. RUBINSTEIN: I mean we're limited.

5 It's a quasi sort of analogous to a criminal
6 proceeding. We would be limited to those charges
7 at this point.

8 THE COURT: Okay. I've got some issues
9 that I need to clarify. And to the extent that
10 with regard to the motion to renew, I think we
11 already talked about that, and I'm resealing
12 everything that we are doing here.

13 I am also at this time going to issue a
14 temporary restraining order staying any
15 conditional action by the Commission until we
16 resolve this motion. Because what I intend to do
17 today is to grant the motion for renew and
18 reargument to the extent that I feel that I need
19 additional information to make decisions
20 concerning whether this is the type of a
21 contention by the Commission that will be an
22 ethical claim.

23 And the reason -- one of the reasons that I
24 get to that is that I now realize, and even though
25 this may not have been as simply stated in the

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2 papers as I found out through reading the
3 newspaper articles, that the Judge had during the
4 time in question, which was little over a year,
5 dealt with over 16,000 issues, ticket matters,
6 that were closed, and another 18,000 or so that
7 had come in.

8 So basically the Judge was dealing with some
9 34,000 issues through his office during the time
10 period in question. And of that, the claim is
11 that somewhere south of 900 were done improperly
12 or at least that's the claim, and I've read the
13 complaint so I understand it.

14 It's -- now I understand the ramifications
15 of the claim and what that means. So of the
16 36,900, less than a thousand are at issue here,
17 which leads me to believe that that is less than
18 five percent, maybe even less than three percent
19 of the Judge's calendar during that period of time
20 suspect, and during that review that was done by
21 the Commission during the precomplaint stage,
22 apparently the Judge has taken measures to make
23 sure this doesn't happen again, and to make sure
24 that from now on the fines will be within the
25 guidelines. And I guess I understand that now.

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2 And also what I really get that I didn't get
3 the first time is that the action being taken by
4 the Commission may have, in fact, obviously in the
5 Judge's case has had a significant impact on the
6 way he might hold discussions with regard to plea
7 agreements. Whether he does plea agreements. And
8 if so, the nature and type of plea agreements that
9 he would enter into, which has the Commission
10 actually reaching into how he operates his daily
11 court routine, and how he operates his pretrials,
12 how he operates his plea deals and plea
13 agreements.

14 And actually gives the Commission --
15 apparently attempts to give the Commission -- not
16 attempts, but, in fact, apparently does give the
17 Commission some input on how he should decide
18 matters with regard to the things before him.
19 That concerns me.

20 Again, I didn't really appreciate that the
21 first time around. I didn't understand that that
22 was a mistake of both fact and law on my part,
23 which gets me to think deeper with regard to this
24 issue and how this issue should be handled.

25 The reason I wanted this on the record is

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2 that I have a number of things that I am going --
3 now that I've granted the motion to renew and
4 reargue, I don't feel that I can adequately make a
5 decision based on the information that was in
6 front of me the first time around.

7 I am going to ask each party to meet and
8 confer and provide to me the following documents
9 and things so that I can make a decision. And I'm
10 going to give you sixty days. If you need more,
11 let me know.

12 But I'm going to need these documents with
13 regard to however many hundred claims there are
14 concerning the issues that the Commission feels
15 were ethical violations here.

16 Number one, I am pretty much of the belief
17 that there might have been DA recommendations with
18 regards to pleas, fines and/or sentencing with
19 regard to the subject cases that we're talking
20 about here.

21 I am going to ask that I receive a copy of
22 any and all DA recommendations in any of the cases
23 that are at issue here. And with regard to those
24 cases that have no DA recommendations, I think
25 whatever document is submitted should say that

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2 there was no DA recommendation. If there was a DA
3 recommendation, I would like to see the document
4 that shows the DA recommendation. And clearly
5 shows whether the recommendation was for a plea
6 agreement or a fine or sentencing, and that would
7 be number one.

8 I am concerned that many of these items were
9 done at the recommendation of the DA. And the
10 question here is who might be really at fault for
11 some of the fines, sentencing and other issues
12 going on in these some 700 cases.

13 One of the things that I did not have before
14 me in the original motion papers was information
15 on all of the alleged violations concerning
16 inconsistencies in fines, surcharges and
17 bookkeeping. And I would like each of you to meet
18 and confer and provide to me any of the alleged
19 inconsistencies, itemizing and showing the alleged
20 inconsistency and fines and surcharges and showing
21 to me the bookkeeping involved in that.

22 And with regard to that, I'd like to receive
23 as number three, a clarification on each case
24 regarding the clerical factors involved in
25 assessing fines and surcharges for the fines and

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2 violations that were involved. What I mean
3 clerical factors, who it was, whether it was the
4 Judge or somebody clerically that did that. How
5 they went about doing that and etcetera.

6 One of the things that I am concerned about
7 here, and I realize this came to the Commission
8 now at least as further reading of both the papers
9 and the newspaper articles, that the -- there were
10 two complaints that brought this to the
11 Commission's attention.

12 I am interested to know whether at the
13 Judge's office and/or through the Office of Court
14 Administration or the Unified Court System, how
15 the reporting is done to both OCA or Unified Court
16 System and/or Department of Motor Vehicles.
17 Whether it's done on a daily basis. Whether it's
18 done at the time of the plea is entered. Whether
19 it is the fine levied. Whether it is done at a
20 time on a monthly report basis.

21 And I am interested to know exactly how that
22 is done and how those reports are made. Who they
23 go to or who they went to. And I'm interested to
24 know the responsibility of the persons that they
25 go to to evaluate whether or not they are

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2 consistent with DMV guidelines and the fine and
3 surcharge guidelines.

4 In other words, I am interested to know
5 whether there is a system in play,
6 administratively in our state that prevents this
7 sort of a thing from happening should the judges
8 make a mistake, particularly judges that handle 34
9 or 35,000 cases over a time period and make less
10 than two percent or three percent mistakes.

11 So I have a concern about that, whether or
12 not there is such an administrative overview in
13 place and if there is how it operates. And I
14 don't know whether the Judge or the Commission or
15 whether OCA or Unified Court System can find that
16 and let us know that, but I think that before we
17 call this an ethical violation, we should see what
18 type of a check-and-balance system there is for
19 the protection of the citizens of the State of New
20 York given that fact.

21 I'm also -- next part -- really part of
22 that, I want to know whether or not there is a
23 computer program in effect and/or discussed or
24 maybe ready to be in effect that would prohibit
25 clerical errors and prohibit errors of excessive

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2 fines in cases so that when that plea and that
3 sentence is actually placed in to the computer,
4 whether the computer would actually reject it if
5 it is outside the sentencing and/or fine
6 guidelines.

7 Seems to me in this day and age that would
8 be something very easily to occur. It would be
9 something easy to make happen. And it would be
10 something that would be very preferable to both
11 the citizens of the state, and also to the judges
12 who serve as elected officials chosen by their
13 local communities.

14 I'm interested to know as part of my list of
15 items, and I would like the -- to get information
16 regarding these as to how many of the alleged
17 violations were bench determinations for fines and
18 surcharges, and at the time of the bench
19 determination, how many were made when the DA was
20 there, when the DA agreed, and where the DA made
21 recommendations on to the bench with regard to
22 both the sentencing and to the plea agreement.

23 I am also interested to know, and I would
24 like to see a list again with those complaints
25 that we have how many of the people involved were

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2 represented by counsel, and how many of those
3 counsel actively agreed to the sentencing. And
4 how many of those counsel, together with the DA,
5 made a plea arrangement which they suggested to
6 the Judge would be fair and equitable and that the
7 Judge took it under his consideration.

8 I already talked about reports. And I want
9 to see the reports, the actual reports that were
10 sent to DMV and to OCA and to UCS from the Judge
11 with regard to whatever reporting process is in
12 effect or was in effect during the subject time
13 period.

14 Just to be sure that I understand how these
15 are reported to DMV and to UCS and OCA, and to
16 see -- again, getting to the oversight issue that
17 this obviously apparently leads us to in this
18 case.

19 I also want to see as a corollary to that
20 how many times it was when these reports were
21 submitted. And I think it was said that it was --
22 there was never a case, but I want to be sure of
23 this, how many times it was when these reports
24 were submitted to either the DMV or the OCA or
25 UCS, and whatever an audit was done.

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2 I'm interested to see whatever audit was
3 done both internally and administratively at OCA,
4 UCS and the DMV. I'm interested to see what
5 feedback was given to Judge Piraino, and whether
6 there were any complaints at any time by any
7 agency, government or otherwise, that the Judge
8 Piraino was overstepping his bounds with regard to
9 fines and surcharges and sentencing.

10 Again, getting to the point of who monitors
11 the reports. Who's in charge of the reports.
12 What are the reports used for. How are the
13 reports used in evaluating the Judge's
14 capabilities. Particularly one who has been on
15 the bench as long as Judge Piraino.

16 One of the things that I was not clear
17 about, and actually in rereading the Commission
18 conversations that took place with Judge Piraino,
19 even they were not clear about, where in a given
20 case when an alleged infraction or an alleged
21 ethical violation occurred, how many tickets that
22 were given to an individual originally were
23 actually given as charges, what were the nature of
24 those charges leading to the plea arrangement.

25 So I'm going to ask that you petition the

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2 Judge, or however you can get that information,
3 advise as to how many tickets or infractions or
4 citations were actually given in a given case that
5 ultimately ended being pled out, and how many
6 charges were eventually pled out, and then whether
7 there was more than one offense charged or whether
8 there was a single offense charged, even though
9 there might have been only one resolution. Maybe
10 there were two or three, four, five tickets
11 charged. I'm interested to see that.

12 And I would like to get something from the
13 Commission as far as their position as it relates
14 to these some 900 or so ethical -- alleged ethical
15 violations as to what their position is with
16 regard to the number of original charges being
17 reduced to a single ticket, and how that relates
18 to the impositions of fines and surcharges.

19 I'm also interested to get from the
20 Commission their position with regard to each
21 violation and what the mens rea was of the
22 petitioner in each alleged ethical violation.

23 In other words, what is it about that
24 violation that causes the Judge to have ethically
25 violated the ethical rules that the Commission is

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2 asserting that he violated.

3 I'm also interested as part of this exercise
4 to get the position of the Commission with regard
5 to what extent does OCA or UCS have the ability
6 and the obligation to administer or review,
7 evaluate and give feedback to judges who submit
8 the reports that they submit.

9 I want to see what the Commission's position
10 is with regard to that so that we can get a better
11 understanding of that. If there is anything
12 written, I'd like to see whatever it is that is
13 written that deals with that administrative review
14 and feedback from judges, either from OCA or UCS.

15 I'd like to get a memorandum of law also at
16 this time during the period that we're looking at
17 these items from the Commission of what connotes a
18 judiciary ethics violation and what level of mens
19 rea is necessary before someone can be charged by
20 the Commission.

21 You know, initially as presented to me in
22 this case, it was a very simple case that there
23 were claims of errors and that the errors were
24 admitted to. I now see issues dealing with how
25 this effects plea agreements, which leads me to my

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2 next request. And my next request I am going to
3 make to the Commission, what is the Commission's
4 position with regard to the ability of judges to
5 accept pleas to Vehicle and Traffic Law Section
6 1101.

7 And given that, what is their position with
8 regard to the fine limitations and the surcharge
9 limitations that govern that section. And what is
10 their position with regard to the use of those
11 fines and surcharges with regard to multiple
12 violations that are reduced to that section.

13 In other words, what is it ethically that is
14 being violated if a judge pleas out two, three or
15 four tickets to an 1101 and imposes a fine that he
16 believes to be fair and reasonable.

17 What are the Commission's beliefs as to what
18 discretion a judge may have in evaluating tickets
19 which are one, two, three or four in number,
20 reducing them to a single charge and then choosing
21 what he believes to be an equitable amount for
22 that.

23 I think I've exhausted my list. I did this
24 on the record so that -- because I'm going to ask
25 Mr. Zimmerman to prepare a proposed order in this

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2 case. To include these documents to be submitted
3 to me, and I now that I've gone through them, and
4 I have spoken them, it appears to me that sixty
5 days maybe -- well, I will ask you is that enough
6 time?

7 MS. RUBINSTEIN: I'm not sure, Your Honor,
8 because it sounds like a vast majority of the
9 documents wouldn't be within the Commissioner's
10 control, that was one of the notes that I just
11 written. Many of those reports would have been
12 submitted by Judge Piraino, too.

13 THE COURT: I'm asking you to meet and
14 confer because some are going to be in your
15 control. Some might be in the Judge's control.
16 Some we might be able to get from OCA or UCS.
17 Some if we can't get them or we don't know how to
18 get them, maybe we can find out what entity i.e.,
19 the audit department of OCA, audit department of
20 DMV. Maybe the comptroller may have some of these
21 documents and things. And if we need to subpoena
22 those, you telling me the Commission might not be
23 able to get them or the Judge might not be able to
24 get them, and we will subpoena them and take a
25 look at this.

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2 MS. RUBINSTEIN: I want to make it clear,
3 for the record, it's not the Respondents that are
4 the keepers of a lot of these documents.

5 THE COURT: I got it. But the Respondents
6 are the ones making the charges here, so it is up
7 to me to feel comfortable that ethical violations
8 charged are within the jurisdiction of them.
9 Given the facts, at least as we know them, leading
10 up to the complaint, and that's really what I'm
11 out to do here. Mr. Zimmerman, you have some
12 question?

13 MR. ZIMMERMAN: No, Your Honor. I'll
14 secure a copy of the transcript, then do my best
15 to make sure the order complies with the decision
16 you've issued on the record and comments you made.
17 I would only note for, Your Honor, that we have
18 already scanned in to and made copies of all of
19 the original court records relating to each of the
20 tickets and charges that are -- that were of
21 concern and have been inquired by the Commission
22 so I can make those available to Miss Rubinstein
23 almost immediately. If you like, Your Honor, I
24 can burn to a CD and have them submitted to your
25 Chambers for review.

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2 THE COURT: Yeah. Those and other things
3 if you can meet and confer and from my laundry
4 list just let me know what you're responding to
5 when you do respond that way -- and it would be
6 very helpful to me to be Bates numbered. I don't
7 know if that is something we can get done or not.
8 If it can be done, I would ask that that be done
9 as well.

10 And with regard to each of these items,
11 including the cost of the transcript, I think in
12 fairness that the two parties share the cost of at
13 least the transcript, and let's see if we can go
14 forward and get to the bottom of all of this.

15 MR. ZIMMERMAN: Thank you. Judge, so I
16 can be sure about the terms I'm going to place
17 into the proposed order, renew and reargument is
18 granted?

19 THE COURT: Yes.

20 MR. ZIMMERMAN: The original TRO is
21 reinstated?

22 THE COURT: Yes.

23 MR. ZIMMERMAN: And the record is
24 resealed?

25 THE COURT: And the record is resealed.

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2 And part of the TRO is that --

3 MR. ZIMMERMAN: Thank you.

4 THE COURT: I want to be sure part of the
5 TRO is that no one from the Commission or the
6 Commission staff will discuss this matter in
7 public. Again, I'm upset about some of the things
8 I read in the papers and some of the items that
9 I've read here. I think that that's been abused.
10 I want to be sure that's in the TRO language, and
11 also the TRO language there should be a stay to
12 all the Commission action pending the final
13 resolution of this motion.

14 MR. ZIMMERMAN: Thank you, Judge.

15 THE COURT: And at the proper time when we
16 get all these documents together and get all these
17 memos and everything together, I will give each of
18 you additional time to submit any additional
19 documents or contentions you want to make, then we
20 will argue a -- sixty days enough?

21 MR. ZIMMERMAN: It is from my side.

22 THE COURT: Miss Rubinstein?

23 MS. RUBINSTEIN: I'm not sure, Your Honor,
24 because as I said previously, it sounds like a lot
25 of the documents are contained by nonrespondents.

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2 I don't know how long it will take to get these
3 reports submitted, the OCA or other
4 nonrespondents.

5 THE COURT: Let's see what we can get
6 within sixty days. Sixty days from today let's
7 plan on meeting. I don't know when that would be.

8 THE CLERK: Would you be looking for a
9 motion argument?

10 THE COURT: Motion term today is June
11 30th, July 30th. How about August 25th? Is that
12 submission or is that --

13 THE CLERK: That's a regular day. We
14 don't have anything after the 28th.

15 THE COURT: August 25th. Let's plan on
16 being here around 11:30. Let's say eleven
17 o'clock. Compare notes where we are. If
18 everything is done and you guys confirm with
19 your -- meet and confer that everything is done,
20 then we don't have to meet, and I will set a date
21 for the argument.

22 MS. RUBINSTEIN: Your Honor, just for
23 clarification, for my purposes, I'm sure that my
24 client would like to make some sort of formal
25 objection to the request for all of these

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2 additional documents.

3 Is there any way in which we could either
4 submit a letter, some sort of position, paper,
5 memorandum of law prior to --

6 THE COURT: No.

7 MS. RUBINSTEIN: -- the August the 25th?

8 THE COURT: I already made my decision.
9 That horse has left the barn. I don't need any
10 more papers in this thing. You submitted papers
11 in opposition. I've done my review. I recognize
12 my shortcomings were in reviewing the original
13 items, and the fact that basically I didn't know
14 enough about what went on here.

15 Now I'm going to learn, and we can either do
16 that with a hearing, which I could have ordered
17 first time around and bring everybody here and
18 have everybody here for two weeks, and slowly do
19 this one document at a time, or get the documents
20 up front, and we can look at them together whether
21 we have a hearing or not that will abide the
22 result of the argument we'll have on the motion.

23 MS. RUBINSTEIN: Thank you for that
24 clarification, Your Honor. Thank you.

25 MR. ZIMMERMAN: Thank you.

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2 THE COURT: Thank you.

3 LAW CLERK: One thing. My computer does
4 not have a CD drive.

5 THE COURT: Come on up here.

6 (A discussion off the record at the Bench, both
7 counsel present.)

8 THE COURT: Thank you, all. We will call
9 this matter August 25th at eleven o'clock here or
10 wherever the courtroom is.

11 MR. ZIMMERMAN: Regular motion term, Your
12 Honor?

13 THE COURT: Yes. Right after regular
14 motion term.

15 MS. RUBINSTEIN: And should it take longer
16 for the documents to be obtained, we should ask
17 for an adjournment?

18 THE COURT: If it does, let me know, and
19 we can deal with that, too. Okay.

20 MS. RUBINSTEIN: Thank you.


21 MR. ZIMMERMAN: Thank you.

22 (Proceedings adjourned.)
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C E R T I F I C A T I O N

It is hereby certified that I am an Official Court Reporter in the Fifth Judicial District, State of New York; that I attended the foregoing proceedings as acting Senior Court Reporter, made stenotype notes thereof; and that the same is a true, accurate and complete transcript of the proceedings had therein to the best of my ability and knowledge.



Anne M. Messineo, RPR

DATED: July 5, 2011.

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