

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

FOR PUBLICATION
April 10, 2012

v

No. 303268
Wayne Circuit Court
LC No. 10-010881-FH

MARY MANDANA WATERSTONE,
Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

No. 303703
Wayne Circuit Court
LC No. 10-010881-FH

MARY MANDANA WATERSTONE,
Defendant-Appellant.

Advance Sheets Version

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

TALBOT, J. (*concurring in part and dissenting in part*).

I write separately because I believe it unnecessary to remand certain issues to the trial court because of the absence of a legal duty to support the charges and my concern for the potential impact of the issues involved in this appeal on the integrity of the judiciary.

I. FACTUAL HISTORY/BACKGROUND

While it is unnecessary to repeat the entire history surrounding these consolidated appeals, it is worthwhile to emphasize that it is undisputed that the two police officers, Robert McArthur and Scott Rechtzigel, and the confidential informant (CI), Chad Povish, committed perjury during both a pretrial proceeding and at trial. It is also undisputed that defendant was aware of the perjury and engaged in two ex parte hearings with the assistant prosecuting attorney, Karen Plants.

As noted, the Michigan Attorney General (AG) brought four charges of misconduct in office, comprised of the following:

COUNT 12 DEFENDANT(S) (04): COMMON LAW OFFENSES

did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by permitting or considering an improper ex parte communication on September 8, 2005 and concealing that communication from the defendants in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena; contrary to MCL 750.505. [750.505-C]
FELONY: 5 Years and/or \$10,000.00

COUNT 13 DEFENDANT(S) (04): COMMON LAW OFFENSES

did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by permitting or considering an improper ex parte communication on September 19, 2005 and concealing that communication from the defendants in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena; contrary to MCL 750.505. [750.505-C]
FELONY: 5 Years and/or \$10,000.00

COUNT 14 DEFENDANT(S) (04): COMMON LAW OFFENSES

did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by concealing perjured testimony from the defendants in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena by her rulings and orders; contrary to MCL 750.505. [750.505-C]
FELONY: 5 Years and/or \$10,000.00

COUNT 15 DEFENDANT(S) (04): COMMON LAW OFFENSES

did commit Misconduct in Office, an indictable offense at common law, by willfully neglecting her judicial duties by allowing perjured testimony [to] be heard by the jury in the case of People of the State of Michigan v. Alexander Aceval and/or People of the State of Michigan v. Ricardo Pena; contrary to MCL 750.505. [750.505-C]
FELONY: 5 Years and/or \$10,000.00

Specifically, the charges arose from the events described as follows:

Counsel for Aceval requested that defendant conduct an in camera interview with McArthur to verify the existence of a confidential informant. On June 17, 2005, defendant conducted the interview in which McArthur and Rehtzigel named Povish as the confidential informant and disclosed the details of the deal provided by the police to Povish for his involvement. As a result of this interview, defendant determined that it was not necessary to reveal Povish's identity as the confidential informant because of concerns regarding his safety. During a September 6, 2005, hearing on Aceval's motion to suppress evidence, Rehtzigel

committed perjury by denying any previous contact with Povish. The prosecutor, Plants, did not object to the testimony despite being aware that it was false.

Plants requested an ex parte meeting with defendant on September 8, 2005; that meeting comprises the basis for count 12. Plants requested the meeting because of indications by Aceval's counsel that he was seeking, despite defendant's earlier ruling, to procure cellular telephone records of Povish and another witness in order to ascertain the identity of the confidential informant. Allegedly, Plants initiated the meeting to request that defendant sign an ex parte order that would preclude Aceval's counsel from obtaining the records. During this meeting, Plants also confirmed that Rechtzigel committed perjury when he did not truthfully respond to questions that would have revealed his meeting with Povish at an earlier date and Povish's status as the confidential informant. Defendant agreed that there existed a significant risk to the safety of Povish if his identity as the confidential informant was revealed.¹ A sealed transcript of the meeting was prepared at defendant's behest.

On September 12, 2005, Povish lied while under oath at trial in response to questions that would reveal his status as the confidential informant. Again, Plants failed to object to the testimony. On September 19, 2005, while the trial was in progress, the second ex parte communication occurred between Plants and defendant, comprising count 13. During this meeting, Plants confirmed that additional incidents of perjury had occurred during the trial by Povish and McArthur, purportedly to protect the identity of the confidential informant.²

¹ The transcript of this meeting is approximately 3½ pages in length. With regard to the acknowledgement of perjury by Rechtzigel, Plants said:

We were doing an evidentiary hearing on Tuesday concerning Mr. Pena and, with Mr. [James] Feinberg's [Aceval's attorney] prompting, Mr. [Steven] Scharg [Pena's attorney] asked the witness, Sergeant Rechtzigel, whether he had met Chad Povish, Brian Hill or the defendant prior to March 11th, 2005. Sergeant Rechtzigel said no. This clearly contradicts earlier testimony he gave about the CI which he had met. He knowingly committed perjury to protect the identification of the CI. To answer yes would have indicated that he had met them in a confidential informant capacity. I did not object at that point because I thought an objection would telegraph who the CI is. I let the perjury happen. He committed perjury knowingly, all in efforts to comply with the Court's order to keep the CI confidential.

² The transcript of this meeting is slightly over one page in length. Plants indicated:

With regard to Chad Povish's testimony, he was asked whether he had been offered any sort of deals or immunity. He said no. He obviously was offered a deal because he's the confidential informant. . . . His testimony was 'no' but he did that to conceal his identity. He indicated that he had never seen Mac[Arthur] before that day. Obviously that was to conceal his identity and there was something else. Oh, he doesn't remember what was said to him by Mac. When he was interviewed at the police department there was [sic] discussions

Ultimately, the jury was charged and Pena was convicted, but Aceval was granted a mistrial because of the inability of his jury to reach a decision. Defendant's concealment of the perjured testimony from Aceval and Pena and permitting such testimony to be heard by the jury, serve as the underlying factual basis for count 14 and count 15, respectively.

II. PROCEDURAL HISTORY

I believe it both relevant and useful to review the trial court's decision and reasoning to place into perspective the events that have transpired and the issues raised before this Court.

While the district court bound defendant over on all four counts of misconduct in office, the circuit court quashed counts 12, 13, and 14. Pertaining to these charges, the circuit court ruled, in relevant part:

In this particular case labeling this particular action and conduct by Judge Waterstone as neglect is a label and is a conclusion drawn, but it is a label and a conclusion drawn by the Attorney General's office.

But in this Court's view this was not neglect of any kind. This was a wilful, intentional, deliberate attempt that quite frankly this Court finds was an ex-parte communication that was not illegal.

A review of the evidence in this particular case indicates that on September 8th and September 19th that ex-parte communications were made with the Court because there was an immediate concern, identifiable concern regarding whether or not a witness on behalf of the prosecution was going to be identified and killed.

To me the notion of the expectation that the Court would invite the defense to participate in that conversation I think is not correct, and I do think that as has been identified here, this is not negligence. This was an intentional, deliberate conduct on the part of Judge Waterstone.

I don't think that there is any other interpretation that can be placed on it. She made a separate record so that her action, her decisions could in fact be reviewed by a later court, and it was done for the specific protection of the life of an informant.

Now to me this is very much analogous to a circumstance where if in fact the police or the investigator or the prosecutor had identifiable, tangible

about what a good job he had done and so that was not exactly the truth. But again it was done with the intent to conceal his identity. When Officer McArthur testified, he testified that he had no information where the cocaine was going. He was in constant communication with the confidential informant and so he knew what directions they were going in. Clearly he testified that way to keep the identity secret.

information that during the course of the trial that the defense was attempting to bribe a juror or threatening a juror, one would not expect that that would be an identification made to the Court with the other side knowing about that.

I find that the same is applicable with regard to Count 14, that the conduct of Judge Waterstone was not out of a neglect of her duty, but an intentional conduct which, if anything, would put it into the category of misfeasance rather than any type of nonfeasance.

Misfeasance, as it would apply to Counts 12, 13 and 14 requires a corrupt purpose. There is no evidence to indicate there is any corrupt purpose.

So with regards to Counts 12, 13 and 14, the Motion to Quash is granted with regard to those three counts.

The circuit court allowed the prosecution to proceed against defendant only on count 15, stating, in significant part:

With regards to Count 15, Judge Waterstone is charged with committing misconduct in office by neglecting her judicial duties by allowing perjured testimony to be heard by the jury and not correcting that perjury that came before that jury.

Now one of the issues that has been of some real concern for this Court is to determine exactly how the alleged misconduct is to be categorized.

Now the Attorney General has categorized it as in all four counts as neglecting judicial duties.

That labeling does not necessarily make it so, but there is an allegation, and it is the prosecutor's theory that in Count 15 as with regards to the other counts against Judge Waterstone that it was nonfeasance on the part of the trial judge in the Aceval and Pena case.

The prosecutor cites dicta in the [*People v*] *Perkins*[468 Mich 448; 662 NW2d 727 (2003)] case as to what constitutes nonfeasance and what the elements are.

But the Court in its research has found interestingly enough that with any number of cases where one reads what is a definition or the distinction between misfeasance and nonfeasance, you can get a different definition, different verbiage used for that particular concept.

The Court did find additionally helpful the case of [*Gray v Clerk of Common Pleas Court*, 366 Mich 588; 115 NW2d 411 (1962)].

* * *

And the Supreme Court in the [*Gray*] case harkens back to a case of [*In re Cartwright*, 363 Mich 143; 108 NW2d 865 (1961)], where misfeasance is defined, which it's stated, ["as a cause for removal from office, is a default in not doing a lawful thing in a proper manner, or omitting to do it as it should be done."] [See *Gray*, 366 Mich at 593.]

The Court in [*Gray*] went on to define nonfeasance, and I quote: "nonfeasance is a substantial failure to perform a duty, or, in other words the neglect or refusal, without sufficient excuse, to do that which it was the officer's legal duty to do. Failure to perform the duties of a public office is in and of itself not only nonfeasance but also malfeasance.[]" [See *Gray*, 366 Mich at 594.]

Now in this particular case the prosecution has alleged, and the Preliminary Examination established, that there was perjured testimony that was presented during the jury trial, and the trial court did not correct that particular perjury. Did in fact allow that to go forward.

It went forward, and one of the defendants, Mr. Pena, was in fact convicted.

Now this Court finds that that does in fact constitute what would be considered the failure to perform the duties of a public office; that being performing the responsibility of the Court.

This Court does in fact find that with regards to Count 15 that there was no abuse of discretion for the Examining Magistrate to conclude that there was a failure to perform those duties and that it was in effect not error.

Both the AG and defendant appeal the circuit court's decision.

III. STANDARDS OF REVIEW

"The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime was committed and whether there is probable cause to believe that the defendant committed it."³ The prosecution need not establish guilt beyond a reasonable doubt, but must present "evidence sufficient to make a person of ordinary caution and prudence [] conscientiously entertain a reasonable belief of the defendant's guilt."⁴ "Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support the bindover of the defendant if such evidence establishes probable cause."⁵ If probable cause exists

³ *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003).

⁴ *People v Hill*, 269 Mich App 505, 514; 715 NW2d 301 (2006).

⁵ *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003) (citation and quotation marks omitted).

to believe that a felony was committed and that the defendant committed it, the district court must bind the defendant over for trial.⁶

“This Court reviews for an abuse of discretion both a district court’s decision to bind a defendant over for trial and a trial court’s decision on a motion to quash an information.”⁷ An abuse of discretion occurs when the outcome falls outside “the range of reasonable and principled outcomes.”⁸ This Court reviews de novo a trial court’s interpretation of the law related to its decision on a motion to quash the information.⁹

IV. ANALYSIS

On appeal, the AG and defendant take issue with various aspects of the trial court’s rulings and its decision to quash three of the four counts of misconduct in office and in permitting the fourth count to proceed to trial. In essence, the appeals by the AG and defendant distill down to challenges regarding what behavior is encompassed by misconduct in office and the use of the felony statute¹⁰ in charging that offense.

This Court further complicated the appeal when, at oral argument, we requested the parties to address additional points not raised in their appellate pleadings. We posed three questions to counsel for supplemental briefing:

(1) What distinguishes acts of willful neglect of duty under MCL 750.478 from acts of nonfeasance comprising misconduct in office under MCL 750.505?

(2) Does MCL 750.478 codify misconduct in office premised on nonfeasance and preclude the bringing of charges for misconduct in office based on nonfeasance under MCL 750.505? If charges are wrongfully brought pursuant to MCL 750.505, what is the proper remedy?

(3) Can acts comprising willful neglect of duty encompass erroneous acts performed in good faith?

Specifically, we sought to determine whether the prosecution properly charged defendant under the *felony* statute governing misconduct in office even though the wording of the various counts was identical to the language in the referenced *misdemeanor* statute.

⁶ MCL 766.13; MCR 6.110(E); *Hill*, 269 Mich App at 514.

⁷ *People v Fletcher*, 260 Mich App 531, 551-552; 679 NW2d 127 (2004).

⁸ *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

⁹ *People v Miller*, 288 Mich App 207, 209; 795 NW2d 156 (2010).

¹⁰ MCL 750.505.

The felony statute provides:

Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than \$10,000.00, or both in the discretion of the court.^[11]

It is undisputed that “misconduct in office was an indictable offense at common law”¹² and, thus, is included within the statute.¹³ Misconduct in office is defined under common law as ““corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.””¹⁴ “An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, nonfeasance.”¹⁵

In comparison, the misdemeanor statute states:

When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00.^[16]

Our Supreme Court has indicated that “when a ‘charge sets forth all the elements of the statutory offense,’ a conviction under MCL 750.505 . . . cannot be sustained.”¹⁷ The statutory provision¹⁸ “does not preclude prosecution for the common-law offense whenever the *conduct* at issue is covered by another statute; it precludes use of the common-law offense when that *offense* has been codified by the legislature.”¹⁹ Specifically, when evaluating whether an offense is chargeable under the misconduct in office statute or precluded by another criminal statute, this

¹¹ MCL 750.505.

¹² *People v Coutu (On Remand)*, 235 Mich App 695, 705; 599 NW2d 556 (1999).

¹³ MCL 750.505.

¹⁴ *Coutu*, 235 Mich App at 705, quoting Perkins & Boyce, *Criminal Law* (3d ed), p 543.

¹⁵ *Perkins*, 468 Mich at 456.

¹⁶ MCL 750.478.

¹⁷ *People v Thomas*, 438 Mich 448, 453; 475 NW2d 288 (1991), quoting *People v Davis*, 408 Mich 255, 274; 290 NW2d 366 (1980).

¹⁸ MCL 750.505.

¹⁹ Gillespie, *Michigan Criminal Law & Procedure* (2d ed), Practice Deskbook (2011 ed), § 5:672, citing *People v Milton*, 257 Mich App 467; 668 NW2d 387 (2003).

Court has stated that “the misconduct in office charge is the ‘indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state.’ *There is no statute that expressly provides punishment for misconduct in office . . .*”²⁰

The majority has concluded that the misdemeanor statute²¹ “constitutes a statute that expressly provides for the punishment of misconduct in office with respect to misconduct that entails willful neglect to perform a legal duty (nonfeasance)” as charged by the prosecution. As a result, the majority dismisses without prejudice all the counts against defendant because the felony charges premised on misconduct in office are precluded by the existence and applicability of the misdemeanor statute.

The dismissal of all the charges without prejudice prolongs this matter without definitive resolution, a result I believe to be in error and unnecessary. The majority’s decision to remand with regard to counts 12, 13, and 14 pertaining to the two ex parte communications and the failure to inform Aceval and Pena of the perjured testimony is not necessary, because it is irrelevant whether these charges are pursued under the felony statute or the misdemeanor statute. Rather, the threshold issue, which is properly before this Court, is whether a legal duty exists that defendant violated. In other words, charges cannot be sustained under either the felony statute or the misdemeanor statute unless defendant has breached or willfully neglected a recognized legal duty.

For purposes of clarity and simplification, I find it most productive to review and analyze the counts individually.

COUNT 12

In count 12, the AG charged defendant with “misconduct in office” premised on defendant “willfully neglecting her judicial duties by permitting or considering an improper ex parte communication on September 8, 2005 and concealing that communication from the defendants . . .” The ex parte communication referenced for this count occurred during pretrial proceedings.

In my opinion, the charges associated with this count were properly quashed because no statutory basis exists to preclude defendant—or any judge—from engaging in an ex parte communication. Consequently, defendant’s participation in an ex parte communication cannot comprise the violation of a duty.

In asserting defendant’s participation in ex parte communications comprised a violation of duty, the AG relies on and cites provisions within the Code of Judicial Conduct. The Code of Judicial Conduct provides, in relevant part:

²⁰*Milton*, 257 Mich App at 472, quoting MCL 750.505 (emphasis added).

²¹ MCL 750.478.

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

* * *

A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

(a) A judge may allow *ex parte* communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided:

(i) the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties and counsel for parties of the substance of the *ex parte* communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.^[22]

As indicated by the Code of Judicial Conduct, engaging in an *ex parte* communication is not specifically prohibited. In fact, “an *ex parte* conference to discuss threats against a witness is proper” but requires a court to “insure that the conference is carefully conducted so that no rights of the defendant are threatened.”²³ In a similar case in which a prosecutor initiated *ex parte*

²² Code of Judicial Conduct, Canon 3(A)(4).

²³ *United States v Adams*, 785 F2d 917, 920 (CA 11, 1986).

communications with a trial court because of concerns regarding the safety of a witness, it was held:

The . . . court did not abuse its discretion in making the initial decisions to allow the *ex parte* proceedings. In each instance, the court was presented with a plausible argument by the government that providing [the defendant] with the information requested would endanger its witnesses and deter them from testifying. . . . The court clearly benefited from having this information, but providing it simultaneously to [the defendant] would have risked revealing the identities of the witnesses that the government sought to protect. As previously noted, courts have recognized circumstances such as these as justifying an *ex parte* proceeding^[24]

Under the circumstances of this case, I do not construe defendant's "initial decision[] to allow the *ex parte* proceedings" to constitute an abuse of discretion. Further, a judge's decision to participate in the *ex parte* communication is not subject to criminalization under either statutory provision, even if error is deemed to have occurred in the subsequent handling of the information generated from the meeting.

The Code of Judicial Conduct sets forth parameters and guidelines for a judge's participation in an *ex parte* communication as a "standard" to be applied, but does not impose a judicial duty. In other words, the code distinguishes between the elements comprising a duty and the standard applied in evaluating the performance of a duty. Pursuant to the language of the code, involvement in an *ex parte* proceeding does not fall within the definition of misconduct in office, which is "corrupt behavior by an officer *in the exercise of the duties of his office* or while acting under color of his office."²⁵ Therefore, in the absence of a duty, participation in an *ex parte* proceeding cannot comprise a public officer's "willful neglect to perform [any] duty" as contemplated by the misdemeanor statute.²⁶

The participation of a judge in an *ex parte* communication is not within the "duties of his office" and cannot, by definition, constitute a "willful neglect to perform" a legal duty. Rather, the strictures pertaining to participation in an *ex parte* communication are merely guidelines for performance. Any error or failure by defendant (or any judge) to follow the specified standards does not rise to the level necessary to comprise a violation of either the felony statute or the misdemeanor statute. Violation of these standards is, rather, within the purview of the Judicial Tenure Commission (JTC). Specifically, "[t]he Commission's authority is limited to

²⁴ *United States v Napue*, 834 F2d 1311, 1320-1321 (CA 7, 1987).

²⁵ *Coutu*, 235 Mich App at 705 (emphasis added, citation and quotation marks omitted).

²⁶ MCL 750.478. As an aside, I would suggest that, when viewed in the context of the language of the misdemeanor statute, defendant's participation in an *ex parte* proceeding cannot, by definition, be construed as comprising nonfeasance. Participation requires overt action and not a failure to act or the willful neglect of a specific duty, which the trial court recognized to be more properly characterized as misfeasance.

investigating alleged judicial misconduct and, if warranted, recommending the imposition of discipline by the Michigan Supreme Court. Judicial misconduct usually involves conduct in conflict *with the standards* set forth in the Code of Judicial Conduct.”²⁷ Defendant’s participation in an ex parte communication was not violative of a duty of her office. Hence, because there was no legal duty, the failure to disclose her participation cannot constitute a willful violation or be construed as comprising misconduct in office.

Specific to count 12, is the fact that the ex parte communication occurred during pretrial proceedings with defendant serving as the fact-finder. Defendant had already made a determination that revealing the identity of the confidential informant was unnecessary. Any information gleaned by defendant from this ex parte proceeding was merely a confirmation of what defendant already knew regarding the identity of the CI and his relationship and/or interactions with the police. The information provided by Plants did not provide defendant with any new extrinsic information or affect her previous ruling regarding the CI’s identity. Because defendant was already aware of the information obtained from the prosecutor during this first ex parte communication, Aceval and Pena could demonstrate no prejudice from this communication. Thus, this ex parte communication falls outside the behavior constrained by either statutory provision.

By charging defendant for participating in this ex parte communication, the AG seeks to criminalize what is essentially a discretionary act that is not specifically prohibited by statute or the Code of Judicial Conduct. Further, the possible precedent established by charging defendant for participation in an ex parte proceeding raises serious concerns for all sitting judges. Of particular concern is the potential for the arbitrary and subjective determination by a prosecutor of which ex parte communications comprise indictable offenses. The possibility of the absurd results that could occur is effectively demonstrated in this case wherein defendant is charged with a criminal offense for participating in an ex parte communication that conveyed no new or revelatory information. The majority, by remanding these issues to the trial court, has engaged in an implicit validation of such a procedure and effectively avoided addressing the more pertinent and underlying question whether a duty even exists.

As it pertains to count 12, I would rule that the charge against defendant, under either the felony statute or the misdemeanor statute, for engaging in an ex parte proceeding and the failure to disclose that proceeding to Aceval and Pena, was properly quashed on the basis that defendant’s participation in the meeting did not violate a judicial duty.

COUNT 13

Similar to count 12, count 13 involves a charge of misconduct in office for defendant’s participation in an ex parte communication with the prosecutor on September 19, 2005, during the course of trial. Specifically, the AG charged defendant with “willfully neglecting her judicial duties by permitting or considering an improper ex parte communication . . . and concealing that communication from the defendants” While distinguishable from count 12 as having

²⁷ <<http://jtc.courts.mi.gov/jurisdiction.htm>> (emphasis added).

occurred during the course of trial rather than pretrial proceedings, the legal analysis of the sustainability of the charge is not at variance with that I have outlined for count 12.

Defendant's participation in the ex parte communication did not constitute the violation of a legal "duty." Ex parte communications are not subject to blanket exclusion by the Code of Judicial Conduct and are permissible under certain circumstances and pursuant to specific standards. Whether defendant violated those standards by participating in the ex parte communication is a matter more properly within the purview of the JTC rather than subject to enforcement through criminal statutes. Therefore, for the same reasons discussed in conjunction with count 12, I would find that the trial court properly quashed count 13.

COUNT 14

In count 14, the AG charged defendant with misconduct in office "by willfully neglecting her judicial duties by concealing perjured testimony from the defendants" The AG is specifically referring to the failure of defendant to inform counsel for Aceval and Pena that perjured testimony occurred during the course of trial. The AG asserts that this failure to inform the defendants constituted misconduct in office through nonfeasance. The AG has not, however, identified any specific duty on the part of a judge to inform a defendant of perjured testimony, which is a necessary prerequisite to sustaining this count under either the felony or the misdemeanor statute. Again, if the AG cannot demonstrate the existence of a duty, any allegation regarding breach or willful neglect cannot be sustained.

Michigan statutory law sets forth the procedure for judges to follow where perjury has occurred, and provides:

Whenever it shall appear to any court of record that any witness or party who has been legally sworn and examined or has made an affidavit in any proceeding in a court of justice, has testified in such a manner as to induce a reasonable presumption that he has been guilty of perjury therein, the court may immediately commit such witness or party, by an order or process for that purpose, or may take a recognizance with sureties, for his appearing to answer to an indictment for perjury; and thereupon the witness to establish such perjury may, if present, be bound over to the proper court, and notice of the proceedings shall forthwith be given to the prosecuting attorney.^[28]

Although the statute indicates that the court may immediately indict a suspected perjurer, the statute does not expressly mandate that the court must inform a defendant of the perjury. Ironically, particularly given the circumstances existing in this matter, the judge is to inform the prosecution of the perjury. Having cited only general precepts pertaining to defendant's obligations in accordance with the Code of Judicial Conduct²⁹, the AG has failed to sufficiently

²⁸ MCL 750.426.

²⁹ Canon 2(A) requires judges to avoid "all impropriety and appearance of impropriety." Canon 2(B) mandates judges to "respect and observe the law."

demonstrate the willful neglect of an official duty by defendant or to meet the requirements necessary to sustain a charge of misconduct in office.

In summary, because I would find that there was no cognizable legal duty breached or violated by defendant as required under either statute for these three counts, I would dismiss these counts with prejudice because it constitutes an unnecessary exercise and waste of judicial resources to remand to the trial court for further proceedings on counts 12, 13, and 14.

COUNT 15

Because this final charge concerns a trial judge knowingly allowing perjured testimony to be considered by a jury, it is the most troubling count on a variety of levels. In count 15, the AG charged defendant with misconduct in office for “willfully neglecting her judicial duties by allowing perjured testimony [to] be heard by the jury” Unlike the previous three counts, this charge encompasses a clearly recognized legal duty, because the commission of perjury in court proceedings has long been prohibited.³⁰ A specific statutory provision addresses the action required of a judge when perjury occurs.³¹ In addition, it has long been acknowledged that a criminal conviction obtained through the knowing use of perjured testimony is violative of a defendant’s due process rights under the Fourteenth Amendment.³²

In this Court, defendant argued that the trial court erred by failing to quash count 15 because the felony statutory provision³³ underlying the charge has never been used to indict a judge acting in his or her official capacity.³⁴ Defendant did not raise the language of the misdemeanor statute. At oral argument, this Court sought clarification from the parties, in seeking to determine whether the AG properly charged defendant under the felony³⁵ statute rather than the misdemeanor statute.³⁶

³⁰ MCL 750.422.

³¹ MCL 750.426.

³² *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959).

³³ MCL 750.505.

³⁴ Defendant further contended that she should be immune from prosecution for misconduct in office and that her good intention of protecting the CI is dispositive regarding whether the misconduct in office charge can be sustained. Defendant also asserted that the AG’s initiation of charges violates the separation of powers because the JTC is responsible for handling all instances pertaining to judicial misconduct.

³⁵ MCL 750.505.

³⁶ MCL 750.478.

As noted previously, the felony statute used to charge defendant provides:

Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than \$10,000.00, or both in the discretion of the court.^[37]

Therefore, the felony statute requires that the offense be indictable at common law and that another statute does not punish that behavior.

Misconduct in office comprised a recognized indictable offense at common law and is defined as “corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.”³⁸ An officer can be convicted of misconduct through acts of misfeasance, malfeasance, or nonfeasance.³⁹ In turn, discussing corrupt behavior in the context of misconduct in office, this Court has stated:

“Corruption” in this context means a “sense of depravity, perversion or taint.” [Perkins & Boyce] at 542. “Depravity” is defined as “the state of being depraved” and “depraved” is defined as “morally corrupt or perverted.” *Random House Webster’s College Dictionary* (1997). “Perversion” is “the act of perverting,” and the term “perverted” includes in its definition “misguided; distorted; misinterpreted” and “turned from what is considered right or true.” *Id.* The definition of “taint” includes “a trace of something bad or offensive.” *Id.* Pursuant to the definitions, a corrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer. See also Perkins & Boyce, *supra* at 542 (“It is *corrupt* for an officer purposely to violate the duties of his office.”).^[40]

In contrast, the statutory language comprising the misdemeanor statute states:

When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00.^[41]

³⁷ MCL 750.505.

³⁸ *Coutu*, 235 Mich App at 705, quoting Perkins & Boyce, *Criminal Law* (3d ed), p 543.

³⁹ *Perkins*, 468 Mich at 456.

⁴⁰ *Coutu*, 235 Mich App at 706-707.

⁴¹ MCL 750.478.

The majority has concluded that the misdemeanor statute encompasses the charged behavior and ends its analysis there. As discussed further hereinafter, the two statutes have distinct elements regarding criminal intent. Thus, the misdemeanor statute does not already punish the charged behavior and the felony charge under MCL 750.505 is not precluded. Whether the AG would elect to continue that charge in light of the following analysis remains questionable.

Discerning the elements distinct to each statutory provision is especially important because the AG charged defendant with “willfully neglecting her judicial duties” and adamantly characterized defendant’s actions solely as constituting nonfeasance. It must be assumed as an underlying premise that all trial judges, including defendant, are entrusted with the duty to conduct a fair trial and preclude a conviction or judgment that they know involves perjured testimony. This is based, at least in part, on the statutory duty imposed on trial judges to instruct a jury in accordance with the following:

It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. The court shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require.^[42]

Because both statutes rely on the same duty for trial judges, the distinction between the felony of misconduct in office and the misdemeanor of willful neglect of duty rests on the existence of criminal intent. Discerning this distinction is complicated by the historic confusion of terms, the imprecise use of language, and the misconstruing of terms as being interchangeable. As illustrated, “corrupt behavior” has been equated with criminal intent; however, it is a separate concept both by definition and in statutory application.

The misdemeanor statute requires “willful neglect,” but fails to define the term. When a term is not defined within a statute, we assign to the term its plain and ordinary meaning within the context it is used.⁴³ To ascertain the meaning of a term we may consult dictionary definitions.⁴⁴ The term “willful neglect” is defined as the “[i]ntentional or reckless failure to carry out a legal duty”⁴⁵ Similarly, this Court has defined the word “willful” as comprising actions that are “‘voluntarily, consciously, and intentionally’ undertaken”⁴⁶ When actions are undertaken “‘voluntarily, consciously, and intentionally,’” they “may be sufficient to

⁴² MCL 768.29.

⁴³ MCL 8.3a.

⁴⁴ *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

⁴⁵ Black’s Law Dictionary (9th ed), p 1133.

⁴⁶ *People v Medlyn*, 215 Mich App 338, 342; 544 NW2d 759 (1996), quoting *People v Harrell*, 54 Mich App 554, 561; 221 NW2d 411 (1974).

constitute ‘wilfulness,’ even though the actions may have been taken from a ‘pure’ or ‘good faith’ motive.”⁴⁷ In other words, any element of “bad purpose” attributable to willful neglect “could be met upon a mere showing that defendant failed to do what he was obligated to do.”⁴⁸

In contrast, the felony statute encompasses “misconduct in office,” which has historically been defined as “‘corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.’”⁴⁹ “An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, nonfeasance.”⁵⁰ Malfeasance, misfeasance, and nonfeasance are merely the different means or mechanisms to effectuate the corrupt behavior.

Further, misconduct in office “does not encompass erroneous acts done by officers in good faith or honest mistakes committed by an officer in the discharge of his duties.”⁵¹ This is diametrically opposed to the definition of actions that are undertaken “willfully,” as such actions “may have been taken from a ‘pure’ or ‘good faith’ motive.”⁵² Other criminal statutes, that define the term “wilful,” highlight this distinction:

“Wilful”, for the purpose of criminal prosecutions, means the intent to do an act knowingly and purposely by an individual who, having a free will and choice, either intentionally disregards a requirement of this act [the Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq.*], or a rule or standard promulgated pursuant to this act, or is knowingly and purposely indifferent to a requirement of this act, or a rule or standard promulgated pursuant to this act. An omission or failure to act is wilful if it is done knowingly and purposely. Wilful does not require a showing of moral turpitude, evil purpose, or criminal intent provided the individual is shown to have acted or to have failed to act knowingly and purposely.^[53]

In the context of misconduct in office, “nonfeasance” is not simply an omission or a failure to act, but rather is defined as an affirmative act encompassing “willful neglect” or “deliberate forbearance.”⁵⁴ Although the conduct sought to be constrained by either statute

⁴⁷ *Id.*

⁴⁸ *Medlyn*, 215 Mich App at 345.

⁴⁹ *Coutu*, 235 Mich App at 705, quoting Perkins & Boyce, Criminal Law (3rd ed), p 543.

⁵⁰ *Perkins*, 468 Mich at 456.

⁵¹ *Coutu*, 235 Mich App at 706.

⁵² *Medlyn*, 215 Mich App at 342.

⁵³ MCL 408.1006(8). See, also, *People v Lanzo Constr Co*, 272 Mich App 470, 475; 726 NW2d 746 (2006).

⁵⁴ Perkins & Boyce, Criminal Law (3rd ed), pp 547-548.

encompasses the willful neglect of duty, the felony offense of misconduct in office contains an additional element or requirement. Although willful neglect can serve to establish corrupt behavior, the common-law offense of misconduct in office has, historically, also necessitated the demonstration of criminal intent. Specifically, this Court has indicated, “‘misconduct in office is corrupt misbehavior by an officer in the exercise of the duties of his office or while acting under color of his office, *and criminal intent is an essential element of the crime.*’”⁵⁵ In contrast, this Court has opined, in analyzing the misdemeanor statute⁵⁶, that the term “willfully” “requires something less than specific intent, but requires a knowing exercise of choice.”⁵⁷ I glean from the above that the felony statute requires criminal intent, while the misdemeanor statute does not.

Historical developments of the common law further support the existence of such a distinction. As discussed by the United States Supreme Court:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory “But I didn't mean to,” and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a “vicious will.” Common-law commentators of the Nineteenth Century early pronounced the same principle

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific

⁵⁵ *Coutu*, 235 Mich App at 706, quoting 67 CJS, Officers, § 256, pp 789-790 (emphasis added).

⁵⁶ MCL 750.478.

⁵⁷ *People v Lockett (On Rehearing)*, 253 Mich App 651, 655; 659 NW2d 681 (2002).

ones, for the instruction of juries around such terms as “felonious intent,” “criminal intent,” “malice aforethought,” “guilty knowledge,” “fraudulent intent,” “wilfulness,” “*scienter*,” to denote guilty knowledge, or “*mens rea*,” to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.^[58]

The requirement of criminal intent, as the distinguishing feature between the felony statute and the misdemeanor statute, is logical based on the definition of misconduct in office. To interpret these statutes otherwise would inexplicably reduce the penalty for misconduct in office solely on the basis of the commission of the offense through nonfeasance rather than malfeasance or nonfeasance. This would then lead to absurd and inconsistent rulings for behavior deemed equally egregious.

Such a distinction is consistent with the legal concept and definition of “criminal intent” as “[a]n intent to commit an actus reus without any justification, excuse, or other defense.”⁵⁹ In using the term “criminal intent,” it has been suggested that “other term[s] such as mens rea or guilty mind should be employed for more general purposes, and ‘criminal intent’ be restricted to those situations in which there is (1) an intent to do the *actus reus*, and (2) no circumstance of exculpation.”⁶⁰ This is distinguished from the concept of “general intent,” which is defined as “[t]he intent to perform an act even though the actor does not desire the consequences that result.”⁶¹ This coincides with the differentiations recognized in Michigan, that “the distinction between specific intent and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act.”⁶² In accordance with prior decisions by this Court:

“A much more workable definition would center upon the several mental states set forth in the various proposed criminal codes. Analyzed in this fashion, specific intent crimes would be limited only to those crimes which are required to be committed either ‘purposefully’ or ‘knowingly,’ while general intent crimes would encompass those crimes which can be committed either ‘recklessly’ or ‘negligently.’ Thus, in order to commit a specific intent crime, an offender would have to subjectively desire or know that the prohibited result will occur, whereas in a general intent crime, the prohibited result need only be reasonably expected

⁵⁸ *Morissette v United States*, 342 US 246, 250-252; 72 S Ct 240; 96 L Ed 288 (1952).

⁵⁹ Black’s Law Dictionary (9th ed), p 881.

⁶⁰ *Id.*, quoting Perkins & Boyce, Criminal Law (3d ed), pp 832-834.

⁶¹ Black’s Law Dictionary (9th ed), p 882.

⁶² *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983).

to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result."^{63]}

Hence, the ability of the prosecutor to prove intent in electing to charge defendant under either the felony statute or the misdemeanor statute becomes relevant, which was conceded by the AG during oral argument in this Court.

The AG must submit proofs on defendant's intent, but not necessarily on her motive. As previously discussed by our Supreme Court:

Although sometimes confused, motive and intent are not synonymous terms. A motive is an inducement for doing some act; it gives birth to a purpose. The resolve to commit an act constitutes the intent. The motive inducing the resolve, while illuminative of the intent, is necessarily merged therein and is not an essential element in proving commission of crime. The essential element of intent is not at all dependent upon motive. If the intent appears the motive inducing the design may be shown but if not shown the design remains and, as the intent governs, the inducement creating the intent is not essential. A motive is a relevant but not an essential fact in proof of murder. It is true it exists whether disclosed or not. If disclosed it may aid the prosecution, but if not disclosed, or only faintly discernible, its absence or hidden character does not abort the charge if the intent is established. The evidence of motive was meager but what there was of it went to the jury, and properly so, on the question of intent.^[64]

Defendant's intent comprises an element of the crime of misconduct in office, which presents an issue for resolution by the trier of fact.⁶⁵ To prove misconduct in office, the AG must demonstrate, as threshold requirements, the existence of corrupt behavior and an intent to procure the result obtained; in this instance the convictions of Aceval and Pena. Therefore, if the AG elects to proceed with the charge of misconduct in office, evidence of defendant's intent comprises a relevant matter to be submitted to the jury for determination to establish the threshold necessary to sustain the charge. This is entirely consistent with prior rulings of this Court that determined, "misconduct in office is corrupt misbehavior by an officer in the exercise of the duties of his office . . . and criminal intent is an essential element of the crime."⁶⁶

I find that the misdemeanor statute and the felony statute comprise separate and distinct codifications. The willful neglect of duty encompassed by the misdemeanor statute does not include the additional element of criminal intent or specific intent that must be demonstrated to

⁶³ *People v Gould*, 225 Mich App 79, 85; 570 NW2d 140 (1997), quoting *People v Lerma*, 66 Mich App 566, 569-570; 239 NW2d 424 (1976).

⁶⁴ *People v Kuhn*, 232 Mich 310, 312; 205 NW 188 (1925).

⁶⁵ *People v Whittaker*, 187 Mich App 122, 128; 466 NW2d 364 (1991).

⁶⁶ *Coutu*, 235 Mich App at 706, quoting 67 CJS, Officers, § 256, pp 789-790.

sustain a charge of misconduct in office committed through nonfeasance. In other words, the misdemeanor statute does not constitute a separate codification of the offense of misconduct in office committed through nonfeasance and, therefore, does not preclude the instant charge in count 15 of misconduct in office based on nonfeasance.⁶⁷

I would, therefore, find that the trial court properly allowed count 15 to proceed and correctly quashed counts 12, 13, and 14.

/s/ Michael J. Talbot

⁶⁷ *Milton*, 257 Mich App at 472.