FILED

DEC 12 2014

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **JAMES JUDE KONAT,** Lawyer (Bar No. 16082).	Proceeding No. 13#00008 FINDINGS OF FACT, CONCLUSIONS OF LAW AND HEARING OFFICER'S RECOMMENDATION

Pursuant to Rules for Enforcement of Lawyer Conduct (ELC) 10.13, a hearing was held before the undersigned Hearing Officer beginning on October 20, 2014 and concluding on November 3, 2014. Special Disciplinary Counsel Marc Silverman represented the Office of Disciplinary Counsel (ODC). Mr. Konat (Respondent) appeared at the hearing *pro se*, with King County Senior Deputy Prosecuting Attorney Stephen Teply acting as his co-counsel.

EVIDENCE ADMITTED

Witness for ODC:

1. Jeffery Robinson

Witnesses for Respondent:

1. The Honorable Michael J. Fox (Retired from King County Superior Court)
2. The Honorable Michael Hayden (Retired from King County Superior Court)
3. Donald Madsen- Managing Director for ACA, Department of Public Defense

4. Seattle Police Lieutenant Emmett Kelsie (Retired)

5. Seattle Police Detective Phillip Allen (Retired)

6. Peter Jarvis- Attorney

7. Ron Jensen- Juror in State v. Monday Trial

8. Teresa Potts- Juror in State v. Monday Trial

9. Seattle Police Detective Alan Cruise

10. Seattle Police Detective Russ Weklych

11. James Konat - Respondent

ODC's Exhibits:

1. State v. Monday Trial Transcript

2. Supreme Court Opinion in State v. Monday

3. Notice of Appearance by Kevin Donnelly

4. Order Authorizing Expert Services

5. Clerk's Minutes from State v. Monday Trial

6. Ledger of Payment to Kevin Donnelly and Investigator

7. Statement of Defendant on Plea of Guilty in State v. Monday

8. Newspaper Articles re: State v. Monday

9. Email from Mark Larson dated 12/1/2011

10. Email from James Konat dated 6/15/2011

Respondent's Exhibits:

1. Character/Reputation Letter and Declaration from Michael Schwartz, Attorney

2. Character/Reputation Letter and Declaration from Senior Deputy Prosecuting Attorney, Scott O'Toole

3. Character/Reputation Letter and Declaration from Senior Deputy Prosecuting Attorney Brian McDonald.

4. Character/Reputation Letter and Declaration from Nelson Lee, Attorney.

5. Character/Reputation Letter and Declaration from Sam Chapin, Attorney.

6. Character/Reputation Letter and Declaration from Kelly Rosa.

7. Character/Reputation Letter and Declaration from Seattle Police Detective Cloyd Steiger

8. DVD – Video of Pioneer Square Crime Played in State v. Monday Trial.

9. Law Review Article, Anti-Snitching Norms and Community Loyalty, Brent D. Asbury, 89 Oregon Law Review 1258, 2011.

10. Law Review Article, Stop Snitchin': Exploring Definitions of The Snitch and Implications for Urban Black Communities, 184 Journal of Criminal Justice and Popular Culture 17(1), 2010.

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

The Formal Complaint filed by ODC charged Respondent with the following counts of misconduct:

Count I - By expressing, in his closing argument to the jury, his personal belief that the "word of a criminal defendant is inherently unreliable" and that this was true in the case before the jury, Respondent violated RPC 3.4(e).[1]

Count II - By expressing, in his closing argument to the jury, his personal belief that "when you have got a really, really, really strong case it's hard to come up with something really,

[1] RPC 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL. A lawyer shall not:
(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

really, really compelling to say" and that this was true in the case before the jury, Respondent violated RPC 3.4(e).

Count III - By alluding, in his closing argument to the jury, to matters that were not relevant or supported by the evidence when he invoked his own personal experience as a prosecutor and the recent death of the elected prosecutor, Respondent violated RPC 3.4(e).

Count IV - By adopting the pronunciation "po-leese" when examining witness Adonijah Sykes and/or by imitating the pronunciation and speech of witness Adonijah Sykes during her testimony in front of the jury, Respondent violated RPC 8.4(d) and/or (h).[2]

Count V - By making comments during closing argument that were not supported by the evidence and that improperly referenced the race of the eyewitnesses and defendant, Respondent violated RPC 3.4(e) and/or RPC 8.4(d) and/or RPC 8.4(h).

Based on the pleadings in the case, the testimony and exhibits at the hearing, the Hearing Officer makes the following:

FINDINGS OF FACT

Respondent's Legal Experience

1. Respondent was admitted to the practice of law in Washington in July of 1986. TR Vol. V 635.

2. Respondent initially worked as a law clerk/bailiff in King County Superior Court. TR Vol. V 636. During that time, Respondent observed both civil and criminal trials, and decided

[2] RPC 8.4. MISCONDUCT. It is professional misconduct for a lawyer to:
(d) engage in conduct that is prejudicial to the administration of justice.
(h) in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments.

that he would be well suited for criminal trial work. TR Vol. V 637-38.

3. When his contract with the Superior Court ended, Respondent took a job as a public defender at the Associated Counsel for the Accused (ACA), where he worked from 1987 to 1989. TR Vol. V 638; TR Vol. III 473-74. During his employment as a public defender, Respondent handled a variety of cases, including theft, robbery, burglary, assault, and murder. TR Vol. V 639.

4. Respondent did good work as a public defender and worked with a diverse client base without any complaints of racial bias. However, Respondent was frustrated with clients who reoffended and/or harmed others. TR Vol. III 473-74. Respondent acknowledges that he hated doing trial work for ACA because he did not believe in the cause, i.e., "I just saw all the things that people did to other people, and I just couldn't get my head around trying to get them off." TR Vol. V 640.

5. In June 1989, Respondent was hired by the King County Prosecuting Attorney's Office. TR Vol. V 641. Respondent was immediately assigned to handle felony cases, first in the Drug Unit and then in the Special Assault Unit, where Respondent did trial work exclusively for 19 months. TR Vol. V 641-44.

6. After the Special Assault Unit, Respondent was assigned to Mainstream Trials. TR Vol. V 645. In Mainstream Trials, Respondent handled assault, robbery, and homicide cases, however, from 1992 on, Respondent tried exclusively homicides. TR Vol. V 658.

7. In 1995, the King County Prosecuting Attorney's Office started the Most Dangerous Offender Project (MDOP). The MDOP program was founded on the principle that King County's homicide practice would be improved by involving the prosecutor much earlier in the investigative process. MDOP was comprised of senior deputy prosecuting attorneys who were

available seven days a week, 24 hours a day, to respond to homicide scenes in King County. When an MDOP prosecutor responded to a scene, he/she worked as part of an investigation team, and typically assumed responsibility for the prosecution of the case from the charging decision through trial. Respondent was one of the founding members of MDOP. TR Vol. V 660-64. Respondent was particularly active in this role and he responded to the scene of every homicide case he prosecuted, as well as many other scenes that were handled by other prosecutors.

8. As a prosecutor, Respondent gained extensive trial experience, taking at least 80% of his cases to trial, a statistic that far exceeded any other King County deputy prosecuting attorney. TR Vol. V 657-58; TR Vol. V 654; TR Vol. III 481. At MDOP, Respondent took his first 60 cases to trial, and did not enter into a plea bargain until his 6th year in the unit. TR Vol. V 668.

9. Respondent also had great success as a trial prosecutor. Respondent never lost a homicide case, and had only one hung jury. TR Vol. V 676.

Events Leading to Kevin Monday Prosecution

10. In the early morning hours of April 22, 2006, Kevin Monday shot Francisco Green, Michael Gradney and Christopher Green multiple times with a semi-automatic handgun in Seattle's Pioneer Square neighborhood. Mr. Monday fired five times at Mr. Green striking him with four different rounds and then turned his weapon on Mr. Gradney and Mr. Green, striking each of them multiple times. Mr. Monday's crimes were captured in their entirety on video, which became the pivotal piece of evidence in the trial against Mr. Monday.

11. Francisco Green died at Harborview Medical Center as a result of his injuries. Christopher Green and Michael Gradney survived their injuries.

12. Respondent responded to the crime scene in the Monday case. He was present until Seattle Police relinquished control of the scene at the intersection of Yesler Street and Occidental Avenue South. From there, Respondent went straight to the King County Medical Examiner's office to attend the autopsy of the murder victim, Francisco Green. TR Vol. V 697 – 703. He worked closely with the homicide detectives investigating the crimes to identify witnesses who had observed the incident and identify the shooter. There were many eyewitnesses to the crimes, including the two surviving victims, but no one came forward, no one cooperated with the police investigation, and no one identified Mr. Monday. As a result, detectives spent many days chasing leads that proved fruitless until detectives got a break in the case. TR Vol. V 703 – 32.

13. A woman, Nakita Banks, called 911 and asked to "anonymously" speak to the case detectives. She was not willing to provide her name or her address but she had used her employer's telephone and the telephone number gave the detectives the information they needed to identify her. She did not want the detectives to visit her at her house and she refused to tell them where she worked when they suggested that they meet with her there. Respondent helped arrange for the interview with Ms. Banks as he was familiar with her employer. Ultimately, Ms. Banks agreed to meet with detectives. The information that Ms. Banks gave to detectives put them on the path to identifying the shooter and solving the case. TR Vol. V 704 – 09.

14. Mr. Monday was arrested on May 15, 2006. TR Vol. V 721– 22. On May 18, 2006, Respondent charged Mr. Monday with one count of Premeditated Murder in the First Degree with a deadly weapon enhancement, two counts of Assault in the First Degree with deadly weapon enhancements, and one count of Unlawful Possession of a Firearm in the second degree.

15. The Monday case was initially going to be tried by another senior deputy prosecuting attorney because of Respondent's heavy caseload. However, when that prosecutor transferred to

another unit, Respondent asked for the case back rather than have it assigned to a prosecutor with less skill or moxie. Having previously met with Francisco Green's family, Respondent wanted Francisco Green's grandmother to "hear that jury say that Kevin Monday was guilty for killing her son." TR Vol. V 733 -37.

The Trial of Kevin Monday

16. The trial against Mr. Monday began April 23, 2007. The State of Washington (State) was represented by Respondent. Kevin Monday was represented by Mr. Donald Minor. Mr. Minor is African-American and has extensive experience representing criminal defendants in King County. TR Vol. V 743 – 44. The Honorable Michael C. Hayden (Judge Hayden) presided over the trial. At the time of this trial in 2007, Judge Hayden had been a Superior Court Judge for 14 years. TR Vol. IV 570 – 72.

17. During trial, Respondent called several witnesses who were in Pioneer Square on the night of the shooting to testify on behalf of the State. Although the videotape of the scene, taken by a nearby street musician, showed that seven of these witnesses (including the surviving victims) were in a position to see the shooting and the shooter, none of the seven identified Kevin Monday as the shooter in their trial testimony. The seven eyewitnesses were: Felicia Barrett (Barrett), DiVaughn Jones (Jones), Antonio Kidd (Kidd), Antonio Saunders (Saunders), Adonijah "Anne" Sykes (Sykes), Michael Gradney (Gradney), and Christopher Green (Green). None of the seven eyewitnesses were willing participants in the proceedings. Each of them had to be arrested, threatened with arrest, or held in custody on unrelated matters to secure interviews with defense counsel and their testimony at trial. TR Vol. V 744 – 48.

18. The seven eyewitnesses, including the two surviving victims, the deceased victim and Kevin Monday are African-American. The Respondent and two of the State's key witnesses,

Seattle Police Detectives Cruise and Weklych, are Caucasian.

19. Eyewitness Sykes refused to cooperate with the law enforcement officers who investigated the shootings and gave inconsistent accounts of the events at trial. Ms. Sykes testified that she had been mistreated by the police and implied that the case detectives had lied about their interactions with her. Ms. Sykes' testimony was pivotal in the trial. Ms. Sykes had initially picked Mr. Monday out of a photo montage and identified him as the shooter but later became combative when detectives asked her to provide a taped summary of the details she previously provided in the unrecorded conversation. Ms. Sykes made it abundantly clear to the detectives that she did not want to be involved and was equally emphatic that she was not going to testify at a trial. TR Vol. V 709 – 21.

20. By the time that Ms. Sykes was scheduled to testify, a lawyer had been appointed to represent her as a material witness. Her lawyer attempted to have Ms. Sykes excused and relieved of her obligation to testify claiming that Ms. Sykes feared for her safety. Ms. Sykes had not previously expressed any concern for her safety, not to Seattle Police Officers or to Mr. Minor in his interview with her just a few weeks before trial. Ms. Sykes' lawyer represented to the trial judge that his client wanted to invoke the 5th amendment to avoid testifying at trial because Ms. Sykes was concerned that she might be charged with some of the crimes that were depicted on the video. Respondent assured the court that Ms. Sykes testimony could not subject her to any of the crimes that had been filed against the defendant.

21. Ms. Sykes' attorney then informed the court that Ms. Sykes' expected testimony could potentially subject her to false reporting charges because he anticipated that her testimony would be different from what she had previously told police. Respondent immediately informed the court that the State would give Ms. Sykes "immunity" from false reporting charges that could be

filed as a result of the undisclosed differences in her testimony. Judge Hayden was not persuaded by the various arguments made by Ms. Sykes' attorney and he ruled that Ms. Sykes would be required to testify. EX ODC-1 (May 21, 2007 TR 3-7).

22. Antonio Saunders, the father of Ms. Sykes' child, testified prior to Ms. Sykes. EX ODC-1 (May 21, 2007 TR 7-130). Before she was called to the stand, however, Respondent informed the court that he was surprised that Mr. Saunders had testified that he could not distinguish between himself and Ms. Sykes in the videotape. Expecting similar testimony from Ms. Sykes, Respondent called Ms. Sykes' mother to testify and identify Ms. Sykes in the video. EX ODC-1 (May 21, 2007 TR 131-34). The court allowed the State to call Ms. Sykes' mother to identify Ms. Sykes' voice. In his ruling, Judge Hayden stated,

> "[A]nd I concur with the State that for whatever reason virtually all of the witnesses in this case have refused to be cooperative to the extreme not only recanting prior statements, but also testifying in a manner that often times stretches one's credulity in assessing the testimony, and I am certainly not the finder of fact, but I suggest that they who are the finders of fact in this case have found much of the testimony to be very, very difficult to accept in light of things that were said before and things as they appear in front of them."

EX ODC-1 (May 21, 2007 TR 134)

23. Respondent informed the court that he did not expect Ms. Sykes to be cooperative and that he anticipated asking the court to declare Sykes a hostile witness. EX ODC-1 (May 21, 2007 TR 132). The court initially reserved ruling on Sykes' status as a witness. EX ODC-1 (May 21, 2007 TR 157). Later, during Sykes' first day of testimony, the court declared her a hostile witness. EX ODC-1 (May 21, 2007 TR 185).

<u>Respondent's Use of the Term "Po-leese" During the Examination of Ms. Sykes</u>

24. Ms. Sykes' testimony took place over the course of two days. EX ODC-1 (May 21, 2007 TR 146 – May 22, 2007 TR 82). It began on the afternoon of May 21, 2007. The court reporter

on the first day of Ms. Sykes' testimony had been reporting much of the previous trial testimony. Because Ms. Sykes was both a material and hostile witness, the State played no role in scheduling her testimony and her attorney made all arrangements for her appearance. When Ms. Sykes entered the courtroom, Judge Hayden immediately sent her back out into the hall. Outside the presence of the jury, Judge Hayden expressed his displeasure with her attire and directed Respondent, or somebody at his direction, to find some appropriate clothing for Ms. Sykes. Ms. Sykes, who was already upset about having to appear and testify, became noticeably more upset about having to wear the clothing provided for her by the State.

25. In his role as a prosecutor, Respondent often interacted with individuals from racially, ethnically, and culturally diverse backgrounds. In investigating, preparing, and trying cases, Respondent found that he had better rapport with people of different backgrounds if he demonstrated that he was comfortable with them and their environment. In some instances, Respondent demonstrated this by copying their dialect or by using a particular handshake. TR Vol. V 679-84.

26. Intermittently during Sykes' examination, both Sykes and Respondent introduced and used various forms of street language. For example, Respondent referred to Sykes' boyfriend as her "baby" and to Sykes' intoxication on the night of the shooting as being "loaded," after which Sykes adopted Respondent's terminology. Similarly, Sykes described persistent police contacts as "sweating" and "bothering" her, after which Respondent adopted Sykes' terminology.

27. Mr. Minor objected to Respondent's examination, and the court told Respondent, "let's try to keep it down a little bit, and let the street language remain in the street. You don't have to buy into it." EX ODC-1 (May 21, 2007 TR 182).

28. During Ms. Sykes testimony, she repeatedly pronounced police with a long "o" ("po-leese"). Ms. Sykes initiated the pronunciation "po-leese" and Respondent used the same pronunciation only after Ms. Sykes. Respondent and Ms. Sykes pronounced the word both ways during the second day of her testimony. Ms. Sykes had been declared a hostile witness the day before. She used the vernacular when complaining about the police. Respondent did not want the jury to believe that either of the detectives would engage in the type of conduct that they were accused of by Ms. Sykes. Respondent's use of the term "po-leese" to demonstrate Ms. Sykes' contempt for law enforcement and lack of cooperation. TR Vol. V 788-91.

29. Respondent did not mock and ridicule Ms. Sykes. While he was emphatic with the questions he put to her to demonstrate her anti-law enforcement bias, he was respectful at all other times during his questioning of Ms. Sykes.

30. Respondent's expert witness, Peter Jarvis, testified that "po-leese" is a term used by Caucasians as well as African-Americans, and that Respondent's use of the term "po-leese" was not outside the practice norms, the standard of conduct, or the standard of care within the practice of law. TR Vol. III 360-62.

31. The Hearing Officer finds that the pronunciation of police as "po-leese" is not unique to African-Americans and that Respondent's adoption of that term when questioning Ms. Sykes did not violate practice norms applicable to felony prosecutions.

32. The Hearing Officer also finds that a reasonable person would not interpret Respondent's conduct in the context of the Monday trial as manifesting bias or prejudice based on race or color.

Respondent's Closing Argument

33. Elected King County Prosecuting Attorney Norman K. Maleng died on May 24, 2007.

34. On May 30, 2007, Respondent began his closing argument as follows:

> Seventeen years and eleven months ago yesterday I signed on, I signed on to serve at the pleasure of Norman K. Maleng. I never imagined in a million years I would get to try as many murder cases as I have in the last 15 years, and I never imagined I would ever get to try one, a doozy, like this one. Seventeen years and about ten months ago I started going to training sessions . . . And two things stood out at me very shortly into my career as a prosecutor, two tenets that all good prosecutors, I think, believe. One is that when you have got a really, really, really strong case, it's hard to come up with something really, really, really compelling to say. And the other is that the word of a criminal defendant is inherently unreliable. Both of those tenets have proven true time and time again over the years, and they have done it specifically in this case over the last five weeks – four weeks.
>
> I never imagined when I signed on to serve at the pleasure of Norm Maleng, this won't be the last murder case I will try, but it is the last one I will try under his name . . .

EX ODC-1 (May 30, 2007 TR 26-27).

35. In addressing the statements given by Kevin Monday to detectives, Respondent argued to the jury:

> [I]f we go through his statement, you are really going to find that he said two, maybe three things that prove to be true. This goes to my second underlying tenet as a prosecutor that as the murderer, the criminal defendant is inherently unreliable and not just because . . . they know that they are being talked to by the police, and that they have got some motive to lie, or that they are in trouble. . . .

EX ODC-1 (May 30, 2007 TR 45).

> Remember the theme, the word of a criminal defendant is inherently unreliable? It's demonstrated time and time again. . . .

EX ODC-1 (May 30, 2007 TR 59).

36. Respondent continued his closing argument:

> [T]he only thing that can explain to you the reasons why witness after witness after witness is called to this stand and flat out denies what cannot be denied on that video is the code. And the code is black folk don't testify against black folk. You don't snitch to the police. . . .

EX ODC-1 (May 30, 2007 TR 29-30).

37. Respondent made the argument about the "code" and "black folk" in anticipation that Mr. Minor would argue to the jury in closing that there was reasonable doubt of Kevin Monday's guilt because no fact witness had identified Mr. Monday as the shooter. TR Vol. V 754. Respondent felt that he needed to explain to the jury why the seven eyewitnesses would not identify Mr. Monday as the shooter when they were in a position to do so. TR Vol. V 762.

38. In closing, Mr. Minor did argue that none of the State's eyewitnesses identified Kevin Monday as the shooter. EX ODC-1 (May 30, 2007 TR 76-85).

39. On rebuttal, Respondent again made reference to the "code" and "black folk":

> [L]et me make it very clear to you if I didn't, I don't accept from the code that black folk don't ID black folk in court or you're a snitch, I don't accept from that generalization and that rule or that code on the street Mr. Gradney and Mr. Green contemplate the testimony, the evidence.

EX ODC-1 (May 30, 2007 TR 109-10).

40. In this context, Respondent was arguing that even the testimony of Gradney and Green, the surviving victims, was influenced by the "code." See TR Vol. V 692.

41. In total, Respondent referenced the "code" ten times during his closing argument.

42. Before and after the Monday trial, Respondent believed that there is an anti-snitch code among some African-Americans, which Respondent described in the disciplinary hearing as follows:

> I want to say that doesn't mean all. That doesn't mean a few. I don't know how many there are. All I know is I encountered an anti-snitch code among African Americans in dozens of cases that I handled with the King County Prosecutor's office.
>
> And one more time, that's not to suggest that there aren't other groups of

> individuals that don't also have and abide by the anti-snitch code; but I will also say that I believe it is most prevalent in some poor urban neighborhoods, and my experience has been many of those are black.

TR Vol. V 695-96.

43. Respondent further testified that,

> I did not in my words, in my actions, or in any other way say, suggest or imply that all black people do anything. In fact, I don't believe I've ever uttered those three words in [succession] in my life, so let me take the time to do so now. I do believe that all black people readily understand why it is that their forefathers and the generations before them and those who are still here and see the – see the abuse that people of color sometimes suffer at the hands of The Man, that they all readily understand the reasons why there would be, could be, and is an anti-law enforcement code among some black people in this country, and more specifically in this community.

TR Vol. V 787-88.

44. Each and every one of the seven eyewitnesses in the Monday trial demonstrated an anti-law enforcement bias. They had demonstrated their anti-law enforcement bias from the moment that they were identified by detectives as witnesses through their testimony at trial. They were arrested, threatened with arrest, or held on unrelated jail commitments to secure their testimony at trial. The eyewitnesses can be clearly identified in the video recording of Mr. Monday's crimes. They were in a position to see and identify Mr. Monday as the shooter yet they refused to identify Mr. Monday in the courtroom despite being able to do so. TR Vol. IV 578, 595-96.

45. Detectives Cruise and Weklych, as well as the first officer on the scene, Aaron Parker, testified in the Monday trial about the anti-law enforcement bias they encounter on a regular basis in the course of their investigations and that existed in this case with the seven eyewitnesses to the shooting. Detectives Cruise and Weklych also testified in this hearing about their experiences with witnesses who are reluctant to assist law enforcement and testify in criminal prosecutions. TR Vol. II 234-37 & Vol. III 431-34.

46. Additionally, the testimony of Judge Hayden, juror Ron Jensen, TR Vol. IV 523-37, jury foreperson Teresa Teresa Potts, TR Vol. IV 498-508, and the trial record in the Monday case established in this hearing that each and every one of the Monday eyewitnesses held an anti-law enforcement bias. As stated in the trial record in response to Mr. Minor's objection to testimony about "the code," Judge Hayden stated:

> [I]t's admissible under, in my view, under 803(a)(3) . . . they are explaining their motivation for lack of cooperation being that they don't talk to police, they don't want to talk to police.
>
> Now, whether that's a code or not among a lot of other people is perhaps his interpretation of it. But as to each one of these witnesses, it's been, I think, very obvious to everyone in the courtroom that virtually every non, virtually every lay witness has been very reticent to testify in this case, and the memory of virtually every lay witness has had significant holes in places where one would not expect that they would have memory lapses. So, and each one of them complained about their treatment by the police.
>
> [H]e can express his view that from a long time as a police officer that what he is seeing from these witnesses is somewhat typical of what he sees from people that are in many kinds of cases.

EX ODC-1 (May 23, 2007 TR 98-99)

47. In this hearing, Judge Hayden testified that in his 15 years on the bench, he had officiated over many cases where witnesses were reluctant to participate but that the Monday case was the only case where each and every one of the eyewitnesses were so blatantly uncooperative. TR Vol. IV. 577. Judge Hayden testified that he made findings in the Monday trial that each of the eyewitnesses called by Respondent were "hostile." TR Vol. IV 583.

48. Although not determinative of any Counts in the present disciplinary matter, Judge Hayden testified that he did not believe Respondent was appealing to racial prejudice in his closing argument. TR Vol. IV 598-601. Likewise, two jurors in the Monday case testified at this hearing that Respondent did not attempt to play on race at any point in the trial. TR Vol. IV 513-

16, 534-39. I find this testimony relevant regarding the objective impressions of a reasonable person.

49. Retired Lt. Kelsie and retired Det. Allen spent their entire careers working for the Seattle police department. Both men are African-American and both were born and raised in Seattle. Both men testified that there is an anti-snitch code among many criminals of all ethnicities. TR Vol. IV 176-89, 309-16.

50. The two lead homicide detectives from the Monday case, Weklych and Cruise, testified at the hearing consistent with their trial testimony, that they often encountered an anti-snitch code among African-Americans in Seattle that are involved in criminal activity. TR Vol. IV 234-51, TR Vol. III 439-44. It was undisputed at the disciplinary hearing that there is no "anti-snitch code" among all African-Americans in Seattle. Direct and circumstantial evidence presented at the hearing supports, at most, the finding that an anti-snitch code does exists among some criminal subcultures within all races and ethnicities in some parts of Seattle.

51. The reluctance to cooperate with the police is multifaceted and involves many factors including fear for one's safety, fear of being ostracized, the existence of a prior relationship with the accused, personal experience with the criminal justice system, and/or historic distrust. TR Vol. II 235-36; TR Vol. V 752; TR Vol. IV 129.

52. The Monday record shows that the State's witnesses may have been reluctant to testify for a variety of reasons.

53. Witness Nakita Banks wanted to be anonymous because she was afraid of being killed. TR Vol. V 705-06, 709-10 TR Vol. II 263. Ms. Banks was so scared that she moved out of state before testifying in the Monday trial.

54. Kidd testified during the Monday trial that he was scared. EX ODC-1 (May 16, 2007 TR

56). Green, Gradney, Jones, and Barrett also had concerns for they safety if they cooperated. TR Vol. II 264-65.

55. Sykes was afraid for her safety. See supra ¶18, ¶19; TR Vol. II 233, 263-64; EX ODC-1 (May 21, 2007 TR 3).

56. Saunders was friends or, at least, acquainted with Kevin Monday before the shooting. TR Vol. III 424. On the night of the shooting, Monday intervened on Saunders' side when Saunders became involved in the argument with Francisco Green.

57. Although there was evidence that the seven eyewitnesses in the Monday trial held an anti-law enforcement bias and that some criminal element of all ethnicities in Seattle subscribe to an anti-snitch code, there was no evidence establishing that any of the eyewitnesses refused to identify Kevin Monday as the shooter because of their race or because of Monday's race.

58. To the extent there was information about the eyewitnesses' race and the "code" and "black folk" at the Monday trial, it was based on Respondent's closing argument and what the jurors surmised of the eyewitnesses' race by observing them in the courtroom. See TR Vol. IV 62-63, TR Vol. IV 28-29.

59. Clearly, when Respondent argued, "the code is black folk don't testify against black folk," he intended to say the words that he said. Just as clearly, Respondent intended for these words to bias the jury in favor of the State's case.

60. Respondent testified at length in this matter. Respondent testified that he did not, in his words or in his actions, suggest that "all" black folks abide by the code. TR Vol. V 787-88. Respondent testified that he implored the jury in his closing argument to believe every word Nakita Banks (who was African-American) uttered on the witness stand and told the jury it was

her courage in voluntarily coming forward that allowed the detectives to solve the Monday case. TR Vol. V 761.

61. Respondent also testified that he suggested in his closing argument that the jury should believe the testimony of the seven eyewitnesses to the extent such testimony was corroborated by the video. TR Vol. V 762.

62. Respondent contends that, when he made his closing argument in Monday, he meant only these seven witnesses "don't testify against black folk." The Hearing Officer finds this argument unpersuasive because that is neither what Respondent said, nor is it what a reasonable person would interpret his actual words to mean.

63. On May 31, 2007 the jury convicted Mr. Monday of Premeditated Murder in the First Degree and both counts of Assault in the First degree. The jury found the defendant guilty of the deadly weapon enhancements on each of the counts. Judge Hayden found Mr. Monday guilty of Unlawful Possession of a Firearm in the Second Degree. The jury was not aware of the Unlawful Possession charge in an effort to avoid any prejudice that knowledge of his prior convictions might cause.

64. On appeal, the Court of Appeals affirmed Mr. Monday's conviction in an unpublished opinion. The court found that the closing argument made by Respondent was "not an appeal to racial bias traditionally held contemptuous by the courts." Division One stated: "Here, the prosecutor could reasonably infer from police testimony, which referred to a code of silence, and the testimony of the eyewitnesses that there was a code on the street not to snitch or testify." They continued: "the prosecutor's comments were not about Monday or his conduct. Instead, they described the reluctance of witnesses, including those called by the State, to identify that Monday was the shooter."

65. Kevin Monday petitioned for review to the Supreme Court, and the Supreme Court granted review of two issues. One of the issues was whether prosecutorial misconduct deprived Monday of a fair trial.

66. In June 2011, the Supreme Court filed an opinion in State v. Monday, 171 Wn.2d 667 (2011), reversing Kevin Monday's conviction based on prosecutorial misconduct. The Supreme Court found that Respondent improperly commented on the credibility of the witnesses and the State's case, and injected racial prejudice into the trial proceedings. EX ODC-2.

67. There was extensive coverage in the media of the Supreme Court's opinion in Monday and Respondent's conduct. EX ODC-8.

68. The King County Prosecuting Attorney's Office removed Respondent from the MDOP and informed him that he would be transferred to the Regional Justice Center (RJC) where he would be handling violent and other serious felony offenses. TR Vol. V 781-84, 831-32; EX ODC-9.

69. In February 2012, Respondent resigned from the King County Prosecuting Attorney's Office because he was not interested in being a prosecutor if he was not trying murder cases, and he no longer wanted to work for the elected Prosecuting Attorney. TR Vol. V 783-84, 817-21, 832.

70. The Monday case was assigned to another prosecuting attorney for retrial, and another public defender was appointed to represent Kevin Monday. EX ODC-3.

71. King County incurred and paid more than $24,000 in defense costs for the retrial of Kevin Monday. EX ODC-4, EX ODC-6.

72. In July 2012, after the first day of his new trial, Kevin Monday pled guilty to one count of murder in the first degree and one count of assault in the second degree. EX ODC-5, EX ODC-

73. Respondent's statements in closing argument regarding the "word of a criminal defendant," taken in context, was made with the conscious objective or purpose to accomplish a particular result, i.e., to use Respondent's office and experience to convince the jury that the defendant was inherently unreliable. Respondent's conduct was knowing and intentional, and constituted impermissible vouching.

74. Respondent's statement in closing argument regarding a "really, really, really strong case," taken in context, was an expression of Respondent's personal opinion as to the justness of the State's case. Respondent conduct in making this statement was negligent.

75. Respondent's statements in closing argument regarding his 15 years of experience and reference to "Norm Maleng," taken in context, alluded to matters that were not supported by the record and injected Respondent's personal experience and the prestige of his office into the proceedings. Respondent's conduct in making these statements was negligent.

76. Respondent's use of a racial stereotype in closing argument regarding the "code" and the assertion that "black folk don't testify against black folk," taken in context, was made with the conscious objective or purpose to accomplish a particular result, i.e., to influence the jury regarding the motivations of the eyewitnesses who refused to identify Kevin Monday as the perpetrator of a homicide. Respondent's conduct was knowing and intentional.

77. Respondent's misconduct caused substantial actual and potential injury as a result of the Supreme Court's opinion reversing the Monday conviction and the subsequent media coverage.

78. Because of Respondent's conduct, the defense, the prosecuting attorney's office, the jurors, and the court system spent valuable time and resources on a four-week trial, only to have the conviction overturned. Additional time and resources had to be expended in order for new counsel, both prosecution and defense, to prepare for retrial.

79. Respondent's conduct adversely reflected on the criminal justice system, the King County Prosecuting Attorney's Office, and the legal profession. It had the effect of eroding public confidence in the criminal justice system and legal profession. EX ODC-10.

80. State prosecutors play an important role in our system of justice. They are held to a high standard of conduct including the duty to defendants to see that their rights to a constitutionally fair trial are not violated. Our government teaches the people by example. Respondent, in his zeal to convict Mr. Monday, interjected personal vouching and a racial stereotype into his oral argument. The former tends to exploit the influence of the prosecutor's office and invades the jury's province of assessing the credibility of the defendant and/or witnesses. The latter fosters two impermissible consequences: 1) the perpetuation of negative racial stereotypes, and 2) the very resentment that causes anti-law enforcement bias and reluctance to cooperate with police and prosecutors.

81. The Hearing Officer finds that Respondent is neither a racist nor a bigot. But, words count and the words that were intentionally and deliberately used by Respondent, as a representative of the State of Washington, employed an unacceptable racial stereotype that was not supported by evidence in the record, that was prejudicial to the administration of justice, and that a reasonable person would interpret as manifesting bias and prejudice based on race or color.

FINDINGS RE: AGGRAVATING & MITIGATING FACTORS

82. During the disciplinary hearing, Respondent testified that his closing argument about the "code" and the State's "really, really, really strong case" were not improper. TR Vol. V 835.

83. Respondent was admitted to practice law in Washington in 1986. He clerked for the King County Superior Court, served as a public defender from 1987-1989, joined the King County Prosecuting Attorney's Office in 1989, and helped establish MDOP in 1995. As detailed

above, Respondent tried murder cases exclusively for two decades (TR Vol. V 743) and was an exceptionally skilled and successful trial prosecutor.

84. Respondent has no record of prior discipline.

85. In the nearly six days of testimony presented in this hearing, witnesses including the trial Judge Michael Hayden, another respected trial judge Michael J. Fox, two jurors from the Monday trial, and the Managing Director of ACA Donald Madsen, provided substantial and uncontradicted evidence of Respondent's good character and reputation, lack of any history of racial bias or prejudice, and his 25 years of valuable public service. In addition, Respondent's exhibits 1-7 provide substantial evidence of Respondent's contribution to the legal profession, his commitment to victims of violent crimes and their families, and his lack of any racial animus. Finally, the witness for ODC, Mr. Robinson, testified that he had professional experiences with Respondent prior to these proceedings and that Respondent never conducted himself in his interactions with Mr. Robinson in a way that would suggest racial animus. Mr. Robinson recounted an incident in which Respondent reached out to Mr. Robinson with a personal note of support when Mr. Robinson was the victim of a hate crime. TR Vol. V 766-67.

86. Retired Superior Court Judge Michael J. Fox, before being appointed to the bench, had a long and accomplished career as a civil rights and labor lawyer representing, almost exclusively, people of color. TR Vol. VI pp. 862-883. Judge Fox estimated that Respondent appeared in his court nearly 2,000 times. A large percentage of those appearances involved minority defendants. In all of Respondent's appearances in his courtroom, Respondent was fair and respectful to all.

87. Donald Madsen, Managing Director for ACA, Department of Public Defense, has known Respondent since he was a law clerk for Judge Sullivan in 1985. He supervised Respondent when Respondent was a public defender trying felony cases at Associated Counsel for the

Accused in 1988 and 1989. Mr. Madsen is familiar with Respondent's work and reputation as a prosecutor because he has continued to supervise a group of defense attorneys who handled and tried cases against Respondent. Mr. Madsen has not observed Respondent do or say anything that indicates racial animus. Further, Mr. Madsen has never heard anybody else claim to have seen or heard Respondent conduct himself in a way indicating that he harbors racial animus of any kind.

88. The more experienced of the two homicide detectives, Russ Weklych, has worked many homicide cases with Respondent over almost 20 years. The victims in all of those cases were racial minorities.

89. During the disciplinary hearing, Respondent recognized that he made mistakes during the trial and said things in his final argument that were "inartful and admittedly regrettable." TR Vol. V 796-97, 821-23, 835-39. Respondent regretted attributing the code to "black folk" and admitted it was inappropriate. TR Vol. V 837. He recognized that he had failed to appreciate how others who were not present, nor familiar with the Monday trial, might, years later, hear his argument and interpret it to be an appeal to prejudice. On June 5, 2011, Respondent issued an apology to his fellow prosecutors and members of the Seattle Police Department. TR Vol. V 823-24, EX ODC-10.

CONCLUSIONS OF LAW

Introduction

1. It is neither the function of this disciplinary matter to retry the case of State v. Monday nor affirm or reverse the published opinion of our Washington State Supreme Court. State v. Monday, 171 Wn.2d 667 (2011) is the law of the land in Washington State. However, it has neither collateral estoppel nor res judicata effect in the current matter. This disciplinary

proceeding is sui generis. It involves different parties, different evidence, different issues and different standards of proof. The purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the lawyer to continue in that capacity for the protection of the public, the courts, and the legal profession.

2. ODC bears the burden of proving each count of the Formal Complaint by a "clear preponderance of the evidence." ELC 10.14(b); In re Disciplinary Proceeding Against Allotta, 109 Wn.2d 787, 792, 748 P.2d 628 (1988).

3. In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. The duties set forth in RPC 3.4(e) and 8.4(d) and (h) were clearing violated as designated in Counts I, II, III and V. Respondent intended to say the words that form the basis of Counts I and V for the purpose of influencing the trial jury's determination. The potential or actual harm caused by Respondent's action are substantial. And, there exists substantial mitigating factors in light of Respondent's history of distinguished public service and complete absence of any evidence of prior anti-racial bias.

Violations Analysis

4. The Hearing Officer finds that ODC proved the following by a clear preponderance of the evidence:

Count I

Respondent's statement in closing argument regarding the "word of a criminal defendant," taken in context, was made with a conscious objective or purpose to accomplish a particular result, i.e., to use Respondent's office and experience to convince the jury that defendant was inherently

unreliable and, as such, it constitutes impermissible "vouching" in violation of RPC 3.4(e).

Count II

Respondent's statement in closing argument regarding a "really strong case," taken in context, constituted a deviation from the standard of care that a reasonable lawyer would exercise in violation of RPC 3.4(e).

Count III

Respondent's statements in closing argument regarding his "15 years" of experience and his reference to Norm Maleng, taken in context, constituted a deviation from the standard of care that a reasonable lawyer would exercise in violation of RPC 3.4(e).

Count IV

Respondent's pronunciation of "po-leese" during the examination of Adonijah Sykes, taken in context, did not violate any Rule of Professional Conduct. The pronunciation was utilized to highlight the attitude of the witness toward the police. The pronunciation is not unique to African-Americans, rather, it is common among many subcultures.

Count V

Respondent's statement in closing argument regarding "the code" and the assertion that "black folk don't testify against black folk," taken in context, was made with a conscious objective or purpose to accomplish a particular result, i.e., to influence the jury regarding the motivations of the eyewitnesses who refused to identify Kevin Monday as the perpetrator of the homicide. In the trial of Kevin Monday, there was circumstantial evidence that these eyewitnesses, who happened to be African-American, subscribed to a code of not cooperating with the police. However, the evidence in the current disciplinary proceeding was uncontradicted that there is no such "anti-snitch code" among all African-Americans. At most, the direct and circumstantial

evidence introduced in the Monday trial supported an argument that an anti-snitch code did exist among certain criminal subcultures among all races in some parts of King County. Respondent's reference to the race of the eyewitnesses was unnecessary and not justified as legitimate advocacy.

Sanction Analysis

5. A presumptive sanction must be determined for each ethical violation. In re Anschell, 149 Wn.2d 484, 69 P.3d 844, 852 (2003). The following standards of the American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") (1991 ed. & Feb. 1992 Supp.) are presumptively applicable in this case:

> **6.2 Abuse of the Legal Process**
> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:
> 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.
> **6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.**
> **6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.**
> 6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.
>
> **7.0 Violations of Duties Owed as a Professional**
> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or

the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

6. Respondent acted knowingly and intentionally by expressing, in his closing argument to the jury, his personal belief that the "word of a criminal defendant is inherently unreliable" and that this was true in the case before the jury.

7. Respondent acted negligently by expressing, in his closing argument to the jury, his personal belief that "when you have got a really, really, really strong case it's hard to come up with something really, really, really compelling to say" and that this was true in the case before the jury.

8. Respondent acted negligently by alluding, in his closing argument to the jury, to matters that were not relevant or supported by the evidence when he invoked his own personal experience as a prosecutor and the prestige of the recently deceased elected prosecutor.

9. Respondent acted knowingly and intentionally by making comments, in his closing argument to the jury, that were not supported by the evidence and that improperly referenced the

race of the eyewitnesses and defendant. Respondent's purpose in arguing the "code" and "black folk don't testify against black folk" was to influence the jury regarding the motivations of the eyewitnesses who refused to identify Kevin Monday as the perpetrator of a homicide.

10. The potential and actual injury caused by Respondent's misconduct was substantial as a result of the Supreme Court's opinion reversing the Monday conviction and the subsequent media coverage.

11. The defense, the prosecuting attorney's office, the jurors, and the court system spent valuable time and resources on a four-week trial, only to have the conviction overturned. Additional time and resources had to be expended in order for new counsel, both prosecution and defense, to prepare for retrial.

12. Respondent's conduct reflected adversely on the criminal justice system, the King County Prosecuting Attorney's Office, and the legal profession. It had the effect of eroding public confidence in the criminal justice system and legal profession.

13. Based on the Findings of Fact and Conclusions of Law and application of the ABA Standards, the presumptive sanction for Count I is suspension.

14. Based on the Findings of Fact and Conclusions of Law and application of the ABA Standards, the presumptive sanction for Count II is reprimand.

15. Based on the Findings of Fact and Conclusions of Law and application of the ABA Standards, the presumptive sanction for Count III is reprimand.

16. Based on the Findings of Fact and Conclusions of Law, Count IV should be dismissed.

17. Based on the Findings of Fact and Conclusions of Law and application of the ABA Standards, the presumptive sanction for Count V is suspension.

18. The following aggravating factors set forth in Section 9.22 of the ABA Standards are

applicable in this case:

(g) refusal to acknowledge wrongful nature of conduct;
(i) substantial experience in the practice of law

19. The following mitigating factors set forth in Section 9.32 of the ABA Standards are applicable to this case:

(a) absence of a prior disciplinary record;
(g) character and reputation ;
(l) remorse

20. The Hearing Officer finds the following additional mitigating factors: 1) that Respondent lacks any history of racial bias or prejudice; 2) that Respondent has provided 25 years of valuable public service, and 3) that, during the disciplinary hearing, Respondent recognized "he exceeded the bounds of acceptable prosecutorial conduct in gaining the Monday conviction" Respondent acknowledged that his wording was inartful when he told the jury, "a criminal defendant is inherently unreliable." TR Vol. V 796, 839.

RECOMMENDATIONS

1. When multiple ethical violations are found, the "ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct." In re Petersen, 120 Wn.2d 833, 854, 846 P.2d 1330 (1993).

2. "A period of six months is generally the accepted minimum term of suspension." In re Cohen, 149 Wn.2d 323, 67 P.3d 1086, 1094 (2003).

3. However, after hearing nearly six days of testimony from the judge and two jurors in the month-long Monday trial, another respected retired judge before whom Respondent appeared on thousands of occasions over many years, the director of ACA for whom Respondent worked

early in his legal career, among other credible witnesses and written evidence, the Hearing Officer concludes that the mitigating factors far outweigh the aggravating factors and warrant a reduction in the presumptive sanction for each of Counts I, II, III, and V. Consequently, the Hearing Officer recommends that:

- for Count I, the presumptive sanction of suspension be mitigated to a reprimand;
- for Count II, the presumptive sanction of reprimand be mitigated to an admonition;
- for Count III, the presumptive sanction of reprimand be mitigated to an admonition;
- for Count V, the presumptive sanction of suspension be mitigated to a reprimand, and
- Count IV be dismissed.

DATED this 12th day of December, 2014.

Craig C. Beles, WSBA# 6329
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FOF, COL & HO's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to Stephen Konat Respondent/Respondent's Counsel at 300 4th Ave #900 Seattle WA 98104 by Certified/First class mail, postage prepaid on the 12th day of December, 2014.

Clerk/Counsel to the Disciplinary Board

Allison Sato

From: Craig C.Beles <craigbeles@comcast.net>
Sent: Friday, December 12, 2014 12:37 PM
To: Allison Sato
Cc: Joe Nappi
Subject: In re Konat 13#00008 Findings, Conclusions & Recommendation
Attachments: Konat FCR.doc

Dear Ms. Sato,

Attached are my Findings, Conclusions and Recommendations in the Konat matter.
Please distribute to the parties at your earliest convenience.

Thank you,
Craig Beles
Hearing Officer

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