

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

RECEIVED AND FILED

FEB 8 2023

COURT OF JUDICIAL DISCIPLINE
OF PENNSYLVANIA

IN RE:

Michael J. Cabry, III
Former Magisterial District Judge
Magisterial District Court 15-3-06
Chester County

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2 JD 2021

MOTION FOR RECONSIDERATION OF SANCTION

AND NOW, this 3rd day of February, 2023, comes the Judicial Conduct Board of the Commonwealth of Pennsylvania (Board), by and through undersigned counsel, and files this Motion for Reconsideration of Sanction, and avers the following:

1. On December 9, 2021, at 2 JD 2021, the Board filed a Complaint in this Court against former Judge Cabry alleging three counts of judicial misconduct stemming from his criminal convictions and sentence for the following offenses: (1) theft by unlawful taking, 18 Pa.C.S.A. § 3921(a), a misdemeanor of the second degree; (2) reporting by candidate and political committees, 25 P.S. § 3246(a), an ungraded misdemeanor; (3) report must list each expenditure and person, 25 P.S. § 3246(B)(4), an ungraded misdemeanor; and (4) lawful election expenses, 25 P.S. § 3254.1, an ungraded misdemeanor.
2. This Court conducted trial on the Board’s Complaint on August 10, 2022.
3. By opinion and order entered October 24, 2022, this Court found former Judge Cabry’s conduct violated Canon 1, Rule 1.1 of the Rules Governing Standards of Conduct of Magisterial District Judges and Article V, § 17(b) of the Pennsylvania Constitution.

4. This Court conducted a sanctions hearing on December 13, 2022, whereat only former Judge Cabry testified.
5. This Court delivered its sanction by opinion and order entered January 31, 2023.
6. This Court sanctioned former Judge Cabry with a severe reprimand.
7. As a basis for its sanction, this Court credited former Judge Cabry's pledge under oath never to seek judicial office again and held him to his promise.
8. A court in this jurisdiction may reconsider an order if the time for appeal has not lapsed and no appeal has been taken of the order in question. **See** 42 Pa.C.S.A. § 5505 ("Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.").
9. As set forth more fully in the attached Memorandum of Law, this Court's sanction constituted an abuse of discretion because the sanction fails to meet this Court's institutional obligation to, *inter alia*, punish former Judge Cabry, to deter future judicial misconduct, and to re-establish the probity of, and public trust in, former Judge Cabry's court.
10. As set forth more fully in the attached Memorandum of Law, this Court's sanction constitutes an abuse of its sanctioning discretion, as former Judge Cabry's *crimen falsi* conviction constitutes an "infamous crime" that

disqualifies him from holding a position of any office of trust or profit in this Commonwealth. **See** Pa.Const., Art. II, § 7.

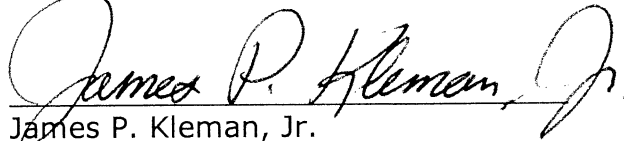
WHEREFORE, as set forth in the proposed order attached to this pleading, it is respectfully requested that this Honorable Court specifically grant the Board's motion for reconsideration within 30 days of its prior January 31, 2023 sanction order for purposes of reviewing the merits of the Board's request for relief set forth in this pleading, vacate its prior January 31, 2023 sanction order, and schedule the matter for oral argument on the subject of the merits of the relief requested in this pleading and to grant such other relief as may be deemed appropriate.

Respectfully submitted,

MELISSA L. NORTON
Chief Counsel

DATE: February 3, 2023

BY:



James P. Kleman, Jr.
Senior Deputy Counsel
Pa. Supreme Court ID No. 87637
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Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 3500
P.O. Box 62525
Harrisburg, PA 17106
(717) 234-7911

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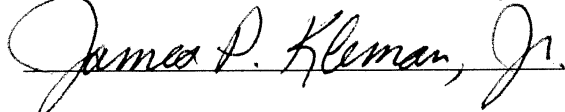
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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Judicial Conduct Board of Pennsylvania

Signature:



Name:

JAMES P. KLEMAN, JR.
Deputy Counsel

Attorney No.:

87637

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MEMORANDUM OF LAW

Recently, in *In re Roca*, 173 A.3d 1176 (Pa. 2017), the Pennsylvania Supreme Court considered this Court’s discretion in imposing sanction on an offending jurist. The Court noted that

The [Court of Judicial Discipline] will always be guided by its institutional obligation to protect citizens from improper judicial behavior, deter future judicial misconduct, protect the integrity of the Commonwealth's judicial system, and re-establish the probity of, and public trust in, the court affected by the misconduct in question. This Court has repeatedly stated that imposition of discipline not only punishes the wrongdoer, but also repairs the damaged public trust and provides guidance to other members of the judiciary regarding their conduct.

Roca, 173 A.3d at 1189 (internal quotations and citation omitted).

The Court also observed that judges who commit misconduct after other judges have been sanctioned for similar misconduct have the benefit of this Court’s earlier decisions and, thus, it is reasonable for the second, third, or fourth judge who commits a particular type of misconduct to receive a more severe sanction than the first judge who did so. *Roca*, 173 A.3d at 1189. Thus, this Court’s view of the appropriate sanction for a particular type of misconduct may be adjusted as time and experience shape this Court’s understanding of the measures which are necessary to achieve its institutional purpose as set forth above. *Id.*, at 1189-90.

The sanction in the present case fails to meet the punishment, deterrence, and “re-establishment” prongs of the institutional purpose set forth above. To explain, this Court’s sanction is fatally inconsistent with a similar, though factually distinct, prior sanction imposed in *In re Tranquilli*, 4 JD 2020. In *Tranquilli*, this Court held the respondent judge’s pledge never to serve again as a judge (tendered with his resignation, stipulation to all allegations presented by the Board, and waiver of trial) as “binding and irrevocable,” which effectively rendered that component of the sanction a

bar on the respondent judge's future judicial service. **See *Tranquilli***, 4 JD 2020, Sanction order 11/19/2020. Here, the language of this Court's sanction order merely recognized former Judge Cabry's testimony that he would never seek judicial office again and stated that "this Court holds him to this and accepts his sworn promise." ***In re Cabry***, 2 JD 2021, Sanction order, 1/31/2023. This language, as opposed to that utilized by this Court in ***Tranquilli***, fails to suffice as a bar from future judicial service in that it merely denotes the credibility of former Judge Cabry's promise without delineating the terms of the promise into language that could be enforced, for example, by way of a contempt petition. **See, e.g., *Sutch v. Roxborough Memorial Hosp.***, 142 A.3d 38, 68 (Pa. Super. 2016) (to enforce terms of order through contempt power, alleged contemnor must know of prohibited conduct, with any ambiguities, omissions, or uncertainties in the order construed in favor of the alleged contemnor.). Inasmuch as this Court has previously found criminal conviction as the basis for preclusion from future judicial service following retirement, **see *In re Shaner***, 142 A.3d 1051, 1057 (Pa.Ct.Jud.Disc. 2016) (senior magisterial district judge precluded from accepting future assignments and reprimanded and censured for criminal conviction), the absence of such "disqualifying" language in the present sanction order fails to meet even the minimum sanction sufficient to deter future misconduct and punish former Judge Cabry, *i.e.*, bar from future judicial service. ***Tranquilli, supra, Shaner***, 142 A.3d at 1057.

More to the point, unlike the non-criminal (though serious) misconduct at issue in ***Tranquilli***, the crime of theft by unlawful taking, of which former Judge Cabry stands convicted, constitutes *crimen falsi*. **See, e.g., *Commonwealth v. Baxter***, 640 A.3d 1271, 1274 (Pa. 1994) (theft by unlawful taking constitutes *crimen falsi*). A *crimen falsi* offense constitutes an "infamous crime." **See, e.g., *Commonwealth ex rel. Baldwin v. Fisher***, 809 A.2d 348, 349 (Pa. 2002) (affirming *quo warranto* removal of individual who served as jury commissioner on the basis that he was convicted of an "infamous crime"). The seriousness of this category of conviction is highlighted by the fact that the Pennsylvania Constitution bars any person so convicted from holding any office of trust or profit in the Commonwealth of Pennsylvania. **See** Pa. Const., Art. II, §7. The Supreme Court of Pennsylvania has defined the term "infamous crime," as referenced in Article II, §7, as including a felony or *crimen falsi* offense:

[W]e reaffirm that a crime is infamous for purposes of Article II, Section 7, if its underlying facts establish a felony, a *crimen falsi* offense, or a like offense involving the charge of falsehood that affects the public administration of justice.

Commonwealth ex rel. Baldwin v. Richard Baldwin, 751 A.2d 647, 653 (Pa. 2000) (emphasis added). Thus, it would seem, at a minimum, this Court's responsibility to deter future judicial misconduct by *both* former Judge Cabry and other jurists similarly situated would require a definitive "bar" from his future judicial service, which is not a component of this Court's sanction order.

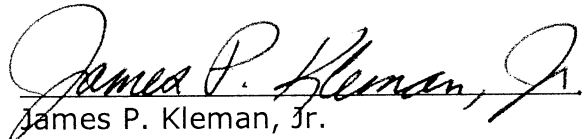
Moreover, the *non sequitur* inherent in permitting a former jurist tainted by a *crimen falsi* offense to achieve their preferred sanction and, at the same time, permitting that jurist to evade future enforcement of that sanction due to the absence of enforceable language fails to meet any notion of repairing the public's damaged trust in the judiciary fostered by former Judge Cabry's conduct. Consequently, the Board requests that this Court specifically grant the Board's motion for reconsideration, vacate its sanction order, and schedule the matter for oral argument on the subject of sanctions as set forth in the proposed order and to grant such other relief as may be deemed appropriate.

Respectfully submitted,

MELISSA L. NORTON
Chief Counsel

DATE: February 3, 2023

BY:



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PROOF OF SERVICE

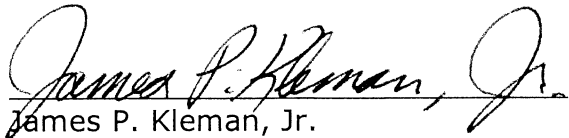
In compliance with Rule 122 of the Court of Judicial Discipline Rules of Procedure, on February 3, 2023, a copy of the Board's foregoing Motion and Memorandum were sent by First Class Mail and Email to former Judge Cabry's counsel, Samuel C. Stretton, Esquire, who agreed to accept service, at the following address:

Samuel C. Stretton, Esquire
103 South High Street
P.O. Box 3231
West Chester, PA 19381-3231
Email: strettonlaw.samstretton@gmail.com

Respectfully submitted,

DATE: February 3, 2023

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ORDER

AND NOW, this _____ day of February, 2023, it is ORDERED that reconsideration for purposes of reviewing the request for relief presented by the Board is hereby specifically GRANTED within 30 days of January 31, 2023. The Sanction Order entered by this Court on January 31, 2023, is hereby VACATED. This Court will, in the near future, issue a scheduling order for oral argument on the issue of sanctions to be imposed in this matter.

BY THE COURT:

_____, J.