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## COMMISSION ON JUDICIAL PERFORMANCE CLOSES INVESTIGATION OF JUDGE AARON PERSKY

The Commission on Judicial Performance (commission) is the independent state agency responsible for investigating complaints of judicial misconduct involving state court judges and for imposing discipline. Pursuant to article VI, section 18 of the California Constitution, the commission may impose sanctions for judicial misconduct ranging from confidential discipline to removal from office. Judicial misconduct usually involves conduct inconsistent with the standards set forth in the California Code of Judicial Ethics. The commission can only impose discipline on a judge if there is clear and convincing evidence of judicial misconduct.

The commission received thousands of complaints and petitions about Santa Clara County Superior Court Judge Aaron Persky's June 2, 2016 sentencing of Brock Allen Turner, a Stanford University student-athlete who was convicted of sexually assaulting an unconscious woman behind a dumpster outside a college party. The sentence imposed – six months in county jail plus three years of probation and lifetime sex offender registration – was widely criticized as being too lenient, and triggered significant public outrage and media coverage. Because Judge Persky's sentencing of Turner and the complaints to the commission received widespread public attention, the commission issues this explanatory statement pursuant to article VI, section 18(k) of the California Constitution.

The complaints submitted to the commission primarily alleged that: (1) Judge Persky abused his authority and displayed bias in his sentencing of Turner; (2) the sentence was unlawful; (3) the judge displayed gender bias and failed to take sexual assault of women seriously; (4) the judge exhibited racial and/or socioeconomic bias because a non-white or less privileged defendant would have received a harsher sentence; and (5) the judge's history as a student-athlete at Stanford University caused him to be biased in favor of Turner and that he should have disclosed his Stanford affiliation or disqualified himself from handling the case.

Many complainants asked the commission to ensure that the sentencing in this case matches both the crime and the jury's verdict and to be sure that justice is done. The commission is not a reviewing court – it has no power to reverse judicial decisions or to direct any court to do so – irrespective of whether the commission agrees or disagrees with a judge's decision. It is not the role of the commission to discipline judges for judicial decisions unless bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty is established by clear and convincing evidence. (*Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 395-399.)

The commission has concluded that there is not clear and convincing evidence of bias, abuse of authority, or other basis to conclude that Judge Persky engaged in judicial misconduct warranting discipline. First, the sentence was within the parameters set by law and was therefore within the judge's discretion. Second, the judge performed a multi-factor balancing assessment prescribed by law that took into account both the victim and the defendant. Third, the judge's sentence was consistent with the recommendation in the probation report, the purpose of which is to fairly and completely evaluate various factors and provide the judge with a recommended sentence. Fourth, comparison to other cases handled by Judge Persky that were publicly identified does not support a finding of bias. The judge did not preside over the plea or sentencing in one of the cases. In each of the four other cases, Judge Persky's sentencing decision was either the result of a negotiated agreement between the prosecution and the defense, aligned with the recommendation of the probation department, or both. Fifth, the judge's contacts with Stanford University are insufficient to require disclosure or disqualification. A detailed discussion of the commission's analysis is set forth below.

### **Overview of the *Turner* Case**

On January 18, 2015, Brock Turner, a 19-year-old Stanford University freshman and member of the swim team, was caught sexually assaulting an unconscious woman behind a dumpster outside a college party. Two passersby witnessed the attack, called 911, and then chased and detained Turner while they waited for law enforcement to arrive.

On March 30, 2016, a jury convicted Turner of three felony charges. Turner was found guilty of violating Penal Code section 220(a)(1), assault with intent to commit rape, Penal Code section 289(e), sexual penetration of an intoxicated person with a foreign object (based on digital penetration) and Penal Code section 289(d), sexual penetration of an unconscious person with a foreign object (again, based on digital penetration). The convictions for violating Penal Code sections 289(d) and 289(e) were for the same conduct and therefore were punishable by a total of three, six, or eight years in state prison for both violations. The Penal Code section 220(a)(1) violation was punishable by two, four, or six years in state prison. Altogether, Turner faced a maximum of 14 years in prison. At the time Turner was sentenced, the Penal Code allowed for a downward departure to probation instead of a state prison term for convictions like Turner's upon a judicial finding that the case was "unusual" and that "the interests of justice would best be served if the person is granted probation."<sup>1</sup>

The district attorney's office sought a six-year state prison sentence for Brock Turner. Defense counsel urged the court to impose a more lenient sentence of four months in county jail plus three to five years of probation. In a 16-page report, the probation department recommended that the judge impose "a moderate county jail sentence, formal probation [for three years], and sexual offender treatment . . . ." (The maximum sentence in a county jail permitted by law is one year.)

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<sup>1</sup> On September 30, 2016, Governor Jerry Brown signed into law Assembly Bill 2888, which amended Penal Code section 1203.065 to prohibit courts from granting probation instead of a state prison sentence to anyone convicted of Penal Code section 289(d) or 289(e).

At the June 2, 2016 sentencing hearing, the victim made a lengthy oral statement and submitted a 12-page written statement. After hearing from the victim, the prosecutor, Turner's father, and Turner himself, Judge Persky took a short recess and then returned and announced his indicated sentence. The judge noted at the outset of his remarks that the sentencing decision was a difficult one.

And as I'm sure everyone in the court can appreciate and as was stated several times today, it is a difficult decision. And I just want to, before I give my tentative decision, read something from [Jane's] statement, which I think is appropriate -- actually, two things from her statement. [¶] She gave a very eloquent statement today on the record, which was a briefer version of what was submitted to the Court. [¶] Let me just say for the record that I have reviewed everything, including the sentencing memorandum, the probation report, the attachments to the probation report, and the respective sentencing memoranda. [¶] And so [Jane] wrote in her written statement, [as read] 'Ruin a life, one life, yours. You forgot about mine. Let me rephrase for you. "I want to show people that one night of drinking can ruin two lives" -- you and me.' [¶] 'You are the cause; I am the effect. You have dragged me through this hell with you, dipped me back into that night again and again. You knocked down both our towers. I collapsed at the same time you did. Your damage was concrete: Stripped of titles, degrees, enrollment. My damage was internal, unseen. I carry it with me. You took away my worth, my privacy, my energy, my time, my safety, my intimacy, my confidence, my own voice, until today.' [¶] And then later on in her written statement, she writes, [as read] 'If you think I was spared, came out unscathed, that today I ride off into the sunset while you suffer the greatest blow, you are mistaken. Nobody wins. We have all been devastated. We have all been trying to find some meaning in all of this suffering.' [¶] And here -- I think this is relevant to the -- to the sentencing decision -- she writes, [as read] 'You should have never done this to me. Secondly, you should never have made me fight so long to tell you you should never have done this to me. But here we are. The damage is done. No one can undo it. And now we both have a choice. We can let this destroy us. I can remain angry and hurt, and you can be in denial. Or we can face it head on: I accept the pain; you accept the punishment; and we move on.'

(R.T. 29:10-30:19.)

Then, the judge announced that his tentative decision was to find unusual circumstances and grant probation instead of a state prison sentence, as recommended by the probation department, to begin with six months in county jail. The judge then stated:

I understand that -- as I read -- that [Jane's] life has been devastated by these events, by the -- not only the incidents that happened, but the -- the criminal process has had such a debilitating impact on people's lives, most notably [Jane] and her sister. [¶] And, also, the -- one other factor, of course, is the media attention that has been given to this case, which

compounds the difficulties that participants in the criminal process face. [¶] So I acknowledge that devastation. [¶] And -- and to me, the -- not only the -- the incident, but the criminal proceedings -- preliminary hearing, trial, and the media attention given to this case -- has -- has in a -- in a -- in a way sort of poisoned the lives of the people that have been affected by the defendant's actions. [¶] And in my decision to grant probation, the question that I have to ask myself, again, consistent with those Rules of Court, is: Is state prison for this defendant an antidote to that poison? Is incarceration in state prison the right answer for the poisoning of [Jane's] life? [¶] And trying to balance the factors in the Rules of Court, I conclude that it is not and that justice would best be served, ultimately, with a grant of probation.

(R.T. 31:4-25.)

Judge Persky explained that probation was prohibited for violations of Penal Code section 220 except in unusual cases where the interest of justice would best be served. The judge then cited the California Rules of Court, which sets forth factors that “may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate.” (Cal. Rules of Court, rule 4.413.) Applying California Rules of Court, rule 4.413(c)(2)(C), the judge found that Turner's youth and lack of a significant record reduced his culpability, thereby overcoming the statutory limitation on probation.<sup>2</sup> The judge then identified and discussed each of the 17 factors outlined in California Rules of Court, rule 4.414.

The judge found the following crime-related criteria to be relevant to his decision:

- the nature, seriousness, and circumstances of the crime as compared to other instances of the same crime
- the vulnerability of the victim
- whether the defendant inflicted physical or emotional injury
- whether the defendant was an active participant in the crime
- whether the defendant demonstrated criminal sophistication

With respect to the vulnerability of the victim, the judge stated, “And the victim in this case was extremely vulnerable. That's an element of the crime with respect to Counts 2 and 3, but not with respect to Count 1. So I have considered that.” (R.T. 33:23-26.) As to the factor relating to the physical or emotional injury inflicted by the defendant, the judge stated, “And as we've heard today, as I heard at trial, there was both physical and devastating emotional injury inflicted on the victim. That weighs, obviously, in favor of denying probation.” (R.T. 33:28-34:3.)

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<sup>2</sup> Judge Persky noted that although the probation department implied in its report that because Turner was intoxicated at the time of the assault, this would be another basis for overcoming the statutory prohibition of probation pursuant to California Rules of Court, rule 4.413(c)(1)(A), the judge was “not relying on that circumstance” and did not “attach very much weight to that.” (R.T. 32:15, 33:19-20.)

The judge found the following defendant-related criteria to be relevant to his decision:

- the defendant's prior criminal record
- the defendant's willingness and ability to comply with the terms of probation
- the likely effect of imprisonment on the defendant
- the adverse collateral consequences on the defendant from the felony conviction
- whether the defendant is remorseful
- whether or not the defendant was likely be a danger to others

With respect to the factor relating to the likely effect of imprisonment on the defendant, the judge indicated that he believed probation was appropriate because "a prison sentence would have a severe impact on [Turner]," acknowledging that a state prison sentence would have a severe impact on a defendant "in any case," but, he said, "I think it's probably more true with a youthful offender sentenced to state prison at a -- a young age." (R.T. 35:22-26.)

With respect to the factor relating to the likelihood of future dangerousness, the judge stated that he believed Turner "will not be a danger to others." (R.T. 38:5.) The probation department had evaluated the defendant's dangerousness using two assessment tools and advised in its report to the court that Turner was not very likely to re-offend. Specifically, the probation department reported that Turner had received a score of 3 on the Static-99R, an actuarial measure of sexual offense recidivism, which placed him in the "Low-Moderate Risk Category for being charged or convicted of another sexual offense." Probation also assessed Turner using the Corrections Assessment Intervention System (CAIS), "a standardized, validated assessment and case management system developed by the National Council on Crime and Delinquency [which] assesses a defendant's criminogenic needs and risk to re-offend." The probation department reported that the CAIS had determined that Turner needed to learn new coping skills and get treatment relating to drug and alcohol abuse, and that he would benefit from family therapy. The probation report stated that each of these needs could be addressed while he was on probation.

After the judge announced his indicated sentence, the prosecutor made a statement, urging the judge to impose (at a minimum) the maximum time in county jail (i.e., a year) and not just six months. Defense counsel then made a statement, noting that "the Court's recitation of the Court's view of the Judicial Council rules and the sentencing factors is certainly one of the most complete and thorough that I've heard in any case for some time." (R.T. 43:25-28.) A deputy probation officer then spoke on behalf of the probation department, urging the court to follow its tentative decision. She indicated that the probation department had followed statutory guidelines, had balanced "the character of the defendant and facts of the case," and had submitted an "unbiased," "fair and complete recommendation." (R.T. 44:23-45:7.) Thereafter, Judge Persky announced that he would adopt his tentative decision and he read the terms of probation into the record, including the requirements that Turner register as a lifetime sex offender and submit to random drug and alcohol testing.<sup>3</sup>

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<sup>3</sup> On July 25, 2016, the terms of Turner's probation were revised to include the requirement that he undergo drug and alcohol counseling. The probation department requested the revision after Turner was caught lying about his high school drug and alcohol use.

Turner filed a notice of appeal on June 2, 2016, immediately after the sentence was imposed. The appeal is still pending. On Friday, September 2, 2016, Brock Turner was released after serving three months in county jail.<sup>4</sup>

### **The Sentence Imposed on Brock Turner Was Not Unlawful**

The sentence imposed in the *Turner* case has been widely criticized by complainants as inadequate punishment in light of the crime committed. Some complainants believe that Judge Persky's sentencing decision was not lawful. The sentence imposed by Judge Persky, however, was within the parameters set by Penal Code section 1203.065(b) and therefore was not unlawful. The transcript of the *Turner* sentencing hearing reflects the judge's finding that Turner's youth and lack of a significant record reduced his culpability, thereby overcoming the statutory limitation on probation. The transcript also reflects the judge's consideration of the factors that the rules require a court to consider to determine whether probation is appropriate instead of a state prison sentence.

Some complainants also believe that the judge's sentencing decision constituted an abuse of his discretion. In particular, some suggest that it was improper for the judge to consider Turner's youth and his level of intoxication as mitigating factors. Others believe that the judge gave unfair mitigating weight to what he perceived was Turner's remorse. Even if it were improper for the judge to assess those factors as he did, those issues are properly addressed on appeal. Canon 1 of the Code of Judicial Ethics states explicitly that "[a] judicial decision or administrative act later determined to be incorrect legally is not itself a violation of this Code." Under the standard set by the California Supreme Court, even if the judge failed to follow a statute or abused his discretion, the commission cannot impose discipline unless the error "clearly and convincingly reflect[ed] bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty . . ." (*Oberholzer v. Commission on Judicial Performance, supra*, 20 Cal.4th 371, 395-399.) As discussed in more detail below, there is not clear and convincing evidence of bias or any other factor required for a finding of judicial misconduct.

### **There is Not Clear and Convincing Evidence of Judicial Bias**

The presence or absence of judicial bias has been established in some cases by examining whether a judge's remarks or conduct reflected bias. (See, e.g., *In re Glickfeld* (1971) 3 Cal.3d 891; *Public Admonishment of Judge Johnson* (2012).) Bias has also been assessed in some instances by examining decisions in other similar cases. (See, e.g., *In re Complaint of Judicial Misconduct* (9th Cir. 2014) 751 F.3d 611.)

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<sup>4</sup> Turner appears to have served half of his county jail sentence. Penal Code section 4019(b)-(c) dictates that for each four-day period spent in county jail, two days is deducted from the inmate's sentence, reducing the sentence by half.

## 1. Judge Persky's Remarks at the *Turner* Sentencing Hearing

When granting probation for certain sex offenses under Penal Code section 1203.065(b), judges are required to specify on the record the circumstances indicating that the interests of justice would best be served by that disposition. When probation is granted, judges are also required to state the primary factor or factors that support the judge's exercise of discretion to grant probation. (Cal. Rules of Court, rule 4.406.)

Some complainants contend that the judge's remark at the *Turner* sentencing hearing that Turner "will not be a danger to others" reflected bias. As discussed above, future dangerousness is one of the factors that a judge must consider when deciding whether to grant or deny probation. (See Cal. Rules of Court, rule 4.414(b)(8).) Moreover, the remark tracked the results of two clinical tests of Turner's future dangerousness contained in the probation report.

Some complainants contend that Judge Persky's statement that a prison sentence would "have a severe impact on [Turner]" reflected bias. Again, the likely impact of imprisonment on the defendant is one of the factors to be considered in determining whether probation is appropriate. (See Cal. Rules Court, rule 4.414(b)(5).) Moreover, the judge acknowledged that state prison is likely to have a severe impact on a defendant "in any case," and, he explained, "I think it's probably more true with a youthful offender sentenced to state prison at a – at a young age."

The transcript from the sentencing hearing does not support the contention that the judge was implicitly referencing Turner's race, socioeconomic status, Stanford affiliation, or role as a college athlete when he remarked on the "severe impact" that prison would have, or when he said that Turner "will not be a danger to others." The transcript also does not support the allegation that the judge did not objectively consider the damage to the victim and expressed no sympathy for the victim.

In sum, the commission concluded that neither the judge's statements about the impact of prison and the defendant's future dangerousness – factors that the judge was required to address on the record – nor any other remarks made by Judge Persky at the sentencing hearing constitute clear and convincing evidence of judicial bias.

Cases in which judges have been reversed and disciplined for making statements that reflect bias stand in stark contrast to the *Turner* case.<sup>5</sup> For example, in the case of *People v. Beasley* (1970) 5 Cal.App.3d 617, the Court of Appeal reversed the trial court's order of probation and dismissal of various rape, robbery, and kidnapping charges. In open court, the judge referred to the victim as the "alleged victim" and ridiculed the police inspector who accompanied her to the defendants' probation hearing and his superior officer who had instructed

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<sup>5</sup> "A judge's comments during sentencing, however, are one type of in court statement that commissions and courts are hesitant to subject to discipline, a reluctance based on concern that sanctions would discourage judges from articulating the bases for their sentencing decisions." (Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability* (2004) 32 Hofstra Law Review 1245. See, e.g., *In re Inquiry Concerning Lichtenstein* (Colo. 1984) 685 P.2d 204; *In re Hocking* (Mich. 1996) 451 Mich. 1.)

the inspector to accompany the victim to court. The appellate court found that Judge Glickfeld's "incomprehensible tirade" against the victim, her police inspector attendant, and his supervisor indicated "a lack of the *impartial* discretion, guided by fixed legal principles in conformity with the spirit of the law, required by *People v. Russel* [(1968)] 69 Cal.2d 187, 194." (*People v. Beasley, supra*, 5 Cal.App.3d at p. 633, italics in original.) In 1971, a year after the appellate decision in *Beasley*, the California Supreme Court censured Judge Glickfeld. The commission's recommendation for discipline was based on the remarks referred to in the appellate decision and on the judge's referral to the victim, during an in-chambers conversation at which the victim was present, as a "horse's ass." The Supreme Court censured Judge Glickfeld for referring to the victim "in an insulting and inexcusable manner" during a conversation in chambers, and for his "intemperate" remarks in open court. (*In re Glickfeld, supra*, 3 Cal.3d 891.)

More recently, in 2012, the commission publicly admonished Judge Derek Johnson for remarks he made at the sentencing hearing in a rape case that created the impression that he could not be impartial in rape cases where the victim suffered no serious bodily injury showing resistance. The judge relied on his own "expert opinion," based on his experience as a prosecutor, saying, "I'm not a gynecologist, but I can tell you something: If someone doesn't want to have sexual intercourse, the body shuts down. The body will not permit that to happen unless a lot of damage is inflicted . . ." The judge also said that the case "trivializes a rape," was "technical," and was "more of a crim law test than a real live criminal case." (*Public Admonishment of Judge Johnson* (2012).)

## 2. Judge Persky's Sentencing Decisions in Other Similar Cases

In the wake of the *Turner* sentencing decision, some have pointed to other criminal cases handled by Judge Persky as proof of his bias in favor of white and/or privileged male defendants, particularly college athletes, and/or of his failure to take violence against women seriously. The commission concluded that the cases cited in support of that proposition do not provide clear and convincing evidence of judicial bias.

In *People v. Raul Ramirez* (No. B1475841), the defendant sexually assaulted his roommate while she was conscious. Through counsel, Ramirez negotiated a deal in which he pleaded guilty to a violation of Penal Code section 289(a) in exchange for a three-year state prison sentence. Ramirez was never sentenced because he failed to appear at his sentencing hearing. Some have compared the three-year sentence that was to be imposed on Ramirez with Turner's lighter sentence, arguing that the only explanation for the disparity was Ramirez's Salvadoran nationality. However, although Judge Persky handled proceedings earlier in the case, it was not Judge Persky who handled the hearing at which Ramirez entered his guilty plea, but another trial judge; thus, the *Ramirez* case cannot be used to demonstrate disparate treatment in sentencing by Judge Persky. In addition, the sentence to be imposed on Ramirez was the result of a negotiated agreement between the defense and the prosecution. Finally, Ramirez pleaded guilty to forcible sexual penetration of a conscious or unimpaired person, which carries a statutory mandatory minimum sentence of three years in state prison. California law explicitly prohibits a downward departure for a violation of Penal Code section 289(a) under any circumstances, whereas the Penal Code sections Brock Turner was convicted of violating permitted (at the time) a downward departure to probation in certain circumstances.

Some have pointed to Judge Persky's sentencing in *People v. Ming Hsuan Chiang* (No. B1475227), *People v. Ikaika Lukas Gunderson* (No. B1577341), and *People v. Keenan Smith* (No. B1581137), each of which involved domestic battery charges, and in *People v. Robert Chain* (No. B1473538), which involved possession of child pornography charges, as evidence of alleged bias in favor of defendants who are white or privileged or college athletes and as evidence that the judge does not take violence against women seriously.

In *Gunderson*, the judge accepted the defendant's guilty plea in May 2015, pursuant to a negotiated agreement between the defense and the prosecution. The judge's deferral of sentencing, and the judge's indication that he would allow a reduction of the felony charge to a misdemeanor charge at sentencing if the defendant complied with the plea conditions, were both part of the agreement. On March 10, 2016, after Gunderson failed to comply with the conditions of the plea, the judge sentenced the defendant on the felony charge. The sentence imposed aligned with the recommendation of the probation department.

In *Chiang*, the judge accepted the defendant's guilty plea in April 2016 and imposed a sentence in June 2016, pursuant to a negotiated agreement between the defense and the prosecution. The sentence imposed aligned with the recommendation of the probation department.

In *Smith*, Judge Persky accepted the defendant's guilty plea in March 2016, pursuant to a negotiated agreement between the defense and prosecution. The judge sentenced the defendant pursuant to that agreement. There was no probation report.

In *Chain*, Judge Persky accepted the defendant's guilty plea in June 2015. After discussions with the defense and the prosecution, the judge imposed a sentence to which the prosecution did not object. The sentence imposed aligned with the recommendation of the probation department.

Judges are required to consider a probation report although they are not required to follow it. (Pen. Code, § 1203(b)(3).) A county probation department is an arm of the superior court, and one of its main purposes is to assist the court in arriving at an appropriate disposition. (*People v. Villarreal* (1977) 65 Cal.App.3d 938, 945.) "It is also fundamental that the probation decision should not turn solely upon the nature of the offense committed, but 'should be rooted in the facts and circumstances of each case.' [citations omitted]" (*Ibid.*) Judge Persky's sentencing decisions in the *Chiang*, *Gunderson*, and *Smith* cases resulted from negotiated agreements between the defense and the prosecution, and the prosecution did not object to the sentence imposed in the *Chain* case. In three of the four cases, the judge's sentencing decisions aligned with the recommendations of the probation department (as it did in *Turner*). (There was no probation report in the fourth case.) Accordingly, these decisions do not provide clear and convincing evidence to support the contention that Judge Persky's decisions reflect personal bias in favor of white criminal defendants and/or more privileged criminal defendants, or that he takes crimes involving violence against women less seriously.

## Judge Persky Was Neither Required to Disclose His Stanford Affiliation Nor Was He Required to Recuse Himself

Some complainants believe that Judge Persky should have disqualified himself from the *Turner* case because he, like Brock Turner, attended Stanford University and played sports while he was a student there. At the very least, they argue, the judge should have disclosed his Stanford connection. The commission determined that neither disclosure nor disqualification was required in the *Turner* case.

Code of Civil Procedure section 170.1 sets forth the circumstances requiring judicial disqualification. Code of Civil Procedure section 170.1(a)(6)(A)(iii) states that a judge shall be disqualified if “[f]or any reason [a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” Canon 3E(2) requires judges to disclose on the record information that is reasonably relevant to the question of disqualification, even if the judge believes there is no basis for disqualification.

Judge Persky attended Stanford University in the 1980’s. He earned a bachelor’s degree in 1984 and a master’s degree in 1985. As an undergraduate student, Judge Persky was the captain of the Stanford men’s lacrosse team. Since finishing his studies more than three decades ago, the judge’s contacts with Stanford University have been minimal. Excluding payments to a Stanford-affiliated preschool, and excluding a small 2014 contribution to a Stanford-affiliated children’s hospital, Judge Persky and his spouse have donated small sums of money to Stanford University during the 31 years since he completed his studies, totaling \$1,205. Most of these donations were to the Stanford Fund for Undergraduate Education. Judge Persky also has made two donations (\$50 in 1997 and \$100 in 1999) to the Stanford Men’s Lacrosse Program, totaling \$150. In addition to his financial contributions to Stanford University, the judge has had some non-financial ties to the university over the years. He is a lifetime member of the Stanford Alumni Association (a membership his mother purchased for him after he finished his studies); he has attended various alumni events and reunions over the years (for which he paid the prevailing alumni rate); and he has sporadically volunteered his time over the years (for alumni career networking and class reunions, and with a medical school psychiatry class). In sum, the judge has had minimal ties to the university since he graduated in 1985.

In *Leland Stanford Junior University v. Superior Court* (1985) 173 Cal.App.3d 403, a civil action was brought against Stanford and several public entities challenging certain development plans on campus. A motion to disqualify the trial judge was brought based on the facts that the judge was a graduate of Stanford Law School, a founder of the Santa Clara County chapter of the Stanford Law Society in the mid-1960’s and the president of that chapter from 1969 to 1971, and a member of the law school’s Board of Visitors from 1969 to 1972. Since then, the judge’s only association with the school was “as a graduate attending graduate gatherings.” (*Id.* at pp. 405-406.) The trial court disqualified the judge, but the appellate court reversed: “We conclude as a matter of law that the ‘average person on the street,’ aware of the facts, would find Judge Thompson’s activities in and before 1972 both so remote and so unrelated to the management of Stanford’s land and physical facilities as to raise no doubt as to Judge Thompson’s ability to be impartial in this matter.” (*Id.* at p. 408.)

In *McCartney v. Superior Court* (1990) 223 Cal.App.3d 1334, a breach of contract and related tort claims action was brought by a former student of the University of Southern California (USC) against that institution. The student appealed the denial of a motion to disqualify the trial court commissioner because the commissioner had attended USC over 30 years earlier. Citing *Leland Stanford Junior University v. Superior Court*, *supra*, 173 Cal.App.3d 403, the court concluded that no reasonable person would question the commissioner's impartiality. (*Id.* at p. 1340.)

More recently, in *Allphin v. United States* (Fed. Cir. 2014) 758 F.3d 1336, 300 former service members, who were discharged as a result of a program seeking to reduce the number of enlisted personnel serving in the Navy, brought a wrongful discharge action seeking reinstatement or damages. Appellants filed a motion seeking recusal of the judge based on her former employment at the Department of Justice from 1976 to 1987 and as an attorney for the Navy from 1987 to 1996. The federal circuit court affirmed the trial judge's denial of the motion, determining that her prior employment did not create a reasonable basis for questioning her impartiality. "Appellants' subjective beliefs about the judge's impartiality are irrelevant. The judge's prior work for the Department of Justice and the Navy over seventeen years ago does not raise a reasonable question as to her impartiality. A 'mere prior association [does not] form a reasonable basis for questioning a judge's impartiality.'" (*Id.* at p. 1344, citing *Maier v. Orr* (Fed. Cir. 1985) 758 F.2d 1578.)

In the underlying criminal action out of which the current claims against Judge Persky arise, Stanford University was not a party or counsel, thus making his association with his alma mater even more attenuated as a ground for recusal. In *Cline v. Sawyer* (Wyo. 1979) 600 P.2d 725, the Wyoming Supreme Court affirmed an order denying a party's disqualification challenge to the trial judge based on the relationship between the judge and the respondent, who attended the same university. As is pertinent here, the court noted: "The affidavit alleges that the judge and [respondents] attended the same university at the same time where 'they *may have*' belonged to the same fraternities or associations. Certainly such does not reflect a prejudgment of this case by the judge. It does not reflect a leaning of his mind in favor of [respondents] to the extent that it will sway his judgment or to the extent that he would make his decisions in the matter other than on the evidence placed before him." (*Id.* at p. 728, italics in original.)

The commission concluded that Judge Persky's ties to Stanford University do not constitute the kind of relationship or experience that required disclosure or recusal in the *Turner* case, and they are not sufficient to establish bias or favoritism for Brock Turner or any Stanford-affiliated litigant.

### **Conclusion**

"An independent, impartial, and honorable judiciary is indispensable to justice in our society." (Cal. Code of Jud. Ethics, canon 1.)

An independent judge is one who is able to rule as he or she determines appropriate, without fear of jeopardy or punishment.

So long as the judge makes rulings in good faith, and in an effort to follow the law as the judge understands it, the usual safeguard against error or overreaching lies in the adversary system and appellate review.

(Shaman, *et al.*, *Judicial Conduct and Ethics* (5th ed. 2013) Use of Power, § 2.02, p. 2-5.)

In this matter, the commission did not find clear and convincing evidence of misconduct by Judge Persky. Accordingly, the participating commission members voted unanimously to close, without discipline, its preliminary investigation of the complaints against the judge regarding his sentencing decision in the *Turner* case. Commission members Honorable Erica R. Yew of the Santa Clara County Superior Court and Richard Simpson are recused and did not participate in this matter.

Judge Persky is represented by Kathleen M. Ewins, Esq., of San Francisco, California.

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The commission is composed of six public members, two lawyers, and three judicial officers. The chairperson is Anthony P. Capozzi, Esq.

For further information about the Commission on Judicial Performance, see the commission's website at <http://cjp.ca.gov>.