IMMEDIATE STAY REQUESTED
(Oct 26, 2017 Motion for Sanctions C.C.P. 128.7)
(Nov. 27, 2017 Trial)

No. **S244874**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JANE DOE AND JOHN DOE
Plaintiffs and Appellants /Petitioners,
v.
STANFORD HEALTHCARE, ROY HONG MD, FREDERICK DIRBAS MD, PALO ALTO FOUNDATION MEDICAL GROUP
Defendants and Respondent

Appeal from the Sixth Appellate District Case No. H0044798

Santa Clara Superior Court Case No. 2014-CV-1-261702

Honorable Theodore Zayner, Presiding

PETITION FOR REVIEW
(With Rule 8.208 Certificate)

After a decision by the Court of Appeal, Sixth Appellate District, October 5, 2017

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P E T I T I O N F O R R E V I E W

TO THE HONORABLE CHIEF JUSTICE TANI GORRE CANTIL-SAKAUYE OF THE SUPREME COURT OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES:

Petitioners and Plaintiffs, Jane and John Doe, respectfully petition the Supreme Court for review of the opinion of the Court of Appeal, Sixth Appellate District, on a writ of mandate pursuant to Code of Civil Procedure § 170.1 as filed on July 5, 2017 and denied on October 5, 2017.

The order of the Court of Appeal became final on October 5, 2017. Thus, this petition is timely under California Rules of Court 8.490 (b)(1) (A) and 8.500, subdivision (e)(l). A copy of the opinion of the Court of Appeal is attached hereto as "Appendix A".

ISSUES PRESENTED FOR REVIEW

This case would address three quintessential questions, namely:

(1) Does this Court herald that judicial refusal to accept service of a challenge statement might raise concern over impartiality?

(2) Should judicial recusal for cause issue when "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial" or must the evidence be "clear and compelling" in line with the December 2016 published report by the Commission on Judicial Performance? (Exh. 1)

(3) Should judicial disqualification issue when a judge declines to file *any* verified statement in response to a challenge, and declines to allow another judge to decide the recusal hearing?

WHY REVIEW SHOULD BE GRANTED

This matter is suitable for review under California Rule of Court 8.500(b)(1) based on three distinct grounds:

First, the appellate court's opinion or nonexistence thereof in the subject writ of mandate potentially nullifies parts of California's Judicial Canons and Code of Civil Procedure 170. et. seq. with respect to judicial recusal.

On October 5, 2017 the Court of Appeals, Sixth District issued its opinion denying the writ of mandate for recusal of Judge Theodore Zayner if Santa C The gold standard of impartiality has been statutorily based on "the appearance that a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial".

However, the Commission on Judicial Performance's recent report issued in December of 2016 has created inherent conflicts and a contradictory and "novel" standard of recusal. This perceived modified recusal standard as set by the Commission's published report referencing Judge Persky has since been applied in contemporary challenge statements by counsel, law professors, and judges. In particular, the Commission's decision has been applied in Santa Clara Courts and has since created an artificial and unwarranted amalgamation of standards of recusal in accordance with Code of Civil Procedure Section 170.1 and the more stringent standard of disciplinary measures by the Commission.

In relevant background, on or about June 2016 national outrage and more than one million signatures collected arose over a highly controversial ruling by Judge Persky of Santa Clara in a rape case involving a white male of an affluent background. Of high public interest was the undisclosed alma mater of the Judge during the proceeding, and his undisclosed record as a member of a similar Stanford team as the convicted rapist. A recall measure ensued, which is currently live.[1]

[1] Personal Communication on October 11, 2017 with Professor Michelle Dauber of Stanford, on the recall measure for Judge Aaron Persky.

In December of 2016, the Commission on Judicial Performance entirely absolved Judge Persky of any wrongdoing which would warrant *administrative* action. (Exh. 1)

Notwithstanding that the Commission's report was based on standards for *administrative discipline* guidelines, the Commission's publication quickly circulated as the new standard for judicial disclosure *in litigation*. However, if that standard were to be the landmark case, then where would the line in the sand lie between threshold for administrative proceedings and Code of Civil Procedure § 170.1 recusal, which statutorily has a much lower bar? Section 170.1 never required "clear an compelling" evidence, but merely *an appearance* of partiality.

The opinion eviscerates key protections provided to civilians and litigants from unfair adversaries, and contravenes express legislative and administrative intent. It is of paramount importance that the public entrust judicial impartiality. Code of Civil Procedure 170.1 et. seq. were legislatively intended to reasonably safeguard civilians in the courts and statutorily entitle litigants to impartial proceedings or the appearance of impartiality.

If the court's ruling and subsequent writ denial in this case are allowed to stand, it would potentially result in considerable ongoing public concern and thoughts of possible mischief. The opinion creates a conflict between several sections of the Rules and Code of Civil Procedure which carve out a warranted requirement for judicial recusal statutes.

In brief, a judge who declines to disclose his potential party conflicts at case inception, thereby deprives or at minimum presents litigants with a sense of being deprived from the statutory opportunity to timely file a Code of Civil Procedure § 170.6 motion.

In this opinion, the following facts remain at issue. (1) A judge who similarly declines to file *any* verified statement in response to a Code of Civil Procedure § 170.1 challenge for cause proceeding may appear to be attempting to deny transparency in judicial proceedings. (2) A judge who twice denies the

judicial challenge pursuant to Code of Civil Procedure § 170.3, yet declines to file any verified statement, further causes concern regarding transparency in disclosure of potential conflicts. (3) A judge who inexplicably declines to accept service in his court or by his clerk of the challenge statement accordingly raises further concern regarding potential partiality in proceedings. (4) Thus, the judge declining to file *any* verified statement in response to a Code of Civil Procedure § 170.1 recusal or challenge motion, could be perceived as potentially noncompliant with legislatively mandated statutory requirements to do so.

Ultimately, these failures or oversights in procedural issues could cause to be perceived as impairment of the judge's authority, and essentially diminishing his effectiveness as a judge. Such an important judicial canon of transparency in verified statement as well as accepting service of a Code of Civil Procedure § 170.1 challenge statement ultimately enhances precisely the public trust and faith in the justice system that litigants require for a sense of judicial fairness.

Should judicial refusal to voluntarily recuse align with judicial declining to affirmatively respond through a verified declaration of *no conflict,* possible misconduct which plagued this case and forced plaintiffs to file the C.C.P. Section 170.1 motion to recuse. The impact of the appellate opinion is not limited to the unarmored civilians at issue just in this case or to the litigants who are currently opposing parties in the subject Court with a potential conflict – but also to the hundreds and thousands of litigants who have been, and will be subject to these same perceived non-transparent dealings in the judicial system.

The opinion essentially opens the door for even the perception of a misuse of the express authorities granted to the Court. Such accommodation of unconstrained conduct and disregard for perception of fairness in adversarial proceedings could cause endless litigation, lost trust in the judicial process, and associated failed accountability. Therefore, the Supreme Court

should grant petition review to address the opinion's interpretation of the law. (Cal. Rules of Court, Rule 8.500, subd. (b)(1).)

Second, the opinion seems to interpret that the judiciary would not be required to necessarily disclose potential conflicts to litigants at case inception, nor be required to file a verified answer to a served challenge statement. In other words, the opinion appears to assign "privilege" to the Court such that compliance with the statutory requirements of Code of Civil Procedure §§ 170.1 and 170.3 are suggestions, rather than legislatively intended mandates.

However, failure to disclose relevant or potential conflicts at case inception does prejudice and prevent a party from being to timely file a Code of Civil Procedure § 170.6, as in this case.

A judge who fails to file a verified answer within 10 days of the filed challenge must statutorily be recused. Failure to timely file a verified statement per Code of Civil Procedure § 170.3 would typically not be protected by any claim of judicial privilege.

The opinion is likely at odds with prior Supreme and Appellate Court cases, would reasonably reduce the public's trust in the global judicial process and facilitate a perception of unjust adversaries. Ultimately, such a pattern will mean that the public will perceive that they can not obtain fair, unbiased, and impartial consideration in the courts. The public would be hesitant in filing such grievances or relying on the judicial process to mitigate grievances with utmost impartiality. As a result, the opinion and the Court's ruling would frustrate the protections provided by the legislature for public protection and litigants' ability to rely on these afforded judicial protections. The opinion is inconsistent with the letter and spirit of applicable authority on judicial challenge. If allowed to stand, it will significantly diminish public trust.

This Court should grant review to secure a uniformity of the decision and to settle an important question of law by confirming that a judge's declining to file *any* type of verified statement would warrant recusal. (Cal. Rules of Court,

Rule 8.500, subd. (b)(l).)

Third, landmark decisions of this Court address the baseline against which avoidance of the appearance of potential judicial conflict must be measured. Under the Judicial Canons as well as Code of Civil Procedure § 170.et seq., this Court should grant review of this petition to establish confirmation in review with the law.

STATEMENT OF REASONS FOR GRANTING REVIEW

This Petition for Review Should be Granted Because the Opinion Removes Essential Protections from the Public and Diminishes Trust in the Judicial System.

1. No Reasonable Justification Likely Exists for a Judge to *Decline* to Accept Service at the Courthouse of a Challenge Statement.
2. No Good Basis is Found in Code of Civil Procedure section 170.3 for Neglecting to Timely File an Answer or Declaration.
3. Supreme Court History Does Not Appear to Support the Trial Court and Appellate Decision Denying Review vis-a-vis a Writ of Mandate or an Alternate Writ for Judicial Recusal.
4. There is No Other Step for Petitioners to Appeal a Decision on a Writ Denial.
5. Legislative Intent Does not Support Striking Judicial Recusal Without an Answer or Statement Filed by the Judge.

A potential conflict has been developing between the public court of opinion, these judicial recusal cases, some Court of Appeal decisions, and most importantly the Commission on Judicial Performance's 2016 published report absolving Judge Persky of any wrongdoing.

The opinion reflects on a case, not unlike the Judge Persky case also in Santa Clara County, these issues of judicial transparency and potential statement of conflict. As a result, judicial recusal and disclosure has risen to a highly controversial height and public awareness. Moreover, in light of the Nation's

recent upheaval over the Judge Aron Pesky Ruling also in the Sixth District on the Stanford rape case, the judge faced a nationwide backlash for his perceived light sentencing of a convicted campus rapist. Much of the public outrage was in relation to the Judge's failure to transparently disclose his alma mater and contributions to Stanford. In that case, arguably there was at least a perception that "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial". Public interest in such disclosures are at an all time peak and thus Judge Persky is facing a formal attempt to remove him from the bench.

In 2016, community leaders from Santa Clara County filed a notice of intention to collect signatures to recall Judge Aaron Persky in 2017. The exorbitant measure was initiated based on a perception of lack of relevant disclosure. Judge Persky was accused of leniency in his June 2016 punishment of Stanford University swimmer Brock Turner. Turner had faced up to 14 years, but was handed a six-month sentence. He was released after serving only three months in county jail for the January 2015 assault."

Thus, this petition for review should be granted. This Court's order will set forth required case law, and applicable statutes in Code of Civil Procedure § 170.1.

The possibility that adjudication by a partial judge ensues may lead the public to be skeptical of the judicial process, thereby diminishing the public's confidence in the profession. "Where doubt may becloud the public's view of the ethics of the legal profession and thus impugn the integrity of the judicial process, it is the responsibility of the court to ensure that the standards of ethics remain high." (*U.S. ex rel. Sheldon El. Co. v. Blackhawk Htg. & Plmg.* (S.D.N.Y. 1976) 423 F.Supp. 486, 489.) [20 Cal.3d 913].

As directed by this Court's prior decisions, judicial recusal must issue in compliance with Code of Civil Procedure 170.1. As explained infra, the conflict between the impermissible and misleading amalgamation of the

Commission on Judicial Performance's discipline guidelines and Code of Civil Procedure section 170.1's sanctioned recusal requirements could not be more clear. The opinion exacerbates these conflicts and should be reversed.

Review should be granted to "secure uniformity of decision and to settle an important question of law" as to how significance determinations. (Cal. Rules of Court, Rule 8.500, subd. (b)(1).)1 Without review, the disclosures required by this Court and Code of Civil Procedure Section 170.1 and the associated recusal would be diminished.

FACTUAL AND PROCEDURAL BACKGROUND

In this petition, plaintiffs challenge a fundamental and critical gatekeeping function within the judicial system. Judicial fair dealing are of paramount importance to the general public, and that shared interest is one of judicial integrity and the appearance of propriety amongst judges.

The opinion if allowed to stand could result in considerable mischief. Reversal would enhance best practices, and a better bar for judicial disclosure of potential conflict.

The circumstances belying the necessity of this petition are unique, however also commonplace. This petition before the Supreme Court if compelling to warrant this highest Court's review, shall quite likely elucidate a likely void in California in standards of appellate review for recusal.

Should this Court find compelling this interesting the played out chronicle in questions of law with disqualification and ethics could be thereby facilitated.

LEGAL ARGUMENT

JUDICIAL RECUSAL PER C.C.P SECTION 170. 1 NEITHER REQUIRES NOR SUGGESTS THAT THE JUDGE NECESSARILY ENGAGED IN *ANY* IMPROPER CONDUCT.

Although a ruling disqualifying a judge for cause pursuant to Code of Civil Procedure § 170.1 under certain circumstances might provide evidence of conduct warranting judicial discipline, such discipline could not be imposed without further proceedings before the Commission on Judicial Performance, where the judge would have a full and fair opportunity to respond to any allegations of misconduct, as well as an opportunity to petition for review in this court. (See Cal. Const., art. VI, § 18, subd. (d); Cal. Rules of Court, rule 935; Rules of Com. on Jud. Performance, rules 109-135.) Moreover, many grounds warranting disqualification for cause do not suggest that the judge necessarily has engaged in improper conduct.

THE STANDARD IS IF A PERSON AWARE OF THE FACTS MIGHT REASONABLY ENTERTAIN A DOUBT THAT THE JUDGE WOULD BE ABLE TO BE IMPARTIAL.

Statutory schemes govern disqualification of a trial judge for cause. A judge shall be disqualified for cause if any of the grounds specified in section 170.1 is true, including 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" (§ 170.1, subd. [24 Cal. 4th 1064] (a)(6)(C)). "If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge." (§ 170.3, subd. (c)(1).)

"[T]he judge may file a consent to disqualification ... or the judge may file a written verified answer admitting or denying any or all of the allegations contained in the party's statement and setting forth any additional facts material or relevant to the question of disqualification." (§ 170.3, subd. (c)(3).)

If a judge refuses to recuse himself or herself, "the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's answer, by a judge selected by the chairperson of the Judicial Council ...." (§ 170.3, subd. (c)(5).) "The judge deciding the question of disqualification may decide the question on the basis of the statement of disqualification and answer and such written arguments as the judge requests, or the judge may set the matter for hearing as promptly as practicable. If a hearing is ordered, the judge shall permit the parties and the judge alleged to be disqualified to argue the question of disqualification and shall for good cause shown hear evidence on any disputed issue of fact." (§ 170.3, subd. (c)(6).)

As established above, the statutes governing judicial disqualification contain an express provision regarding appellate review: "The determination of the question of the disqualification of a judge ... may be reviewed only by a writ of mandate ... sought ... only by the parties to the proceeding." (§ 170.3(d), italics added.)

THE COMMISSION ON JUDICIAL PERFORMANCE'S "CLEAR AND CONVINCING" STANDARDS OF EVIDENCE AND DISCIPLINE SHOULD NOT BE *AMALGAMATED* WITH RECUSAL PER CODE OF CIVIL PROCEDURE § 170.1.

Judge Persky's sentencing decisions in other similar cases were included in the Commission on Judicial Performance's December 2016 report. The Judicial Commission commented "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." Although Judge Persky was absolved

of disciplinary proceedings, the amalgamation of such administrative canons with the statutory requirements by Code of Civil Procedure sections 170.1 and 170.3 must not lie.

PETITION POSTURE

This Petition before the Supreme Court is taken by Petitioners from an opinion and order denying a judicial challenge for cause pursuant to Code of Civil Procedure § [2] 170.1. On June 20, 2017 (AOBE p. 80) the trial Court issued an order striking Plaintiffs' renewed Verified Recusal Statement which was filed 11 days earlier, on June 9, 2017. (AOBE p. 1) The Court's order exceeded the 10 day statutory response deadline according to Code of Civil Procedure § 170.3 (c) , and failed to include any form of a verified statement, answer, or disclosure of the relevant conflicts by the challenged judge

The second basis for this petition is the surreptitious contemporaneous removal of the Mrs. Zayner video (Appellant's Opening Brief Exhibits Volume 1 of 1, p.47-48[3]) on "The Stanford Family" *within days* of that key evidence being inset into Plaintiffs' first challenge statement. (AOBE p. 90)

Notwithstanding the inherent judicial duty to disclose (Code of Civil Procedure § 170.3(C) (1)), and the neglect to do so (AOBE[4] p. 20-21 Decl. Doe ¶¶9,10), the Court's basis of an entirely conclusory strike of Plaintiffs' verified recusal statement did not appear to be supported by statute. Moreover, the willful timing and unequivocal destruction of the video of Mrs. Zayner on "The Stanford Family" (AOBE[5] P. 47,48) must be presumed as tantamount to the weight and implications of the destroyed evidence. (Evid. Code §413) Therefore, this petition for review should be granted. Petitioners should granted a stay and relief from the Court's interim orders.

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[2] All Codes reference California Code of Civil Procedure Section , herein "CCP".
[3] All References to "AOBE" herein refer to (Appellant's Opening Brief Exhibits Volume 1 of 1)
[4] AOB refers to Appellant's Opening Brief Exhibits in the Separate Volume and Bates numbered.
[5] AOB refers to Appellant's Opening Brief Exhibits in the Separate Volume and Bates numbered

STATEMENT OF WRIT FILED IN THE APPELLATE COURT

The nature of the underlying case is a medical malpractice, battery, and invasion of privacy matter. The relief sought in the trial court was voluntary judicial recusal. The writ petition was taken following the judicial officer's failure to file an answer, the judicial officer's refusal to permit another judge to make a determination on the disqualification based on facts and law, the judicial officer's refusal to accept service of the verified statement and exhibits, and the judicial officer's refusal to recuse himself and insistence to pass upon his own disqualification.(Code of Civil Procedure sections 170.1, 170.3)

Despite the legislatively unsupported self-passing on a timely judicial recusal, the challenged judicial officer here ultimately struck Petitioners' recusal statements twice, once on May 5, 2017 (AOBE p. 83) and again on June 20, 2017 (AOBE p. 80). However, the judge did not file *any* answer.

The challenged judge correspondingly struck the second or "renewed" judicial recusal statement in conclusory fashion ruling that the Plaintiffs presented *no new facts* to support the refiling of the recusal, despite the new facts evidenced.(AOBE p. 6, ¶¶1,2) Therefore the issues presented to the Court of Appeals through the subject writ of mandate was a judicial challenge in Santa Clara Superior Court Pursuant to Code of Civil Procedure § 170.1 and Code of Civil Procedure § 170.3.

THE COURT HAS JURIDICTION OVER THIS TIMELY PETITION.

Pursuant to Rules of Court 8.470 and 8.500 a writ of mandate is a final order, appealable within as a petition for review. The Court of Appeals denied the writ of mandate on October 5, 201.

In relevant parts, Code of Civil Procedure § 170.3 (d) "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. The

petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court's order determining the question of disqualification. If the notice of entry is served by mail, that time shall be extended as provided in subdivision (a) of Section 1013."

THE JUDGE'S FAILURE TO ANSWER WITHIN 10 DAYS AUTOMATICALLY MANDATES RECUSAL.

Code of Civil Procedure § 170.3(C) (1) is instructive that a challenged judge had ten days to file a verified response or submit to recusal. *PBA, LLC v KPOD, Ltd.* (2003) 112 CA4th 965

The California Judges Benchguide is correspondingly on point. [§2.29] To contest disqualification, the judge must file an answer within the ten-day period prescribed in CCP §170.3(c)(3) (i.e., within ten days of the filing or service of the statement), denying the allegations contained in the statement. *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 421, 285 CR 659. Although the statute refers to an "answer" by the challenged judge, a judge's written declaration under penalty of perjury satisfies the statutory requirement. *People v Mayfield* (1997) 14 C4th 668, 811, 60 CR2d

In this case, the Judge failed to file a written declaration under penalty of perjury. (AOBE p. 80 Court Order; p. 83 Court Order.) Moreover, the judge neglected to deny the allegations or submit a verified response attesting to the true relationship between the judge and Stanford.

THE SURREPTITIOUS DISAPPEARANCE OF THE KEY VIDEO EVIDENCE OF THE CHALLENGED JUDGE'S SPOUSE WARRANTED CONCERN AND LIKELY RECUSAL.

Accessed at https://www.youtube.com/watch?v=inLHxM-j7l8, the 2012 video of Mrs. Zayner was surreptitiously destroyed some days after the long running YouTube© video was cited and linked as evidence for judicial disqualification in Plaintiffs' April 28, 2017 verified statement. (AOBE p. 1)

(Evid. Code § 413)

The Transcript of the Destroyed Mrs. Zayner Video Attests to a Lifelong Commitment to Defendant Stanford by Mr. and Mrs. Zayner.(AOBE p.47)

Mrs. Zayner [2012]: "Well we have a joke in the family which is that my parents encouraged us to go anywhere we wanted to go for school long as it was Stanford."

CAPTION "Dawn Neisser, '79 Founding Grant Society Member planning a bequest to Stanford"

"My name is Dawn Neisser, I'm a graduate of Stanford class of 1979. I've been an alum, a fan, a supporter of the school since then. I'm married to Ted [sic Theodore] Zayner, Class of '78. This [2012] is our third year of being members of the [Stanford] Founding Grant Society Members. We designated our gift to the Stanford undergraduate education because both of us were undergraduates here and this was the beginning of this entire life experience life experience for us.

One of my favorite memories was spring quarter of senior year there was a very close group of us very close friends and one night probably a Thursday given our traditions we were over at the Oasis we had burgers and beer and then we went for our last late night swim skinny dip in Lake Laguintas and you just don't want that night to end.

You're just too close to the end so we hopped in the car and we drove over ot the Coast and it was a beautiful moonlit drive and there were about six of us and it was like continuing that freshman dorm floor conversation senior year wrapped blankets arounds ourselves and walked on the beach for hours talking and I don't even remember what time we got back to campus [Stanford].

We graduated with a really core group of clos e friends that has kept together ever since graduation. We may be physically disparate but we're still very, very close. We just wanted that to continue to someone else, for several

someone however many someone's there can be. It was a very easy decision."

CAPTION: "The Founding Grant Society Honoring those who have included Stanford University in their estate plans".

"For more information contact Stanford Office of Planned Giving Phone (650) 725-4358 Email: planned.giving@stanford.edu)."

The Destroyed Mrs. Zayner Video Attests to Both Judge Zayner and Mrs. Zayner's membership in the Stanford Founding Grant Society . (AOBE p. 47)

"Theodore C. Zayner" is named in Stanford's recent publication as one of approximately 25 members of the Stanford Founding Grant Society Members. (AOBE p.148), with an undisclosed sum. [6] Had Petitioners been timely advised or known of these facts at case inception, they would have reasonably filed a Code of Civil Procedure § 170.6 motion which would have entitled them to mandatory recusal without cause of basis. However, the judge's failure to timely advise Petitioners of a potential relationship and conflict prejudiced Petitioners from being able to file a timely Code of Civil Procedure § 170. 6 motion. Thus, Petitioners discovered the undisclosed judicial relationship too late to procedurally file a § 170.6, and were forced to file a Code of Civil Procedure § 170.1 motion more than one year before the subject court.

THE APPELLATE STANDARD OF REVIEW ON A WRIT WAS MISINTERPRETATION OF LAW, AND EXERCISE OF DUE DISCRETION.

The Court of appeals' opinion leaves ambiguity in this matter such that it can neither be presumed that the writ had merit, not had no merit. More than 95% of writs are simply denied without explanation nor opinion as in this case.

[6] Mrs. Zayner attests that their estate planning contributions to Stanford are such that they would support several students at Stanford.

However, the subject of this Petition should be reviewed by the Supreme Court to provide a definitive bar of recusal for the State's Courts.

The Court of Appeals declined the request to review the trial court's decision for an abuse of discretion. The appellate court thereby declined to adjudicate the application for issues of law. *Curle v. Superior Court (Gleason) (2001)* 24 Cal. 4th 1059 [No. S080322. Feb. 8, 2001.]

The trial court applied an inappropriate standard in its denial of Petitioners' Code of Civil Procedure § 170.1 challenge– whether the judicial officer who was challenged could *refuse* personal service of the verified statement exhibits (AOBE p.55-56, Decl. Sotto¶¶4,5 , Decl Lloyd ¶¶3,4).

On April 28, 2017 the Court accepted personal service of the verified recusal statement. On May 2, 2017 the Judge and his clerk refused to accept service of the exhibits to the statement.

On or about May 5, 2017 the Judge struck the recusal challenge in part citing the absence of the section 170.1 exhibits. The Judge on that basis ruled himself on the judicial challenge. However, the judicial officer failed to file an answer to the challenge statement or submit a declaration to deny *any* of the allegations.

In refusing to accept service of the documents from the Code of Civil Procedure § 170.1 statement, the Judge thereby essentially ratified a cognizable appearance of partiality for which judicial acceptance of recusal should have been then a potentially justified remedy.

Code of Civil Procedure § 170.1 did not require Petitioners to submit any evidence or proof of actual judicial conflict of interest. Statutorily, it would be sufficient that Petitioners presented a challenge statement which supported a finding of "the appearance" of judicial bias.

Therefore, the trial court was in error for self striking the verified statement for judicial challenge, citing the failure to provide evidence. Code of Civil Procedure § 170.3 required the judge to timely file an answer or verified

statement within 10 days. The Judge's order striking the § 170.1 failed to include a declaration or answer to the allegations in Petitioner's recusal challenge.

The Facts Constituted Grounds For the Judge to File at Least an Answer with a Declaration. (CCP § 170.3 (c) (1)).

The facts and evidence met the lay criteria of "appearing" to lack impartiality. The judge was therefore required to file an answer in response to the challenge statement. Although the judge *ruled* and made an order striking the challenge, he at no time filed a declaration or answer to the alleged fact basis for partiality. Thus, according to Code of Civil Procedure §170.3 judicial disqualification should have issued.

Failure to Disclose the Judicial Relationship to Stanford in Advance of this Disqualification Motion Justified Recusal.

It was uncontroverted that the challenged Judge neglected to disclose in open court the relationship with the party defendants in this case, and at least defendants in several other similarly situated cases in Santa Clara. Judicial Canons require various forms of acceptable disclosure to parties which include doing so in open court. In AOBE p. 39-53 are itemized in the exhibit appendix , which reference the undisclosed and significant relationships of the judicial officer and his spouse and family to Defendants Stanford and its alter egos.

Undisclosed Judicial Financial Interests and Estate Planning with Stanford and its Alter Egos Justified Recusal.

The challenged Judge neglected to comply with the Judicial Canons and disclose in open court the relationship with the party defendants in this case, and at least defendants in several other similarly situated cases in Santa Clara. (AOBE p. 44,45)

Undisclosed Current and Ongoing Relationships With Stanford Justified Recusal.

Exhibits are attached to this brief in support that the judge's relationships to Defendants Stanford and its alter egos are current, relevant, and prejudicial. (AOBE p.144-161; and p. 39-52)

Significant Spousal Financial Interests Separately Warranted Judicial Disclosure and Likely Recusal.

Code of Civil Procedure § 170.1. (a) "A judge shall be disqualified if any one or more of the following are true:

(B) A judge shall be deemed to have a financial interest within the meaning of this paragraph if: (i) A spouse or minor child living in the household has a financial interest. (ii) The judge or the spouse of the judge is a fiduciary who has a financial interest. (AOBE p.48, p. 157)

The video evidence of the judge's spouse, Mrs. Zayner, publicly displayed on Youtube© warranted judicial disclosure or at least an answer either denying or explaining the relationship. However, not only did the judge fail to file an answer per Code of Civil Procedure § 170.3, the video evidence of Mrs. Zayner endorsing Stanford surreptitiously disappeared from YouTube® within days after Petitioners filed their first recusal challenge.

1. **Judicial Failure to Timely *Answer* the Verified Challenge Statement Per C.C.P. Section 170.3 Justified Recusal.**

Whereas a statement of disqualification cannot be based on belief, hearsay, or other inadmissible evidence; accordingly a judicial answer to a petition for Code of Civil Procedure § 170.1 can also not build its foundation on a bed of sand.

The challenged judicial officer must submit a verified answer, even in the alternative, to the order striking the recusal, with a declaration of facts, under oath. Here the Judicial Order striking the verified recusal Statement declined to

include *any* foundation or any substantive answer. There was not *any* answer at all.

At minimum, the judge was required to file an answer and declaration of facts and disclosure of potential judicial partiality or relationships. *United Farm Workers of America v Superior Court* (1985, 4th Dist) 170 Cal App 3d 97, 216 Cal Rptr 4.

2. **After Petitioners Released their April 28, 2017 Exhibits to Stanford with a link to Mrs. Zayner's Stanford Video Testimonial, the Video Surreptitiously Vanished.**

The single most concerning evidence in this case was the actual disappearance of the video. Mrs. Judge Zayner's video astonishingly vanished. Not only was it destroyed, but all traces of its prior existence were fully sanitized from the internet. The potential conduct of the parties of interest after the video evidence was released and before the second recusal challenge was filed is disturbing. (Evidence Code § 413)

In absence of any verified statement or answer by the judge,

the assumption is that the video and allegations in the verified video of Mrs. Zayner which was marked as "2012" surreptitiously was destroyed or removed from all public view days after Plaintiffs' notice to Stanford and Judge Zayner. Stanford denied either doing or instructing the destruction or concealment of Plaintiffs' evidence. Judge Zayner simply struck the recusal challenge without meeting the statutory requirements of Code of Civil Procedure § 170.3. He has thus failed to answer, or address the destroyed video. Despite two Code of Civil Procedure § 170.1 challenges, he has not filed any statement or answer under oath.

3. **The Judge's Willful Refusal to Accept Personal Service of the Recusal Challenge papers Violated Judicial Canons and of CCP § 170.3(C) (1).**

CCP §170.3(C)(1) requires that a statement of disqualification to be personally served on the judge to be disqualified or upon his or her clerk provided the judge is present in the courthouse or chambers. Here the Statement of Disqualification was first served on the Court on Friday April 28, 2017 (AOBE p.89 POS, p.61 Decl. Sotto¶¶¶4-6), however, inexplicably when servers attempted to serve the remainder of the filed documents (Exhibits and Declaration) on May 1, 2017, the next business day on the Judge and/or Court Clerk, the Clerk and judicial officer refused service, estopping service and frustrating purpose. (AOBE p. 56 Decl. Sotto ¶¶¶4,5,6; p. 61 Decl. Lloyd ¶¶2-5). Subsequently, the Court then struck the verified statement as "conclusory" and also ruling that there were "no exhibits" or declarations to the statement. (AOBE p.83 Court Order)

PETITIONERS' STATEMENTS OF RECUSAL WERE TIMELY.

Pursuant to Code of Civil Procedure § 170.4 (b), the verified recusal statement were timely and demonstrated viable grounds for disqualification. Petitioners filed a statement of disqualification on April 28, 2017. (AOBE p. 89)

Whereas, the Court refused to accept service of the full moving papers and exhibits (AOBE p. 56 Decl. Sotto ¶¶¶4-6; p. 61 Decl. Lloyd ¶¶¶2-5).

Whereas, the Court struck the first disqualification partly based on the very exhibits which the Court refused to accept service (AOBE p.83 Court Order);

Whereas, the Court's first order striking disqualification failed to include an alternative verified answer within ten days or accept recusal (AOBE p.83 Court Order 5/5/17);

Whereas, on or about after May 5, 2017 Petitioners learned of the evidence destruction and or concealment of the Mrs. Judge Zayner testimonial video from

the prior unrestricted public view (AOBE p.47, p.48; p.20, Decl. Doe ¶5; AOBE p.51-52) ; and

Whereas Defendants stonewalled and denied any association or knowledge of the Court's possible removal of the video evidence of Mrs. Judge Zayner (AOBE p. 51, 52) ;

Petitioners therefore on June 9, 2017 filed a second statement of judicial disqualification. (AOBE p.1)

A party seeking to disqualify a judge must do so "at the earliest practical opportunity after discovery of the facts constituting the grounds for the disqualification". (CCP §170.3, subd. (c) (1). Petitioners' Statement of Disqualification was based on facts and events that became known to them between on or about March 1, 2017 and May 10, 2017 (AOBE p. 109 Decl. Doe ¶9) Because the Statement of Disqualification was filed at the earliest practicable opportunity after discovery of the facts, it must be considered timely and weighed on its merits. Code of Civil Procedure § 170.1.

THE STATEMENT OF DISQUALIFICATION STATED UNAMBIGUOUS GROUNDS FOR RECUSAL.

The Court must consider a statement of disqualification that demonstrates on its face potential legal grounds for recusal. Code of Civil Procedure §170.4 subd. (b). A statement of recusal must set forth the grounds for disqualification. (Code of Civil Procedure § 170.3 subd. (c) (1). A statement of disqualification may be based on admissible evidence.

A JUDGE HAS JUST AS STRONG A DUTY TO RECUSE HIMSELF FOR CAUSE, AS A DUTY TO SIT.

A judge has both an ethical and statutory duty to recuse himself where there are legal grounds for recusal. (Code of Civil Procedure § 170). The judge's duty to decide does not override the duty to recuse if there are grounds for recusal.

United Farm Workers of America v Superior Court supra 170 Cal. App 3d.p.100.

A judge is statutorily prohibited from deciding the issue of his own recusal. Pursuant to Code of Civil Procedure § 170.3 (c) (5) "A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party."

THE JUDGE'S DUTY TO DISCLOSE IS GREATER THAN THE DUTY TO RULE.

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. Public perception and trust in the justice system is paramount.

The "duty to disclose," means that Judge Zayner was already under a duty to familiarize himself with any possible conflicts of interest (Code of Civil Procedure§170.1(3)(c)) and disclose any possible conflicts immediately to the parties. It is not up to the plaintiffs to discover conflicts of interest invoking a Code of Civil Procedure § §170.1 whether in a timely manner or not. "Although a party has an obligation to act diligently, he or she is not required to launch a search to discover disqualifying information that a judge should have disclosed," *Christie v. City of El Centro* (App. 4 Dist. 2006) 37 Cal.Rptr.3d 718, 135 Cal.App.4th 767, review denied. See also, (*Urias*, supra, 234 Cal.App.3d at p. 425, 285 Cal.Rptr. 659 [party not required to investigate to ascertain a judge's former clients]; *Betz,* supra, 16 Cal.App.4th at pp. 935, 937, 20 Cal.Rptr.2d 841 [parties not required to investigate to ascertain clients of law firm in which arbitrator had been a partner].) Even as late as October 12, 2017 Judge Zayner has not made disclosures to parties in this case, or many if not all other Plaintiffs

similarly situated. (Santa Clara Superior Court: *Lyons vs. Stanford, Phills vs. [Stanford])*

1. The Judge Should Disclose His Current and Close Allegiances and Affiliations.

While a 'mere prior association [does not]form a reasonable basis for questioning a judge's impartiality.'" (*Allphin v. United States* (Fed. Cir. 2014) 758 F.3d 1336p. 1344, citing *Maier v. Orr* (Fed. Cir. 1985) 758 F.2d 1578.), no case asserts that publicly naming yourself as "The Stanford Family", forming the Stanford Founder's Grant Society, donating to Stanford undisclosed sums (AOBE p. 147, 148), and affirming at a public recall of a college graduation's late night skinny dipping with your wife and Stanford "SULsies" (AOBE p. 150- "comments"), friends, drinking beers and committing your life earnings to Stanford. (AOBE p.77) (Accessed now at https://www.youtube.com/watch?v=inLHxM-j7l8).

2. **The judge should not proceed in spite of a conflict of interest that he knows or should know, or only recuse after being discovered .**

On or about at least April 17, 2017, Judge Zayner was aware of a potential appearance of conflict with several Defendant Stanford and its alter ego cases in his Court. (AOBE p138 ¶ 11). Other Plaintiff cases with Stanford defendants were regularly appearing in Judge Zayner's Court, and at least one had recently brought forth the Judge's current financial and interest relationships. (AOBE p.129-130)

There was no evidence that the Judge, in this case or others similarly situated with Defendants Stanford or its alter egos, even in perhaps abundance of caution, since the t earlier motion in *Lyons vs. Stanford* (AOBE p. 128) disclosed his

relationship to any Plaintiffs. (*Phils adv. Leland* [Stanford] CV263146) (AOBE p.109 Decl. Doe ¶¶¶6,7,8)

3. **The judge Should Not Refuse to Disqualify Himself and Force the Parties to Proceed in Spite of an Undisclosed Conflict of Interest.**

"The issue of disqualification must be raised at the earliest reasonable opportunity after the party becomes aware of the disqualifying facts". *North Beverly Park Home-owners Ass'n v. Bisno* (App. 2 Dist. 2007) 54 Cal.Rptr.3d 644, 147 Cal.App.4th 762, rehearing denied, review denied. That is the only timeliness requirement for a CCP §170.1, which is true here.

As to the legislative purpose, "Statutes governing disqualification of judges for cause are intended to ensure public confidence in the judiciary and to protect the right of the litigants to a fair and impartial adjudicator". *Rossco Holdings Inc. v. Bank of America* (App. 2 Dist. 2007) 58 Cal.Rptr.3d 141, 149 Cal.App.4th 1353, modified on denial of rehearing. See also, *Peracchi v. Superior Court* (2003) 135 Cal.Rptr.2d 639, 30 Cal.4th 1245, 70 P.3d 1054, rehearing denied.

4. The acts of a judge subject to disqualification are void.

While the majority of cases instruct that the orders of a judge subject to recusal are void, according to some authorities the order are voidable. *Giometti v Etienne* (1934) 219 C 687, 688– 689 (void); *Urias v Harris* Farms, Inc. (1991) 234 CA3d 415, 424, 285 CR 659 (voidable); *Betz v Pankow* (1993) 16 CA4th 931, 939–940, 20 CR2d 841 (voidable); *Rossco Holdings Inc. v Bank of America* (2007) 149 CA4th 1353, 58 CR3d 141 (void); *Christie v City of El Centro* (2006) 135 CA4th 767, 37 CR3d 718 (void); see also §2.75 for discussion of effect of rulings by judge who was subject of a peremptory challenge.

5. Recusal of a Judge Issues When the Facts Creating Disqualification Arise.

In *Christie v. City of El Centro* (App. 4 Dist. 2006) 37 Cal.Rptr.3d 718, 135 Cal.App.4th 767, review denied, the disqualification of a judge occurs when the facts creating recusal arise, not when disqualification is established.

This instructive case would mean that Judge Zayner should be disqualified before he took the case because the facts creating the disqualification (life commitment of the Judge and Mrs. Zayner to Stanford) already had arisen prior to his accepting assignment, not when the facts were discovered by Plaintiffs, and thus his rulings are *voidable* on objection.

On or about April 28, 2017 the Trial Court declined to entertain the exhibits in the first filing, and then on or about June 9, 2017 the Trial Court declined to consider the merits and new evidence, or allow the statement and evidentiary exhibits to be ruled on by another judge. Notwithstanding the Court's refusal to recuse itself, and the Court's refusal to disclose its relationship to Stanford in open court From June 9, 2017 to June 30, 2017, the Trial Court continued to rule on all motions in the base case with full force and effect.

THE JUDGE HAS IMMENSE AND INTRICATE PERSONAL AND FAMILIAL LIFELONG ALLEGIANCES TO DEFENADNT STANFORD.

Even a casual alumnus could argue some interest would not be an inconclusive grounds for recusal. It is much simpler in this particular case because the judge has shown much, much more than a related interest. The monologue in these videos shows a judiciary and his spouse who are dedicated to if not almost obsessed with their alma mater (AOBE p.47-48). Since the Judge engages regularly in these velvet handcuff Stanford activities, that influence and cross promotional relationship without a waiver of both parties, should preclude the judge from making judgment in a case involving Stanford or any of its alter egos.

STANFORD'S ALTER EGOS ARE OF SIMILAR NAME RECOGNITION AND FINANCIAL INTEREST.

The alter egos of Stanford, Stanford HealthCare, and Leland Junior University, etc. known to be the one and the same for purposes of alumni and

the spirit of fundraising. For example, clearly, Stanford University medical students intern at the Stanford Hospital or SHC, and the professors and doctors are employees of Stanford University. Therefore, even assuming arguendo that Stanford University does not have any relationship to Stanford Health and the multitude of Stanford's other named institutions, such argument is not persuasive in attempts to reject mandatory judicial recusal. Clearly, if Defendant "Stanford" whether Stanford Health, Leland University, Board of Trustees of Leland, Stanford University, Packard Hospital, etc. were to lose a trial , it would inarguably bode less favorably for the name Stanford and the institutional finances (alumni contributions, fundraising, public image) regardless of its alter egos.

Accordingly the volumes of court awarded exorbitant monetary "sanctions" in favor of Stanford by the challenged Judge as shown here would equate to a better financial outlook for Stanford as a general institution. Notwithstanding Stanford's operations as a "non-profit", its divisions and alter egos utilize for example the lands which are owned by Stanford and its operating entities.

Judge Zayner was in violation of 170.3 (C)(5) which states in relevant part: "A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party. In that case, the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson. The clerk shall notify the executive officer of the Judicial Council of the need for a selection. The selection shall be made as expeditiously as possible."

Section 170.3(c)(1) If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge. The statement shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. Copies of the statement shall be served on each party or his or her attorney who has appeared and shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers.

(2) Without conceding his or her disqualification, a judge whose impartiality has been challenged by the filing of a written statement may request any other judge agreed upon by the parties to sit and act in his or her place.

(3) Within 10 days after the filing or service, whichever is later, the judge may file a consent to disqualification in which case the judge shall notify the presiding judge or the person authorized to appoint a replacement of his or her recusal as provided in subdivision (a), or the judge may file a written verified answer admitting or denying any or all of the allegations contained in the party's statement and setting forth any additional facts material or relevant to the question of disqualification. The clerk shall forthwith transmit a copy of the judge's answer to each party or his or her attorney who has appeared in the action.

(4) A judge who fails to file a consent or answer within the time allowed shall be deemed to have consented to his or her disqualification and the clerk shall notify the presiding judge or person authorized to appoint a replacement of the comply with CCP 170.3(4) recusal as provided in subdivision (a).

SUMMARY

During a new era of Internet accessibility and readily disseminated media coverage and enhanced best practice judicial standards, and in the wake of the national civilian outrage related to Hon. Judge Aaron Persky and his alma mater Stanford (*People vs. Brock Turner*), such public perceptions of judicial indifference to self-policing cannot lie. A 1985 case (*Stanford University v. Superior Court)* supra where Stanford prevailed in reversal of judicial disqualification must not be the standard for this case, nor should that dated case be the determining case law in this new era.

The basic question is simple: How can Judge Theodore Zayner, a Stanford Alumni with long ties and active connections to the Stanford institution, having donated large sums of money (enough to support "someone or several someones" YouTube Mrs. Zayner) to Stanford via the [Stanford] Founding Grant Society Members, with his wife elaborating how loyal their family is to Stanford, be impartial in cases involving Stanford that are put in before him? How can anyone suing Stanford in Judge Zayner's court feel fairly treated if they would know about this unwavering loyalty between Judge Zayner and Stanford?

STAY REQUESTED

Petitioners respectfully request a stay on the case in Superior Court Pending the Supreme Court's review. Upcoming hearings include October 26, 2017 a C.C.P. 128.7 Motion for Sanctions, and November 27, 2017 for Trial.

CONCLUSION

The Court of Appeal's decision heralds a likely unprecedented era in Code of Civil Procedure § 170.1 judicial challenge. The contemporaneous amalgamation of the aforementioned appellate opinion and the recent Judicial Commissions' published opinion regarding significantly higher judicial disclosure standards in Santa Clara Superior Court could force expand the interpretation of legislative intent of Code of Civil Procedure § 170.1. To permit further consideration of the issues raised by the petition for review from the writ of mandate and subject Code of Civil Procedure § 170.1 recusal statement, all proceedings in *Doe vs. Hong,* l-14- CV-261702 are requested to be stayed until the further order of this court in accordance with the Rules of Court.

Respectfully Submitted Date: October 13, 2017

BY /sJDoe/ _____ / JohnDoe/ _____

Jane Doe John Doe

Declaration to Authenticity of Exhibits

1. All exhibits accompanying this Petition are true copies of the original documents on file with the respondent court. The exhibits are incorporated herein by reference as though fully set forth in this petition. The Exhibits are paginated consecutively, and page references in the petition are to the consecutive pagination.

Beneficial Interest of Petitioners; Capacities of Respondent and Real Parties in interest

2. Jane Doe and John Doe (collectively "Petitioners") are Plaintiffs in an action now pending in the respondent court entitled Doe vs. Hong et al (include Stanford Hospital and Stanford University professor Dr. Dirbas) in the Santa Clara County Superior Court Case No. 14-CV-260712. Petitioners are named herein as the real parties in interest.

Timeliness of Petition

3. Following the October 5, 2017 denial of Petitioners' writ by the Sixth Appellate Court, this petition is timely within Calif. Rules of Court. 8.490 and 8.500.

On June 9, 2017 Petitioners filed and personally served a verified judicial recusal statement which the respondent judge took under submission. On June 20, 2017, a ruling was issued and served by the Clerk by mail (Code of Civil Procedure § 1013) from in-chambers work. The Court did not include *any* verified statement to its denial order.

On July 3, 2017 a writ petition was filed as quickly as possible after the June 20, 2017 ruling.

Absence of Other Remedies

A ruling of denial on a writ is reviewable by Petition to the Supreme Court. A ruling on a denial of the disqualification of a judge (Code Civ. Proc., § 170.3, subd. (d)) was reviewable by writ.

WORD COUNT CERTIFICATION

I am one of the Petitioners in this action. Using Microsoft Word 2017, word count function, there are 8392 words in this brief. This Petition is printed in Times Roman font size 13.

I certify that the foregoing is true and correct.

DATED: October 13, 2017

/ sJDoe/

Jane Doe

CERTIFICATE OF INTERESTED PARTIES

A true and correct copy of Plaintiffs'/ Petitioners' NOTICE OF MOTION AND MOTION FOR ORDER TO STAY PROCEEDINGS IN TRIAL COURT PENDING DETERMINATION OF WRIT H044798 was served on the following parties.

DEFENDANT HONG AND PAFMG
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Neil, Dymott, Frank, McFall,
Trexler,McCabe & Hudson APLC
1010 Second Avenue, Suite 2500
San Diego, CA 92101-4959
Phone: (619) 238-1712
Fax: (619) 238-1562

DEFENDANT STANFORD AND DIRBAS
Ms. Daniela Stoutenburg
DUMMIT, BUCHHOLZ & TRAPP
1661 Garden Highway
Sacramento, CA 95833
Ph: (916) 929-9600Fax: (916) 927-5368

Honorable Theodore Zayner
Judge of the Superior Court of California,
County of Santa Clara
Department Six
191 N. First Street
San Jose, CA 95113

Sixth District Court of Appeal
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

Clerk of the California Supreme Court
Web Site: Electronic Service of Civil Appellate Briefs
<http://www.courts.ca.gov/4dca-esub.htm>
(electronic pdf copy of brief served pursuant to CRC 8.212(c)(2))

Supreme Court of California
350 McAllister Street
Room 1295
San Francisco, CA 94102-4797

APPENDIX “A”

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JANE DOE et al.,
Petitioners,
v.
THE SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent;
ROY HONG et al.,
Real Parties in Interest.

H044798
Santa Clara County No. CV261702

BY THE COURT:

The petition for writ of mandate or other appropriate relief and the request for stay are denied.

(Premo, Acting P.J., Elia, J., and Bamattre-Manoukian, J. participated in this decision.)

Date: 10/05/2017 Premo Acting P.J.

EXHIBIT “1”

COMMISSION ON JUDICIAL PERFORMANCE
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102

Contact: Victoria B. Henley
Director-Chief Counsel
(415) 557-1200

FOR RELEASE
December 19, 2016

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."[1]

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.)

[1] 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.[2] 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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[2] 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.[3]

[3] 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.[4]

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.)

[4] 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.[5] 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

[5] "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.)