IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-JP-00319-SCT

MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE

v.

ALBERT B. SMITH, III

DATE OF JUDGMENT:	02/24/2011
TRIAL JUDGE:	HON. H. DAVID CLARK, II
COURT FROM WHICH APPEALED:	MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE
ATTORNEYS FOR APPELLANT:	JOHN B. TONEY DARLENE BALLARD
ATTORNEYS FOR APPELLEE:	ANDREW W. M. WESTERFIELD MERRIDA BUDDY COXWELL
NATURE OF THE CASE:	CIVIL - JUDICIAL PERFORMANCE
DISPOSITION:	PUBLIC REPRIMAND, FINE, AND ASSESSMENT OF COSTS - 12/15/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

DICKINSON, PRESIDING JUSTICE, FOR THE COURT:

¶1. Tunica County Circuit Court Judge Albert B. Smith III acknowledged that he abused his contempt powers and exhibited poor courtroom demeanor. The Mississippi Commission on Judicial Performance recommends punishment of a public reprimand, a $1,000 fine, and an assessment of costs totaling $100. We accept the Commission's recommendation.

BACKGROUND FACTS AND PROCEEDINGS

¶2. In 2006, Richard Becton failed to appear at his scheduled arraignment. When he later appeared and announced that he did not have counsel, Judge Smith responded, "You don't

take these charges serious [sic] do you?" After appointing counsel to represent Becton, Judge Smith said: "I would suggest you call [your counsel] 'cause if you are convicted, I'm going to get you." And according to the agreed statement of facts, Judge Smith told Becton's bail bondsman, Marshall Sanders, to "get on top of getting his people to court at the right time." Then, after threatening to hold Sanders in contempt of court when, in future cases, his clients fail to appear as scheduled, Judge Smith ordered him jailed for a week – but released him after he had served three days.

¶3. In 2009, attorney Robert Little represented two clients who appealed their DUI (driving under the influence) convictions from the Tunica County Justice Court to Judge Smith's court. When the first case was called for trial, Little and prosecutor Charles Graves both announced to Judge Smith that the case was not ready to proceed because the State had failed to comply with discovery. Judge Smith granted a continuance, set the case for trial, and admonished counsel to be prepared for trial. He then entered an order requiring the State to comply with defendant's discovery requests.

¶4. The day before the trials of Little's two clients were to begin, Graves informed the court administrator that he would be presenting proposed orders of dismissal for both cases, due to the arresting agency's failure to provide the videos of his clients' arrests. The following day, when Judge Smith called the first case for trial, Little was temporarily out of the courtroom, but Graves was present. When he attempted to approach the bench to present an order of dismissal, Judge Smith found both Little and Graves in contempt, imposing a fine against each and imprisoning Graves for several hours, during which – without having

Graves brought into the courtroom – Judge Smith held a hearing on the contempt matter. Graves appealed Judge Smith's judgment of contempt against him, and this Court reversed the judgment, finding that Judge Smith had violated Graves's due process rights.[1]

¶5. In September and October 2009, the Commission formally charged Judge Smith with willful misconduct in office and conduct prejudicial to the administration of justice. In lieu of a hearing, the Commission and Judge Smith signed an Agreed Statement of Facts and Proposed Recommendation. The record – consisting of the agreed factual findings and clerk's papers – was filed with this Court without objection. Judge Smith and the Commission signed a Joint Motion for Approval of Recommendation, and the Commission filed a supporting brief.

¶6. Judge Smith's brief, while supporting the joint motion, included factual allegations and assertions that disputed portions of the Agreed Statement and Joint Motion, so the Commission moved to strike those contradictory portions. Judge Smith responded, arguing that the parties had an understanding that he could present "mitigating" facts surrounding the circumstances leading to the contempt orders. Judge Smith also moved to strike the portion of the Commission's brief that discussed prior informal actions taken against him.

¶7. We granted both motions because the post-agreement factual assertions by both parties were an impermissible attempt to supplement the record already filed with this Court.[2]

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[1] ***Graves v. State***, 66 So. 3d. 148 (Miss. 2011).

[2] *See, e.g.,* ***Miss. Comm'n on Judicial Performance v. Dearman***, 66 So. 3d 112 (Miss. 2011).

ANALYSIS

¶8. Ordinarily, in reviewing contested judicial misconduct cases, we conduct an "independent inquiry of the record" and, in doing so, "accord careful consideration to the findings of fact and recommendations of the Commission, or its committee, which has had an opportunity to observe the demeanor of the witnesses."[3] But where, as here, the judge and Commission agree on the facts, we ordinarily will accept the findings as true.[4]

¶9. And in deciding what conduct is sanctionable, and the appropriate punishment for sanctionable conduct, we look to Article 6, Section 177A of our Constitution:

> On recommendation of the commission on judicial performance, the Supreme Court may remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state for (a) actual conviction of a felony in a court other than a court of the State of Mississippi; (b) willful misconduct in office; (c) willful and persistent failure to perform his duties; (d) habitual intemperance in the use of alcohol or other drugs; or (e) conduct prejudicial to the administration of justice which brings the judicial office into disrepute . . . .

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[3] ***Miss. Comm'n on Judicial Performance v. Boone***, 60 So. 3d 172, 176 (Miss. 2011) (quoting ***In re Removal of Lloyd W. Anderson, Justice Court Judge***, 412 So. 2d 743, 746 (Miss. 1982)).

[4]This statement raises concern for Presiding Justice Carlson, but his concern is misplaced. We announce no new standard of review today. We continue to conduct our own independent inquiry of the record. But we are unable to find a single case where we have failed to accept agreed findings of fact as true. Thus, we are justified in our conclusion that we "ordinarily" accept them as true. But in a particular case in which we do not agree with the agreed facts – should such a case ever arise – we are certainly free to reject them.

Miss. Const. art. 6, § 177A.

¶10. Section 177A's prohibition against "conduct prejudicial to the administration of justice" brings into play the five canons of the Mississippi Code of Judicial Conduct.[5] And we have defined Section 177A's term "willful misconduct in office" as

> "[t]he improper or wrongful use of power of his office by a judge acting intentionally, or with gross unconcern for his conduct and generally in bad faith . . . . A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of authority constitutes bad faith . . . .Willful misconduct in office of necessity is conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[6]

I. Judge Smith's Violations

¶11. According to the Commission's findings, Judge Smith violated Canons 2A and 3B(4) by addressing the lawyers and bail bondsman discourteously, that is, without respect and appropriate judicial temperament; and he violated Canons 2A, 3B(2), 3B(4), and 3B(8) by wrongly imposing contempt sanctions against two lawyers and a bail bondsman. The Commission also alleges he violated Canons 2A, 3B(4), and 3B(8) when he told a defendant "[i]f you're convicted, I'm gonna get you." We agree.

¶12. While I cannot dispute that my friend, Justice Kitchens, has vast experience and a storied and commendable tenure at the bar, I must say that my own three decades as a lawyer suggest that one knows a discourteous judge when encountering him or her in the courtroom;

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[5] Miss. Code of Judicial Conduct pmbl.

[6] ***In re Quick***, 553 So. 2d 522, 524-25 (Miss. 1989).

and a word or phrase discourteously said in the courtroom may very well not appear – on paper – to have been said discourteously. But the proof-in-the-pudding in this case is that Judge Smith agreed his "demeanor during the hearings was confrontational and discourteous to counsel . . . ," and we take him at his word.

II. Sanctions

¶13. To assist our determination of appropriate sanctions, we have developed six factors to be applied to the facts of each case: (1) the length and character of the judge's public service; (2) whether there is any prior caselaw on point; (3) the magnitude of the offense and the harm suffered; (4) whether the misconduct is an isolated incident or evidences a pattern of misconduct; (5) whether moral turpitude was involved; and (6) the presence or absence of mitigating or aggravating circumstances.[7]

A. Length and Character of Judge's Public Service

¶14. Other than Judge Smith's eleven-year tenure as a judge, the record is silent regarding the length and character of his public service.

B. Prior Caselaw

¶15. We have made it quite clear that the power granted to judges does not license them to be disrespectful to the lawyers and citizens who appear in their courtrooms; and that judges must conduct themselves with appropriate judicial demeanor.

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[7] ***Miss. Comm'n on Judicial Performance v. Gibson***, 883 So. 2d 1155, 1158 (Miss. 2004), *overruled in part on other grounds by* ***Boone***, 60 So. 3d at 177.

In re Blake[8]

¶16. In ***Blake***, addressing the trial judge's protracted display of inappropriate vitriol and disrespect for one of the lawyers in the case, we stated:

> The record provides no justification whatsoever for [the judge's] animosity and sarcasm toward [the lawyer]. We recognize and endorse a trial judge's duty to control the courtroom, using reasonable measures to efficiently move matters along and keep over-zealous counsel in check. However, the professional obligations of dignity, respect and decorum [are] not limited to counsel. Canon I of the Code of Judicial Conduct states, "A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved."[9]

Mississippi Commission on Judicial Performance v. Spencer[10]

¶17. We also have said that, in an appropriate case, a judge's display of inappropriate judicial temperament may lead to removal from office. In ***Spencer***, we found that the judge exhibited "outrageous, erratic conduct and hostile demeanor" to those exposed to him, and we stated that "[e]lected members of the judiciary have a duty to conduct themselves with respect for those they serve, including the court staff and the litigants that come before them."[11] We explained that if "judges do not behave with judicial temperament and perform

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[8] ***In re Blake***, 912 So. 2d 907 (Miss. 2005).

[9] ***Id.*** at 914.

[10] ***Miss. Comm'n on Judicial Performance v. Spencer***, 725 So. 2d 171 (Miss. 1998).

[11] ***Id***. at 178.

their duties according to the law. . . there seems little hope that our citizenry at large may understand and respect the legal process."[12]

Mississippi Commission on Judicial Performance v. Gunter[13]

¶18. In ***Gunter***, we cited Municipal Court Judge George Gunter for abusing his contempt powers when he called a defendant's mother before the bench and "harshly berated and humiliated her."[14] When the mother attempted to speak, Judge Gunter ordered her arrested for contempt of court.[15] Judge Gunter did not send any papers to the detention center but ordered that the mother be held twenty-four hours without bond.[16] Several hours later, he called the detention center and had her released.[17] The Court found that Judge Gunter had violated the Code of Judicial Conduct and sanctioned him with a public reprimand, $1,500 fine, and costs of the proceedings.[18]

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[12] ***Id.***

[13] ***Miss. Comm'n on Judicial Performance v. Gunter***, 797 So. 2d 988 (Miss. 2001).

[14] ***Id***. at 989.

[15] ***Id***.

[16] ***Id***. at 990.

[17] ***Id***.

[18] ***Id***. at 992.

Mississippi Commission on Judicial Performance v. Byers[19]

¶19. Circuit Court Judge Shirley C. Byers was charged with abuse of contempt powers for holding a newspaper reporter in contempt after learning the reporter had disobeyed an order restricting publication of an article about a court proceeding.[20] She had the reporter arrested and brought before her, but no affidavit, show-cause order, or notice of hearing was filed, nor was the reporter allowed to present any witnesses or evidence.[21]

¶20. The Commission charged Byers with six counts of judicial misconduct, including the abuse-of-contempt charge, and the Court opined that her misuse of contempt powers was "the most troubling and serious" offense.[22] The Court found that Byers had abused her powers by incorrectly handling the constructive-contempt situation, and it ordered Judge Byers to be publicly reprimanded and to pay a $1,500 fine and costs amounting to $2,023.59.[23]

C. The Magnitude of the Offense and the Harm Suffered

¶21. Judge Smith's failure to adhere to proper procedure when exercising his contempt power was a serious abuse of power because of the incarceration and threats of incarceration in the two matters before him. His actions caused a negative impact on Graves and Sanders

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[19] ***Miss. Comm'n on Judicial Performance v. Byers***, 757 So. 2d 961 (Miss. 2000).

[20] ***Id***. at 970.

[21] ***Id***.

[22] ***Id***.

[23] ***Id***. at 973.

because of the deprivation of their liberty. A less serious, albeit significant, impact to Graves, Little, Sanders, and Becton was the abusive and disrespectful behavior to which they were subjected.

D. Isolated Incident or Pattern of Conduct

¶22. The record contains no information or indication that Judge Smith's behavior in these two cases was part of a pattern of similar conduct.

E. Moral Turpitude

¶23. This Court has defined "moral turpitude" as "includ[ing], but not limited to, actions which involve interference with the administration of justice, misrepresentation, fraud, deceit, bribery, extortion, or other such actions which bring the judiciary into disrepute."[24]

¶24. This Court expanded the definition to include a violation of "some basic tenets of daily living in a civil society, such as living by the standards of fundamental decency and honesty by not abusing the judicial process, and by revering the law and the judicial system, and upholding the dignity and respect of the judiciary through appropriate conduct and behavior toward others."[25] Judge Smith abused the judicial process by incarcerating and threatening to incarcerate individuals for contempt without providing them basic due process rights, and his actions constituted moral turpitude.

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[24] ***Gibson***, 883 So. 2d at 1158 n.2.

[25] ***Miss. Comm'n on Judicial Performance v. Sanford***, 941 So. 2d 209, 217 (Miss. 2006).

F. Mitigating or Aggravating Circumstances

¶25. This Court has held that mitigating circumstances exist when a judge publicly acknowledges the inappropriateness of the conduct and agrees with the Commission's findings.[26] We accept Judge Smith's agreement with the Commission's findings and the proposed sanctions in mitigation of his inappropriate conduct. The record includes no evidence of aggravating circumstances.

Conclusion

¶26. We find that Judge Smith violated Canons 2A, 3B(2), 3B(4), and 3B(8) of the Mississippi Code of Judicial Conduct and, therefore, committed willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, as referenced in Article 6, Section 177A of the Mississippi Constitution. After reviewing the agreed facts submitted by the Commission and Judge Smith; and after giving careful consideration to the Commission's recommendations, we order that Judge Smith be publicly reprimanded, fined $1,000, and assessed $100 in court costs.

¶27. TUNICA COUNTY CIRCUIT COURT JUDGE ALBERT B. SMITH, III, SHALL BE PUBLICLY REPRIMANDED, PAY A $1,000 FINE, AND BE ASSESSED COSTS OF $100. THE PUBLIC REPRIMAND SHALL BE READ IN OPEN COURT BY THE PRESIDING JUDGE OF THE TUNICA COUNTY CIRCUIT COURT ON THE FIRST DAY OF THE NEXT TERM OF THAT COURT IN WHICH A JURY VENIRE IS PRESENT AFTER THE ISSUANCE OF THIS COURT'S MANDATE, WITH JUDGE SMITH IN ATTENDANCE.

WALLER, C.J., AND PIERCE, J., CONCUR. CARLSON, P.J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION JOINED BY

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[26] ***Gibson***, 883 So. 2d at 1158.

KING, J.; RANDOLPH AND KITCHENS, JJ., JOIN THIS OPINION IN PART. RANDOLPH, J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION JOINED BY LAMAR, J.; KITCHENS AND CHANDLER, JJ., JOIN THIS OPINION IN PART. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY CHANDLER, J.; CARLSON, P.J., JOINS THIS OPINION IN PART.

CARLSON, PRESIDING JUSTICE, CONCURRING IN PART AND IN RESULT:

¶28. I join the plurality in finding that Judge Smith abused his contempt powers and exhibited poor courtroom demeanor. I write separately, however, because I find the plurality's standard of review to be inconsistent with this Court's precedent.

¶29. Without citation, the plurality pronounces that "where, as here, the judge and Commission agree on the facts, we ordinarily will accept the findings as true." Plur. Op. ¶ 8. In his dissent, Justice Kitchens correctly finds that the plurality's statement is a newly-announced standard of review and that it is contrary to the well-established standard that this Court conducts an independent review of the record. Kitchens Op. ¶ 32; *see* ***Miss. Comm'n on Judicial Performance v. Boone***, 60 So. 3d 172, 184 (Miss. 2011). I agree with Justice Kitchens's analysis of our standard of review in judicial performance cases and take this opportunity to comment on this Court's standard.

¶30. Earlier this year, in ***Boone***, this Court clarified the standard of review in judicial performance cases and overruled any case that stands for the proposition that this Court does not conduct an independent review of the record. ***Boone,*** 60 So. 3d at 177. ***Boone*** cited ***In re Removal of Lloyd W. Anderson, Justice Court Judge***, 412 So. 2d 743 (Miss. 1982). ***Anderson*** was this Court's first opportunity to examine Article 6, Section 177A of the

Mississippi Constitution of 1890, which states: "On recommendation of the commission on judicial performance, the supreme court may remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state . . . ."

¶31. Discussing our responsibilities mandated by Section 177A, ***Anderson*** held that this Court should conduct an independent inquiry of the record in judicial performance cases. ***Anderson*** states:

> Therefore, it appears we are required to be a factfinding body, at least to some degree, in every case of this nature . . . . The power to impose sanctions is delegated solely to this Court; it therefore follows we have an obligation to conduct an independent inquiry of the record in order to make our final determination of the appropriate action to be taken in each case. In so doing, we will accord careful consideration [to] the findings of fact and recommendations of the Commission, or its committee, which has had the opportunity to observe the demeanor of the witnesses.

Anderson, 412 So. 2d 743, 746.

Id. The standard announced in ***Anderson*** and affirmed in ***Boone*** does not distinguish between cases with agreed facts and those with contested facts. We apply the same standard to all judicial performance cases.

¶32. For the reasons discussed above, I do not join the plurality's proposition that "where . . . the judge and Commission agree on the facts, we ordinarily will accept the findings as true." Plur. Op. ¶ 8. I do, however, join the plurality's finding that Judge Smith's actions constituted willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, pursuant to Article 6, Section 177A of

the Mississippi Constitution of 1890. I also join the plurality's finding that Judge Smith should be publicly reprimanded, fined $1,000, and assessed costs of $100.

KING, J., JOINS THIS OPINION. RANDOLPH AND KITCHENS, JJ., JOIN THIS OPINION IN PART.

RANDOLPH, JUSTICE, CONCURRING IN PART AND IN RESULT:

¶33. I concur in part and result with the plurality.

¶34. The plurality properly struck portions of the briefs of both Judge Smith and the Commission[27] as "impermissible attempt[s] to supplement the record" of proceedings of the Commission. (Plur. Op. at ¶ 7). I supplement the Plurality's holding by adding that neither the Commission nor a judge can enter "an understanding" to present additional facts, mitigating or otherwise, separate and apart from the record below. (Plur. Op. at ¶ 6). This Court previously has stated that:

> an Agreed Statement of Facts on which the parties submit [a] case for trial is binding and conclusive on them, and the facts stated are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated, or the truth, competency or sufficiency of any admission contained in the Agreed Statement or to maintain a contention contrary to the Agreed Statement or be heard to claim that there are other facts that the Court may presume to exist, or to suggest, on appeal, that the facts were other than stipulated, or that any material fact was omitted.

[27]This includes, i.e., Judge Smith's "factual allegations and assertions that disputed portions of the Agreed Statement and Joint Motion" and the Commission's discussion of "prior informal actions taken against" Judge Smith. (Plur. Op. at ¶ 6).

In re Collins, 524 So. 2d 553, 561 (Miss. 1988) (on rehearing) (quoting 83 C.J.S. *Stipulations* § 25 (1954)). "Alleged facts," which are not agreed upon or tested by cross-examination, should not be considered facts at all.

¶35. Regarding the conflicting opinions on the standard of review, it is clear (and has been for at least a century or two, or longer) that a court may consider agreed-upon facts, i.e., stipulations. I find no fault in the plurality accepting them as true here,[28] for an "independent inquiry of the record"[29] reveals the Agreed Statement of Facts. Accordingly, for purposes of this case, the disagreement appears to be much ado about nothing, a distinction without a practical difference.

¶36. Finally, I reject the plurality's finding that Judge Smith's acts involved "moral turpitude." (Plur. Op. at ¶ 24). A finding of moral turpitude "must involve some immorality" and must cross the line "from simple negligence or mistake, to willful conduct which *takes advantage of a judge's position for greed or other inappropriate motives*." ***Miss. Comm'n on Judicial Performance v. Vess***, 10 So. 3d 486, 493 (Miss. 2009) (quoting ***Miss. Comm'n on Judicial Performance v. Gordon***, 955 So. 2d 300, 305 (Miss. 2007)); ***Miss. Comm'n on Judicial Performance v. Roberts***, 952 So. 2d 934, 942 (Miss. 2007) (emphasis added). I discern no evidence of deceit, fraud, extortion, trickery, monetary gain or any other indicia of conduct which involves Judge Smith using his position "for greed or other inappropriate

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[28](Plur. Op. at ¶ 8).

[29](Carlson Op. at ¶ 31; (Kitchens Op. at ¶ 38).

motives[,]" so as to support a finding of moral turpitude. ***Vess***, 10 So. 3d at 493 (quoting ***Gordon***, 955 So. 2d at 305). But the absence of moral turpitude does not alter my agreement with the plurality's recommended sanction.

¶37. For these reasons, I respectfully concur in part and in result.

LAMAR, J., JOINS THIS OPINION. KITCHENS AND CHANDLER, JJ., JOIN THIS OPINION IN PART.

KITCHENS, JUSTICE, DISSENTING:

¶38. Today's plurality opinion announces a new standard of review for judicial performance cases that reach us via agreed recommendations: This Court no longer will conduct an "independent inquiry of the record," but, instead, "where, as here, the judge and Commission agree on the facts, we ordinarily will accept the findings as true." Plur. Op. ¶ 8. Because I cannot embrace this new standard, and because the agreed facts in the present case do not provide us a clear factual basis sufficient to support a finding that Judge Smith engaged in judicial misconduct, I respectfully dissent.[30]

¶39. According to our rules, this Court is charged with "prepar[ing] and publish[ing] a written opinion and judgment directing such disciplinary action, if any, as it finds just and proper." Miss. Comm'n on Judicial Performance R.10E. Our opinion and judgment are to be based on a "review of the entire record," and this Court may "accept, reject, or modify, in whole or in part, the findings and recommendation of the Commission." Miss. Comm'n

[30]I join Justice Randolph's separate opinion to the extent that he finds Judge Smith's actions did not involve moral turpitude.

on Judicial Performance R.10E. While there may be cases in which this Court "may simply choose to defer to the Commission," ***Mississippi Commission on Judicial Performance v. Neal***, 774 So. 2d 414, 417 (Miss. 2000) (citing ***In re Bailey***, 541 So. 2d 1036, 1040 (Miss. 1989)), it should not be that agreed recommendations ordinarily will receive our automatic approval, for to do so would be inconsistent with this Court's duty to make an independent inquiry of the record before deciding each case. ***Miss. Comm'n on Judicial Performance v. Boone***, 60 So. 3d 172, 176 (Miss. 2011) (quoting ***In re Removal of Anderson***, 412 So. 2d 743, 746 (Miss. 1982)).

¶40. In two recent cases, we rejected the Commission's recommended sanctions of two justice court judges for their having passed several driving under the influence of alcohol (DUI) cases to the inactive files upon in-court recommendations of the county prosecuting attorney. ***Miss. Comm'n on Judicial Performance v. Little***, 72 So. 3d 501 (Miss. 2011); ***Miss. Comm'n on Judicial Performance v. McGee***, 71 So. 3d 578 (Miss. 2011). We held that the Commission erroneously had found, and the accused judges had agreed, this practice to be prohibited by statute, which, we held, it is not. A sentencing trial court judge has the duty to determine in criminal cases that are resolved by agreement between the prosecution and the defendant that there is, indeed, a factual basis for the guilty plea, and that the prosecution's sentencing recommendation, if any, is within prescribed parameters. Similarly, we, as the Court with the ultimate responsibility for meting out sanctions in judicial performance cases, have a solemn obligation to ascertain whether the agreements reached between the Commission on Judicial Performance and accused judges have sound factual

bases, and, if so, whether the conduct which an accused judge admits actually amounts to violation of Mississippi's Code of Judicial Conduct. *See* ***Miss. Comm'n on Judicial Performance v. Sanford***, 941 So. 2d 209, 217-18 (Miss. 2006) (holding that a joint recommendation is "akin to a criminal defendant entering into a plea agreement with the prosecution, whereby the defendant agrees to plead guilty to the offense in return for the prosecution's promise of a specific recommended sentence to the judge for consideration"); URCCC 8.04 A(3) ("Before the trial court may accept a plea of guilty, the court must determine that . . . there is a factual basis for the plea.")

¶41. In the present case, Judge Smith is being sanctioned for "wrongly imposing contempt sanctions against two lawyers and a bail bondsman," for addressing these individuals "discourteously," and for telling a defendant, "if you're convicted, I'm gonna get you." Plur. Op. ¶¶ 2, 11. However, based on the agreed facts and the record before us, I would not accept the Commission's determination that Judge Smith's conduct in these regards is sanctionable.

¶42. For instance, the plurality does not specify how Judge Smith was discourteous; but according to the agreed facts, "Canons 2A and 3B(4) were violated when Respondent addressed counsel and Mr. Sanders discourteously in court by addressing them by their last names only or as 'lawyer' and not extending to those individuals the usual common courtesy and dignity of addressing them as 'Mister.' " Yet, in writing its own opinion, the plurality has done the same thing, referring to a litigant, Richard Becton, as "Becton," to a bail bondsman, Marshall Sanders, as "Sanders," to two attorneys, Robert Little and Charles

Graves, as "Little" and "Graves," and to Circuit Court Judge Shirley C. Byers as "Byers." A random and cursory perusal of this Court's decisions over many years reveals that we, as well as most, if not all, other appellate courts in the United States, routinely refer to litigants, lawyers, clerks, public officials of all kinds, and other jurists, including members of the United States Supreme Court, by their surnames only. Likewise, I cannot discern how referring to counsel as "lawyer" is any more of an insult than referring to the bench as "judge." During my long career at the Bar, I deemed it a high honor to be addressed as "lawyer."

¶43. The plurality finds that "the proof-in-the-pudding in this case is that Judge Smith agreed his 'demeanor during the hearings was confrontational and discourteous to counsel . . . ,' and *we take him at his word*." Plur. Op. ¶ 12 (emphasis added). Thus, despite its protestations to the contrary, the plurality is not conducting its "own independent inquiry of the record." Plur. Op. n.4. Moreover, the entire statement in the agreed facts reads as follows: "Respondent's demeanor during the hearing was confrontational and discourteous to counsel as evidenced *by the attached transcript and included audio recording*." (Emphasis added.) The plurality gives no indication that its decision is based on an independent review of the transcript and recording. Finally, this statement in the agreed facts refers only to Judge Smith's interactions with Little and Graves and not Becton.

¶44. Judge Smith's other interactions with Defendant Richard Becton are easily understood and are not at all disturbing to this justice, who practiced law in Mississippi's criminal courts for well over forty years. His question to Becton, "You don't take these charges serious[ly]

do you?" was addressed to an indictee who appeared for arraignment without an attorney. This clearly was an effort by the judge to impress on the accused the importance of his having counsel to attend and represent him in court on a felony charge. There can be no dispute that Becton needed an attorney. The judge was trying to convince him of the importance and urgency of obtaining one. It was in this context, and for this purpose, that the judge continued, "I would suggest you call [your counsel] 'cause if you are convicted, I'm going to get you." Rather than an impermissible threat, I view this as a constructive and emphatic effort on the judge's part to impress upon Becton the gravity of his situation, and the certainty that, if he were found guilty, the day would come when he would be brought before Judge Smith for sentencing. Instead of tip-toeing around the serious matters at hand, the judge, in no uncertain terms, made it plain to Becton that it was his responsibility to get in touch with his lawyer in order to have the benefit of the lawyer's assistance in circuit court. In so doing, Judge Smith was fulfilling the duty that this Court imposes on Mississippi's circuit judges to be vigilant in helping accused persons understand the importance of being represented in court by legal counsel. *See* ***Patton v. State***, 34 So. 3d 563 (Miss. 2010) (reversing criminal conviction because defendant was not warned of the dangers and disadvantages of self-representation) (citing ***Faretta v. California***, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); URCCC 8.05).

¶45. Regarding the contempt orders, Judge Smith's rulings are more akin to a mistake of law rather than a willful, sanctionable abuse of contempt power. *See* ***Miss. Comm'n on Judicial Performance v. Martin***, 921 So. 2d 1258, 1263 (Miss. 2005) (denial of bond not

sanctionable when judge's actions were based on honest, yet mistaken, understanding of constitutional rights). When the county prosecutor appealed his contempt convictions, the Office of the Attorney General defended Judge Smith, which included the Attorney General's filing a petition for writ of certiorari with this Court after the Court of Appeals had reversed and rendered. ***Graves v. State***, 66 So. 3d 148, 151 (Miss. 2011) (citing ***Graves v. State***, 66 So. 3d 158 (Miss. Ct. App. 2010)). By defending the contempt citations, the Attorney General – the chief lawyer of this state – recognized that Judge Smith's actions had an arguable basis in the law. The law of contempt is not so clear that the justices of this Court can always agree on such matters. *See* ***In re E.K.***, 20 So. 3d 1216 (Miss. 2009). Indeed, this Court reviewed the ***Graves*** case "to clarify certain aspects of the law of contempt." ***Graves***, 66 So. 3d at 151. Simply because a judge erred in imposing contempt citations does not warrant a finding that the judge's conduct was sanctionable. *See e.g.*, ***C.K.B. v. Harrison County Youth Court***, 36 So. 3d 1267, 1276 (Miss. 2010) (reversing contempt sanctions against child, his mother, and his counsel for an alleged violation of the court's directive in other, unrelated cases); ***Brame v. State***, 755 So. 2d 1090, 1094 (Miss. 2000) (holding that attorney's gross negligence did not rise to the level of willful conduct required to support a finding of criminal contempt). Because the defense attorney was held in contempt for the same reasons as the county prosecutor, Judge Smith's holding the defense attorney in contempt also fails to warrant a sanction from this Court.

¶46. The bail bondsman, Marshall Sanders, was held in contempt in a separate incident, but the plurality does not explain how Judge Smith's actions in that instance were improper. According to the agreed findings of fact:

> During the exchange with Mr. Sanders, Respondent threatened Mr. Sanders with contempt. At one point Mr. Sanders approached a deputy in the presence of the Respondent, placed his hands behind his back and offered to submit to arrest. Respondent ordered Mr. Sanders jailed for a week. Mr. Sanders did not appeal the Respondent's order. The record does not reflect that Mr. Sanders requested bond or an attorney. Respondent alleges that he properly held Mr. Sanders in direct criminal contempt for talking in the courtroom. Respondent further alleges that, in his opinion, Mr. Sanders' demeanor, attitude and gestures were disrespectful to the Court and warranted the use of the Court's contempt power.

These findings are supported by the transcript of the proceedings, but neither the record nor the agreed findings suggests that Judge Smith willfully abused the court's contempt power. Accordingly, I cannot agree that Judge Smith's mistake of law warrants sanctions. ***Martin***, 921 So. 2d at 1263.

¶47. Because the agreed findings have failed to set forth clearly sanctionable conduct, and because an independent review of the record reveals none, I would dismiss the joint motion asking us to approve the recommended sanctions. For the foregoing reasons, I respectfully dissent.

CHANDLER, J., JOINS THIS OPINION. CARLSON, P.J., JOINS THIS OPINION IN PART.