No. _____

In The
Supreme Court of the United States

ROBERT KING,

Petitioner,

v.

WADE MCCREE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JOEL B. SKLAR
Counsel of Record
LAW OFFICE OF JOEL B. SKLAR
615 Griswold, Suite 1116
Detroit, MI 48226
313-963-4529
joelsklarlaw@gmail.com

Attorney for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Petitioner was the defendant in a felony criminal child support case. Respondent was the presiding state court judge. Respondent initiated from the bench a secret extramarital sexual and economic relationship with the complaining witness, mother of the child in question. Respondent failed to disqualify himself or reassign the case to a disinterested judge after he began the affair. Respondent allowed and encouraged the complaining witness to participate ex parte on how to sentence and extract money from Petitioner. Respondent admits these facts.

Petitioner sued Respondent and the complaining witness pursuant to 42 U.S.C. § 1983, for depriving him of his fundamental due process of law right to a fair, neutral and impartial judge guaranteed under the Fifth and Fourteenth Amendments. The United States District Court for the Eastern District of Michigan Southern Division dismissed Petitioner's civil rights suit based on judicial immunity. The Sixth Circuit Court of Appeals, believing itself constrained by *Stump v. Sparkman*,[1] affirmed.

The question presented is:

Whether this Court should revisit *Stump v. Sparkman* to elucidate it and hold that

[1] 435 U.S. 349 (1978).

QUESTION PRESENTED – Continued

judicial immunity from civil suit pursuant to 42 U.S.C. § 1983 does not extend to the presiding judge's admitted non-judicial conduct in this case.

PARTIES TO THE PROCEEDING

Petitioner is Robert King who fathered a child with Geniene La'Shay Mott. Petitioner was the plaintiff in a federal action filed pursuant to 42 U.S.C. § 1983 against Respondent and Ms. Mott in the United States District Court for the Eastern District, Southern Division of Michigan. Petitioner was the Plaintiff-Appellant in the United States Court of Appeals for the Sixth Circuit. The petition will refer to Petitioner as "King."

Respondent is former Wayne County Circuit Court Judge Wade H. McCree.[2] Respondent was a Defendant in the trial court. Respondent was the Defendant-Appellee in the Sixth Circuit. The petition will refer to Respondent as "McCree."

---

[2] Respondent is the son of an icon; the venerated Honorable Wade Hampton McCree, Jr. The elder McCree was the first African-American appointed to the Sixth Circuit Court of Appeals where he was known as the "poet laureate of the Sixth Circuit" and was the second African-American Solicitor General of the United States. He died in 1987. Respondent's father, especially in the State of Michigan and the Sixth Circuit, remains revered as a champion of civil rights and a man of unquestioned integrity.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit is reported at *King v. McCree*, 2014 FED App. 0531N (6th Cir. 2014). Pet. App. 1a-33a. The Sixth Circuit affirmed the decision of the United States District Court for the Eastern District of Michigan Southern Division on July 26, 2013, reported at *King v. Mott*, 2013 U.S. Dist. LEXIS 104669 (E.D. MI). Pet. App. 34a-48a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The District Court's opinion was rendered on July 26, 2013. Petitioner filed a notice of appeal on August 1, 2013. The Sixth Circuit's opinion was rendered on July 21, 2014.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

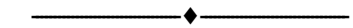
This Sixth Circuit determined that McCree was absolutely immune from King's lawsuit filed pursuant to 42 U.S.C. § 1983 for McCree's violation of King's Fifth and Fourteenth Amendment rights to due process of law.

The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property without

due process of law" when faced with criminal prosecution. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law. . . ."

Regarding the relevant statutory provisions, King filed his lawsuit against McCree and Geniene La'Shay Mott pursuant to 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.



STATEMENT OF THE CASE

A. The Undisputed Facts.

Robert King ("King") and Geniene La'Shay Mott ("Mott") are unmarried parents of a minor child. Pet. App. 2a. Mott was the complaining witness in a felony child-support case against King. Pet. App. 2a. Wade H. McCree ("McCree") was the Wayne County Circuit Court judge who presided over *People v. King*. Pet. App. 2a.

On May 21, 2012, McCree first saw Mott at a hearing on *People v. King*. Pet. App. 3a. He was immediately attracted to her. Pet. App. 4a. In open court, McCree told Mott: "Ma'am you've been so patient all day and you know, having all this time with my deputy here, let me get a little of it." Pet. App. 3a.

At the hearing, McCree accepted King's guilty plea to the charge of failing to pay child support under a delayed sentence agreement pursuant to MCL 771.1(1). Pet. App. 3a. Under this agreement, the court could withdraw the plea and dismiss the charges if King made his payments for eleven months. Pet. App. 3a-4a. McCree scheduled the case for review hearings on August 16 and November 15, 2012. Pet. App. 4a.

When the courtroom emptied, McCree handed Mott his judicial business card and instructed her to contact him. Pet. App. 4a-5a. McCree later described first seeing Mott in a text message to her which said: "Girl, every man in the damn courtroom was peeping

your upscale game." Pet. App. 5a. McCree continued, comparing other litigants to Mott: "C'mon, U'r talking about the 'docket from hell,' filled with tatted up, overweight, half-ass English speaking, gap tooth skank hoes . . . and then you walk in." (Ellipsis in original). Pet. App. 5a.

On May 30, 2012, Mott and McCree met for lunch and the two "hit it off." Pet. App. 5a.

Within a week of their lunch date, McCree and Mott began their adulterous affair. Pet. App. 6a. McCree and Mott repeatedly engaged in sexual intercourse and even used McCree's judicial chambers for some of their trysts. Pet. App. 7a. McCree promised to marry Mott and buy a house together. He loaned her $6,000 "to tide [her] over" until she received payment from King. Pet. App. 7a. McCree and Mott exchanged numerous emails, texts (including those sent and received from the bench)[3] and phone calls which concerned the case against King. Pet. App. 7a. McCree violated various courthouse security policies by permitting Mott to enter the courthouse through an employee only entrance without clearing security, allowing her to remain alone in his chambers while he was on the bench, arranging for her to park her vehicle in an area reserved for judges, and smuggling

[3] In one such text, Defendant McCree declared: "Oh yeah, I text from the bench. After last nite, its all I can do not 2 jerk off 'under' the bench :-). U know U have a magnificent pair of legs!" *In re McCree*, 496 Mich. 51, 59 (Mich. 2014).

her cell phone into the courthouse for her so the two could secretly communicate during court proceedings. Pet. App. 6a-7a, 9a.

McCree knew to disqualify himself from *King* but did not. He allowed Mott to participate in his decisions concerning King. He did this to sustain their meretricious relationship. Pet. App. 13a-14a.

On June 20, 2012, McCree, who was already under investigation by the Michigan Judicial Tenure Commission for sending a shirtless photo of himself to a female court employee,[4] sent Mott an email which cautioned her to keep their adulterous affair quiet:

> My Judicial Tenure Commission matter has me nervous, as you might expect. I have to be **real** careful until this matter is put to rest. I can only ask humbly for your indulgence. Sorry. Second, you are a complaining witness on a case that is before me. Naturally, if it got out that we were seeing each other before your B.D.'s [referring to King as the "Baby Daddy"] case closed everybody could be in deep shit. Why you want to spend time with a man like me remains a mystery, but if

[4] When he discussed the photograph with local media, Defendant declared: "There's no shame in my game." Defendant consented to a sanction of public censure for breaching the standards of judicial conduct. *In re McCree*, 493 Mich. 873 (Mich. 2012).

> you'll have me . . . then as Bill Withers said, 'use me up!' SMOOCHES.

(Bold in original.) Pet. App. 7a.[5]

In anticipation of an August 16, 2012 "review date" to see if King was in compliance with the terms of his delayed sentence, McCree and Mott discussed ex parte whether Plaintiff should be tethered or thrown into jail if he wasn't current on his obligations. Pet. App. 7a-9a.

Before the proceeding, McCree smuggled Mott's cell phone into court so the two could covertly text message one another about King's case while McCree reviewed it.[6] Pet. App. 8a-9a. McCree placed King on

---

[5] In another text message sent to Mott, McCree wrote:

> Yeah, I'm DEEPLY concerned that certain levels of 'us' remain COMPLETELY UNDETECTED as long as U'r still a litigant N case B4 me & while my nut s R still on a chopping block B4 the JTC.

495 Mich. at 67.

[6] For example, McCree and Mott exchanged the following text messages:

> *Mott*: Just keep in mind thur ill be in ur courtroom & need 2 bring in my phone so I can text U what I want done incase he makes payment that morning . . . otherwise lock his ass up until he pays 2500 in cash directly 2 me via FOC . . . u seem 2 always call his case last so ill show up late & we can leave 2gether.
>
> *McCree*: Likewise, my truck will B unlocked so U can set anything out of sight N my car. We'll hold the case till U get there, or B sure 2 call Sharon Grier [the Prosecutor assigned to the case] ahead of time so she'll know U (the 'C.P.') [presumably complaining

(Continued on following page)

party] will B N the courtroom. I figured if [he] hasn't come current by his courtdate, he gets jail 2 pay. If he says he can bring me the $$, I'll put him on a tether till he brings the receipt 2 FOC or do 'double time'.

Mott: Huh??? Teether? 4 how long and how much???

* * *

McCree: Oooops, did I misspell 'tether'. No, some guys say if they get locked up they can't bring the $$, but if let out they can. So here's the deal: go 2 jail (150 days), release upon payment of $1500. OR, get a tether & bring back w/n 30 days $2500 or serve 9 months! BONUS: pay w/n 30 days, remove tether

Mott: He's about 15k behind . . . 2500 is asking much plus YOU ordered him 2 pay $50 bucks a month towards arrearage. . @ that rate ill be getting CS [presumably child support] til Racheal is 26

* * *

McCree: OK, the math will be based on his failures since being placed on probation, but if U'r right the threat of jail will loosen his purse strings!

Mott: ok so let's go with what u proposed. . . . go to jail (150 days) release upon payment of $1500. OR, get a tether & bring back w/n 30 days $2500 or serve 9 months! BONUS: Pay w/n 30 days, remove tether

Mott: He will pay cause they won't let him go to jail PLUS u sending him to jail would violate his Oakland probation and he gets 10 years.

McCree: Cool. I'll run it by the prosecutor.

Mott: Make sure she's aware they already let him off the hook by accepting 400 for probation when they told him 1000

* * *

McCree: Will do. That's good to know.

On the morning of the review hearing, McCree and Mott exchanged the following text messages:

(Continued on following page)

a "tether" and advised King that as soon as he paid $672 he would order the tether removed. Pet. App. 9a. McCree also told King that if the money was not paid by the end of the month he would consider withdrawing the delayed-sentence agreement and imposing a felony conviction. Pet. App. 9a. McCree scheduled another review hearing for August 29, 2012. Immediately after the August 16, 2012 hearing, McCree and Mott had sexual intercourse in McCree's judicial chambers. Pet. App. 9a.

Sometime after August 16, McCree decided to transfer the *King* case to another judge of his choosing. Pet. App. 9a. On September 19, 2012, McCree entered an Order which transferred the case. Afterwards, McCree sent Mott a text message which said:

> DONE DEAL!!!-). I told a story so well, I had me believe it!!! Brother King is on his way to the 2 'hangin' Judge Callahan. He fuck up Once & he's through!!

Pet. App. 10a.

On October 31, 2012, McCree told Mott he did not want to see her anymore. Pet. App. 11a. Mott told McCree she was pregnant with his child. Pet. App.

> *McCree*: I think your B.D. is here!!
>
> *Mott*: Did the prosecutor agree wit our deal since she cut him a break last time??
>
> *McCree*: Look for 'my girl' Sharon Grier, she's our prosecutor & she's been 'prepped'.

In re McCree, 495 Mich. at 64-66.

11a. McCree then met with the Prosecuting Attorney for Wayne County (Kym Worthy) and made a false report for "stalking/extortion" implicating Michigan criminal statute MCL 750.411a. Pet. App. 11a, 13a-14a. The Wayne County Prosecutor declined to get involved.

On December 6, 2012, after she learned of McCree's failed effort to have her arrested and criminally charged, Mott exposed the relationship and her ex parte discussions with McCree about King's case on local television news. Pet. App. 11a-12a.

These are not allegations. They are undisputed facts and incontrovertible.[7]

---

[7] The Michigan Supreme Court established the operative facts of McCree's misconduct and affirmed "almost all of the JTC's [Judicial Tenure Commission] findings and conclusions of law. . . ." *Id.* at 459. The Michigan Supreme Court found:

> The evidence establishes that respondent (a) had a sexual relationship with a complaining witness in a case pending before him without recusing himself for several months, (b) engaged in numerous ex parte communications with her concerning the case, as well as concerning another case in which one of her relatives was a party, (c) violated various policies of the courthouse by permitting his mistress to enter the facility through an employee entrance without going through security, allowing her to remain alone in his chambers while he was on the bench, arranging for her to park her vehicle in an area reserved for judges, and sneaking her cell phone into the courthouse for her, (d) transmitted numerous text messages to her while he was on the bench that contained inappropriate and derogatory references to defendants, litigants,

(Continued on following page)

B. King files his lawsuit against McCree and Mott for violating his Fifth and Fourteenth Amendment due process of law rights pursuant to 42 U.S.C. § 1983.

On February 11, 2013, King sued McCree and Mott in the United States District Court for the Eastern District Southern Division of Michigan under 42 U.S.C. § 1983. Pet. App. 14a. King alleged that McCree violated his Fifth and Fourteenth Amendment due process of law right to a fair, impartial and neutral judge when he engaged in non-judicial acts with Mott, *i.e.*, repeated sexual intercourse and ex parte discussions about his case. Pet. App. 14a. McCree filed a motion for summary disposition pursuant to Fed. R. Civ. Pro. 12(b)(6) based on judicial immunity.

C. The District Court's dismissal of King's § 1983 action based on judicial immunity.

The District Court found that absolute judicial immunity required dismissal of King's complaint

---

> and witnesses appearing before him, (e) lied about when and why he finally did recuse himself from the case in which his mistress was the complaining witness, (f) sought to use the prosecuting attorney's office as leverage against his then ex-mistress by concocting charges of stalking and extortion against her, and (g) lied under oath during the JTC proceedings.

495 Mich. at 55-56.

against McCree.[8] Pet. App. 40a, 45a-46a. The District Court also found that McCree's affair with Mott had nothing to do with King because it was "private," did not violate King's due process rights and, even if it did, King suffered no injury cognizable under § 1983. Pet. App. 41a-42a.

D. The Sixth Circuit affirms.

King filed a timely appeal. The Sixth Circuit Court of Appeals affirmed and found that judicial immunity barred King's claims. Pet. App. 21a-22a. The concurrence found McCree's conduct repugnant but "felt constrained by precedent to grant immunity." Pet. App. 31a.

REASONS FOR GRANTING THE PETITION

The criminal case against King was conducted in the Frank Murphy Hall of Justice. What occurred in McCree's courtroom and chambers was far removed from justice, due process of law and constitutionally mandated impartial and neutral judicial decision making. The constitutional and statutory violations should not be swept under the carpet of absolute judicial immunity. Judicial immunity is not a license for a corrupt and depraved judge to engage in non-judicial

[8] King's case against Mott for her role in the conspiracy was dismissed without prejudice. Pet. App. 15a.

conduct which deprives the accused of his fundamental due process rights. The decisions below turn judicial immunity on its head.

There are four reasons why the Court should grant this writ of certiorari.

First, *Stump v. Sparkman*[9] has been wrongly extended to protect judges for non-judicial acts and extra-judicial conduct which violate a litigant's right to due process of law. In *Stump v. Sparkman*, the Court explained the utility and purpose of judicial immunity. Judicial immunity restores public confidence in the judicial system because it enables judges to make independent, fearless decisions without threat of being sued by a disappointed litigant. The judicial function, not the person who performs them, is what judicial immunity seeks to protect. This purpose is not served when a presiding judge admits that he engaged in non-judicial acts with a litigant or interested party that, under any objective standard, rendered his independence and impartiality impossible. Judicial immunity was not intended to shield a judge from § 1983 suits whose corruption and bribery (*i.e.*, in this case, sex for influence and favorable rulings) made it impossible for him to be fair, let alone just. The fact that lower courts have applied judicial immunity to protect judges from § 1983 suits for non-judicial conduct like McCree's, compels the

[9] 435 U.S. 349 (1978).

Court to revisit, clarify and limit *Stump* to its original purpose.

Second, there is a split in the federal courts on the application of judicial immunity and the presence of an injury cognizable under § 1983 when a criminal defendant is deprived of his Fifth and Fourteenth Amendment due process right to an impartial judge. In *Archie v. Lanier*[10], the Sixth Circuit Court of Appeals denied a state court judge judicial immunity from civil suit where he coerced sex from litigants who appeared before him. In *King*, both lower courts found that McCree inflicted no constitutional injury on King because McCree only had direct personal contact with King at three court hearings. In *Wallace v. Powell,* 2014 U.S. Dist. LEXIS 2908 (M.D. Pa. 2014), the United States District Court for the Middle District of Pennsylvania denied a judge immunity where he received and concealed bribes which may have impacted his sentencing of juveniles. The *Wallace* court found that the judge engaged in non-judicial acts and committed a constitutional tort under § 1983 by setting in motion a series of events which deprived the sentenced juveniles of their Fifth, Sixth and Fourteenth Amendment due process rights to an impartial tribunal.

Third, the Court should address the impact of *Caperton v. Massey Coal Company*[11] on judicial

---

[10] 95 F.3d 438, 440 (6th Cir. 1996).

[11] 556 U.S. 868 (2009).

immunity. In *Caperton*, the Court found that one litigant's Fourteenth Amendment due process right to an impartial tribunal was violated when the other litigant made substantial campaign contributions to one of the appellate judges deciding the case. The Court applied an objective test to find that the appellate judge violated the aggrieved litigant's due process rights to an impartial tribunal when he refused to disqualify himself from the case. Applying the analysis in *Caperton*, the Court should decide whether a presiding judge who had an undisclosed sexual and economic relationship with the complaining witness should be subject to a § 1983 suit by the criminal defendant because the judge failed to recuse or disqualify himself to fuel the relationship.

Fourth, absolute immunity for judges is important as the basis for the application and extension of absolute immunity to prosecutors and other governmental workers, such as state social workers.[12] Review is appropriate because Circuit Courts have inconsistently applied absolute immunity to other state actors. Some Circuit Courts focus on the conduct of the governmental actor while others focus on their function. This inconsistent application should be addressed and reconciled.

---

[12] *Ernst v. Child and Youth Services of Chester County*, 108 F.3d 486 (3d Cir. 1997), *cert. denied*, 522 U.S. 850 (1997); *Holloway v. Brush*, 220 F.3d 767 (6th Cir. 2000).

I. Federal courts have wrongly extended judicial immunity beyond that contemplated in *Stump* to protect judges from civil liability even where the judge's admitted non-judicial conduct violated the due process rights of the accused.

In *Bradley v. Fisher*,[13] the Court first adopted absolute judicial immunity in a case where a lawyer representing a criminal defendant sued the presiding judge under the belief that the judge had ordered him removed from the rolls of attorneys practicing in that court. The *Bradley* court recognized that common law protected judges from liability in civil actions irrespective of the "motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry."[14] The majority reasoned:

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that

[13] 80 U.S. 335 (1872).

[14] *Id.* at 347-48.

> independence without which no judiciary can be either respectful or useful.[15]

Bradley held, therefore, that judges of general jurisdiction are absolutely immune from monetary liability "for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."[16]

Almost one hundred years later, in *Stump v. Sparkman*, the Court again addressed the application and parameters of absolute judicial immunity. *Stump* involved a young woman who had unknowingly been sterilized pursuant to an order entered by a state court judge upon petition by the woman's mother. When the woman married and discovered that she had been sterilized she and her husband filed a civil rights action pursuant to § 1983 against the judge who entered the order for violation of her Fourteenth Amendment due process rights.

The Court reversed the decision of the Seventh Circuit Court of Appeals which refused to apply the doctrine of judicial immunity to the state court judge's actions. The *Stump* majority, citing *Pierson v. Ray*,[17] recognized that § 1983 did not abolish common-law

---

[15] *Id.* at 347.

[16] *Id.* at 335, 352. Justices Davis and Clifford dissented and argued that a judge should not be immune where there were allegations that a judge acted maliciously or corruptly. (J. Davis, dissenting). *Id.* at 357.

[17] 386 U.S. 547 (1967).

judicial immunity. The majority held that a judge acting within his jurisdiction is immune from civil liability for his judicial acts.[18] *Stump* explained that "whether an act by a judge is a 'judicial one' relate[s] to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity."[19]

Justices Stewart, Marshall and Powell dissented. Justice Stewart commented:

> The petitioners' brief speaks of "an aura of deism which surrounds the bench . . . essential to the maintenance of respect for the judicial institution." Though the rhetoric may be overblown, I do not quarrel with it. But if aura there be, it is hardly protected by exonerating from liability such lawless conduct as took place here. And if intimidation would serve to deter its recurrence, that would surely be in the public interest.[20]

McCree was the presiding judge when he initiated then continued his intimate relationship with

---

[18] 435 U.S. at 359-62.

[19] 435 U.S. at 362; *see also Mireles v. Waco*, 502 U.S. 9 (1991) (judicial immunity granted to judge who was alleged to have ordered court officers to use excessive force in bringing an attorney to his courtroom because judicial direction to bring counsel to the courtroom on a pending case was a "judicial act" irrespective of motive).

[20] 435 U.S. at 347 (fn. omitted) (J. Stewart, dissenting).

Mott. He and Mott discussed ex parte how much money King should pay, using the threat of incarceration to "loosen his purse strings" and how McCree should sentence King. McCree and Mott concealed their intimate relationship because they knew it was wrong and procedurally unfair to King.

McCree smuggled Mott's cell phone into the courthouse in violation of court security policies so he and Mott could discuss King's case from the bench. After McCree sentenced King on August 16, 2012, on terms he and Mott had covertly agreed upon, McCree and Mott had sex in his judicial chambers, as they had done countless times before.

None of these undisputed facts were judicial functions or paradigmatic "judicial acts" defined in *Stump*. Yet, it is undeniable that they impacted McCree's ability to be fair, neutral and disinterested.

The Fifth and Fourteenth Amendment guarantees to a fair, impartial and unbiased judge are the bedrock of our judicial system.[21] Without these guarantees there can be no justice.

McCree violated King's federally protected rights to due process of law. Applying judicial immunity to shield McCree from King's § 1983 action for monetary damages does nothing to serve the purposes of

---

[21] *See*, *e.g.*, *Tumey v. Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133, 136 (1955); *Marshall v. Jerrico*, 446 U.S. 238 (1980).

absolute judicial immunity articulated in *Bradley*, *Pierson*, *Stump* and their spawn.

It is inconceivable to King that the Court ever intended *Bradley, Stump* or other precedent to immunize a judge from a § 1983 suit for non-judicial conduct like that exhibited and admitted to by McCree which was inextricably linked to the process.[22] Judicial immunity protects the function or judicial act – not the person who holds the office.[23] Immunity is not intended to insulate judges corrupted by prurient self-interest and gratification (be it unbridled libido or cash) from § 1983 actions from their victimized litigants for clearly non-judicial conduct. Judicial immunity cannot trump constitutional guarantees of due process, especially where the non-judicial acts which violate those guarantees are undisputed and incontrovertible.

If the Court denies Petitioner's writ, citizens will draw the reasonable conclusion that application of judicial immunity to this case is just another example of judges protecting one of their own. The constitutional mandate of due process of law will be perceived as illusory. Application of judicial immunity to

---

[22] Sexual gratification, perhaps more than money, is a powerful form of bribery. The Court cannot ignore this immutable aspect of human nature.

[23] *Forrester v. White*, 484 U.S. 219, 220-21, 229-30 (1988) (administrative acts by a judge, such as hiring and firing court employees, is an administrative function not protected by absolute immunity because it is not a judicial function).

McCree (and any other judge whose corruption is a matter of public record and undisputed fact) will only further erode fading public trust and faith in the judiciary.

This case is an appropriate vehicle for the Court to revisit *Stump*, elucidate a clear test for application of judicial immunity and ensure that lower courts apply the doctrine narrowly to serve its stated purpose.[24]

II. Federal courts are divided and employ inconsistent analysis on the application of judicial immunity for claims filed pursuant to 42 U.S.C. § 1983 for non-judicial acts which violate a criminal defendant's due process of law right to a fair, neutral and impartial judge.

In *Archie v. Lanier*,[25] female litigants sued a state court judge for violating their Fourteenth Amendment due process rights when the judge used his official position to coerce sex from the women. The Sixth

---

[24] Judicial immunity "is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959). The Court has made it clear that the doctrine of immunity should not be applied broadly and indiscriminately, but should be invoked only to the extent necessary to effect its purpose. *See Doe v. McMillan*, 412 U.S. 306, 319-25 (1973).

[25] 95 F.3d 438, 440 (6th Cir. 1996).

Circuit found that the female litigants suffered an injury under § 1983 and denied the judge judicial immunity.

In *King*, both the District Court and Sixth Circuit found that King suffered no injury cognizable under § 1983. The District Court inexplicably concluded that McCree's sexual relationship with Mott did not directly involve King because he was not physically present when the two had sex or met undercover. Pet. App. 41a-45a. The Sixth Circuit found that McCree only dealt directly with King on the three occasions King appeared before McCree in open court. Pet. App. 22a-24a. The Sixth Circuit ignored that McCree and Mott acted in tandem at the appearances engaging in substantive communications ex parte.

The Sixth Circuit found that "King can point to no case supporting his claim that Judge McCree's relationship with Mott, in itself, amounted to a constitutional tort against King." Pet. App. 25a-26a. The Sixth Circuit, therefore, held "that a defendant cannot avoid the bar of judicial immunity by relying on non-judicial, out-of-court acts that may have affected judicial acts. Personal bias alone of a judge – when not serving in a judicial function – does not create a due process violation." Pet. App. 25a.

In its opinion, the Sixth Circuit discussed but misapplied *Wallace v. Powell*, a case decided by the United States District Court for the Middle District of Pennsylvania. Pet. App. 26a-28a. *Wallace* involved a state court judge who conspired to send juveniles to a detention facility in exchange for money. When the scandal was exposed, the judge was sued by multiple defendants he sentenced for, among other things, violating their Fifth, Sixth and Fourteenth Amendment constitutional rights to an impartial tribunal whenever they appeared in the judge's courtroom. The district court found that judicial immunity protected the judge for civil liability for his "courtroom conduct," including sentencing the juvenile defendants from the bench. The district court, however, denied immunity for his non-judicial acts.

The *Wallace* court cited *Marshall*, *Caperton*, *Tumey*, *Murchinson* and other Supreme Court authority which held that the *Due Process Clause* guaranteed criminal defendants the right to an impartial, disinterested and fair tribunal. The *Wallace* court reasoned:

> Embodied in the guarantee of an impartial tribunal is the absolute right to a criminal proceeding conducted by a judge free of bias or pecuniary motivation. [Internal citations omitted]. The Supreme Court has emphasized that the inquiry as to a judge's bias in the due process context requires an objective determination considering "not whether the judge is actually, subjectively biased, but whether the judge in his position is 'likely' to

> be neutral, or whether there is an unconstitutional 'potential for bias.'"[26]

The *Wallace* court, therefore, found that the juveniles sentenced by the judge were injured for purposes of § 1983 when they were denied their constitutional right to an impartial tribunal, irrespective of whether the sentencing judge was actually animated by the bribery scheme.[27]

The *Wallace* court then applied the "setting in motion" theory of causation to the defendant judge.[28] The *Wallace* court explained this theory as follows:

> A person 'subjects' another to the deprivation of a constitutional right, within the meaning of § 1983, if [that person] does an affirmative act, participates in another's affirmative act, or omits to perform an act which [that person] is legally required to do that causes the deprivation of which complaint is made. Indeed, the requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.[29]

---

[26] *Id.* at *15, citing *Caperton*, 556 U.S. at 881.

[27] *Id.* at *16.

[28] *Id.* at *17.

[29] *Id.* at *17. The *Wallace* court noted that the First, Fourth, Fifth, Seventh, Eighth and Ninth Circuit Courts of Appeals have

(Continued on following page)

Accordingly, the *Wallace* court held that the defendant judge's non-judicial acts "set in motion and/or caused the deprivation of Plaintiffs' right to an impartial tribunal" for which judicial immunity did not apply.

The Sixth Circuit's application of judicial immunity to McCree is inconsistent with the holding and the "setting in motion" theory of causation adopted in *Wallace* and other cases. *Wallace* found that non-judicial acts committed by the defendant judge outside the courtroom and the presence of the charged juveniles caused a constitutional injury cognizable under § 1983. Under *Wallace* and the Circuit Court precedent it relied upon, McCree's affair with Mott set in motion the constitutional deprivation suffered by King, *i.e.*, his due process right to an impartial, neutral disinterested judge. *Wallace* conflicts with the Sixth Circuit's holding in *King*. The Court, therefore, should grant Petitioner's writ to address and resolve this inconsistency.

---

adopted the "setting in motion" theory to establish causation for a constitutional injury.

III. No federal court has considered application of *Caperton* to a suit filed under § 1983 against a presiding judge who deprived a criminal defendant of his due process of law right to an impartial tribunal because the judge failed to disqualify or recuse himself where he was constitutionally mandated to do so.

In *Caperton*, the Court found that a state Supreme Court judge violated a litigant's Fourteenth Amendment due process rights to an impartial tribunal where the appellate judge received substantial campaign contributions from the opposing party but refused to recuse or disqualify himself from deciding the case. The due process violation occurred outside of the courtroom and the aggrieved litigant's presence. The Court found a Fourteenth Amendment violation because, under an objective standard, the appellate judge who received the campaign contributions could not be fair. The Sixth Circuit ignored this holding when it found that King suffered no injury for purposes of § 1983 when McCree failed to disqualify or recuse himself while engaged in a closeted affair with Mott.

No federal court has considered *Caperton*'s impact on § 1983 or judicial immunity.

In this case, sex was the *quid pro quo* for Mott's ex parte participation and influence in McCree's deliberation of King's case. McCree could not be fair,

disinterested or impartial while he and Mott carried on their clandestine adulterous relationship.[30] "[McCree] intentionally used his judicial position to advance his own interest by holding on to the King case in order to keep her interested" and relieve economic pressure from Mott.[31] McCree satisfied his sexual appetite at the cost of King's inviolable constitutional guarantees to life, liberty, property and due process of law.

Caperton holds that a judge who fails to disqualify himself when, under an objective standard, he cannot be fair, violates a litigant's due process of law

---

[30] As held by the Michigan Supreme Court:

> In respondent's words in his own defense, "Wade should have recused himself," but the failure to do so resulted in "no harm no foul." We disagree. The "harm" done was to the parties' rights to a fair legal process and the public's right to an impartial judiciary, and the "foul" committed was the resulting violation of Michigan's Code of Judicial Conduct.

In re McCree, 495 Mich. at 56.

[31] *Id.* at 60. The Michigan Supreme Court also noted:

> The defendant in the *King* case owed Mott about $15,000 in child support, and the master found that "the Examiner's theory that some of [respondent's] motivation in having looked after this case and transferring it to a judge of his choice so it would ensure payment of the support and, thus, take off some of the financial pressure that was building for McCree in looking after two families is, by a preponderance, true" as respondent had "advanced money to Mott possibly as much as $6,000."

Id. at 61, footnote 9.

rights. Granting this writ will allow the Court to address whether a criminal defendant – or any litigant – may pursue a § 1983 action against a judge who failed to disqualify himself when he was constitutionally mandated to do so.

IV. Reviewing the scope and application of absolute immunity is necessary because of its impact on immunities for state court prosecutors, social workers and other governmental employees.

In *Imbler v. Pachtman*,[32] the Court extended absolute immunity from § 1983 suits to prosecutors performing prosecutorial functions. Prosecutorial immunity was based on the same considerations for absolute immunity afforded judges and grand jurors under common law.[33]

In *Buckley v. Fitzsimmons*,[34] the Court reiterated that "the *Imbler* approach focuses on the *conduct* for which immunity is claimed, not on the harm that the

---

[32] 424 U.S. 409, 423-24, 428-29 (1976).

[33] *See Kalina v. Fletcher*, 522 U.S. 118, 131-35 (1997) (Justices Scalia and Thomas question whether the Court's "functional" approach to immunity issues has strayed from the common-law foundation for absolute immunity as it existed in 1871, when § 1983 was enacted.).

[34] 509 U.S. 259 (1993).

conduct may have caused or the question whether it was lawful."[35] (Emphasis added).

Various circuits have recognized absolute immunity for other governmental workers who interact with the judiciary. In *Ernst v. Child and Youth Services of Chester County*,[36] the Third Circuit Court of Appeals focused on the *functions* performed by a state social worker and, to the extent they were quasi-judicial in nature, found the social worker absolutely immune from a § 1983 suit. In *Holloway v. Brush*,[37] the Sixth Circuit Court of Appeals took a different approach and refused to grant absolute immunity to a social worker because her *conduct* fell outside her role as a legal advocate. The question of whether the application of immunity should focus on "function" versus "conduct" remains in doubt.

The Court, therefore, should grant the writ to reconcile the inconsistent application of absolute immunity to judges, prosecutors and other state actors to whom it has been applied.

---

[35] *Id*. at 271.

[36] 108 F.3d 486, 495-96 (3d Cir. 1997).

[37] 220 F.3d 767, 779 (6th Cir. 2000).

CONCLUSION

Petitioner Robert King respectfully requests that this Honorable Court grant the writ of certiorari or, in the alternative, summarily reverse the decision of the United States Sixth Circuit Court of Appeals and remand this matter for further proceedings consistent with the Court's order.

Respectfully submitted,

JOEL B. SKLAR
Counsel of Record
LAW OFFICE OF JOEL B. SKLAR
615 Griswold, Suite 1116
Detroit, MI 48226
313-963-4529
joelsklarlaw@gmail.com

Attorney for Petitioner

Dated: October 17, 2014

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 14a0531n.06

No. 13-2033

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT KING, Plaintiff-Appellant, v. WADE MCCREE; GENIENE LA'SHAY MOTT Defendants-Appellants.	)))))))	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN (Filed Jul. 21, 2014)

Before: BOGGS, COLE, and McKEAGUE, Circuit Judges.

BOGGS, J., delivered the opinion of the court, in which COLE and McKEAGUE, JJ., joined. COLE, J., delivered a separate concurrence, in which McKEAGUE, J., joined.

BOGGS, Circuit Judge. Judge Wade McCree, while serving as the presiding judge in a felony child-support case against Robert King, maintained a romantic and sexual relationship with the complaining witness against King. In part as a result of this conduct, the Michigan Supreme Court both removed Judge McCree from judicial office and prospectively suspended him without pay for six years if voters should reelect Judge McCree in November 2014. King

sued Judge McCree under 42 U.S.C. § 1983, alleging that Judge McCree's conduct surrounding his case violated his right to due process of law. The district court determined that Judge McCree is immune from suit under the doctrine of judicial immunity. Because any violation of King's constitutional rights arose purely from Judge McCree's judicial actions, we affirm.

I

A. The First Encounter

In January 2012, Judge Wade McCree was a judge on the Third Judicial Circuit Court in Wayne County, Michigan. Robert King and Geniene La'Shay Mott were the unmarried parents of a five-year-old girl.

On March 12, 2012, the court issued a felony warrant for King's arrest for failing to pay child support, in violation of Mich. Comp. Laws § 750.165. On March 21, 2012, the state arraigned King before Magistrate Renee R. McDuffee, and the court entered a plea of not guilty. The court then transferred King's case to Judge McCree.

On March 28, 2012, Judge McCree held a hearing in King's case, consisting of an arraignment on an information and a preliminary examination. King waived the preliminary examination.

Two months later, on May 21, 2012, Judge McCree conducted a pre-trial hearing in *People v. King,* No. 12-003141-01-FH. Mott, the custodial parent in the state's child-support case against King, was present. King owed Mott $280.50 per month in support, and he owed Mott over $10,000 in total.[1] At the hearing, the state learned that King had made a $400 payment on his arrears that day. Consequently, the court and the parties agreed to a "delayed sentence" in which King agreed to a stipulated payment plan.

During this hearing, Judge McCree met Mott for the first time. As the prosecutor prepared the child-support payment agreement, Judge McCree told Mott: "Ma'am you've been so patient all day and you know, having all this time with my deputy here, let me get a little of it." Judge McCree then asked Mott about her daughter's age and school. Mott told Judge McCree that she had gone years without receiving much payment. Mott told Judge McCree that "[i]f [King] don't have court dates he doesn't pay. If we have to go to court he magically always has the money."

King pleaded guilty to failure to pay child support. Judge McCree entered the delayed sentence, pursuant to Mich. Comp. Laws § 771.1(2), under which the court would withdraw the plea and dismiss

---

[1] At one point, the prosecutor listed the total as $15,000. At another point, the prosecutor listed the total as "[j]ust shy of" $12,000.

the charges if King made his payments for eleven months. Judge McCree scheduled the case for review hearings on August 16 and November 15, 2012.

B. The Spark

The Michigan Judicial Tenure Commission (JTC) ultimately filed a complaint against Judge McCree based on his conduct surrounding *People v. King*. At a hearing before the JTC a year later, Judge McCree recalled what transpired after King's pre-trial hearing ended and court adjourned on March 28, 2012.

"Well, the courtroom had now pretty much cleared," Judge McCree said. "There weren't a half dozen people left in the courtroom[,] and she was chatting with my deputies and so forth[,] and I'm still on the bench doing my paper shuffle. And she's making conversation, and we're all involved in it. Making light conversation. Everybody is into it."

Judge McCree acknowledged that this was not "standard practice." "But," he said, "I confess she was an attractive, striking woman, and, you know, she caught my eye." The JTC examiner asked Judge McCree if he "c[a]me on to her at that point." "Oh, we chatted, sure," Judge McCree said. "As you can probably tell, I'm a bit animated. I'm a rather effervescent personality, and sure, we chatted."

Judge McCree's courtroom deputy dropped Mott's card on Judge McCree's bench, and Judge McCree may have given Mott his business card as well. Judge

McCree could not recall giving Mott his business card, but he acknowledged that it was "quite likely" that he did so.

Judge McCree later described his meeting Mott in a text message to her. It said: "Girl, every man in the damn courtroom was peeping your upscale game." Judge McCree stated that "everyone" referred, in part, to himself. The message also said: "C'mon, U'r talking about the 'docket from hell,' filled w/tatted up, overweight, half-ass English speaking, gap tooth skank hoes . . . and then you walk in." (ellipsis in original). It concluded: "Had Jewell not been [there] that day, I'd have asked Deputy Green to escort you back into chambers so I would be [sic] so obvious giving you my biz card." Judge McCree stated that he sent the message in order to flatter Mott and that he did not intend to demean any litigant who had appeared before him.

Judge McCree testified before the JTC that Mott called his chambers a day or two later. As Judge McCree recalled: "I returned the call to her[,] and we chatted, and she was talkative. She was interesting, and she said, [']Can we get together?['] I said sure. I don't have – I don't see why not." The two made lunch plans for a week later.

On May 30, 2012, Judge McCree and Mott had lunch together in Detroit's Eastern Market area, just east of downtown. The two "hit it off." Mott "had a very interesting lifestyle," Judge McCree testified. "She was – she loved sports and knew sports. She was

not someone who just feigned an interest." They also discussed Mott's work. Mott "claimed to have been in public relations and media consulting work, and obviously a whole lot more, as it did involve intimate – that did involve intimate . . . relations."

Judge McCree knew that Mott was involved in a pending case before him when he made plans with her. Judge McCree said that on both May 21 and on May 30 it did not "dawn on [him]" to transfer King's case.

C. A "Volatile" Relationship

According to Judge McCree, after lunch, on May 30, 2012, Mott texted Judge McCree, telling him that she would like to see him. Judge McCree responded, telling Mott that they should coordinate their "calendars together."

In June 2012, Judge McCree and Mott began a romantic, sexual relationship. At his JTC hearing, Judge McCree described the relationship as "volatile." "Ms. Mott is passionate," Judge McCree stated. "She would be at the apex of euphoria. She'd be at the abyss of near homicidal anger." As Judge McCree recalled, "[A]fter the romance began, I found out that I had to do a lot of things just to pacify her. I had to tell her things she needed to hear to pacify her."

In the course of their relationship, Judge McCree loaned Mott money. Judge McCree estimates that he gave Mott about $6,000. "Her big time is the NBA

season, which, of course, kicks up November, December and then runs through the winter and early spring," Judge McCree said. "She was coming into this sum of money. And Wade, if I could just get, you know – just to tide me over."

Judge McCree acknowledged that, on a few occasions, their trysts took place in his chambers. Judge McCree occasionally escorted Mott through the courthouse's back entrance and into his chambers. Judge McCree acknowledged texting Mott while he was on the bench but denied doing so while court was in session or while he was on the record.

Judge McCree asked Mott to remain discreet about their relationship. He stated that he "obviously made these requests because he was concerned about his wife and family discovering their relationship." On June 20, 2012, Judge McCree allegedly e-mailed Mott: "My Judicial Tenure Commission matter has me nervous, as you might expect. I have to be **real** careful until this matter is put to rest. I can only ask humbly for your indulgence. Sorry." The e-mail also allegedly said: "Second, you are the complaining witness in a case that is before me. Naturally if it got out that we were seeing each other before your B.D.'s [presumably, "baby daddy's"] case close, everybody could be in deep shit."

D. The August 16, 2012, Review Hearing

Judge McCree acknowledged that, during his relationship with Mott, they "probably" discussed

whether King was in compliance with the delayed-sentence agreement. King was scheduled for an August 16, 2012, review hearing before Judge McCree. Judge McCree acknowledged that in the days prior to the hearing, he and Mott exchanged text messages about King's hearing and the potential actions that Judge McCree could take if King were not in compliance with the agreement. Mott allegedly suggested that Judge McCree impose a jail sentence for King unless King paid $2,500 in cash. Judge McCree allegedly responded in a text message: "I figured if he hasn't come current by his courtdate, he gets jail 2 pay. If he says he can bring me the $$, I'll put him on a tether till he brings the receipt 2 FOC [presumably, "friend of court"] or do 'double time'."

According to Judge McCree, he advised Mott that he could not order King to pay more than the consent order required or pay any quicker than the order required. Judge McCree acknowledged that he told Mott that he could send King to jail or place him on a tether until King made payments. These were statements, Judge McCree said, that he made to other complaining witnesses in felony child-support cases. Prior to the August 16 hearing, Mott informed Judge McCree that King was behind on his child-support payments.

On August 12, 2012, Judge McCree and Mott allegedly exchanged additional text messages about King's upcoming review hearing. In these messages, Mott suggested that King pay more than what was required under the delayed-sentence order. Judge

McCree states that he again told Mott that he could not require King to pay more.

On August 16, 2012, the date of King's review hearing, Judge McCree assisted Mott in bringing her cell phone into the courtroom, in violation of courthouse policy. At the hearing, the prosecutor informed Judge McCree that King was $672 short of compliance with the delayed-sentence agreement. King told the court that he had been working as a manager of a bar in Pontiac, Michigan but that assailants robbed him of $2,000 and shot and killed two of his friends. Judge McCree permitted King to pay the money that was owed by the end of the month. Judge McCree also placed King on a "tether" in order to monitor his whereabouts. Judge McCree also advised that the court could remove the tether as soon as King paid what he owed. He stated: "[W]hen $672 o[f] that is paid I'll certainly take the tether off." If King did not pay the money by that time, Judge McCree informed King that he would consider withdrawing the delayed-sentence agreement and imposing a felony conviction. Judge McCree scheduled an additional review hearing for August 29. King alleges that, immediately after the August 16 hearing, Judge McCree and Mott had sex in Judge McCree's chambers.

E. Judge McCree Transfers King's Case

At some point after the August 16 hearing, Judge McCree decided that he needed to transfer King's case to another judge. On September 19, 2012, around

8:46 a.m., Judge McCree allegedly texted Mott: "Running upstairs 2 C if Judge Callahan will 'take' Brother King's case. I'll B N touch w/a quickness:-)" Judge McCree acknowledged that he told the assistant attorney general that he was transferring the case because his son and Mott's son attended a social event together, which, he says, was a true statement because the boys attended a football game "together" at Wayne State University. Judge McCree allegedly told the same information to Chief Judge Timothy Kenney. Judge McCree did not disclose his personal relationship with Mott. Around 9:48 a.m., Judge McCree allegedly texted Mott: "DONE DEAL!!!:-). I told a story so well, I had me believing it!! Brother King is on his way 2 'hangin' Judge Callahan. He fuck up ONCE & he's through!!" That day, Judge McCree entered an order transferring King's case to Judge Callahan.

The court scheduled King for a November 15, 2012, review hearing before Judge Callahan. The clerk noted on King's docket sheet that the assistant attorney general informed the court that King was in compliance with the agreement. The court delayed the review hearing at the prosecutor's request.

On November 15, the day of King's scheduled hearing, Mott allegedly texted King asking why King's hearing before Judge Callahan did not occur. Judge McCree stated that he did not respond. Judge McCree allegedly told Mott he would ask the prosecutor why King's hearing was delayed. Judge McCree

stated that he did not recall speaking with the prosecutor about the November 15 hearing.

F. Denouement

Around October 31, 2012, Judge McCree told Mott that he wished to end their relationship. Mott informed Judge McCree that she was pregnant with his child.

At one point, Mott confronted Judge McCree at his house, causing Judge McCree's wife to contact the police. Mott also confronted Judge McCree during an afternoon in Detroit's Belle Isle park. Additionally, Judge McCree stated that Mott confronted him in the courthouse parking lot, demanding money and his time. Judge McCree also stated that Mott attempted to contact him on his daughter's cell phone.

Consequently, on November 20, 2012, Judge McCree filed a stalking and extortion complaint against Mott with the Wayne County Prosecutor's Office. Judge McCree stated that he told the prosecutor's office that he had a relationship with Mott and that he transferred the case to Judge Callahan. Judge McCree also stated that he told the prosecutor's office that Mott demanded money from him in exchange for an abortion and silence about their relationship.

On December 6, 2012, Mott disclosed the details of her relationship with Judge McCree to a local television reporter. That day, a local television station

broadcast a report about Judge McCree's relationship with Mott.

G. Aftermath

On March 12, 2013, the Michigan JTC filed a formal complaint against Judge McCree based, in part, on his conduct relating to *People v. King*. *See In re Judge McCree,* Formal Compl. No. 93 (Mich. Jud. Tenure Comm'n Mar. 12, 2013), *available at* http://jtc.courts.mi.gov/downloads/FC93.complaint.pdf. Judge McCree acknowledged that his failure to recuse himself from King's case after beginning a relationship with Mott constituted "misconduct in office," in violation of both Mich. Const., art. 6, § 30(2), and Michigan Court Rule 9.205, providing standards for judicial conduct. Judge McCree denied that his relationship with Mott impacted his handling of the King case in any way. Michigan disciplinary rules provide that "conduct that violates the standards or rules of professional conduct adopted by the Supreme Court" constitutes "grounds for discipline." Mich. Ct. R. 9.104(4). Judge McCree acknowledged that he "likely violated" this rule when he conducted King's August 16, 2012, review hearing. Judge McCree further acknowledged that he violated the standards of judicial conduct. Additionally, Judge McCree acknowledged that he violated Canon 3C of Michigan's Code of Judicial Conduct when he did not disqualify himself from King's case before August 16.

After investigation, the Judicial Tenure Commission recommended that that [sic] the Michigan Supreme Court remove Judge McCree from office. *In re Judge McCree,* 845 N.W.2d 458, 459 (Mich. 2014). Judge McCree petitioned the Michigan Supreme Court to reject the JTC's recommendation on the ground that his failure to recuse himself resulted in "no harm no foul." *Id.* at 460. The Michigan Supreme Court determined that Judge McCree's conduct resulted in harm to the "parties' rights to a fair legal process and to the public's right to an impartial judiciary." *Ibid.* The court affirmed the JTC's factual findings and adopted its recommendation. *Id.* at 459. The Michigan Supreme Court removed Judge McCree from office and conditionally suspended him without pay for six years, with the suspension becoming effective only if voters reelect Judge McCree to judicial office in November 2014. *Id.* at 459-60. The court also ordered Judge McCree to pay the JTC $11,645.17 in costs. *Id.* at 460.

The Michigan Supreme Court's published opinion discusses in great detail Judge McCree's relationship with Mott. We limit our description of the facts here to those relevant to King's case. Relevant here, the Michigan Supreme Court found that Judge McCree:

> had an affair with a complaining witness in a case pending before him, had numerous ex parte communications with that witness about the case, extended to her special treatment concerning the case, and caused her reasonably to believe that she was influencing

> how he was handling her case. When their relationship subsequently went sour, he sought to employ the prosecutor attorney's office as leverage against her by concocting charges of stalking and extortion.

Id. at 476.

H. Current Litigation

On February 11, 2013, King sued Judge McCree and Mott in federal court. King sued Judge McCree under 42 U.S.C. § 1983, alleging that Judge McCree violated his due-process rights, in violation of the Fifth and Fourteenth Amendments. In a separate count, King alleged, under § 1983 and § 1985, that Judge McCree and Mott conspired to violate his due-process rights.

The district court granted Judge McCree's motion to dismiss. *See King v. McCree,* No. 13-10567, 2013 WL 3878739, at *6 (E.D. Mich. July 26, 2013). The district court recognized judicial immunity for Judge McCree from a civil lawsuit arising out of his judicial actions. *Id.* at *5. The court determined that immunity also extended to King's § 1983 conspiracy count against Judge McCree. *Ibid.* The court also found that King's claim, to the extent based on § 1985, failed to state a claim because it was not plausibly based on class-based animus. *Ibid.* The court permitted the § 1983 conspiracy claim to proceed against Mott. *Id.* at *5 n.2.

On August 1, 2013, King appealed the district court's order dismissing the case against Judge McCree. At that time, King's case against Mott remained pending. On August 13, 2013, we directed King to show cause why we should not dismiss his appeal for lack of jurisdiction. On August 14, 2013, the district court accepted King's and Mott's stipulated order and dismissed the case against Mott without prejudice. On September 4, 2013, we withdrew the show-cause order and ordered that the appeal proceed on the merits.[2]

[2] McCree argues that we lack appellate jurisdiction. *See* Appellee Br. x-xiii. We previously held that the district court's August 14, 2013, order resolved all pending claims and rendered the July 26, 2013, order final and appealable. Order, *King v. McCree,* No. 13-2033 (6th Cir. Sept. 4, 2013), ECF No. 22. King moved for reconsideration of our order withdrawing the show-cause order, and a three-judge panel denied King's motion. Order, *King v. McCree,* No. 13-2033 (6th Cir. Nov. 6, 2013), ECF No. 54.

"[T]he law-of-the-case doctrine . . . expresses the practice of courts generally to refuse to reopen what has been decided." *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817 (1988) (internal quotation marks omitted). We retain the power to revisit prior decisions, "although as a rule [we] should be loathe [sic] to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Ibid.* (internal quotation marks omitted). McCree has not demonstrated that extraordinary circumstances merit revisiting our prior rulings.

II

We review de novo a district court's determination about judicial immunity. *See Bright v. Gallia Cnty., Ohio,* ___ F.3d ___, Nos. 13-3451 & 13-3907, 2014 WL 2457629, at *4 (6th Cir. June 3, 2014). Judge McCree, as the party claiming judicial immunity, bears the burden of establishing that judicial immunity is proper. *See ibid.* (citing *Antoine v. Byers & Anderson, Inc.,* 508 U.S. 429, 432 (1993)).

III

A

Section 1983 provides a federal cause of action against state officials for the deprivation of constitutional rights under color of state law. 42 U.S.C. § 1983. Similarly, § 1985 provides a federal cause of action against persons who conspire to deprive an individual of "equal protection of the laws" or of "equal privileges immunities under the laws." 42 U.S.C. § 1985(3). Here, King alleges that Judge McCree violated his Fifth and Fourteenth Amendment due-process right and that Judge McCree conspired with Mott to do so.

At common law, judges received immunity from liability for damages for acts committed within their "judicial jurisdiction." *Pierson v. Ray,* 386 U.S. 547, 554 (1967). The Supreme Court formally adopted the doctrine in 1871. *Bradley v. Fisher,* 80 U.S. 335

(1871).[3] That year, the Court held that "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* at 347. "If civil actions could be maintained . . . against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be

---

[3] This fascinating case concerns the aftermath of the assassination of President Lincoln.

In June 1867, the government tried John H. Suratt in District of Columbia criminal court for Lincoln's murder. *Bradley v. Fisher,* 80 U.S. 335, 344 (1871). At trial, Suratt was represented by attorney Joseph Habersham Bradley, and George P. Fisher was the presiding "justice." *Ibid.* Fisher claimed that one day after recessing court, he was descending from the bench when Bradley "accosted [him] in a rude and insulting manner," "charging [Fisher] with having offered [Bradley] a series of insults from the bench from the commencement of the trial." *Ibid.* According to Fisher's account, he "disclaimed any intention of passing any insult whatever" and "assured [Bradley] that he entertained for him no other feelings than those of respect" but that Bradley "so far from accepting this explanation," "threatened [Fisher] with personal chastisement." *Ibid.* Fisher then entered an order barring Bradley from practicing before that court. *Ibid.*

Bradley complained against Fisher. The United States Supreme Court held that Fisher's removal of Bradley from the bar could not provide the basis for action against Fisher. *Id.* at 356. The Court determined that Fisher could not be liable for damages for his judicial act. *Id.* at 357.

entirely swept away." *Id.* at 348. The Supreme Court made clear the proper penalty for judges who act "with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively" "in the exercise of the powers with which they are clothed as ministers of justice:" such judges "may be called to an account by impeachment and suspended or removed from office." *Id.* at 350.

The doctrine of judicial immunity exists "not for the protection or benefit of a malicious or corrupt judge" but for "the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequence." *Pierson,* 386 U.S. at 554. Section 1983, enacted in 1871, did not abolish judicial immunity. *Ibid.*; *see Stump v. Sparkman,* 435 U.S. 349, 356 (1978) ("[J]udicial immunity . . . appli[es] in suits under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983.")[4]

The Court has clarified that judicial immunity is immunity not just from the ultimate assessment of damages but is immunity from suit itself. *Mireles v. Waco,* 502 U.S. 9, 11 (1991) (per curiam). A plaintiff may overcome judicial immunity in only two circumstances. *Ibid.* Relevant here is the exception for

[4] President Grant signed into law the bill containing § 1983 on April 20, 1871. The Supreme Court decided *Bradley* on December 1, 1871. Even aside from the Court's express holding in *Pierson,* that alone might suggest that the passage of § 1983 did not abolish judicial immunity.

"nonjudicial actions, *i.e.,* actions not taken in the judge's judicial capacity." *Ibid.*[5] "[T]he proposition that judicial immunity extends only to liability for 'judicial acts' was emphasized no less than seven times in Mr. Justice Field's opinion for the Court in the *Bradley* case." *Stump,* 435 U.S. at 365 (Stewart, J., dissenting). Two factors determine whether an act is a "judicial" one: "the nature of the act itself, *i.e.,* whether it is a function normally performed by a judge" and also "the expectations of the parties, *i.e.,* whether they dealt with the judge in his judicial capacity." *Stump,* 435 U.S. at 362 (majority opinion). Courts must "look to the particular act's relation to a general function normally performed by a judge." *Mireles,* 502 U.S. at 288. Under this "functional approach," "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester v. White,* 484 U.S. 219, 224, 227 (1988).

The Supreme Court has offered several examples of acts that are "judicial" within the meaning of its judicial-immunity doctrine. These include: entering

---

[5] The second exception is for actions "taken in the complete absence of all jurisdiction." *Mireles,* 502 U.S. at 12. We recently considered the scope and nature of this exception. *See Bright v. Gallia Cnty., Ohio,* ___ F.3d ___, Nos. 13-3451 & 13-3907, 2014 WL 2457639, at *6-8 (6th Cir. June 3, 2014). It was also the subject of our decision in *Stern v. Mascio,* 262 F.3d 600 (6th Cir. 2001).

Here, King does not argue that McCree's actions were taken in the absence of all jurisdiction.

an order striking an attorney's name from the roll of attorneys entitled to practice before the bar, *Bradley,* 80 U.S. at 356-57; adjudging parties guilty when their cases are before a judge's court, *Pierson,* 386 U.S. at 553; and approving petitions relating to the affairs of minors, *Stump,* U.S. at 362. In *Mireles,* a state public defender alleged that after he failed to appear for the initial call of a judge's morning calendar, the judge "ordered police officers 'to forcibly and with excessive force seize and bring plaintiff into his courtroom.'" *Mireles,* 502 U.S. at 10 (quoting certiorari petition). The Ninth Circuit denied immunity for the judge on the ground that authorizing the use of excessive force is not a judicial act. *Id.* at 11. With neither briefing nor argument, the Supreme Court summarily reversed, holding that ordering court officers to bring a person before a judge is a judicial act. *Id.* at 12.[6]

On the other hand, the Court has held that the act of demoting and discharging a court employee, along with other acts "involved in supervising court employees and overseeing the efficient operation of a court," is not a "judicial" one. *Forrester v. White,* 484 U.S. 219, 229 (1988). Judges who perform these acts do so in an "administrative capacity" only. *Ibid.*

---

[6] Justice Stevens dissented on the merits. *See Mireles,* 502 U.S. at 14. Justices Scalia and Kennedy dissented from the decision granting certiorari and also from the decision to decide the case without briefing and argument. *See id.* at 15.

B

1

King complains of multiple acts taken by Judge McCree. If these acts are "judicial," then Judge McCree is immune from suit under the doctrine of judicial immunity. *See Stump,* 435 U.S. at 359. In deciding whether Judge McCree's actions are judicial, we look to both "the nature of the act itself" and "the expectations of the parties." *See id.* at 362.

The district court correctly identified three actions taken by Judge McCree that involved King directly. These are: Judge McCree accepting King's guilty plea and entering the delayed-sentence agreement on May 21, 2012; Judge McCree extending King additional time to pay the money that was owed and Judge McCree placing King on a "tether" on August 16, 2012; and Judge McCree transferring the case to "hangin" Judge Callahan on September 18, 2012.

As for the May 21 actions, at the time Judge McCree accepted King's plea and entered the delayed-sentence agreement, Judge McCree had not begun his relationship with Mott. The May 21 actions, then, likely did not deprive King of due process. Additionally, as for the September 18 actions, Judge McCree's act of transferring the case to another judge was certainly improper insofar as he did not do so sooner and may have been improper insofar as he intentionally transferred the case to a judge whom he believed to give harsh sentences.

At any rate, the district court correctly held that *all acts* taken by Judge McCree directly involving King were judicial ones. *See King,* 2013 WL 3878739, at *4-5. As in *Stump* itself, both *Stump* factors point in the same direction. First, we consider "the nature of the act itself, *i.e.,* whether it is a function normally performed by a judge." *Stump,* 435 U.S. at 362. Judge McCree's actions involved accepting a guilty plea, entering a delayed-sentence agreement, affording King apparent leniency in implementing a sentence agreement, placing King on a tether, and transferring King's case to another judge. These are functions undoubtedly "normally performed by a judge." *Stump,* 435 U.S. at 349. Second, we consider "the expectations of the parties, *i.e.,* whether they dealt with the judge in his official capacity." *Stump,* 435 at 362. King dealt with Judge McCree as the presiding judge in his felony child-support case. The interactions occurred in a courtroom and King's counsel was present, as were a lawyer for the state and a court reporter. The proceedings occurred on the record. They were also notated on the docket sheet. Because Judge McCree performed acts normally performed by judges and because he did so in his capacity as a state circuit court judge, his acts were "judicial." Accordingly, he receives judicial immunity.

On August 16, 2012, at the time of King's review hearing before Judge McCree, King was not in compliance with his delayed-sentence agreement. King was behind $672 on the agreement. Judge McCree noted that he could have sent King to "have a date

across the street" – presumably to jail. Instead, Judge McCree allowed King to pay the money that was owed by the end of the month. Additionally, Judge McCree placed a tether on King. Judge McCree may not have treated King differently from other similarly situated litigants. Assuming, arguendo, that Judge McCree's relationship with Mott motivated him on August 16 or that Judge McCree acted in bad faith on that date, the district court nonetheless correctly applied Supreme Court law: "A judge will not be deprived of immunity because the action he took . . . was done maliciously." *Stump,* 435 U.S. at 356; *see King,* 2013 WL 3878739, at *5; *see also Bright,* ___ F.3d. ___, WL 2457629, at *6 (recognizing judicial immunity even when a judge's actions "were petty, unethical, and unworthy of his office.").

2

On appeal, King argues that Judge McCree's non-judicial acts deprived him of due process. Specifically, King argues that he was "personally and directly deprived of [the constitutional guarantee of due process] every time Judge McCree and Mott engaged in any extrajudicial contact." Appellant Br. 21. King also argues: "Plaintiff's due process rights were violated when McCree and Mott had sex in chambers and elsewhere, when they spent time together outside the courtroom, discussed and decided how to sentence Plaintiff for his late child support payments." *Ibid.* Before the district court, King identified other allegedly non-judicial acts by Judge McCree that deprived

him of due process, including: flirting with Mott from the bench on May 21, engaging in ex parte communications with Mott, giving Mott his business card, having lunch with Mott, "hav[ing] sex repeatedly" with Mott, having sex with Mott in his chambers, giving Mott $6,000, secretly discussing with Mott using jail to loosen King's "purse strings," and instructing Mott not to disclose the affair in order to avoid "deep shit."[7] Appellant Br. 20 n.16. At oral argument, King's counsel argued that the depth and number of these non-judicial acts, as well as the intimacy of Judge McCree's personal relationship with Mott, makes this case exceptional. King's counsel described his theory as "death by a thousand cuts."

These acts, though often reprehensible, did not directly involve King. The district court correctly determined that these acts could not, without more on Judge McCree's part, deprive King of due process. *See King,* 2013 WL 3878739, at *4. "In the Sixth Circuit, a section 1983 cause of action is entirely personal to the direct victim of the alleged constitutional tort."[8]

---

[7] We accept King's assertion that McCree's personal relationship with Mott consisted of non-judicial acts. *See Archie v. Lanier,* 95 F.3d 438, 444 (6th Cir. 1996) (Merritt, C.J., concurring) ("Yielding to an unruly libido is not the exercise of judicial power, or somehow like or related to the performance of judicial duties. . . . A judge's long study of the law does not proceed from sexual appetites, even though we may sometimes say that 'the law is a jealous mistress.' ").

[8] To be sure, we made this statement in the context of discussing the identity of persons whose injuries may give rise to a

(Continued on following page)

Claybrook v. Birchwell, 199 F.3d 350, 357 (6th Cir. 2000). King can point to no case supporting his claim that Judge McCree's relationship with Mott, in itself, amounted to a constitutional tort against King. King relies on the following language from *In re Murchison,* 349 U.S. 133, 136 (1955): "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." But this right extends to what occurs *in trials and tribunals.* This language suggests, at most, that Judge McCree's presiding over King's case violated King's due-process right – not that Judge McCree's non-judicial acts violated King's constitutional right. *Murchison* does not support King's claim that Judge McCree deprived King of due process every time Judge McCree engaged in extra-judicial contact with Mott. We hold that a defendant cannot avoid the bar of judicial immunity by relying on non-judicial, out-of-court acts that may have affected in-court, judicial acts. Personal bias alone of a judge – when not serving in a judicial function – does not create a due-process violation.[9]

---

§ 1983 harm. *See Claybrook,* 199 F.3d at 357. King seeks to recover for injuries allegedly sustained only by him – not by other persons. But the underlying principle is similar: King must point to actions by McCree that directly deprived him of due process. King's argument, essentially, is that McCree's non-judicial acts affected McCree's judicial acts. But King cannot rely on this argument to escape the bar of judicial immunity.

[9] A due-process violation may, however, occur when the biased judge assumes the bench and presides over an actual case. *See Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980) ("The Due

(Continued on following page)

The district court held that even if King could proceed against Judge McCree under § 1983 for Judge McCree's non-judicial acts, King's claims would fail because Judge McCree was not "acting under color of state law." *King,* 2013 WL 3878739, at *4. On appeal, King argues that Judge McCree "acted under color of state law when he used his position as the presiding judge to satisfy his sexual desire." Appellant Br. 23. Because Judge McCree's non-judicial acts did not deprive King of due process, we need not decide whether Judge McCree was acting under color of law when engaging in his relationship with Mott. *See Stump,* 435 U.S. at 369 n.6 (dissenting opinion) (declining to decide whether judge was acting under color of state within the meaning of § 1983 when judge approved a petition relating to the affairs of a minor).

3

Although King does not discuss it, we are aware of the ongoing civil litigation against a former Pennsylvania state-court judge in which a district court held the former judge liable for his non-judicial acts that violated plaintiffs' civil rights. That case is substantially different. *See Wallace v. Powell,* Nos. 3:09-cv-286/0291/0357/0630/0357/2535, 3:10-cv-1405, 2014 WL 70092 (M.D. Pa. Jan. 9, 2014).

Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.").

Mark Ciavarella, a former Pennsylvania juvenile-court judge, conspired with another judge and developers to construct and finance a new juvenile-detention facility and then to send juveniles to that facility, in exchange for kickbacks from the developers. *See id.* at *4-6. Between 2003 and 2007, while the conspiracy was ongoing, Ciaverella placed 217 to 330 juveniles in the new detention facility each year; between 2009 and 2011, after the conspiracy ended, the county juvenile court placed 31 to 38 juveniles in detention each year. *Id.* at *6. Ciavarella received over $2.7 million as part of his role in the conspiracy. *Ibid.* A federal grand jury indicted Ciavarella for racketeering, fraud, money laundering, extortion, bribery, and federal tax violations in connection with the conspiracy. *Id.* at *7. A federal judge sentenced Ciavarella to 28 years of imprisonment.

Multiple plaintiffs sought to hold Ciavarella civilly liable for violating their civil rights and for conspiracy to do so. *Id.* at *8. Even under these truly conscience-shocking, extraordinary circumstances, the district court recognized that Ciavarella received judicial immunity for his judicial acts – namely, finding the juveniles delinquent and sentencing them to the detention facility. *Id.* at *1. The district court said: "[B]ecause the law requires that judges no matter how corrupt . . . are immune from suit, former Judge Ciavarella will escape liability for the vast majority of his conduct in this action." *Ibid.*

The court, however, held Ciavarella liable for non-judicial acts that directly harmed the plaintiffs.

See id. at *9-12. These acts included: appearing on television to urge the shutdown of an old county-run detention facility, aiding the new detention center in staffing the facility with employees of the old facility, enacting an administrative zero-tolerance policy that resulted in more juveniles receiving detention, persuading another judge to join the conspiracy, proposing the construction of the new facility, introducing two of the facility's developers, failing to disclose payments, and actively concealing payments. *Id.* at *9-10. Under a "setting in motion" theory of causation in which "[a] person 'subjects' another to the deprivation of a constitutional right . . . by setting in motion a series of acts *by others* which the actor knows or reasonably should know would cause *others* to inflict the constitutional injury," the court held that these non-judicial acts directly caused the deprivation of plaintiffs' rights to an impartial tribunal. *Id.* at *11 (emphasis added).

As we see the case, Ciavarella's non-judicial acts not only "set in motion" the deprivation of the plaintiffs' rights but *directly* deprived the plaintiffs of their rights. Ciavarella was part of a scheme to deprive juveniles of their liberty who otherwise might not be so deprived.

C

Judge McCree receives judicial immunity under existing Supreme Court law. We note, however, that whether judges *should* receive judicial immunity for

all judicial acts is a question not free from doubt. In 1871, in *Bradley* itself, Justices Davis and Clifford dissented "from the rule laid down by the majority of the court, that a judge is exempt from liability in a case like the present, where it is alleged . . . that he acted maliciously and corruptly." *Bradley,* 80 U.S. at 357. In their view, judges who act maliciously should be "subject to suit the same as a private person would be under like circumstances." *Ibid.*

Additionally, in *Stump,* of the eight Justices to hear the case,[10] three dissented from the decision creating the Court's two-factor test to determine which acts are "judicial." *See Stump,* 435 U.S. at 364-69 (Stewart, Marshall, & Powell, JJ., dissenting). The dissenting Justices proposed an alternative test relying on the underlying rationale for judicial immunity. *See id.* at 368. They would have adopted a test that considered, in part, whether a judge's act occurred in the course of a case, whether litigants were present, whether the losing party could appeal, and whether there was even a pretext of principled decision-making. *See id.* at 368-69. For Justice Powell, the dispositive factor was whether a judge's act precluded "any possibility for the vindication of [an individual's] rights elsewhere in the judicial system." *Id.* at 369 (Powell, J., dissenting separately).[11]

---

[10] Justice Brennan did not sit. *See Stump,* 435 U.S. at 364.

[11] McCree's acts would be "judicial" even under the tests proposed by both dissenting opinions in *Stump.*

Nor has the Court spoken with a single voice in determining what qualifies as a judicial act even under the accepted *Stump* test. In *Mireles,* Justice Stevens dissented, arguing that a judge's ordering officers to commit a battery "has no relation to a function normally performed by a judge" and is, therefore, a non-judicial act. *Mireles,* 502 U.S. at 14. Justices Scalia and Thomas have also questioned whether the Court's "functional" approach to immunity questions has strayed significantly from the common-law foundation for absolute immunity as it existed in 1871, when § 1983 was enacted. *See Kalina v. Fletcher,* 522 U.S. 118, 131-35 (1997) (Scalia & Thomas, JJ., dissenting).

Our task on appeal, though, is limited to applying the law of the "one supreme Court." U.S. Const., art. III., § 1. The Supreme Court's judicial-immunity doctrine has remained undisturbed for decades. Under existing Supreme Court law, Judge McCree is immune from suit under the doctrine of judicial immunity.

IV

We AFFIRM the district-court judgment.

COLE, Circuit Judge, concurring. What dark days for the Michigan court system, whose Hall of Justice is inscribed with the words "freedom," "truth," "equality," and perhaps most importantly – "justice."

Through a deeply troubling pattern of personal and professional misconduct, as well as a long line of salacious news headlines that followed, Circuit Court Judge Wade McCree may as well have taken a sand-blaster to those inscriptions. Casual readers of this opinion (as well as the plaintiff-appellant, Robert King) may erroneously conclude that, by affirming the grant of absolute judicial immunity from suit for personal damages, we are somehow endorsing Judge McCree's conduct or going out of our way to protect one of our own. Though constrained by precedent to grant immunity, we do nothing of the sort.

In this case, there is no debate that Judge McCree failed to meet even the most basic expectations for members of the judiciary. The Michigan Supreme Court recently determined that he had a sexual affair with Geniene La'Shay Mott, who was a complaining witness in a case before him; that he regularly engaged in ex parte communications with Mott regarding the status of the case, even while he was sitting on the bench, which led her to believe that she could influence his judicial decisions; that he asked Mott to keep their relationship confidential because of a then-pending Judicial Tenure Commission investigation regarding his previous conduct toward a female deputy sheriff; that he intentionally used his judicial position to advance his own interests by holding on to the *King* case to keep Mott interested in him; and that he failed to recuse himself from the case as soon as he started the relationship with Mott. *In re McCree,* 845 N.W.2d 458, 460-62 (Mich. 2014).

As a result, the Michigan Supreme Court removed Judge McCree from office and conditionally suspended him without pay for six years beginning on January 1, 2015, on the off chance that Wayne County voters might re-elect him to office this fall. *Id.* at 476.

I applaud the Michigan Supreme Court for taking these actions and for doing its level best to restore some measure of dignity and integrity to the bench that Judge McCree so sullied. That said, King's suit seeking to hold Judge McCree personally liable for damages is not the solution. "Generally, we rely upon the judges further up the judicial hierarchy to review and correct the rulings of lower courts." *Bright v. Gallia Cnty., Ohio,* ___ F.3d ___, Nos. 13-3451 & 13-3907, 2014 WL 2457629, at *1 (6th Cir. June 3, 2014) "Only in a few circumstances do we allow lawsuits against individual judges to proceed, and for good reason." *Id.* While Judge McCree's misconduct was worthy of removal from office, *see McCree,* 845 N.W.2d at 476, the majority opinion properly and persuasively concludes that his misconduct does not fit within one of the narrow exceptions to absolute judicial immunity.

Absolute judicial immunity remains "strong medicine." *Forrester v. White,* 484 U.S. 219, 230 (1988) (internal quotation marks omitted). At times, its application will seem over-inclusive – shielding from suits for damages those who clearly have abused their office and tarnished the reputation of the judiciary. This is the price we all must pay for "the benefit of the public, whose interest it is that judges should

be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray,* 386 U.S. 547, 554 (1967) (internal quotation marks omitted). I take solace knowing that the Michigan Supreme Court has already stepped in and rendered the best justice possible: removing Judge McCree from office. Accordingly, I join the majority in affirming the district court's grant of judicial immunity and dismissal of King's suit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT KING,

Plaintiff,

v. Case No. 13-10567

WADE McCREE AND GENIENE La'SHAY MOTT, HON. AVERN COHN

Defendants. /

MEMORANDUM AND ORDER GRANTING DEFENDANT WADE McCREE'S MOTION TO DISMISS COMPLAINT (Doc. 15)[1]

I. INTRODUCTION

In this 42 U.S.C. §§ 1983 and 1985 case, Plaintiff Robert King (King) claims that his child's mother, Geniene La'Shay Mott (Mott), and Wayne County Circuit Court Judge Wade McCree (McCree) conspired to deprive King of his Fifth and Fourteenth Amendment due process rights while he was a defendant in a child support matter on McCree's docket. King says that during this time, Mott and McCree were carrying on a secret sexual relationship. The complaint is in two counts:

[1] Although originally scheduled for hearing, upon review of the papers, the Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); E.D. Mich. LR 7.1(f)(2).

Count I Fourteenth Amendment Due Process – § 1983 (McCree); and

Count II Conspiracy to Violate Fourteenth and Fifth Amendment Rights – §§ 1983, 1985 (McCree and Mott).

Now before the Court is McCree's motion to dismiss the complaint based on judicial immunity. The motion is GRANTED. The reasons follow.

II. BACKGROUND

The factual allegations in King's complaint (Doc. 1) are accepted as true for purposes of McCree's motion to dismiss and are summarized below. *See Barney v. PNC Bank, Nat. Ass'n,* 714 F.3d 920, 923 (6th Cir. 2013) (citing *Handy – Clay v. City of Memphis, Tenn.,* 695 F.3d 531, 535 (6th Cir. 2012) ("Because we are reviewing the district court's order of dismissal under Fed. R. Civ. P. 12(b)(6), we must accept as true the facts set out in the complaint.")).

King and Mott are the biological parents of a six-year-old child. Mott has sole custody of the child; King is required to make child support payments to Mott.

After neglecting to make multiple child support payments over a period of years, the State of Michigan brought a criminal felony non-support case against King in the Wayne County Circuit Court. The case, *People of the State of Michigan v. Robert King,*

No. 12-3141, was randomly assigned to McCree's docket.

On May 21, 2012, King appeared before McCree for a pretrial hearing. The complaining witness, Mott, was also present in the courtroom. A transcript of the hearing shows that King pleaded guilty to failure to pay child support. In exchange, King was placed on a "delayed sentence" under Mich. Comp. Laws § 771.1(2). The delayed sentence required King to pay $280.50 per month for current support and $50.00 per month for arrears until April of 2013. If King complied with the payment schedule until April of 2013, he would be eligible to withdraw his plea and have the case dismissed.

Beginning at the May 21 hearing, McCree started an improper relationship with Mott. King's complaint says:

> 21. Defendant McCree noted on the record that he was aware of Defendant Mott's presence in the courtroom throughout the morning.
>
> 22. Acting on his sexual impulse and desire, Defendant McCree began to flirt with Mott and Mott, for her own purposes, reciprocated by flirting with McCree.
>
> 23. Alone in the courtroom, following the hearing, Defendants spoke with each other ex parte and soon thereafter began a sexual relationship.

> 24. Over the months that followed, Defendants' sexual relationship rapidly intensified.
>
> 25. Among other things, Defendants' illicit relationship involved outings and sexual trysts in various locations including Defendant McCree's judicial chambers.
>
> 26. During these secret sexual liaisons, and at other times, Defendants discussed how to pressure and obtain larger and more immediate child support payments from Plaintiff at an upcoming child support review hearing, including incarcerating and tethering Plaintiff until he paid the money demanded by Mott.

(Doc. 1 at 4, Pl.'s Compl. ¶¶ 21-26).

On August 16, 2012, King appeared before McCree for a case review hearing. At this time, King was not in compliance with the delayed sentence agreement. The complaint says that, between the May 21 and August 16 hearings, King was $672.00 short of the total required payments. The complaint goes on to say that, acting on his "prurient whims and desires for sexual gratification," McCree ordered that King be placed on a tether until getting caught up with the child support payments.

The Register of Actions in King's case indicates that the tether was removed four days later on August 20, 2012.

King's case was transferred to another Wayne County Circuit Court judge on September 18, 2012.

III. STANDARD OF REVIEW

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of a complaint. To survive a Rule 12(b)(6) motion to dismiss, the complaint's "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 545 (2007). *See also Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio,* 502 F.3d 545, 548 (6th Cir. 2007). The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). Moreover, "[o]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679. Thus, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* In sum, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Id.* at 678 (internal quotation marks and citation omitted).

IV. DISCUSSION

McCree says he is entitled to absolute judicial immunity from a § 1983 suit arising out of his judicial actions. McCree also contends that King fails to state a claim of conspiracy under § 1985. He is correct.

A. Fourteenth Amendment Due Process – § 1983 (Count I)

In Count I, King seeks to impose liability on McCree for a violation of his due process rights under the Fourteenth Amendment. King fails to state a claim upon which relief can be granted because McCree is entitled to absolute immunity for his judicial actions.

1. The Law

The Supreme Court has long recognized that, "[a]lthough unfairness and injustice to a litigant may result on occasion," a "judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Mireles v. Waco,* 502 U.S. 9, 10 (1991) (quoting *Bradley v. Fisher,* 80 U.S. 335, 347 (1872) (internal quotation mark omitted)). To carry out their judicial actions without fear of personal consequences, judges are entitled to absolute judicial immunity from § 1983 civil suits. *Pierson v. Ray,* 386 U.S. 547, 553-54 (1967); *Barnes v. Winchell,* 105 F.3d 1111, 1115 (6th Cir. 1997).

Absolute judicial immunity can only be overcome in two circumstances. First, "a judge is not immune from liability for nonjudicial actions, *i.e.,* actions not taken in the judge's judicial capacity." *Mireles,* 502 U.S. at 11 (citing *Forrester v. White,* 484 U.S. 219, 227-29 (1988); *Stump v. Sparkman,* 435 U.S. 349, 360 (1978)). Second, "a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Id.* at 12 (citations omitted).

2. McCree is Absolutely Immune

King says that McCree is not entitled to absolute judicial immunity for his actions. King contends that McCree allowed Mott to dictate how to pressure King into making higher and more immediate child support payments, which included placing King on a tether. King does not dispute that McCree had jurisdiction to place him on a tether and order him to make child support payments. Instead, King argues that the actions taken by McCree were not judicial actions. The Court therefore limits its analysis in determining whether McCree's acts were judicial acts.

King explains McCree's purported nonjudicial actions in his response brief:

> It was not a judicial act to flirt with Ms. Mott from the bench when he first saw her on May 21, 2012. It was not a judicial act to pursue her in the courtroom. It was not a judicial act to engage in *ex parte* contact and give her his

> judicial business card with instructions to contact him. It was not a judicial act to have a lunch date with Ms. Mott on May 30, 2012. It was not a judicial act to have sex repeatedly with Ms. Mott, including in judicial chambers. It was not a judicial act to text Ms. Mott from the bench about his desire to "jerk off." It was not a judicial act to allow Ms. Mott to take up residence at his deceased mother's Ann Arbor home. It was not a judicial act to give Mott $6,000. It was not a judicial act when he and Ms. Mott secretly discussed using the threat of jail to "loosen [Plaintiff's] purse strings." It was not a judicial act to instruct Mott to keep their affair quiet while he presided over [the child support matter], lest Defendants find themselves in "deep shit[."].

(Doc. 18 at 21-22, Pl's. Resp. Br.).

Unfortunately for King, none of the acts he complains of involved McCree dealing with him; they involved McCree and Mott. King's § 1983 claims cannot, as a matter of law, be based on actions taken by McCree that did not directly involve King. Indeed, "[a] § 1983 cause of action is entirely personal to the direct victim of the alleged constitutional tort." *Carmichael v. City of Cleveland,* 881 F.Supp.2d 833, 844-45 (citing *Jaco v. Bloechle,* 739 F.2d 239, 241 (6th Cir. 1984); *Claybrook v. Birchwell,* 199 F.3d 350, 357 (6th Cir. 2000)). Thus, "[n]o cause of action lies under § 1983 for collateral injuries allegedly suffered personally by another." *Id.* (citation omitted).

Further, even if King could state a § 1983 claim against McCree for the above acts, none of the specific acts involved McCree acting under "color of state law." To state a claim under § 1983, King must show that his alleged constitutional violations were committed by McCree while he was "acting under color of state law." *West v. Atkins,* 487 U.S. 42, 48 (1988). This requires McCree to have "exercised power 'possessed by virtue of state law and made possible only because [McCree] is clothed with the authority of state law.'" *Id.* at 49 (citations omitted). This is not the case here. McCree's relationship with Mott was personal. McCree's private pursuit of Mott was not "under color of state law" solely because of his status as a judge. He was not "acting in his official capacity or . . . exercising his [official] responsibilities pursuant to state law" when he pursued a personal relationship with Mott. *Id.* at 50 (citing *Parratt v. Taylor,* 451 U.S. 527, 535-36 (1981); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 152 (1970); *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 157 n.5 (1978)). Although McCree was acting under color of state law when presiding over King's child support case, he was not similarly doing so in his personal relationship with Mott.

The facts alleged in the complaint state only three actions taken by McCree that directly involved King:

1. On May 21, 2012, McCree accepted King's guilty plea, designated a payment plan and approved a delayed sentence;

2. On August 16, 2012, McCree placed King on a tether because of his failure to abide by the payment plan; and

3. On September 18, 2012, McCree recused himself from King's case; the case was transferred to another judge.

These acts are judicial acts.

The Supreme Court has "made clear that whether an act by a judge is a 'judicial' one relate[s] to the nature of the act itself, *i.e.,* whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.,* whether they dealt with the judge in his judicial capacity." *Mireles,* 502 U.S. at 12 (quoting *Stump,* 435 U.S. at 362) (internal quotation marks and citation omitted). In other words, courts "look to the particular act's relation to a general function normally performed by a judge." *Id.* at 13. Here, accepting a guilty plea, enforcing a payment plan, approving a delayed sentence, placing King on a tether for failure to abide by the payment plan, and transferring King's case to another judge are all acts relating to a general function normally performed by a judge. Indeed, "a judge who assigns a case, considers pretrial matters, and renders a decision acts well within his or her judicial capacity." *John v. Barron,* 897 F.2d 1387, 1392 (7th Cir. 1990).

That McCree's sexual relationship with Mott may have motivated him to act unfavorably towards King does not change the "nature" and "function" of his judicial actions. The motivations behind an action

taken by a judge are irrelevant. *Barnes,* 105 F.3d at 1115 ("[T]he Supreme Court explicitly stated that '[a] judge will not be deprived of immunity because the action he took was . . . done maliciously. . . .' ") (quoting *Stump,* 435 U.S. at 356). Because a judge's errors can be corrected on appeal, "judicial immunity applies even to judicial acts performed maliciously, corruptly, in bad faith, or in error." *Huffer v. Bogen,* 503 F. App'x 455, 458-59 (6th Cir. 2012) (citing *Brookings v. Clunk,* 389 F.3d 614, 617 (6th Cir. 2004)).

King misplaces his reliance on a line of cases where judicial immunity was denied because a judge performed nonjudicial acts. *See Archie v. Lanier,* 95 F.3d 438 (6th Cir. 1996) (refusing to extend judicial immunity to a judge who stalked, harassed, sexually molested, and abused an employee, a prospective employee, and a litigant); *King v. Love,* 766 F.2d 962 (6th Cir. 1985) (reasoning that deliberately misleading a police officer, if true, was a non-judicial act); *Harper v. Merckle,* 638 F.2d 848 (5th Cir. 1981) (finding that judge was not protected by immunity for initiating proceedings against man who came to judge's chambers to drop off a child support payment to his ex-wife, who was the judge's employee); *Gregory v. Thompson,* 500 F.2d 59 (9th Cir. 1974) (holding that a judge's use of physical force to evict someone from the courtroom is not a judicial act); *Lopes v. Vanderwater,* 620 F.2d 1229 (7th Cir. 1980) (reasoning that judge who acted in a prosecutorial capacity not entitled to judicial immunity). In these cases, the judges were performing actions not normally performed

by a judge. This is not the case here; McCree's actions in presiding over King's child support case were clear judicial actions.

The Court in no way endorses the conduct described in the complaint. The courtroom, however, is not the appropriate venue to remedy King's complaints because McCree is absolutely immune from a civil lawsuit arising out of his judicial actions.

B. Conspiracy to Violate Fourteenth and Fifth Amendment Rights – §§ 1983, 1985 (Count II)

In Count II of the complaint, King claims that McCree and Mott conspired to violate his Fourteenth and Fifth Amendment due process rights. King's claim is premised on § 1983 and § 1985. To the extent that King's conspiracy claim is brought under § 1983, McCree is entitled to absolute judicial immunity. To the extent that King's conspiracy claim is brought under § 1985, the complaint fails to state a claim as a matter of law.

1. McCree is Entitled to Absolute Judicial Immunity on § 1983 Claim

As explained above, McCree is entitled to absolute immunity because his acts were judicial acts. King's allegations that McCree conspired with Mott to deprive him of his due process rights does not change this result. *See Harvey v. Loftus,* 505 F. App'x 87, 90 (3rd Cir. 2012) ("Judicial immunity attaches

even if the act was done in furtherance of a conspiracy.") (citing *Dennis v. Sparks,* 449 U.S. 24, 26-27 (1980)); *Holloway v. Walker,* 765 F.2d 517, 524 (5th Cir. 1985) ("[I]t is irrelevant that Walker is alleged to have performed those acts pursuant to a bribe or a conspiracy; they remain 'judicial acts.'"); *Ashelman v. Pope,* 793 F.2d 1072, 1077-78 (9th Cir. 1986) ("[A] conspiracy between judge and prosecutor to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges. . . ."); *Barron,* 897 F.2d at 1392 ("[J]udges, on mere allegations of conspiracy, could be hauled into court and made to defend their judicial acts, the precise result that judicial immunity was designed to avoid.") (citing *Ashelman,* 793 F.2d at 1077); *Hunt v. Bennett,* 17 F.3d 1263, 1267 (10th Cir. 1994) ("Indeed, *Sparks* reaffirmed that judges enjoy absolute immunity from liability under § 1983 – even when the judge allegedly conspires with private parties."). Accordingly, King fails to state a conspiracy claim against McCree under § 1983.[2]

[2] The § 1983 conspiracy claim proceeds against Mott. The Supreme Court has explained that a private party who is alleged to have conspired with a judge who is entitled to absolute immunity can still be liable for conspiracy under § 1983. *Dennis v. Sparks,* 449 U.S. 24, 28-29 (1980). The private actor is considered to be acting under color of state law under § 1983. *Id.* at 27-28.

2. King Fails to State a Conspiracy Claim Under § 1985

Section 1985(3) states, in pertinent part,

> If two or more persons in any State . . . conspire . . . on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages. . . .

42 U.S.C. § 1985(3).

The Sixth Circuit has explained the necessary elements a plaintiff must establish to bring a conspiracy claim under § 1985(3):

> To establish a claim under 42 U.S.C. § 1985(3), a plaintiff must prove (1) a conspiracy involving two or more persons (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws and (3) an act in furtherence of the conspiracy (4) which causes injury to a person or property, or a deprivation of any right or privilege of a citizen of the United States. *Hilliard v. Ferguson,* 30 F.3d 649, 652-53 (5th Cir. 1994). Plaintiff must also establish that the conspiracy was motivated by a class-based animus. *Id.* at 653.

Johnson v. Hills & Dales Gen. Hosp., 40 F.3d 837, 839 (1994).

To save his § 1985(3) claim from dismissal, King says that McCree and Mott's conspiracy to deprive him of his constitutional rights was based on his gender and status as a father. King's assertions are not plausible. Indeed, King's complaint fails to make the same conclusory allegation that his response brief makes. The complaint states that the conspiracy claim is based on "Mott conspir[ing] with Defendant McCree to violate Plaintiff's constitutional rights *so she would receive favorable rulings from the court in exchange for having sex with Defendant McCree*." (Doc. 1 at 10, Pl's. Compl. ¶ 59) (emphasis added). King has not alleged a plausible conspiracy claim that was motivated by a class-based animus. Thus, to the extent that Count II of the complaint is based on § 1985(3), it is dismissed.

V. CONCLUSION

For the reasons stated above, McCree's motion to dismiss was granted. The complaint as it relates to McCree is DISMISSED. Insofar as Count II (conspiracy) is based on § 1983, it proceeds against Mott. However, King cannot proceed on his conspiracy theory under § 1985(3).

The case manager will schedule a status conference to chart the future course of the case as it relates to Mott.

SO ORDERED.

S/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: July 26, 2013

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, July 26, 2013, by electronic and/or ordinary mail.

S/Sakne Chami
Case Manager, (313) 234-5160