



**BEFORE THE
STATE COMMISSION ON JUDICIAL CONDUCT**

CJC Nos. 01-0201-DI; 01-0854-DI; 01-1036-DI

PUBLIC WARNING

**HONORABLE JAY GIBSON
70TH JUDICIAL DISTRICT COURT
ODESSA, ECTOR COUNTY, TEXAS**

The allegations before the State Commission on Judicial Conduct (the Commission) were that the Honorable Jay Gibson exceeded and misused his authority as judge by pursuing various grievances and criminal charges against Ector County District Attorney John Smith (Smith), Texas Ranger Captain Barry Caver (Caver), and Texas Ranger Sergeant Jess Malone (Malone) due to their involvement in the investigation and prosecution of an aggravated kidnapping case pending in Judge Gibson's court. In the course of pursuing his complaints against these individuals, the judge used his office and official letterhead to initiate investigations of the above-mentioned individuals and to focus public attention, through the media and the Legislature, on alleged problems within the District Attorney's office. Judge Gibson's actions cast public discredit upon the judiciary, cast reasonable doubt on his ability as a judge to act impartially and fairly, and interfered with the performance of his duties as judge. Based on the facts and evidence presented in this case, the Commission finds that a **Public Warning** is appropriate.

BACKGROUND

Judge Gibson's grievances with Smith, Caver and Malone stemmed from an aggravated kidnapping case (the Babjeck Case) that had been rejected for prosecution by the District Attorney's office in August 1999.

The Babjeck Case

The Babjeck Case involved the following events. On April 19, 1999, two women, Linda Altamirano (Altamirano) and LaRhonda Lazore (Lazore), allegedly kidnapped Carol Babjeck (Babjeck) at gunpoint, took her to a field where they beat the woman and smeared her with cow manure. On August 16, 1999, because of statements given to officers by Babjeck concerning the cause of the fight and her lack of serious injuries, a prosecutor in the District Attorney's office determined the case had no "jury appeal" and declined to pursue the case.

Shortly after the District Attorney's office dropped the case, the local media published rumors that Smith was acquainted with at least one of the defendants, and had received campaign contributions from one of the defendants' business partners, including a \$250 contribution shortly before the case was dropped. Smith publicly denied the rumors and provided several statements to law enforcement officials, including FBI agents, who investigated the matter.

In late September 1999, Babjeck contacted the FBI in Oklahoma with concerns over the District Attorney's handling of the case. On October 1, 1999, the FBI contacted Malone to investigate why the District Attorney's office refused to pursue the case. Malone investigated Smith's alleged relationships with one of the defendants and her business partner. He also investigated the prosecution's determination that the case lacked "jury appeal" by checking into the victim's alleged drug use and her alleged involvement in the sale of drugs at a nightclub owned by one of the defendants.

On January 10, 2000, the Babjeck Case was presented to a grand jury empanelled for the 161st District Court. No witnesses were called to testify. The grand jury heard only from Malone regarding his limited investigation into the reasons why the District Attorney's office initially declined to prosecute the case. Because the chief investigator for the Ector County Sheriff's department was given notice of the grand jury proceedings at the last minute, no one from that office was available to testify about the investigation into the aggravated kidnapping charges. However, Malone did provide a copy of the investigating officer's incident report to the grand jury for its review. After receiving the information described above, the grand jury declined to hand up any indictments against the alleged kidnapers.

In May 2000, Judge Gibson had lunch with a private investigator, John Searcy (Searcy), where the two discussed the Babjeck Case. Searcy provided the judge with a copy of a newspaper article in which sheriff's deputies who had investigated the Babjeck Case criticized the way the case had been presented to the January 2000 grand jury. At the conclusion of their lunch meeting, Judge Gibson asked Searcy to serve on his next grand jury, which was to be empanelled in July 2000, to look into the Babjeck Case.

In July 2000, Judge Gibson selected several grand jury commissioners who would be responsible for finding at least twelve (12) qualified individuals from Ector County to serve as grand jurors for the July 2000 term. One of the commissioners selected by Judge Gibson was Searcy, who consequently served on the July 2000 grand jury.

On August 14, 2000, the grand jury requested the District Attorney's files regarding the Babjeck Case. Initially, Smith refused to turn over these files and confronted several grand jurors about their decision to investigate a case that had been rejected by both the District Attorney's office and another grand jury. Smith set up a meeting with Searcy and two other grand jurors. Smith also asked Malone's supervisor, Caver, to be present. Neither Caver nor the grand jurors were aware of the reason for Caver's presence at the meeting. During the meeting, Smith criticized the grand jury for engaging in what perceived to be improper grand jury "shopping."

Smith then addressed rumors that the grand jury was investigating Malone, at Judge Gibson's request, over possible perjury charges. Smith explained that this was the reason that he had asked Caver to attend the meeting. After determining that Malone was not the subject of a the grand jury's investigation, Caver advised Smith that he thought the grand jurors were entitled to the Babjeck Case file. In response to a grand jury subpoena, Smith produced the file.

On August 21, 2000, after reviewing the Babjeck Case file and hearing testimony from numerous witnesses, Judge Gibson's July 2000 grand jury returned indictments for aggravated kidnapping against Altamirano and Lazore. In late March 2001, in Judge Gibson's court, Lazore was convicted of aggravated kidnapping by a jury, who recommended a punishment of 5 years' probation. Judge Gibson rejected the jury's recommendation and gave Lazore a 10-year probated sentence, with thirty (30) days' jail time as a condition of probation. In late May 2001, in Judge Gibson's court, Altamirano was convicted of aggravated kidnapping and was sentenced by the jury to 10 years in prison. Only Altamirano has appealed her conviction. That appeal is still pending.

The Drug Vault Controversy

On May 6, 2001, the *Odessa American* published a story concerning discrepancies in inventories conducted of two walk-in drug vaults controlled by the District Attorney's office. In 1998, responsibility for the drug vaults had been turned over to Ector County and Smith after the Permian Basin Drug Task Force lost its state grant funding and was disbanded amid allegations of misconduct by the Director of the task force, Tom Finley (Finley). Terry Tyree (Tyree), an investigator for the District Attorney's office, took over the management of the vaults after the Department of Public Safety performed an inventory of the narcotics contained in the vaults. A March 1, 2001 inventory indicated, among other things, that several items found in the vaults were not accounted for in previous inventories prepared and maintained by the District Attorney's office. As a result of the discrepancies, the District Attorney announced that he intended to investigate the problem.

On May 7, 2001, Judge Gibson, in his capacity as local administrative judge, sent a letter to Smith. In his letter, Judge Gibson requested an independent audit of the contents of the drug vaults that had been under the control of Tyree, who had recently been charged with stealing two paintings from a Kerrville conference center. Judge Gibson criticized Smith by stating, "The fact that the drug supervisor you appointed, Terry Tyree, has come under legal accusation of theft, I believe compounds the problem of loss of public confidence." Because of the criminal charges pending against Tyree, Judge Gibson asserted that it would be inappropriate for Smith to conduct any investigation into the drug vault inventory problem. Tyree, who left the District Attorney's office on March 1, 2000 due to the Kerrville incident, was indicted in June 2000 in Kerr County for misdemeanor theft. That case is still pending trial.

Judge Gibson provided a copy of the May 7th letter to a reporter for the *Odessa American* because the judge believed that Smith would not agree to an independent audit without public pressure. Judge Gibson felt that the media attention generated by his letter would ensure that any audit would be conducted independently of the District Attorney's office.

An *Odessa American* article published on May 9, 2001, reported that Judge Gibson had been told by several Ector County judges that it was not within their jurisdiction to direct, or intervene in, the business of the District Attorney's office. At least one judge, Ector County Judge Jerry Caddel, stated in the article that Judge Gibson's letter was an inappropriate use of his position as district judge and as administrative judge for the county. Judge Gibson stated that he was justified in sending the letter because he believed the investigation of the drug vault to be an administrative issue as well as a judicial issue. The article quoted Judge Gibson as stating that, with or without the support of the other judges, he believed he had a duty and a right to speak out on the issue of the drug vaults.

As a result of the drug vault controversy, Smith asked the Department of Public Safety to conduct an independent audit of the narcotics evidence maintained by the District Attorney's office in the courthouse drug vaults. In an article published by the *Odessa American* on July 6, 2001, the results of the audit were released to the public. According to DPS officials, "the drug vaults were inventoried completely and everything was accounted for."

The July 2001 Grand Jury

In July 2001, Judge Gibson empanelled another grand jury. As was the case with the July 2000 grand jury, Judge Gibson personally selected several grand jury commissioners, who were then allowed to sit on the grand jury. The July 2001 grand jury immediately began investigating Tyree for the theft of two paintings from a Kerrville conference center. Since Tyree had already been indicted in Kerr County for the theft of the paintings, the July 2001 grand jury began exploring other possible criminal charges to bring against Tyree.

On or about July 9, 2001, the first day of the grand jury's term, prosecutor Lee Hadden (Hadden) was asked by the grand jury to remain outside of the courtroom while Finley, former commander of the Permian Basin Drug Task Force, approached the grand jury to present testimony against Tyree. Finley was aware that the grand jury was in session because his friend, Tom Pace (Pace), was one of the grand jurors.¹

While the July 2001 grand jury was investigating Tyree, Judge Gibson was asked on more than one occasion to assist the members with their work. For example, Judge Gibson placed a telephone call to the Office of the Attorney General on behalf of Foreperson Tammy Hawkins (Hawkins) to inquire if the Prosecutors Assistance Division of that office would prosecute Tyree for using his official county vehicle to transport the two paintings from Kerrville to Odessa. On another occasion, Judge Gibson escorted Hawkins to the District Clerk's office where he personally assisted her in completing an application for a subpoena to compel a Texas Ranger to testify before the grand jury about Tyree. Hawkins also turned over her notes to Judge Gibson for safe keeping because she was nervous about the grand jury's investigation of Tyree.

After investigating Tyree concerning the Kerrville theft, the July 2001 grand jury was unable to indict him for any offense.

The Judge's Complaints against the District Attorney, the Texas Rangers, and DPS

On May 17, 2001, Judge Gibson was approached by Caver who was concerned about persistent rumors that the judge was pursuing an indictment against Malone regarding his testimony before the July 2000 grand jury and in the Lazore case, where Malone had been called to testify as a defense witness. On May 18, 2001, Caver and Lieutenant Joe Sanders (Sanders) met with Judge Gibson in chambers where a frank discussion took place about the judge's concerns about the conduct of the District Attorney's office and Malone in connection with the Babjeck Case. According to Caver, he secretly tape-recorded the meeting in order to have an accurate record of the conversation.

On May 25, 2001, Judge Gibson initiated an internal affairs investigation against Caver and Malone by sending a letter to DPS Colonel Thomas Davis (Davis) concerning the judge's suspicions that the two Rangers engaged in illegal, incompetent, or inappropriate conduct in connection with the Babjeck Case. In his May 25th letter, written on official judicial letterhead, Judge Gibson complained that Caver failed to intervene when Smith tried to intimidate three of Judge Gibson's July 2000 grand jurors into not investigating the Babjeck Case or Malone's conduct before the January 2000 grand jury. The judge also complained about Malone's conduct in connection with the Ranger's investigations of (1) the Babjeck Case, (2) criminal charges against former Title

¹ In 1997, at the request of Smith, Finley and Pace were investigated by the FBI and Texas Rangers in connection with alleged criminal conduct while employed with the Permian Basin Drug Task Force. The results of the investigation were presented to a grand jury in August 1998, but no indictments were returned. Judge Gibson would later raise his concerns about the Finley investigation in a May 25, 2001 letter to DPS Colonel Thomas Davis in which the judge requested an investigation of Malone and Caver.

IV-D Master Robert Hollmann, and (3) criminal charges against Tom Finley, the former commander of the Permian Basin Drug Task Force.

Judge Gibson set out in detail the allegations of misconduct that he wished DPS to investigate concerning Caver and Malone, then provided a copy of the May 25th letter to Judge Dean Rucker, the administrative judge for the local judicial district, and to several senators and representatives with whom the judge once served in the Texas Legislature. The reason Judge Gibson provided copies of his May 25th letter to members of the Legislature was because he believed that they were the “boss” of DPS. The judge also believed that DPS would be more responsive to his request if the Legislature became involved.

As a result of the judge’s May 25th letter, DPS conducted an internal investigation, known as an Administrative Inquiry, of Caver and Malone. In connection with the investigation, affidavits were submitted to DPS officials by Caver, Malone, and Sanders. The DPS investigator also contacted a dozen witnesses concerning the incidents and allegations discussed in Judge Gibson’s complaint. On June 26, 2001, based on this investigation, DPS concluded its internal investigation with a finding that no violation of policy or law had been committed by Caver or Malone.

In June 2001, while DPS was conducting its investigation, Judge Gibson approached individuals in Ector County in an effort to obtain information that could be used against Malone. Chief Bailiff Troy Davis provided a sworn statement that described one such encounter with the judge. During this time, Judge Gibson also filed a complaint against Smith with the local grievance committee of the State Bar of Texas. That matter was dismissed after a hearing in September 2001.

Upon learning that DPS had concluded its investigation and had found no misconduct by Caver and Malone, Judge Gibson made several public information requests to DPS asking for all records concerning Malone, Caver, and Smith. One of the records that Judge Gibson obtained was a transcript of the May 18, 2001 meeting that took place in his office with Caver and Sanders. In early 2002, angered that Caver had been secretly tape-recording the meeting, Judge Gibson contacted the Attorney General’s Office to inquire if attorneys with the Special Prosecutors Division would prosecute Malone for criminal contempt for allegedly giving perjured testimony before the court. The judge also asked if the attorneys would act as Special Prosecutors in the event that the judge was able to obtain a determination, through a Special Court of Inquiry, that Caver had committed a crime by secretly tape-recording the May 18th meeting. The Attorney General’s Office declined to assist the judge and, to date, there have been no criminal investigations or charges filed against Caver or Malone for these, or any other offenses.²

In March 2002, after spending months compiling information obtained from DPS records obtained through his public information requests, at a cost of close to \$3,500 of

² Judge Gibson had also contacted DPS Colonel Davis to ask for his department’s assistance in getting a Special Prosecutor and Special Court of Inquiry to pursue criminal charges against the District Attorney.

his own money, Judge Gibson sent a thirty-five (35) page complaint against DPS and the Ector County District Attorney's Office to (1) State Representative Pete Gallego, Chairman of the House Investigation Committee, (2) Texas Public Safety Commission Chairwoman Colleen McHugh, and (3) DPS Director Colonel Thomas Davis. In this complaint, Judge Gibson accused DPS of engaging in a "cover-up" in connection with its investigation of the Texas Rangers.

PROCEEDINGS BEFORE THE COMMISSION

During its meeting in Austin, Texas, on April 11-12, 2002, the Commission concluded a review of allegations against the Honorable Jay Gibson, judge of the 70th Judicial District Court, Odessa, Ector County, Texas. Judge Gibson was advised by letter of the Commission's concerns and provided written responses. Judge Gibson appeared before the Commission on April 11, 2002, and gave testimony. After considering the evidence before it, the Commission entered the following Findings and Conclusions:

FINDINGS OF FACT

1. At all times relevant hereto, Judge Gibson was judge of the 70th Judicial District Court, Odessa, Ector County, Texas.
2. Judge Gibson has been the local administrative district judge in Ector County since 1998.
3. In May 2000, Judge Gibson had lunch with John Searcy, a private investigator, where the two men discussed the District Attorney's handling of the Babjeck Case. After Searcy expressed concerns that the Babjeck Case had been poorly handled and improperly presented to the January 2000 grand jury, Judge Gibson asked Searcy to sit on the judge's next grand jury to look into the matter.
4. In July 2000, Judge Gibson empanelled a grand jury, which immediately began investigating the Babjeck case. Searcy was one of the grand jury commissioners who also consequently served on the July 2000 grand jury.
5. In August 2000, Judge Gibson's grand jury returned indictments for aggravated kidnapping in the Babjeck Case. Both defendants were later convicted of aggravated kidnapping by juries in Judge Gibson's court.
6. On May 7, 2001, Judge Gibson sent a letter to John Smith that was critical of the District Attorney's handling of inventories conducted on narcotics evidence maintained in courthouse drug vaults.
7. Judge Gibson sent the May 7th letter in his capacity as local administrative judge even though he did not have the permission or support of the other Ector County judges to speak on their behalf concerning this issue.

8. The letter, which was written on official judicial letterhead, was sent to a reporter for the *Odessa American*, in an effort to put public pressure on the District Attorney to allow an independent audit of the drug vault evidence. The *Odessa American* published a series of articles concerning the drug vault controversy and Judge Gibson's intervention in this political situation.
9. On May 25, 2001, Judge Gibson sent a letter to DPS Colonel Thomas Davis asking for an investigation into possible illegal or improper activities by Texas Rangers Caver and Malone.
10. Judge Gibson sent the May 25th letter on official judicial letterhead. The judge also provided copies of the complaint to several members of the Texas Legislature in an effort to put pressure on DPS officials to conduct an investigation.
11. Thereafter, Judge Gibson began to personally question law enforcement personnel in an effort to obtain negative information about Malone that would assist DPS investigators in their investigation of the judge's complaint.
12. Judge Gibson also filed a complaint with the local grievance committee of the State Bar of Texas against Smith alleging that the District Attorney had engaged in illegal or unethical conduct in connection with the Babjeck Case.
13. Upon learning that the DPS investigation into the conduct of Caver and Malone had resulted in a finding of no misconduct, Judge Gibson spent close to \$3,500 and countless hours in time and energy in an effort to find flaws in the DPS investigation.
14. In March 2002, Judge Gibson filed a 35-page complaint against DPS and the Ector County District Attorney's Office with State Representative Pete Gallego, DPS Commission Chairwoman Colleen McHugh, and DPS Colonel Thomas Davis.
15. As with his other complaints, Judge Gibson's March 2002 complaint was sent on official judicial letterhead.

RELEVANT STANDARDS

1. Canon 2B of the Texas Code of Judicial Conduct states, in relevant part, that "[a] judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others."
2. Canon 4A(1) of the Texas Code of Judicial Conduct states that "[a] judge shall conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge."

3. Canon 4A(2) of the Texas Code of Judicial Conduct states that “[a] judge shall conduct all of the judge’s extra-judicial activities so that they do not interfere with the proper performance of judicial duties.”

CONCLUSIONS

The Commission concludes from the evidence presented that Judge Gibson acted outside of the scope of his authority when he wrote the May 7, 2001 letter to District Attorney John Smith concerning the independent audit of the courthouse drug vaults. By writing the letter on official judicial letterhead and providing a copy to the *Odessa American*, Judge Gibson used the prestige of his office in an attempt to promote his own private interests in how the District Attorney’s office takes care of its business in violation of Canon 2B of the Texas Code of Judicial Conduct. The Commission further concludes that the negative media attention generated by the judge’s intervention in this controversy cast public discredit on the judiciary, in violation of Article 5, §1-a(6)A of the Texas Constitution.

The Commission also concludes that the judge’s use of official court letterhead in connection with the judge’s relentless pursuit of complaints against the District Attorney, the Texas Rangers, and the Department of Public Safety (copies of which were provided to members of the Texas Legislature) violated Canon 2B of the Texas Code of Judicial Conduct by lending the prestige of judicial office to advance the judge’s private interests or the private interests of others. The judge’s actions also cast public discredit on the judiciary and reasonable doubt on his capacity to fairly judge future criminal cases that are brought before his court by the District Attorney’s office, or that involve local law enforcement officers, in violation of Article 5, §1-a(6)A of the Texas Constitution and Canon 4A(1) of the Texas Code of Judicial Conduct.

The Commission additionally concludes that Judge Gibson’s relentless extra-judicial pursuit of alleged illegal or unethical conduct by the District Attorney, the Texas Rangers and the Department of Public Safety, has interfered with the proper performance of his duties in violation of Canon 4A(2) of the Texas Code of Judicial Conduct.

In reaching these conclusions, the Commission notes that there is an appearance of impropriety in Judge Gibson’s appointment of grand jury commissioners who are known to him and who are subsequently allowed to sit on a grand jury when the judge knows, or should know, that such individuals have a specific and personal reason for wanting to serve on the grand jury. Although the law may not expressly prohibit such a selection process, it is the Commission’s opinion that such a practice casts public doubt on the impartiality of the grand jury process.

In condemnation of the above-recited conduct that violated Canons 2B, 4A(1) and 4A(2) of the Texas Code of Judicial Conduct, it is the Commission’s decision to issue a **PUBLIC WARNING** to the Honorable Jay Gibson, Judge of the 70th Judicial District Court, Odessa, Ector County, Texas.

Pursuant to the authority contained in Article 5, Section 1-a(8) of the Texas Constitution, it is ordered that the actions described above be made the subject of a **PUBLIC WARNING** by the Commission.

The Commission takes this action in a continuing effort to protect public confidence in the judicial system and to assist the state's judiciary in its efforts to embody the principles and values set forth in the Texas Constitution and the Texas Code of Judicial Conduct.

Issued this the 5 day of June, 2002.

A handwritten signature in black ink, appearing to read "Michael O'Neal", written in a cursive style.

Honorable Michael O'Neal, Chair
State Commission on Judicial Conduct