Opinion Issued February 7, 2022

DOCKET NO. SCR 21-0003

SPECIAL COURT OF REVIEW[1]
IN RE INQUIRY CONCERNING HONORABLE PAUL D. LILLY
CJC NOS. 19-1767 & 19-1878

OPINION

This Special Court of Review was selected by lot and appointed by the Chief Justice of the Supreme Court of Texas to conduct a trial de novo to review the sanctions entered by the State Commission on Judicial Conduct against the Honorable Paul D. Lilly, County Judge of Brown County. *See* TEX. GOV'T CODE ANN. § 33.034.

The State Commission on Judicial Conduct alleged Judge Lilly violated Canons 2A, 2B, 3B(2), 3B(8), and 4A(1) of the Texas Code of Judicial Conduct as well as article V, section 1-a(6)A of the Texas Constitution by serving as county

[1] The Special Court of Review consists of The Honorable Lana Myers, Justice, Court of Appeals, Fifth District of Texas at Dallas, presiding by appointment; The Honorable Greg Neeley, Justice, Court of Appeals, Twelfth District of Texas at Tyler, participating by appointment; and The Honorable Scott Golemon, Chief Justice, Court of Appeals, Ninth District of Texas at Beaumont, participating by appointment.

judge while also being a licensed peace officer commissioned as a reserve deputy sheriff in another county, by denying bail to a defendant on a motion to revoke probation, and by having an *ex parte* communication with the defendant. *See* TEX. CONST. art. V, § 1-a(6)A; TEX. CODE JUD. CONDUCT, Canons 2A, 2B, 3B(2), 3B(8), 4A(1), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B. Following a hearing in which the Commission heard testimony from Judge Lilly, the Commission concluded that Judge Lilly violated these provisions. The Commission issued a private warning and a public admonition, and it ordered Judge Lilly to obtain six hours of instruction with a mentor.

When the Commission imposes a sanction on a judge, the judge may request a special court of review be appointed by the chief justice of the supreme court to review the action of the Commission. TEX. GOV'T CODE ANN. § 33.034(b); TEX. RULES REM'L/RET. JUDG. 9(a). The Commission then files a charging document with the allegations of judicial misconduct against the judge. GOV'T § 33.034(d). The special court of review holds a trial de novo and renders its decision by written opinion. *Id.* § 33.034(e), (h). As this review is governed to the extent practicable by the rules of law, evidence, and procedure that apply to the trial of a civil action, the Commission has the burden to prove the charges against a respondent by a preponderance of the evidence. *See id.* § 33.034(f); *In re Slaughter*, 480 S.W.3d

842, 845 (Tex. Spec. Ct. Rev. 2015); *In re Hecht*, 213 S.W.3d 547, 560 (Tex. Spec. Ct. Rev. 2006).

Judge Lilly requested a trial de novo before a special court of review as permitted by section 33.034 of the Texas Government Code. *See* GOV'T § 33.034(b), (e)(2). This Court conducted a trial of the charges brought by the Commission. After considering the evidence submitted, the testimony of a witness, and the arguments of counsel, we find the Commission failed to prove Judge Lilly violated the canons and constitution by serving concurrently as county judge and a reserve deputy sheriff; the Commission failed to prove Judge Lilly violated the canons by ordering the defendant on a motion to revoke probation in Brown County, who was then in custody in Runnels County, be denied bail on the motion to revoke probation; and that the Commission proved Judge Lilly violated the canons by having an *ex parte* communication with the defendant on the motion to revoke probation.

CAUSE NUMBER 19-1767: CONCURRENT SERVICE AS COUNTY JUDGE AND RESERVE DEPUTY SHERIFF

Judge Lilly was elected county judge of Brown County and began his term of office on January 1, 2019. Before becoming county judge, he was a licensed peace officer with the State of Texas and was the Chief of Police of Howard Payne University in Brownwood, the county seat of Brown County. After winning election to the position of county judge, Judge Lilly maintained his peace officer license, and he became a reserve deputy sheriff in San Saba County and Hood County. While

holding the office of county judge in Brown County, Judge Lilly participated in patrols as an unpaid reserve deputy sheriff in San Saba County and Hood County, performed security services for a concert, and taught a class to peace officers in San Saba County on less-than-lethal use of a TASER. He did not arrest anyone while a reserve deputy sheriff, and he did not appear in court as a witness on any matter that arose out of his being a reserve deputy sheriff. As county judge, Judge Lilly presided over the trials of civil and criminal matters. He testified in a hearing before the Commission that at some point he transferred the criminal judicial responsibilities to Brown County's county court at law judge.[2]

The Commission alleges Judge Lilly's concurrent service as Brown County's county judge and as a reserve deputy sheriff in other counties violates Canon 2B[3] by

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[2] The evidence on this charge includes the following agreed stipulations:

> 1. At all relevant times, the Honorable Paul Lilly was the County Judge of Brown County, Texas. As Brown County Judge, Judge Lilly performs judicial functions and, until recently, presided over criminal cases in the Brown County Court.
>
> 2. At the time of his election and upon taking office as Brown County Judge in 2019, Judge Lilly had an active Texas Peace Officer License and was a part time or reserve peace officer with the San Saba County Sheriff's Office.
>
> 3. From June 13, 2019, to the present, Judge Lilly has maintained an active Texas Peace Officer's License and is a reserve peace officer for the Hood County Sheriff's Office. In that capacity, Judge Lilly has, in fact, performed service as a peace officer while also serving as a judicial officer, including going on patrol on at least two occasions.
>
> 4. From March 29, 2021, to the present, Judge Lilly has also served as a part-time or reserve peace officer for the San Saba County Sheriff's Office. In that capacity, Judge Lilly has, in fact performed services as a peace officer while also serving as a judicial officer, including providing security services at a musical event, going on patrol on at least two occasions, and teaching a class for the San Saba Sheriff's office on intermediate use of force (less than lethal TASER).

[3] Canon 2B provides:

conveying the impression that peace officers are in a special position to influence the judge; violates Canon 4A(1)[4] by casting reasonable doubt on the judge's capacity to act impartially as a judge; and violates article V, section 1-a(6)A of the Texas Constitution[5] because his concurrent service is willful or persistent conduct that compromises the impartiality and independence of the judicial office and is clearly inconsistent with the proper performance of his duties, or casts public discredit upon the judiciary or the administration of justice. *See* TEX. CONST. art. V, § 1-a(6)A; Canons 2B, 4A(1).

The Commission's only evidence that Judge Lilly violated the canons and the constitution was these facts: Judge Lilly is a commissioned peace officer with Hood County and San Saba County performing duties as a reserve deputy sheriff in those counties while serving concurrently as the county judge of Brown County. As the

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> A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

[4] Canon 4A(1) provides:

> A judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge . . . .

[5] Article V, § 1-a(6)A provides:

> Any Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice. Any person holding such office may be disciplined or censured, in lieu of removal from office, as provided by this section.

Commission asserts, "the relevant question . . . is whether a person who is both a presiding judge [of a county court] and a licensed peace officer whose commission is placed with a law enforcement agency and who actually performs services as a peace officer for such agency violates relevant ethical standards."

The Commission argues that Judge Lilly's serving concurrently as both a county judge and a peace officer:

> creates the impression that Judge Lilly may not be impartial or may be subject to the influence of certain groups, thereby casting discredit upon himself and the judiciary in general.
>
> Furthermore, Judge Lilly's insistence on engaging in dual service makes it that much easier for members of the public to assume that he would be more likely to presume the testimony of a fellow peace officer to be more credible than that of the defendant in a particular case.

The Commission asserts this determination is an objective one not requiring determination of Judge Lilly's subjective biases. Judge Lilly argues the determination is subjective requiring proof that he is biased in favor of other peace officers. We need not decide whether the test is objective or subjective, because regardless of the test, we find the Commission failed to prove Judge Lilly's actions violated the canons and the constitution.

In arguing the test is objective, the Commission gives as an example a Judge who is discovered to be a member of the Ku Klux Klan. The Commission argues that if Judge Lilly is correct and determination of whether the canons and constitution were violated is subjective, then the actual biases and motives of the Ku

Klux Klan judge would have to be considered to determine whether the judge's membership in the organization violates ethical standards.

The Commission's analogy is not persuasive. Before determining whether mere membership in an organization violates the canons and constitution by conveying the impression that others are in a position to influence the judge or cast doubt on the judge's capacity to act impartially as a judge, the Commission would have to prove that membership in such an organization would have that effect. A court may take judicial notice of a fact generally known within the trial court's territorial jurisdiction, TEX. R. EVID. 201(b)(1), and, for purposes of this opinion, we will presume that a court could take judicial notice that the Ku Klux Klan is a group whose basis is generally understood to be its members' belief in the superiority of some persons and the inferiority of others based on race, sexuality, and religion.[6] The public would be entitled to believe that a judge espouses the core beliefs of an organization to which the judge belongs. A judge's mere act of belonging to a group such as the Ku Klux Klan could "convey . . . the impression that [others] are in a special position to influence the judge," and "cast reasonable doubt on the judge's capacity to act impartially as a judge." Canons 2B, 4A(1). Thus, merely belonging to a group could violate the canons and constitution when

[6] Whether judicial notice of this fact under Rule of Evidence 201(b)(1) would be appropriate is not before us, and we make no determination that it would be appropriate.

the judge's presumed embrace of the group's core beliefs would violate the canons and constitution.

However, a county judge's being a licensed peace officer does not suggest that the judge believes peace officers have superior credibility or that the public perceives the judge as having that belief. The Commission's analogy would be appropriate only if the Commission proved it was widely understood that peace officers believe they and other peace officers are superior in credibility to all persons who are not peace officers. This Court has no reason to believe that there is a general belief that peace officers consider themselves and other peace officers to have greater credibility than other members of the public. This is not a fact of which we may take judicial notice. TEX. R. EVID. 201(b)(1). Therefore, absent any evidence to the contrary, the mere fact that a county judge is a reserve deputy sheriff does not indicate that the judge may believe peace officers are more credible than the general populace. Nor does it indicate that a county judge's concurrent service as a reserve deputy sheriff in another county would "cast reasonable doubt on the judge's capacity to act impartially as a judge" or "convey . . . the impression that [others] are in a special position to influence the judge." Canons 2B, 4A(1).

The Commission asserts that the Separation of Powers doctrine demonstrates why Judge Lilly's concurrent service violates the canons and the constitution. The Texas Constitution provides for separation of the branches of government:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1. This provision is violated when one branch of government assumes or is delegated a power more properly attached to another branch or when one branch unduly interferes with another branch so that it cannot effectively exercise its constitutionally assigned powers. *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990); *Medrano v. State*, 421 S.W.3d 869, 878 (Tex. App.—Dallas 2014, pet. ref'd). Judge Lilly's actions in volunteering as a reserve deputy sheriff do not constitute the judiciary assuming the powers of the executive branch or vice-versa. Nor does any evidence show that Judge Lilly's actions as a reserve deputy sheriff unduly interfere with the judicial branch.

The Commission acknowledges that it is not disciplining Judge Lilly for violating the Separation of Powers doctrine, but it says "the underlying principle [of the Separation of Powers provision] is a fundamental one . . . . [N]o member of one branch of government can exercise authority attached to another branch of government; or, in other words, serve for two different branches of government as Judge Lilly is currently doing." The Commission continues:

> In other words, the Separation of Powers doctrine merely provides insight as to what is already plainly obvious: that Judge Lilly's service to two

> separate branches of government is unethical . . . . This is a case of the law being so well-established, so precedential, and having been made clear so long ago that some may have been forgotten what it says.

Despite the Commission's assertion that "the law" is "so well-established, so precedential, and having been made clear so long ago," the Commission provides no legal authority to support these statements.

The Commission says its position "can largely be summarized by the old adage that a person cannot serve two masters." Presumably, the Commission means that the public would perceive a county judge serving as a reserve deputy sheriff in another county as serving two masters, and that the perception would "cast reasonable doubt on [Judge Lilly's] capacity to act impartially as a judge." *See* Canon 4A(1). The Commission does not explain who the two masters are in this situation. In both positions, the person takes an oath to "faithfully execute the duties" of the position and to "preserve, protect, and defend the Constitution and laws of the United States and of this State." TEX. CONST. art. XVI, § 1 (official oath); *see* TEX. LOC. GOV'T CODE ANN. § 81.002 (county judge must take official oath); *id.* § 85.004(c) (reserve deputy sheriff must take "oath"); *id.* § 85.004(c-2) (person reappointed as reserve deputy must "retak[e] the official oath"). Under the oaths Judge Lilly swore for the different positions, the "master" is the same: "the Constitution and laws of the United States and of this State." Nothing about the positions and no evidence before this Court indicate that a county judge who is also

a reserve deputy sheriff in another county would be unable to act impartially as county judge. Nor has the Commission presented any evidence that the public would perceive a county judge who is also a reserve deputy sheriff in another county as not being impartial as county judge.

The Commission argues that whether concurrent service violates the canons and the constitution should be determined as a matter of law based on the fact of concurrent service alone and not on a case-by-case basis. The Commission argues that the canons and the constitution:

> go beyond prohibiting actual bias and prohibit something more: perception of bias. The standard, therefore, is quite plainly an objective one: no judge, regardless of actual bias, may engage in any behavior which might *create the impression* that that judge is subject to bias or partiality, or which might discredit the judiciary itself. Thus, even if Judge Lilly, specifically, is not susceptible to bias, the same cannot be said for all judges. Because all judges cannot be expected to always remain unbiased, it is the integrity of the judiciary itself that the relevant ethical provisions are meant to protect by prohibiting *all* judges from engaging in *any* behavior which might cast discredit upon it, whether actually biased or biased in appearance only. Accordingly, the only question which remains is whether Judge Lilly's dual service creates the impression of bias or susceptibility to influence on his part or casts discredit upon the judiciary.

Even if the Commission is correct that we can determine generally whether a county judge's concurrent service as a peace officer violates the canons and constitution by conveying that others are in a special position to influence the judge (Canon 2B), casting reasonable doubt on the judge's capacity to act impartially (Canon 4A(1), or

by casting discredit on the judiciary or administration of justice (TEX. CONST. art. V, § 1a(6)A), the Commission had the burden of proving that concurrent service does those things. The Commission presented no such evidence.

The common-law doctrine of incompatibility, not discussed by the parties, considers whether a person may serve in two government offices at the same time.[7] "The doctrine of incompatibility prevents one person from holding two offices if the duties are inconsistent or in conflict, or if one office is subordinate to the other." *Estate of Humphrey*, No. 05-15-00589-CV, 2016 WL 5723961, at *3 (Tex. App.—Dallas Oct. 3, 2016, pet. denied) (mem. op.). "In determining incompatibility, the crucial question is whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other." *State ex rel. Hill v. Pirtle*¸ 887 S.W.2d 921, 930 (Tex. Crim. App. 1994). The evidence before us does not show that a county judge's concurrent service as a reserve deputy sheriff in another county would be detrimental to the public interest, or that the performance of either position would interfere with the performance of the other.

[7] Article XVI, § 40 of the constitution prohibits a person holding "more than one civil office of emolument." TEX. CONST. art XVI, § 40. Because Judge Lilly is not paid for his service as a reserve deputy sheriff, his position does not involve an emolument. *See State ex rel. Hill v. Pirtle*¸ 887 S.W.2d 921, 931 (Tex. Crim. App. 1994) ("emolument" is a pecuniary profit, gain, or advantage); *Emolument*, Black's Law Dictionary (8th ed. 2004) ("Any advantage, profit, or gain received as a result of one's employment or one's holding of office."). The Commission acknowledges in its briefing that there is no violation of article XVI, § 40, in this case.

We do not hold that, as a matter of law, the mere act of serving as a county judge in one county and as a reserve deputy sheriff in another county does not violate the canons and the constitution as alleged in this case. Instead, we hold that the Commission presented no evidence in this case that concurrent service violates the canons and the constitution. If the Commission were to present evidence that concurrent service "conveys or permits others to convey that they are in a special position to influence the judge," "cast[s] reasonable doubt on the judge's capacity to act impartially as a judge," or "casts public discredit upon the judiciary or administration of justice," then the Commission might be able to prove that concurrent service violates the canons and the constitution. TEX. CONST. art. V, § 1-a(6)A; Canons 2B, 4A(1). But the mere fact of concurrent service with no evidence that bias is inherent or publicly perceived in the concurrent service is not such proof. If the standard is an objective one, then the Commission has failed to meet its burden of proof on that standard.

If the standard is subjective, then the Commission also failed to meet that burden. The Commission presented no complaints from the public that Judge Lilly's concurrent service casts discredit upon the judiciary or himself or created the appearance that he would be biased in favor of peace officers.[8] The Commission

[8] The Commission received a complaint about Judge Lilly serving as County Judge and a reserve deputy sheriff, and the complaint stated the complainant had told Judge Lilly that his concurrent service violated the Commission's position set forth in its public statement, PS-2000-1. The complaint did not expressly allege that Judge Lilly's concurrent service created a perception in the community that Judge Lilly was

presented no evidence of what activities Judge Lilly actually engaged in besides the general descriptions that he went on patrol, provided security at a music event, and taught a class about TASERs. It is conceivable that a person might say or do things while engaged in these activities that would cast discredit upon the judiciary or himself or create the appearance that the person would be biased in favor of peace officers, but the Commission presented no evidence that Judge Lilly said or did any such thing.

The Commission also states it "has alleged that Judge Lilly's exercising of authority of two separate branches of government at the same time creates the impression of bias and/or casts public discredit upon the judiciary, thereby violating relevant ethical provisions." But allegations that conduct creates an impression of bias and casts public discredit on the judiciary are not proof that it does so. Also, no evidence shows that while exercising the judicial powers of county judge, Judge Lilly also exercised the powers of the executive branch by exerting his authority as a peace officer. Nor does the evidence show that he exerted his authority as a member of the judicial branch while exercising his authority as a peace officer. Furthermore, when this alleged conflict was brought to Judge Lilly's attention by

biased. The Commission acknowledges that its public statement "is merely a notice to the public" and does not serve "as any basis for its legal authority in this matter." The Commission also states that it does not consider the notice "as an interpretation entitled to some sort of *Chevron* deference." *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

the Commission, he transferred authority over criminal cases to the county court at law judge, and he no longer exercises authority over criminal cases.

Judge Lilly is a county judge. In that position, he is involved, with the constitution's blessing, in all three branches of government. *See* TEX. CONST. art. V, §§ 15, 16, 18(b). The county judge is a legislator as a member of the commissioner's court, an executive as presiding officer of the commissioner's court, and is the presiding judge over the judicial cases filed in the county court. *Id.*; *In re Fletcher*, 584 S.W.3d 584, 586 n.2 (Tex. App.—Houston [1st Dist.] 2019, orig. proceeding). But a county judge's concurrent service in these three branches of government are not presumed to violate the canons.

The Commission also argues that its interpretation of the canons should be accorded deference. *See Thompson v. Tex. Dep't of Licensing & Reg.*, 455 S.W.3d 569, 571 (Tex. 2014). In *Thompson*, the supreme court stated,

> We defer to agency interpretations of statutes only if they are ambiguous, provided that the agency's interpretation is reasonable and does not conflict with the plain language of the statute. But if an undefined term has multiple common meanings, it is not necessarily ambiguous; rather we will apply the definition most consistent with the context of the statutory scheme.

Id. (citation omitted). In this case, the canons and the constitution are not ambiguous. The dispute is not what the words mean but whether the Commission has presented evidence that Judge Lilly's conduct violated the canons and the constitution.

The Commission also asserts its interpretation is entitled to "*Chevron* deference." Under this doctrine, the courts defer to an administrative agency's interpretation "whenever decision as to the meaning or reach of a statute has involved reconciling conflicting polices, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subject to agency regulations." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). This case does not involve reconciling conflicting policies. Instead, the issue is whether the Commission proved that a county judge's concurrent service as a reserve deputy sheriff creates the impression that the judge is not impartial. This is a matter of proof, not policy. Nor does this case require "more than ordinary knowledge respecting" the canons and the constitution.

We conclude the Commission has failed to meet its burden of proving that Judge Lilly violated Canons 2B and 4A(1) and article V, § 1-a(6)A of the constitution by serving as County Judge of Brown County while serving concurrently as a reserve deputy sheriff in Hood County and San Saba County. We dismiss the Commission's Private Warning and Order of Additional Education in CJC No. 19-1767, and we find Judge Lilly not guilty of this charge.

CAUSE NO. 19-1878: DENIAL OF BOND AND *EX PARTE* COMMUNICATIONS

The Commission issued public admonishments and an order of additional education based on events concerning the motion to revoke the probation of Adam Ben Carter.

On May 15, 2019,[9] Carter pleaded guilty to possession of two ounces or less of marijuana, a Class B misdemeanor. Judge Lilly accepted Carter's guilty plea and sentenced him to 180 days in jail, probated for six months. Five days later, on May 20, Carter was arrested in Runnels County and charged with possession of less than one gram of methamphetamine, a state jail felony. The court in Runnels County set Carter's bond at $7,000.[10] On June 4, Brown County's county attorney filed a motion to revoke Carter's probation. On June 6, Judge Lilly signed a warrant for Carter's arrest and detention on the motion to revoke probation. Judge Lilly indicated on the order that there would be no bond for the motion to revoke probation. Also on June 6, Judge Lilly signed an order setting the motion to revoke probation for hearing "instanter" and ordered the Brown County sheriff to produce

[9] Unless otherwise indicated, all dates are in the year 2019.

[10] Carter testified at the hearing on the motion to revoke probation that he was held in Runnels County on three felony charges with bonds set at $7,500, $10,000, and $15,000. The motion to revoke probation alleged Carter was arrested in Runnels County for possession of a controlled substance and possession of drug paraphernalia. Judge Lilly and the Commission stipulate in this case that Carter was arrested for possession of less than one gram of methamphetamine, a state jail felony, and that his bond on that charge was $7,000.

Carter for the hearing. The order also denied bond for Carter on the motion to revoke probation. Judge Lilly wrote on the order,

> "Confined for 180 days in county jail without Bond/Bail."
>
> Paul D. Lilly
>
> "up-too" [sic]
>
> Set hearing, 6/12/19

No hearing took place on June 6 or June 12, and Carter remained in jail in Runnels County.

Carter wrote a letter to Judge Lilly, filed in the Brown County Clerk's office on September 20, stating Carter wanted to plead true to the motion to revoke probation and be sentenced to time served so he could make bond on the charges pending in Runnels County and return to work and to outpatient treatment. On September 27, Brown County filed a letter from Carter to the county attorney for Brown County requesting appointment of an attorney to represent him. Carter received an application for appointment of an attorney, which he completed and returned to Brown County's indigent defense coordinator. On October 7, an attorney was appointed to represent Carter on the motion to revoke probation, and the motion was set for hearing on October 11. Judge Lilly signed a bench warrant requiring Carter to be brought to Brown County for the hearing.

On October 9, Carter's appointed attorney filed a motion requesting a continuance of the October 11 hearing because he had not received discovery from

the State, he could not provide effective assistance without the discovery, and he had not had sufficient time to prepare since his appointment two days' earlier. On October 11, Judge Lilly held the hearing on the motion to revoke probation. Carter waived his right to counsel, and Judge Lilly denied the appointed attorney's motion for continuance. During the hearing, Judge Lilly told Carter and the county attorney that "if you're willing to plead to it, I'm willing to give him time served unless you object to that." The county attorney said he did not object. Judge Lilly said he accepted Carter's plea, and he sentenced Carter to 120 days in jail, which was less than the time he had served.

During the hearing, Judge Lilly told the county attorney that he telephoned and spoke to Carter at the Runnels County jail before counsel was appointed for Carter:

> to let him know that we were going to bring him back over here. I wanted to talk to him personally and tell him we were going to bring him back over here for this. . . . And then I talked to the jailer to find out how his conduct was and how he did there.

The Commission investigated Judge Lilly's denying Carter bond on the motion to revoke probation and Judge Lilly's telephone call with Carter. The Commission concluded Judge Lilly violated Canons 2A[11] and 3B(2)[12] by setting "no

[11] Canon 2A provides:

> A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

[12] Canon 3B(2) provides:

bond" on the misdemeanor motion to revoke probation without considering the statutory factors for setting bond. The Commission also determined Judge Lilly violated Canon 3B(8)[13] and article V, § 1-a(6)A of the constitution by "engaging in impermissible *ex parte* communications with a criminal defendant and others concerning the merits of a pending or impending judicial proceeding." The Commission publicly admonished Judge Lilly for these actions and ordered that he obtain two hours of instruction with a mentor.

No Bond Order

The Commission charged Judge Lilly with violating Canons 2A and 3B(2). Canon 2A provides, "A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3B(2) states, "A judge should be faithful to the law and shall maintain professional competence in it."

> A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

[13] Canon 3B(8) provides:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control.

The evidence on this charge included the parties' stipulations, Judge Lilly's responses to written inquiries from the Commission, and Judge Lilly's testimony before the Commission. The parties' stipulated, "On June 4, 2019, the Brown County Attorney filed a motion to revoke Carter's probation. Judge Lilly ordered 'no bail' for Carter on the misdemeanor motion to revoke probation." In his responses to the Commission's inquiries about setting "no bond" on the motion to revoke probation, Judge Lilly explained that he is not an attorney and that "[t]he County Attorney advised that Carter was in custody on a felony charge in Runnels County and that we should wait until he bonded out on the felony before bringing him back to Brown County on this Motion to Revoke." At the hearing before the Commission, Judge Lilly testified he did not remember setting the no-bail order and that he was not aware Carter was in custody until he received the letter from him.[14]

The Commission asserts that Judge Lilly failed to follow the law because he denied Carter bail without considering the statutory factors for determining bail under article 17.15 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 17.15. In briefing following the final hearing before this Court, Judge Lilly states, "As to the charge that Judge Lilly did not properly consider the

[14] Judge Lilly's testimony at the hearing before the Commissioners that he did not order "no bond" in Carter's case conflicts with his earlier responses to the Commission's inquiries. The Commission argues Judge Lilly perjured himself at the Commission hearing. However, Judge Lily also told the Commissioners at the hearing that he was recovering from a heart attack and a quadruple bypass heart surgery, "so my memory is a [bit] fuzzy."

statutory factors in setting bond, Judge Lilly concedes that he erred in that. He is willing to accept the decision of the Court as to what sanction, if any, is proper and appropriate for this mistake."

This Court's duty is to consider the evidence and determine whether the Commission proved Judge Lilly violated the canons by signing the no-bond order without considering the article 17.15 factors. Judge Lilly's concession indicates he did not consider the statutory factors in ordering no bond, but the statutory factors do not apply if Carter was not entitled to be considered for admission to bail on the motion to revoke probation when Judge Lilly signed the no-bond order. The Commission has not explained why Carter was entitled to be considered for release on bail at that time. This determination is controlled by statute and is a question of law.

Article 42A.751(b) of the Code of Criminal Procedure provides that a defendant arrested on a warrant for violation of conditions of community supervision may be held in the county jail "until the defendant can be taken before the judge for a determination regarding the alleged violation." CRIM. PROC. art. 42A.751(b). "[T]he arresting officer or the person with custody of the defendant" must take the defendant before the judge who ordered the arrest within forty-eight hours of the arrest on the motion to revoke probation. *Id.* art. 42A.751(c). The judge then performs all duties required by article 15.17, which includes admitting the person to

bail if allowed by law. *Id.* art. 15.17(a). "[O]nly the judge who ordered the arrest for the alleged violation may authorize the defendant's release on bail." *Id.* art. 42A.751(c).

Under article 42A.751(c), Carter was not entitled to be admitted to bail until he was brought before Judge Lilly, which would happen after the arrest warrant for the motion to revoke probation was served. Judge Lilly was not "the arresting officer or person with custody" of Carter, so it was not Judge Lilly's responsibility to see that Carter was brought to him for considering admitting him to bail. On June 6, Judge Lilly signed the arrest warrant and ordered no bail. No evidence shows that the arrest warrant had been served when he signed the no-bond order. Furthermore, Carter had not been brought before Judge Lilly when Judge Lilly signed the no-bond order, so at that time, Carter would not have been entitled to seek release on bond for the motion to revoke probation. *See id.*

Article 42A.751(d) provides that if the defendant has not been released on bail, "on motion by the defendant, the judge who ordered the arrest for the alleged violation of a condition of community supervision shall cause the defendant to be brought before the judge for a hearing on the alleged violation within 20 days of the date the motion is filed." *Id.* art. 42A.751(d). Carter had not been released on bail, and his letter to Judge Lilly filed September 20 was the equivalent of a motion under article 42A.751(d). The hearing was held on October 11, twenty-one days after the

motion was filed. Neither Carter nor the Commission complained about the timeliness of the hearing under article 42A.751(d). Judge Lilly's failure to comply with article 42A.751(d) does not prove Carter was entitled to be admitted to bail or that Judge Lilly was required to consider the statutory factors for bail in article 17.15.

We conclude the Commission failed to meet its burden of proving Judge Lilly violated Canons 2A and 3B(2) by ordering no bond on the motion to revoke probation. We dismiss the Commission's Public Admonition and Order of Additional Education in CJC No. 19-1878 to the extent it concerns Judge Lilly's no-bond order, and we find Judge Lilly not guilty of this charge.

Ex Parte Communication

The Commission charged Judge Lilly with violating Canon 3B(8) and article V, § 1-a(6)A of the constitution by having an *ex parte* communication with Carter concerning the merits of a pending or impending judicial proceeding. Judge Lilly asserts that his telephone conversation with Carter did not violate the canon and the constitution because he and Carter did not discuss the merits of the motion to revoke probation.

A communication is *ex parte* if it is outside the presence of the parties, is between the judge and a party, and is "concerning the merits of a pending or impending judicial proceeding." Canon 3B(8).

The Commission alleged, "Judge Lilly called Carter directly in the Runnels County Jail and discussed Carter's intentions regarding the pending motion to revoke, as well as a potential plea for time served." The question is whether the evidence shows their conversation concerned "the merits" of the motion to revoke Carter's probation. There is conflicting evidence concerning the contents of their conversation.

At the final hearing before this Court, Carter testified he was taken by the jailers to a phone and spoke to Judge Lilly. Carter testified:

> A. He told me that he had received my correspondence, that he was going to—that he appointed me an attorney, that he was going to bench warrant me to Brown County to get the matter taken care of. That on the day that I was bench-warranted, that I would speak to my attorney in the jail prior to court, and then we would go ahead and go through the proceeding.
>
> Q. Did you at any time attempt to discuss the substance or the facts in the case related to your motion to revoke probation?
>
> A. Not that I recall. . . .
>
> Q. Did Judge Lilly ask you any questions about the substance of your case, about the facts of your case?
>
> A. No.
>
> . . . .
>
> Q. Judge Lilly called you to confirm that you did, in fact, want to plead true to the motion to revoke. Correct?
>
> A. No. He did not exactly say that. He called and told me that he had received my letter, that he had appointed an—an attorney had been appointed to represent me, and that I was going to be bench-warranted to Brown County to have a hearing on a motion to revoke.

. . . .

> Q. So you're testifying that Judge Lilly did not call to confirm the contents of your letter; specifically, that you wanted to plead true to a motion to revoke in exchange for time served?
>
> A. . . . The judge did call over there. . . . So apparently, yes, he had received the letter and we were going to [sic] through with the hearing on the motion to revoke.
>
> . . . .
>
> I would suppose my answer is, yes, to the question. He did call over and advised me that he had appointed an attorney to represent me and he had received my letter, an attorney had been appointed to represent me, and that we were—he would bench warrant me over so that we could have a hearing on the motion to revoke that I had asked for.

The parties' Agreed Stipulations state:

> While the motion to revoke remained pending, Judge Lilly, in response to a letter from Carter requesting to plead true to the motion to revoke for time served, called Carter directly in the Runnels County Jail to confirm these were his intentions. Judge Lilly also spoke to a Runnels County Jailer about Carter's conduct in jail.

At the hearing on the motion to revoke, Judge Lilly discussed the telephone call:

> The Court: You and I talked on the telephone. You want to get rid of this misdemeanor, correct?
>
> The Defendant: Absolutely.
>
> The Court: I'm willing—if you're willing to plead to it. I'm willing to give him time served unless you object to that.
>
> . . . .
>
> Mr. Britton [prosecutor]: Can I ask him a quick question? You said that you had spoke[n] to him?

> The Court: To bring him over here. I called over there on—what day did I call over there?
>
> The Defendant: Monday
>
> The Court: Monday. He didn't have a Court appointed attorney then.
>
> Mr. Britton: Okay.
>
> The Court: He got one appointed between then and now.
>
> Mr. Britton: Oh, okay. Because when you said you had called him, I don't know if you meant them or him.
>
> The Court: Well, I spoke to both of them.
>
> Mr. Britton: Oh, okay.
>
> The Court: I called him to let him know that we were going to bring him back over here. I wanted to talk to him personally and tell him we were going to bring him back over here for this.
>
> Mr. Britton: Oh, okay.
>
> The Court: And then I talked to the jailer to find out how his conduct was and how he did there.

Judge Lily responded to the Commission's letter of inquiry about the communication as follows:

> 7. During the October 11, 2019 hearing in *State v. Adam Ben Carter*, Cause No. 057190 in the Brown County Court, you stated that you had spoken to the defendant Carter by telephone. Please describe who made that call, when it was made, and the substance of the conversation.
>
> After receiving the letter dated September 25, 2019 from Mr. Carter stating that he wanted to waive his right to counsel and plead true to the Motion to Revoke I called the Runnels County Jail to speak to Mr. Carter. I asked him if he truly wanted to plead true and accept time served. Mr. Carter stated yes.

> 8. Please explain how your telephone conversation with Carter, a defendant in custody awaiting hearing on a case pending in your court, complied with a judge's obligation not to initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party . . . concerning the merits of a pending [or] impending judicial proceeding. Tex. Code Judicial Conduct Canon 3B(8).
>
> I did not initiate the contact with Mr. Carter. He wrote in a letter that he wanted to waive his right to counsel and plead true to the MTR for time served. Mr. Carter's letter had been provided to the County Attorney prior to this call. I did not speak with Mr. Carter about the substance or factual allegations of the case.

At the hearing before the Commission, the Commission's attorney showed Judge Lilly a copy of the Commission's findings of fact and told Judge Lilly:

> [W]hat I'd like to do is just to list off those particular findings for you. I'll just refer to them by number. . . . And then all we need to hear from you is whether that finding is correct or you agree with it; or if you disagree with it, if you would tell us why you disagree with it.

Judge Lilly answered "Yes" to the findings he agreed with. Finding 10 was:

> While the motion to revoke remained pending, Judge Lilly called Carter directly in the Runnels County Jail and discussed Carter's intentions regarding the pending motion to revoke, as well as a potential plea agreement.

At the hearing, the Commission's lawyer asked Judge Lilly if he agreed with finding 10:

> Q. And Finding of Fact No. 10, Judge.
>
> A. Yes, I had a very quick telephone conversation with him, and this—now or later, I can explain to you the reason for that, but I don't disagree with it. It's just I want to make sure that it's understood that it was an extremely short conversation just simply to get—he wasn't represented by an attorney, so I had no one else to contact other than him directly.

To summarize, at the final hearing, Carter testified there was no discussion of whether he would plead true for time served. In the Agreed Stipulations, the parties stipulated Judge Lilly "called Carter directly in the Runnels County Jail to confirm these were his intentions." In the responses to the letter of inquiry, Judge Lilly said he called Carter at the jail and "I asked him if he truly wanted to plead true and accept time served." And at the hearing before the Commission, Judge Lilly testified he agreed with the finding that he called Carter "and discussed Carter's intentions regarding the pending motion to revoke, as well as a potential plea agreement." Thus, there is evidence that Judge Lilly discussed with Carter whether he planned to plead true to the motion to revoke and be sentenced to time served, and there is evidence that their conversation did not discuss whether Carter intended to plead true.

After considering the credibility of the witnesses and the context of the statements, we have determined that Judge Lilly did discuss with Carter whether Carter would plead true to the motion to revoke probation and accept time served as punishment. We next consider whether that discussion concerned "the merits of a pending or impending judicial proceeding." Canon 3B(8).

Judge Lilly argues the communication did not discuss the merits because the discussion concerned only procedures and not the underlying facts. Webster's Dictionary defines "merits" as meaning "the substance of a legal case apart from

matters of jurisdiction, procedure, or form" and "individual significance or justification." *Merits*, WEBSTER'S THIRD NEW INT'L DICTIONARY (1981). Black's Law Dictionary defines "merits" as meaning, "The elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, esp. of procedure < trial on the merits >." *Merits*, BLACK'S LAW DICTIONARY (8th ed. 2004).

Cases applying Canon 3B(8) have interpreted "*ex parte* communications" as "those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter. They are barred in order to ensure that 'every person who is legally interested in a proceeding [is given the] full right to be heard according to law.'" *In re Thoma*, 873 S.W.2d 477, 496 (Tex. Rev. Trib. 1994) (quoting JEFFREY M. SHAMAN, ET AL., JUDICIAL CONDUCT AND ETHICS, § 6.01 at 145 (1990)); *see also Nealy v. Nealy*, No. 13-14-00689-CV, 2016 WL 4045240, at *2 (Tex. App.—Corpus Christi–Edinburg July 28, 2016, pet. denied) (mem. op.); *In re S.A.G.* 403 S.W.3d 907, 914 (Tex. App.—Texarkana 2013, pet. denied); *Twist v. Garcia*, No. 13-05-00321-CV, 2007 WL 2442363, at *6 (Tex. App.—Corpus Christi–Edinburg Aug. 30, 2007, no pet.) (mem. op.); *Spigener v. Wallis*, 80 S.W.3d 174, 182 (Tex. App.—Waco 2002, no pet.); *In re J.B.K.*, 931 S.W.2d 581, 583 (Tex. App.—El Paso 1996, no writ). Canon 3B(8) does not prohibit communications concerning uncontested administrative or procedural matters. *In re S.A.G.*, 403

S.W.3d 907, 916 (Tex. App.—Texarkana 2013, pet. denied). Thus, a court's request to a party to prepare a response to a request for findings of fact and conclusions of law was not an *ex parte* communication about the merits of the case. *See Randolph v. Texaco Expl. & Prod., Inc.*, 319 S.W.3d 831, 836 (Tex. App.—El Paso 2010, pet. denied).

Judge Lilly argues that his communication with Carter concerned procedure, not merits. We disagree. As Black's Law Dictionary explains, "merits" is "the substantive considerations to be taken into account in deciding a case." *Merits*, BLACK'S LAW DICTIONARY. At the hearing on the motion to revoke Carter's probation, the only issues to be decided were whether the allegations in the motion were true and, if so, the appropriate punishment. The evidence shows Judge Lilly and Carter discussed that Carter would plead that the allegations were true in exchange for a sentence of time served. Thus, their conversation involved "the substantive considerations to be taken into account in deciding a case."

We conclude the Commission proved Judge Lilly violated Canon 3B(8).

Discipline

Having determined the Commission proved Judge Lilly violated Canon 3B(8), we must determine the appropriate discipline, if any. Article V of the Texas Constitution states that any judge may be disciplined for:

> willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office,

> willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.

TEX. CONST. art. V, § 1-a(6)(A). "Willful conduct requires a showing of intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment or lack of diligence." *In re Slaughter*, 480 S.W.3d at 848. A judge need not have specifically intended to violate the Code of Judicial Conduct; a willful violation occurs if the judge intended to engage in the conduct for which he is disciplined. *Id.*

Judge Lilly's *ex parte* communication was "willful" in that he intended to engage in the communication. *See id.* The communication was clearly inconsistent with the performance of his duties. *See* TEX. CONST. art. V, § 1-a(6)A. Therefore, discipline is appropriate and permitted by the constitution.

The Commission determined that Judge Lilly should be publicly admonished for the *ex parte* communication and that he must obtain two hours of instruction with a mentor concerning judicial ethics and criminal procedure. Judge Lilly testified before the Commission that he had already completed the two hours of instruction. We must determine whether that discipline or another is appropriate.

One tribunal has described the purpose for imposing sanctions as follows:

> The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice. The discipline we

> impose must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future.

In re Sharp, 480 S.W.3d 829, 838–39 (Tex. Spec. Ct. Rev. 2013) (quoting *In re Barr*, 13 S.W.3d 525, 560 (Tex. Rev. Trib. 1998) (quoting *In re Kneifl*, 351 N.W.2d 693, 700 (Neb. 1984))). The Code of Judicial Conduct provides that not every transgression should result in discipline. Canon 8A. Whether discipline should be imposed and the degree of discipline "should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system." *Id.* The Commission directs us to the "*Deming* factors," which several courts have considered in determining an appropriate sanction:

> (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct;
>
> (b) the nature, extent and frequency of occurrence of the acts of misconduct;
>
> (c) whether the misconduct occurred in or out of the courtroom;
>
> (d) whether the misconduct occurred in the judge's official capacity or in his private life;
>
> (e) whether the judge has acknowledged or recognized that the acts occurred;
>
> (f) whether the judge has evidenced an effort to change or modify his conduct;

(g) the length of service on the bench;

(h) whether there have been prior complaints about this judge;

(i) the effect the misconduct has upon the integrity of and respect for the judiciary; and

(j) the extent to which the judge exploited his position to satisfy his personal desires.

Matter of Deming, 736 P.2d 639, 659 (Wash. 1987); *see also In re Sharp*, 480 S.W.3d at 839 (applying *Deming* factors). We apply these factors to this case as follows.

(a), (b) Judge Lilly's violation of having the *ex parte* communication with Carter appears to be an isolated event. Judge Lilly has stated he has transferred authority over criminal cases to the county court at law judge and that he no longer exercises authority over criminal cases. (c) The record does not show that the *ex parte* communication took place in the courtroom. (d) The *ex parte* communication took place in Judge Lilly's official capacity and not in his private life. (e) Judge Lilly acknowledged that the communication occurred; however, he argues his communication with Carter did not violate Canon 3B(8) because it did not concern the merits. (f) Judge Lilly has shown an effort to modify his conduct by taking the ordered hours of additional judicial education and by transferring the criminal docket to the county court at law judge. (g) Judge Lilly has been on the bench since January 2019, about nine months at the time of the violation and three years at the time of this opinion. (h) There is no evidence of prior complaints about Judge Lilly. (i) No

evidence shows the violation affected the integrity of and respect for the judiciary. (j) No evidence shows the *ex parte* communication was to satisfy Judge Lilly's personal desires.

The Commission publicly admonished Judge Lilly for the *ex parte* communication and ordered that he complete two hours of instruction with a mentor. The evidence shows that Judge Lilly has completed the two hours of instruction. The violation involved Judge Lilly's official capacity, invoking factor (d). Judge Lilly denied that his telephone conversation with Carter violated Canon 3B(8), invoking factor (e). On the other hand, Judge Lilly has taken steps to insure no further violations occur by transferring the criminal docket to the county court at law judge.

When the public is aware of the actions constituting the violation, a public admonishment may be necessary to preserve the integrity and independence of the judiciary, to restore and reaffirm public confidence in the administration of justice, and in recognition that judges must respect and honor the judicial office as a public trust. *See In re Sharp*, 480 S.W.3d at 842. The evidence in this case does not show that Judge Lilly's *ex parte* communication violating the canons was publicized[15] or

[15] The Commission asserts in its briefing that Judge Lilly publicized in the media his sanction concerning concurrent service. We have concluded that sanction was improper because the Commission failed to prove Judge Lilly's concurrent service violated the canons. However, the Commission does not assert that Judge Lilly publicized his public reprimand concerning the *ex parte* communication. Moreover, although the Commission asserts that Judge Lilly publicized one or both of the sanctions, there is no evidence before this Court that Judge Lilly did so.

that his actions impaired the integrity and independence of the judiciary. Nor does any evidence show that the violation affected the public's confidence in the administration of justice. *Cf. id.* Therefore, we conclude a private warning is the appropriate discipline for Judge Lilly's violation of Canon 3B(8).

CONCLUSION

In CJC No. 19-1767, we conclude the Commission failed to prove Judge Lilly's conduct of serving concurrently as the County Judge of Brown County and as a reserve deputy sheriff in San Saba County and Hood County violated Canons 2B and 4A(1) of the Texas Code of Judicial Conduct and article V, section 1-a(6)A of the Texas Constitution. We **DISMISS** the Commission's Private Warning and Order of Additional Education in that case, and we find Judge Lilly not guilty of this charge.

In CJC No. 19-1878, we conclude the Commission failed to prove that Judge Lilly's no-bond order violated Canons 2A and 3B(2) of the Texas Code of Judicial Conduct. We **DISMISS** the Commission's Public Admonition and Order of Additional Education concerning that allegation, and we find him not guilty of this charge. However we conclude the Commission proved Judge Lilly violated Canon 3B(8) of the Texas Code of Judicial Conduct and article V, section 1-a(6)A of the Texas Constitution by having an *ex parte* communication with Carter. We find Judge Lilly guilty of this charge. We **VACATE** the Commission's Public

Admonishment and Order of Additional Education concerning this violation, and we **ORDER** that Judge Lilly receive a private warning concerning this violation. As Judge Lilly has completed the additional education ordered by the Commission, we do not order that he complete additional education.

SPECIAL COURT OF REVIEW[16]

[16] The Special Court of Review consists of The Honorable Lana Myers, Justice, Court of Appeals, Fifth District of Texas at Dallas, presiding by appointment; The Honorable Greg Neeley, Justice, Court of Appeals, Twelfth District of Texas at Tyler, participating by appointment; and The Honorable Scott Golemon, Chief Justice, Court of Appeals, Ninth District of Texas at Beaumont, participating by appointment.