

Opinion Issued November 4, 2021



SPECIAL COURT OF REVIEW

IN RE:	§	No. SCR 20-0006
INQUIRY CONCERNING	§	Appeal from the
JUDGE ROBERT C. RICHTER, JR.	§	State Commission on Judicial Conduct
	§	(TC# CJC No. 18-1426)

**OPINION**

This is a *de novo* review of a decision by the State Commission on Judicial Conduct (“the Commission”) to sanction the Honorable Robert C. Richter, Jr. (“Judge Richter”) with a Public Admonition and Order of Additional Education for conduct committed while serving as an Associate Judge for the Missouri City Municipal Court in Fort Bend County, Texas. After carefully considering the evidence, arguments of counsel, and the pre and posttrial briefing, we believe the evidence is insufficient to demonstrate Judge Richter “willfully” engaged in the conduct as alleged in the charging document.

This is not to say that Judge Richter’s conduct going forward does not require modification. While we agree it was within Judge Richter’s discretion to initiate the contempt proceedings in this case, once he made the decision to proceed, he was compelled to follow well-established principles of due process *before* entering judicial findings and setting in motion a process that could potentially result in the attorney’s deprivation of liberty. While we believe that Judge Richter violated principles of due process during this contempt proceeding, we do not believe the conduct,

*as alleged in the charging document*, was committed through misuse of the power of his office. Rather, we are persuaded by the evidence that the specific acts alleged in the charging document were motivated by the Judge's good-faith belief, although incorrect, that he was following correct procedure. Accordingly, we dismiss the sanction.

## **BACKGROUND**

### **The Traffic Cases**

On August 23, 2016 Randy Duong ("Duong") received a ticket for Speeding in a School Zone and Failure to Display Driver's License on Demand. The ticket required him to resolve these traffic cases in the Missouri City Municipal Court. On October 18, 2016, a complaint in each traffic case was sworn and filed with the court. Duong entered a plea of not guilty in each case. On October 18, 2016, notice was issued of a pretrial conference set for November 16, 2016 in each case. Duong appeared for the pretrial conference and requested a jury trial, which was scheduled to occur on February 16, 2017. Duong failed to appear in court on the jury trial date. Consequently, a third case was added against Duong for Failure to Appear and an arrest warrant was issued for his arrest.

### **Attorney Kubosh's Entry of Appearance**

On March 7, 2017, Attorney Paul A. Kubosh ("Kubosh") faxed to the municipal court a Letter of Representation entering his appearance in all three of Duong's cases. The letter was stamped "Received" by the court on March 13, 2017. Duong's arrest warrant was withdrawn. After several resets, the reasons for which are not clear in the record, Duong's cases were eventually set for jury trial on February 15, 2018.<sup>1</sup>

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<sup>1</sup> Although several notices of reset are contained within the record, the reset notice setting the jury trial on February 15, 2018 is absent. The last reset notice that appears before February 15, 2018 indicates Duong's cases were set for jury

### **Attorney Kubosh's Motion for Continuance**

On February 14, 2018, Kubosh filed in the municipal court a sworn written motion seeking a continuance of the jury trial setting. According to the written motion, the basis for the continuance was that Kubosh's office "had more courts than attorney's [sic] available." The motion was opposed by the State because it "was not timely filed." The motion was denied on the same day by the Presiding Judge, the Honorable Debra Sinclair, who did not state a reason. The record does not indicate precisely when or how the court conveyed notice to Kubosh that his motion for continuance was denied.

However, according to Judge Richter, the court clerk informed him the next day, on February 15, 2018, that Kubosh was aware that the motion for continuance had been denied. In an affidavit submitted to the Commission, the court clerk stated that on February 15, 2018, a person from Kubosh's office called "[e]arly that morning" to advise the court that the attorney assigned to the Duong cases was "diagnosed with the flu the night before, and that 'she' could not come to court,"<sup>2</sup> and during the phone call, the person acknowledged that "Kubosh knew" the motion for

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trial on October 19, 2017. Judge Richter testified before the Commission on October 5, 2020 that Duong's cases were not reached at the October 2017 setting, but that Judge Richter "told" the attorney who appeared for Duong (not Kubosh) that Duong's case would be reset and that it was "going to be the first and only case, if there's no others." He testified that he did not use the word "preferentially" but he made clear the case would be reached at the next setting. Judge Richter also testified that a standard notice of reset "was sent," which advised that any motion for continuance must be filed in writing no later than eight days prior to the court setting. Judge Richter's chronology of events further stated the reset notice was "signed" by Duong and that an "additional notice was faxed to attorney Kubosh's office" on October 20, 2017. However, unlike every other reset notice in the record before us, neither the signed reset notice, nor a copy of the fax, nor fax confirmation related to the February 15, 2018 reset appear in the record. In addition, the parties stipulated in this proceeding only to the fact that a jury trial was set for February 15, 2018. Accordingly, in the absence of the notice itself, we accept as true only the fact that Duong's case was set for jury trial on February 15, 2018. While we do not doubt that Judge Richter *believed* the reset notice was sent, which would comport with his court's usual practice, the record suggests *this written* notice was *not actually* sent to Kubosh. However, the record also establishes Kubosh had actual knowledge of the February 15, 2018 trial setting.

<sup>2</sup> Medical records later submitted to the court confirmed the attorney assigned by Kubosh to handle Duong's cases was examined at an urgent care clinic where the attorney's vital signs were taken. The records indicate that on February 14, 2018 at 12:35 p.m., the attorney had a temperature of 100.4 °F and was subsequently diagnosed with the flu and an acute upper respiratory infection.

continuance, filed the day before, was denied. On February 15, 2018, Duong appeared for the jury trial setting. However, because neither Kubosh nor any attorney from his firm appeared on Duong's behalf, Duong's cases were reset to May 30, 2018. Notices of the resets were faxed to Kubosh's office on the same day.

**Judge Richter Signs Show Cause and Contempt Orders Simultaneously Then Attempts Service by Fax, Rather than Personal Service.**

On February 15, 2018, Judge Richter also signed two orders related to the contempt case against Kubosh. Both orders were filed under the Duong cause numbers but styled "The State of Texas vs. Paul Kubosh" and "In Re Paul A. Kubosh." One order, titled "Contempt Showcause" stated that "[o]n March 1, 2018, you will be given the opportunity to showcause why;" (1) "You failed to appear for your client's Jury Trial" and (2) "Why you should not be held in contempt of court per the attached order." Attached to the show cause order was a signed "Order of Contempt" stating Judge Richter made a finding that Kubosh was in contempt of court for, among several other alleged acts, failing to appear at the February 15, 2018 jury trial setting. The contempt order also required Kubosh be confined in the city jail for one day and fined \$100. Both of Judge Richter's signed orders were faxed to Kubosh's office on February 15, but neither order was ever personally served on Kubosh. Copies of the faxes and fax confirmations sheets in the record conclusively establish both orders were received by Kubosh's office on February 15, 2018.

**Judge Richter Signs an Arrest Warrant Unaccompanied by Complaint or Affidavit**

Kubosh did not appear for the March 1, 2018 show cause hearing. On March 8, 2018, despite the court's failure to have Kubosh personally served with the show cause order, Judge Richter signed a "warrant of arrest" issued in the name of "The State of Texas" commanding law enforcement to arrest Kubosh and bring him before the court *instanter* to answer for the offense of

contempt of court. The warrant indicated, incorrectly, that it was based on an offense of which Kubosh was “accused by written complaint under oath and filed before [Judge Richter].” The warrant referenced both a new docket number and a new citation number. The arrest warrant was faxed from Judge Richter’s court to Kubosh’s office unaccompanied by an affidavit or a written sworn complaint because neither existed. A fax confirmation sheet indicates the arrest warrant was received by Kubosh’s office on March 8, 2018. Although the warrant appears to be an active warrant, according to Judge Richter, the warrant was never “entered into the system” and Kubosh was therefor never *actually* in jeopardy of being arrested by law enforcement.

#### **Judge Richter Signs Order Withdrawing Arrest Warrant But Filing Was Delayed**

On March 26, 2018,<sup>3</sup> Kubosh, by and through his attorney Kevin Pennell, filed an emergency motion to vacate the arrest warrant in the Missouri City Municipal Court. The motion also requested Judge Richter refer the contempt matter to the regional presiding judge for assignment. At a hearing held on March 29, 2018, Judge Richter granted Kubosh’s motion to vacate and signed an order withdrawing the warrant. Despite the fact that the order withdrawing the warrant was signed on March 29, 2018, the order was not filed by the court clerk until approximately two weeks later.

According to the parties’ stipulations filed in this proceeding, at the hearing on March 29, 2018, Judge Richter showed Kubosh’s attorney the signed order then handed it to a court clerk to

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<sup>3</sup> Between March 12, 2018 and March 26, 2018, in various emergency motions seeking an order to recall the warrant, including a verified Emergency Petition for Writ of Mandamus filed in district court, Kubosh repeatedly denied “receiving” either the show cause order or the contempt order before the arrest warrant was issued. In addition, at the *de novo* trial held in this proceeding, Kubosh testified he was made aware of the show cause and contempt orders on March 8, when an attorney from his office, Mr. Pittsford, had appeared in Judge Richter’s court and was told by the Judge that a warrant was “going to” be issued for Kubosh’s arrest. After learning about the arrest warrant from Mr. Pittsford, Kubosh sent another attorney, Mr. De la Garza, to court to obtain copies of “documents” so he could “find out just what was going on.”

scan and file. Kubosh's attorney requested a copy of the order. The court clerk informed him before she could provide him with a copy, she would first have to scan the order. However, according to the court clerk, she later misplaced the order, which prevented her from getting a copy to Kubosh's attorney and delayed the filing of the order. The order withdrawing the arrest warrant was not filed until mid-April 2018, after Judge Richter signed a duplicate order. According to a hand-written note, purportedly made by the court clerk, the original order was eventually found on April 19, 2018 in her desk "mixed in w/other paper."

There is no evidence in the record indicating that prior to the filing of the order withdrawing the warrant, Judge Richter ever informed Kubosh or his attorney that the warrant had never been "entered into the system" or that the warrant was never active. Instead, in an email exchange initiated on April 16, 2018 in which Kubosh's attorney asked for confirmation that the order recalling the warrant "has been filed of record with the clerk . . . and . . . the clerk is recalling the arrest warrant and notifying law enforcement . . . ." The clerk responded "Yes, the order has been filed and the warrant was recalled."

### **The Contempt Proceeding is Dismissed with Prejudice**

On April 19, 2018, the Honorable Susan Brown, presiding judge of the 11th Administrative Judicial Region, assigned Judge Christopher Morales to preside over attorney Kubosh's contempt hearing. On May 31, 2018, after two hearings Judge Morales granted the State's motion to dismiss the contempt charge with prejudice. The basis for the dismissal motion was that a "State's attorney is unavailable." According to Judge Richter, he agreed that the contempt proceeding should be dismissed because "we had spent so much time on it by then that it was just wasting assets and time and energy, and I didn't have any objection to it at that point."

## PROCEDURAL HISTORY

On July 20, 2018, the Commission received a complaint along with fifteen exhibits alleging Judge Richter had violated standards of judicial conduct during the contempt proceeding he initiated against Kubosh.<sup>4</sup> The Commission informed Judge Richter of the complaint and submitted written questions related to the complaint allegations. Judge Richter cooperated with the inquiry and answered the Commission's questions in writing. Judge Richter also submitted his own exhibits. The Commission met on December 4-5, 2019 to consider the allegations made against Judge Richter, and after reviewing the complaint, Judge Richter's answers to the written questions, and relevant documentation, the Commission entered the following *tentative* findings of fact:

1. At all times relevant hereto, the Honorable Robert Richter was Municipal Court Judge, Missouri City, Fort Bend County, Texas.
2. On or about March 13, 2017, Attorney Paul Kubosh filed a letter of representation on behalf of a traffic court defendant in Judge Richter's court. The case was set for jury trial on February 15, 2018.
3. The day before the trial, Attorney Kubosh filed a motion for continuance. The motion was denied by Presiding Judge Debra Champagne.
4. No attorney appeared for the defendant on February 15, 2018.
5. The same day, Judge Richter signed an order holding Attorney Kubosh in contempt for failing to appear and ordering that Kubosh be held in jail for one day and fined \$100, and he issued a show cause order setting a hearing for March 1, 2018, to determine if Attorney Kubosh should be held in contempt for failing to appear.
6. Kubosh was never personally served with either the order of contempt or the

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<sup>4</sup> The complaint pointed to several acts allegedly committed by Judge Richter in violation of judicial standards, including an allegation that he "disappear[ed] an order" and that he "coerc[ed]" an assistant city attorney into prosecuting the contempt charge, but the Commission pursued only two: (1) "failing to personally serve Kubosh with a show cause order;" and (2) "issuing an arrest warrant against Kubosh based on a 'written complaint under oath and filed before me' that did not exist."

show cause order, and therefore, failed to appear for the March 1, 2018 show cause hearing.

7. On March 8, 2018, Judge Richter signed an arrest warrant for Attorney Kubosh to be brought to court *instanter* to answer the offense contempt of court but the warrant was not accompanied by an affidavit or written complaint filed under oath.

8. Attorney Kubosh filed a motion to vacate the arrest warrant, which was granted on March 29, 2018.

At a subsequent hearing held before the Commission on October 5, 2020 in which Judge Richter testified, Judge Richter did not dispute the Commission's factual findings. Nor did he deny that he made procedural errors or that his actions caused an officer of the court to be temporarily denied due process. Rather, Judge Richter argued that his conduct did not rise to the level of judicial misconduct because it amounted to mere legal errors that were made in a good faith effort to comply with the law.

The Commission disagreed that the judge's conduct did not rise to the level of judicial misconduct and, on October 28, 2020, made final the findings listed above, and entered its determination that Judge Richter's conduct willfully violated Canons 2A and 3B(2) of the Texas Code of Judicial Conduct, and that he should therefore be publicly admonished for his conduct and ordered to obtain additional education in the areas of contempt proceedings generally, and specifically, contempt proceedings applicable to officers of the court. Judge Richter subsequently requested appointment of a special court of review.<sup>5</sup> On December 2, 2020, Texas Supreme Court Chief Justice Nathan L. Hecht appointed by random selection this panel to review the Commission's decision. We subsequently held a *de novo* trial in which testimony from Judge

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<sup>5</sup> See TEX.GOV'T CODE ANN. § 33.034(b) ("Not later than the 30th day after the date on which the commission issues its decision, the judge must file with the chief justice of the supreme court a written request for appointment of a special court of review.").

Richter and Kubosh was heard. The parties also submitted pretrial and posttrial briefing.

### **STANDARD OF REVIEW**

A Special Court of Review conducts its review of a sanction issued in an informal proceeding *de novo*. TEX.GOV'T CODE ANN. § 33.034(e)(2). Reviews of informal proceedings are governed to the extent practicable by the rules of law, evidence, and procedure that apply to the trial of a civil actions generally. TEX.GOV'T CODE ANN. § 33.034(f). The Commission bears the burden of proving the allegations in a charging document by a preponderance of evidence. *In re Hecht*, 213 S.W.3d 547, 560 (Tex. Spec. Ct. Rev. 2006). The decision rendered by a Special Court of Review is not appealable. TEX.GOV'T CODE ANN. § 33.034(i).

### **THE CHARGING DOCUMENT**

The Texas Constitution provides in relevant part that a judge may be disciplined for: (1) “willful or persistent violation of rules promulgated by the Supreme Court of Texas,” (2) “incompetence in performing the duties of the office,” (3) “willful violation of the Code of Judicial Conduct,”<sup>6</sup> or (4) “willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit on the judiciary or on the administration of justice.” TEX.CONST. art. V, § 1-a(6)(A).

In three charges,<sup>7</sup> the Commission’s allegations invoke two of the four categories listed

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<sup>6</sup> The Code of Judicial Conduct is promulgated by the Texas Supreme Court, and can be found at: <https://www.txcourts.gov/media/1452409/texas-code-of-judicial-conduct.pdf> (as amended through May 28, 2021).

<sup>7</sup> The charging document in this *de novo* proceeding alleges violations of two additional standards of conduct, Canon 3(B)(8) and TEX.CONST. art. V, § 1-a(6)(A), that were not alleged below. Such expansion of charges is permitted by statute. *See* TEX.GOV'T CODE ANN. § 33.034(d)(“[T]he commission shall file with the clerk a charging document that includes, as applicable, a copy of the censure or sanction issued and any additional charges to be considered by the court of review.”).

above: (1) *willful* violation of the Code of Judicial Conduct, namely Canons 2A,<sup>8</sup> 3B(2)<sup>9</sup> and 3B(8);<sup>10</sup> and (2) *willful* conduct that is clearly inconsistent with the proper performance of the judge’s duties. *See* TEX.CONST. art. V, § 1-a(6)(A). In addition, the charging document identifies three acts that the Commission contends constitutes “willful” conduct committed by Judge Richter: (1) failing to have Kubosh personally served with the show cause order; (2) signing an order holding Kubosh in contempt before holding a show cause hearing; and (3) issuing an arrest warrant against Kubosh that was not based on facts set forth in a sworn complaint or affidavit establishing probable cause as required by Article 45.014(a) of the Texas Code of Criminal Procedure.<sup>11</sup>

In response, Judge Richter repeats the argument he made below by admitting he engaged in conduct that resulted in the procedural errors alleged in the charging document, but argues his conduct was not “willful” because he was acting under a good-faith belief he was following the correct procedure as it applied to contempt proceedings. We address his argument below.

## DISCUSSION

### **I. “Willful” Standard Applicable to Allegations of Judicial Misconduct Arising From Legal Error.**

In judicial misconduct cases “willful” conduct generally occurs when a judge intentionally, or with gross indifference, misuses the power of the judicial office. *See In re Slaughter*, 480

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<sup>8</sup> *See* TEX.CODE JUD.CONDUCT, CANON 2A (“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.”).

<sup>9</sup> *See* TEX.CODE JUD.CONDUCT, CANON 3B(2)(“A judge should be faithful to the law and shall maintain professional competence in it.”).

<sup>10</sup> *See* TEX.CODE OF JUD.CONDUCT, CANON 3B(8)(“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.”).

<sup>11</sup> TEX.CODE CRIM.PROC.ANN. art. 45.014(a) provides: “When a sworn complaint or affidavit based on probable cause has been filed before the justice or municipal court, the justice or judge may issue a warrant for the arrest of the accused and deliver the same to the proper officer to be executed.”

S.W.3d 842, 848 (Tex. Spec. Ct. Rev. 2015)(“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.”)[Internal quotations omitted]; *see also In Re Ginsberg*, ---S.W.3d ---, No. 18-0001, 2018 WL 2994940, at \*4 (Tex. Spec. Ct. Rev. June 11, 2018)(“‘willful’ means ‘the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross indifference to his conduct.’”)(quoting *In re Barr*, 13 S.W.3d 525, 534 (Tex. Rev. Trib. 1998)). A judge acts intentionally “when the act is done with the conscious objective of causing the result or of acting in the manner defined in the pertinent rule of conduct.” *In re Ginsberg*, 2018 WL 2994940, at \*4; *In re Barr*, 13 S.W.3d at 534. “Gross indifference is indifference that is flagrant, shameful and beyond all measure and allowance.” *In re Ginsberg*, 2018 WL 2994940, at \*4; *In re Barr*, 13 S.W.3d at 534. “If a judge intentionally engaged in the conduct that violated a judicial canon, then the violation is willful.” *In re Ginsberg*, 2018 WL 2994940, at \*4; *In re Barr*, 13 S.W.3d at 534-35.

However, when an allegation of judicial misconduct arises from purely legal error, as opposed to non-legal error, the applicable “willful” standard “for determining whether legal error rises to the level of judicial misconduct” requires us to ask: (1) “whether the judge violated clear and determined law” and (2) “if so, whether the legal error was egregious, part of a pattern or practice, or made in bad faith.” *In re Ginsburg*, 2018 WL 2994940, at \*5. In light of this standard applicable only to legal error, “judicial disciplinary proceedings are inappropriate where the judge’s complained-of action is made under law that ‘is arguably unclear or ambiguous.’” *In re Ginsburg*, 2018 WL 2994940, at \*5 (quoting *In re Barr*, 13 S.W.3d at 545). “So long as judicial rulings are made in good faith, and in an effort to follow the law as the judge understands it, the

usual safeguard against error or judicial overreaching lies in appropriate appellate review.” [Internal quotations omitted]. *In re Ginsburg*, 2018 WL 2994940, at \*5; *In re Barr*, 13 S.W.3d at 545.

The Commission does not argue that the alleged conduct arises from non-legal error, and we find that the conduct as alleged in the charging document arises only from legal error committed by Judge Richer. Consequently, we apply the “willful” standard applicable to legal error to the allegations made in this case.

**II. Did Judge Richter Intentionally, or with Gross Indifference, Violate Clear and Determined Law? If so, Was the Violation Egregious, Part of a Pattern, or Made in Bad Faith.**

**A. Alleged Conduct #1 and #2**

The Commission alleges Judge Richter willfully violated the judicial canons and willfully engaged in conduct that is clearly inconsistent with the proper performance of his duties by: (1) failing to *personally* serve the attorney with the show cause order and (2) signing an order holding Kubosh in contempt *before* holding a show cause hearing. The Commission argues Judge Richter either “knew or should have known” he was failing to “follow basic and fundamental notions of due process with respect to an alleged attorney contemnor’s due process right” when he engaged in this conduct. And the Commission’s proof consists solely of evidence demonstrating the *result* of Judge Richter’s conduct, i.e. that Kubosh ultimately did not receive notice of the show cause hearing.

We believe the Commission applies the incorrect legal standard. We also find that while relevant, evidence establishing that the attorney in this case ultimately did not receive due process is not dispositive. Rather, the relevant inquiry here is whether the evidence demonstrates Judge

Richter intentionally, or with gross indifference violated clear and determined law, and if so, whether the violation was egregious, part of a pattern, or made in bad faith. Because we believe the Commission's evidence is insufficient to establish that Judge Richter did so, its case fails.

In this proceeding, while conceding he committed procedural errors, Judge Richter argues he did not willfully violate the judicial canons or engage in conduct that is clearly inconsistent with his duties because he made a good faith *attempt* to comply with both the requirements of due process and the rules of procedure applicable to contempt proceedings as he understood them. His argument is supported by the evidence produced in this case.

First, Judge Richter testified he believed the correct procedure in the contempt context, although incorrect, was to "enter an order and then set it for show cause [hearing]," which is the procedure he followed here. The record also establishes that in his 32 years on the bench, Judge Richter had only twice before accused an attorney of contempt. In both prior instances, Judge Richter entered the show cause order simultaneously with the contempt order. On one of those occasions, the attorney appeared at the show cause hearing and Judge Richter dismissed the contempt charge. On the other occasion, there is no evidence that the contempt order was appealed, or that Judge Richter had any reason to believe the procedure he followed was incorrect. These facts corroborate Judge Richter's testimony that he was acting under a good faith belief that he was following the correct procedure in this case.

Second, Judge Richter stated that although he now understands he was supposed to have the attorney *personally* served with the show cause order, at the time he engaged in the alleged conduct, he mistakenly believed serving the attorney by *fax* was sufficient to *comply* with due process requirements in contempt proceedings. Judge Richter said this belief was based in part on

the fact that the Court had utilized the fax method of service for this particular attorney for approximately 15 years and that it had proven reliable during that time. In addition, a fax confirmation sheet confirms that both the show cause and contempt orders were faxed to, and received by Kubosh's office on the same day they were signed. Moreover, the show cause order itself establishes that Judge Richter clearly intended to provide to the attorney an opportunity to be heard before rendering final the findings contained within the contempt order. This evidence was uncontroverted.

In our view, this evidence leaves no doubt that Judge Richter in fact *attempted* to provide Kubosh with notice and an opportunity to be heard. The fact that Judge Richter ultimately failed in his attempt because he was unaware of the *correct* method of service for purposes of the contempt proceeding, which Judge Richter rarely utilizes, does not alone establish that he engaged in "willful" conduct as that term is defined for purposes of judicial discipline. There is no proof, for example, that Judge Richter *refused* to set a show cause hearing at all, or made *no* attempt to serve the attorney with the show cause order or the contempt order, or that he had been previously corrected by a higher court for the same mistakes. As there is no evidence establishing that Judge Richter intentionally, or with gross indifference, violated clear and determined law, we hold the Commission failed to meet its burden to demonstrate by a preponderance of evidence that Judge Richter engaged in "willful" conduct in this regard.

**B. Alleged Conduct #3**

Next, the Commission alleges Judge Richter willfully violated the judicial canons and willfully engaged in conduct that is clearly inconsistent with the proper performance of his duties by issuing an arrest warrant that was not based on probable cause set forth in a sworn complaint

or affidavit. In response, Judge Richter stated that while acting under the good-faith assumption that his show cause order was properly served and that it had been received and ignored by Kubosh, Judge Richter issued an arrest warrant after Kubosh failed to appear for the show cause hearing. Judge Richter further argued that although he now understands he should have issued a *capias*,<sup>12</sup> which does not require a sworn complaint or affidavit, at the time he engaged in the conduct, he thought a warrant was the appropriate vehicle to compel the presence of the attorney and he did not know a complaint or affidavit was necessary to support a charge of contempt of court that was initiated by the same judge signing the warrant. In light of the infrequency with which Judge Richter utilized the contempt procedures, we credit this testimony as true.

The Commission offers no evidence to rebut Judge Richter's testimony. While Kubosh alleged in his complaint filed with the Commission he believed Judge Richter's conduct was motivated by a "vendetta" against him, there was absolutely no evidence submitted by the Commission to support that allegation and it was directly contradicted by Judge Richter. For these reasons, we hold the evidence does not support the Commission's allegation that these procedural errors, as alleged in the charging document, were committed "willfully," as that term is defined for purposes of justifying judicial misconduct sanctions in relation to legal errors.

## CONCLUSION

Because we hold the evidence was insufficient to establish that the conduct as *alleged* in the charging document was "willful," we dismiss the sanction entered below.<sup>13</sup>

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<sup>12</sup> See TEX.CODE CRIM.PROC.ANN. art. 23.02 (omitting from *capias* requisites a complaint or affidavit).

<sup>13</sup> The charging document did not allege any violations by Judge Richter relating to his sending an arrest warrant that he knew was inactive; therefore, whether this constituted judicial misconduct is beyond the scope of the Court's review.

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<sup>14</sup> The Special Court of Review consists of The Honorable Yvonne T. Rodriguez, Chief Justice of the Eighth Court of Appeals, presiding by appointment; The Honorable Gina M. Palafox, Justice of the Eighth Court of Appeals, participating by appointment; and The Honorable Leticia Hinojosa, Justice of the Thirteenth Court of Appeals, participating by appointment.