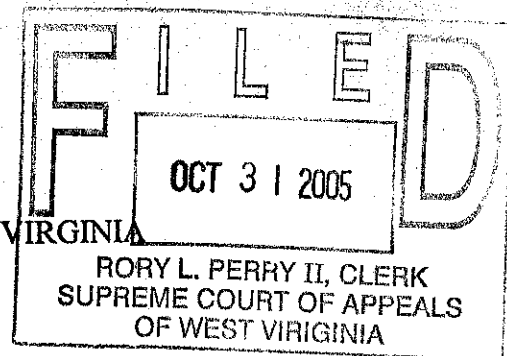


NO. 31797

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



IN THE MATTER OF : WILLIAM TOM TOLER
MAGISTRATE FOR WAYNE COUNTY

COMPLAINT NO. 122-2004

BRIEF OF WILLIAM TOM TOLER, MAGISTRATE FOR WAYNE COUNTY

OCTOBER 31, 2005

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**IN RE: WILLIAM TOM TOLER,
 MAGISTRATE WAYNE COUNTY
 COMPLAINT NO.: 122-2004
 SUPREME COURT OF APPEALS NO.: 31797**

STANDARD OF REVIEW

On review, by Supreme Court of Appeals, of record of disciplinary proceedings against judge, the Court is not required by anything in constitutional rules to give any conclusive weight to findings or recommendations of judicial review board, and Court would review record on facts and law and assess sanctions imposed, de novo. Judicial Code of Ethics,

When reviewing the findings and recommendations of the Judicial Hearing Board, the Supreme Court has plenary authority. > In re Riffle, 2001, 558 S.E.2d 590, 210 W.Va. 591

Judicial Hearing Board is limited to making written recommendation, which shall contain findings of fact, conclusions of law, and proposed disposition, and because of Board's limited judicial capacity, it is without authority to make legal decision that is entitled to preclusive or procedural judicata effect. > Matter of Means, 1994, 452 S.E.2d 696, 192 W.Va. 380

FACTUAL and PROCEDURAL HISTORY

Carol Cyrus filed Complaint No. 191-03. It was filed November 6, 2003. It was signed by her November 5, 2003 and makes allegations that somewhere during the first two (2) weeks of September, 2001 that William Toler had improper behavior, said complaint is barred by the statute of limitations.

The only other complaint that was filed against Magistrate Toler was Complaint No. 151-03. It was filed on August 27, 2003 by Diane Vanhoose who chose not to appear or give testimony in front of this Judicial Hearing Board.

On July 8, 2004, formal charges were filed against William Tom Toler alleging violation of the Code Judicial Conduct based solely on criminal offenses he was charged with in an indictment on July 7, 2004 by the Wayne County Grand Jury.

On July 16, 2004, William Tom Toler was suspended without pay and the formal charges were held in abeyance pending the criminal charges.

The charges were then amended to include two (2) more charges on August 5, 2004, again based on criminal charges brought against Magistrate Toler.

February 24, 2005, Magistrate Toler was acquitted of all charges in the Circuit Court of Wayne County.

On July 7, 2004, the charges were again amended to include all the criminal charges against him, a copy of that final complaint is attached hereto and incorporated herein. Of specific note is that his activities were enumerated as to specific elements.

This case was then heard by the Judicial Hearing Board on July 13 & 14, 2005. The Board filed its Recommended Findings of Fact Conclusions of Law and Proposed Disposition on August 22, 2005 and on September 6, 2005, Gary Johnson, Chairperson of the Judicial Hearing Board presented to the Supreme Court its written recommended disposition and the Respondent, William Tom Toler, by Donald R. Jarrell, his attorney, presented to the Court his written objections thereto and his Motion in writing requesting that the preceding's be set for oral argument and briefing schedule.

By Order on September 7, 2005, Supreme Court set this matter down for Briefing

Schedule and Oral Argument.

POINTS OF ERROR

1. Rule Number 2.12 Limitation of Compliance of Judicial Disciplinary Procedure requires that these charges be dismissed in that there were a complaint filed more than two (2) years after the complainant knew or should have known the existence of the violation of the code.
2. Rule Number 2.9 requires service of formal charges in this case there was no question that the charges brought against him had the identical elements of the criminal charge and the Judicial Disciplinary Counsel failed to offer evidence on essential elements of that charge, therefore the complaint should be dismissed.
3. The recommended sanctions by the Judicial Ethics Board exceed those under Rule 4.12 which limits the suspension without pay to one (1) year.
4. The standard proof in this case is by clear and convincing evidence and the Judges Judicial Board recommendations are inconsistent with the standard proof and the evidence presented.
5. The board erred in prohibiting the introduction of evidence and testimony as to the vouched record.
6. Any and all other errors appearing on the face of the record.

STATEMENT OF FACTS

DIXIE ELKINS

Counsel for William Toler made inquiry as to missing drugs in the locker room when Mrs Elkins was in charge of it in the jail in Wayne County, record page 15, lines 20-22 and page 16, lines 1-9. Objections to those questions were sustained by the Judicial Ethics Committee and no testimony was allowed to be given as to witnesses that she stole prescription drugs and narcotics to her home from there and falsified records to cover her theft and drug use.

Further, the Judicial Hearing Board would not allow any testimony as to motivation on Diane Vanhose, who was the initial person who started this investigation, record page 20, line 12-19.

Dixie Elkins further admitted her bias against Magistrate Toler and that she stated that if she had her way that he would not be in office and that was prior to any of these allegations being made by her, record page 21, lines 15-19. As well as to setting fire to some of Magistrate Toler's campaign signs, although she states that her husband was the one who actually burned them, record page 22, lines 16-22.

Jack Fry was the father of the boy who was taken up to make bond by the correctional officer, Dixie Elkins who states that he was present through the entire time within a few feet of her, although for a minute or so, the door was cracked, but that there was no indication that anything improper had happened at any time, record pages 71-73, page 74, lines 18 & 19 also page 75, lines 13-19 and page 76, lines 1-9.

Jennifer Lusher testified that the correctional officer Dixie Keese had stated to her well before any allegations were made back in 2002 on or about the 19th day of February, 2002 that Magistrate Toler would not be there for very long and more specifically in response to follow up

questions on page 115 lines 12-13, that Dixie Keese specific comment was that the mother fucker won't be in office much longer.

Brian Sparks was employed as a correctional officer both in Wayne County Jail and Western Regional Jail with Dixie Elkins and indicated that Dixie was not an honest individual and further more the issues as to the female correctional officer's going in front of Tommy were based on issues that were present as far as previous suits. Further inquiry as to the times she took inmates out of the jail and kept her at her house were objected to by counsel and sustained by the chairman although counsel for Magistrate Toler believed that the door had been open during cross-examination, record page 150, lines 7-19.

CATHY PERRY STURGILL

Cathy Perry testifies that present during the time period these allegations were supposed to be made was that Magistrate Toler, his secretary, herself, her ex-husband and her sister. However, she is the only witnesses that make the allegations that anything happened in an improper manner. Charles Sturgill, her ex-husband; Shiela Shad, William Tom Toler's the secretary and Magistrate Toler all confirmed that nothing happened and her sister was not present to testify. She further admitted that all of this allegedly in November, 2001. Her statement came forth on May 27, 2004 alleging what had already been stated in the newspaper as to allegations of other individuals, record page 31, lines 14-21.

Sheila Robertson Shadd, who was the secretary for Magistrate Toler, testified that she was the one who handled the domestic violence on Catha Sturgill and the written documents provided by the court indicate that she was in fact whose signature appears on all the records for her, record page 83-85. Shelia Shad further testified that Cathy Perry's sister was not present

during this, record page 90, lines 10-13, and although Cathy said she was present, no evidence was given by her sister in this case. She further talks about other incidents where Cathy Perry had demanded that her husband be arrested and Mr. Toler refused to as a result of their bitter divorce, record page 93. Sheila further testified that there were initial investigations made by the janitor, that she was present at that time period and that none of this had happened, record page 106, lines 14-17. The first person who questioned her about these was an investigating officer from Putnam County, record page 107, lines 3-5.

Cathy Perry further stated that she was mad at Magistrate Toler for not having her husband thrown in jail on June 24, 2002. Further she indicates her connections and conversations with Sheriff Pennington, record page 37, line 7. She further admits to filling out false affidavits for welfare and food stamps by multiple names and multiple social security numbers, record page 35, lines 11-13. Based upon certain objections of counsel, counsel for the Defendant was not able to inquire as to various false swearing and fraud by this complaining witness, record pages 36 & 37.

Charles Sturgill, who is Cathy Perry's ex-husband, testified that she had made threats toward Magistrate Toler and Magistrate Toler's daughter-in-law, Donna Toler, who was secretary for his attorney in the divorce, record pages 120-121. He further stated that she had brought false allegations as to domestic violence on him, record page 124, lines 2-5. And that she tried to have him thrown in jail on the date of his final hearing so he could not attend the final hearing, however, Magistrate Toler had released him on a PR bond, record page 124. Further he testified that during the time period when allegedly Magistrate Toler had acted improperly against his ex-wife, he was present during that time period, that he was present with Mr. Toler during the entire time period, and that Mr. Toler was not with his wife at any time and that his

ex-wife was with the secretary, who had also confirmed this, record pages 125-129.

Jesse Warren Allen, Jr. further testified as to Cathy Perry being mad, angry, yelling, cursing and yelling so loud there was spitting across the room when she was talking whenever she demanded to have Charles Sturgill extradited to Mingo County and put in jail on the day of the divorce hearing and that further she stated as a threat that she would get him back no matter what it takes, record page 155-156, line 14.

CAROL CYRUS

Carol Cyrus testified about certain allegations involving Mr. Toler that happened supposedly in September, 2001 and filed her Ethics Complaint on November 6, 2003 and it was notarized again by David Pennington. She admits to knowing him for some twenty odd years and Carol Cyrus alleged that since she would not have sex with Magistrate Toler that he dismissed her case and the records in fact show that the case was in front of a different magistrate and dismissed by the prosecutor.

Carol Cyrus admitted under re-direct examination under recall, record pages 133-134, that she had notarized and sworn that the case was fixed against her by Tommy Toler and that he was propositioning me and he didn't get what he wanted, however the official court documents she admits, state that the Prosecutor, Jason Fry, dismissed the case against her and that it was in front of a different magistrate, copy of the document is included in the case file, record page 139. She further states that David Pennington is the one who referred her to the fill out a Judicial Ethics Complaint, record page 141.

Don Hampton testified that Carol Cyrus was not an honest person.

Mary C. Ramey testified that Carol Cyrus was not honest or trustworthy, record page 164,

lines 16-18.

Matthew Taylor testified that Carol Cyrus was a liar and that is her reputation within the community, record page 166, lines 14-18. That as so her reputation in the community is to whether or not she is a rational person was objected to and the chair sustained the objection and she further testified as to ties between her and Sheriff Pennington, record page 167, lines 13-15.

KIMBERLY DAWN THOMPSON

Kimberly Dawn Thompson testified that when she went to see Mr. Toler, she had her grandfather with her and that he made certain allegations of improper contact however, she had no evidence or testimony from anyone to collaborate her statement. She testified that these improper actions happened to her on the elevator going down from his office to the clerk's office to make copies, record page 64, lines 14-17. She further states that she remembers taking the elevator down there, record page 64, lines 20-22, and page 65, line 1. When in fact evidence was given that the clerk's office was on the third floor, the same floor that the magistrate's office was and simply a matter of steps down the hall and that there would be no reason to ride an elevator to a separate floor, nor there was no other place to make copies.

Shelia Shad further testified Kim Thompson had animosity against Mr. Toler, lines 4-8. Prior to the time that she had made certain allegations against him and after the time period when the original charges had been published in the paper, record page 88, lines 4-8.

Sally Wilks, who is the Magistrate Court Clerk, further confirmed that the clerk's office was on the same floor as Magistrate Toler's office and that the testimony Kim Thompson gave as to riding down in an elevator and being molested where they went down to her office to make copies would be false, record pages 108-110.

Greg Davis testified as to Kim Thompson, that she had lied under oath as far as never living in Wayne County and that she had in fact been on food stamps for seven (7) years in Wayne County. Such objection being to the question being made by Mr. Garten and sustained by the chairperson, record page 193, lines 4-10, that Kim Thompson was defiantly not an honest person, that she was a stripper and a drug addict to which an objection was made and the Court struck it, record page 194, that her reputation in the community was that she would defiantly not be honest, that she had falsely testified as to having a semester in school, record page 195, lines 1-5, and that he knew that she was going to make these allegations against Tommy prior to the time when she even went out there, record page 195, lines 6-9, lines 14-16, and the inquiry as to her monetary motive in making charges against Mr. Toler were not allowed to be addressed, record page 197.

Carol Harris testified that Tom Toler respects and complies with the law and that he performs the duties of his office and that he honest, trustworthy and he is not the type to act improperly and further his reputation in the community was honest and trustworthy, record page 172.

Don W. Bias testified that he had known Tom Toler for thirty (30) years and that he was honest and trustworthy person and that he would avoid the appearance of impropriety and that he would promote the law and comply with it and he would put his job as one of his priorities over family and personal issues and that was his reputation throughout the community as well, record page 175-176.

Wilt Salmons testified that Tommy was very honest and he was above reproach and had strong family values, he would avoid improprieties, he would do what was right in according to the law and interpret to the best of his ability and that was his reputation through the community

as well, record page 178-179.

William C. Coffey testified that he has known Tom for thirty (30) years, that he has a very good reputation in the community, that he is honest and trustworthy with strong family values, good moral values, avoids impropriety and upholds the integrity and the independence of the Judiciary, record page 183.

Sandra Pertee testified that he was an honest and trustworthy person and has always been a gentleman in her presence, she has observed him with his wife and family and was impressed with the love that obvious and support that they share. She has respected his work in Wayne County and that he promotes the interest of the Judiciary and that he reflects well in the Magistrate System and that is his reputation in the community.

Vickie Lynn Branham testified that he was a honest and trustworthy person with strong moral values, strong family values and is impartial in the Judiciary and no doubt in her mind of his character.

Zelma Toler then testified that the language that was alleged that Mr. Toler used was not the type of language that he had ever used, that they were fundamental Christians and would not use that type of language.

Mr. Toler then testified as to his background and involvement in the community and a lifetime of public service as to the problems in the political system that caused the motivation of some of the people to testify against him and that Sheriff Pennington had made prior threats to have Tommy removed although that line being of inquiry was allowed to be developed, record page 215. In terms of Kim Thompson that none of this happened but it was substantially based on what had been reported in the paper and on television. He then addressed each of the remaining charges against him, verified his innocence and gave testimony that was concurrent

and supported by other witnesses. Further any inquiry as to the janitor that started this was limited because she had moved out of state and was not present to testify, record page 227. Mr. Toler went on to explain as to the bases between the allegations against him, record page 229-231.

ARGUMENT

There were two verified complaints filed against William Toler in this action.

Carol Cyrus filed Complaint No. 191-03. It was filed November 6, 2003. It was signed by her November 5, 2003 and makes allegations that somewhere during the first two (2) weeks of September, 2001 that he had improper behavior, said complaint is barred by the statute of limitations of 2 years; and must be dismissed.

The only other complaint that was filed against Magistrate Toler was Complaint No. 151-03. It was filed on August 27, 2003 by Diane Vanhooose who chose not to appear or give testimony in front of this Judicial Hearing Board as such the complaint must be dismissed.

§ 8. Censure, Temporary Suspension and Retirement of Justices, Judges and Magistrates;
Removal

“Supreme Court of Appeals is constitutionally vested with responsibility for disciplining judicial officers and has constitutional responsibility to review record and make independent evaluation of it.” Judicial Code of Ethics, > Canons 2, > 2, subd. A, 3, 3, subd. A; Const. Art. 8, § 8; Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, Rule II, subd. A, par. 3. > West Virginia Judicial Inquiry Commission v. Dostert, 1980, 271 S.E.2d 427, 165 W.Va. 233

“Under its inherent rule-making power, which is hereby declared, the supreme court of appeals shall, from time to time, prescribe, adopt, promulgate and amend rules prescribing a

judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof, and the supreme court of appeals is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of the State, including one of its own members, for any violation of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any successor or substituted retirement system for justices, judges and magistrates of this State) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the supreme court of appeals, continue to serve as a justice, judge or magistrate.

Where the people by the Constitution, and the Legislature by statute, have comprehensively dealt with the subject and prescribed the grounds for removal and of disqualification of judicial officers, the courts are not justified in adding other grounds not comprehended therein or recognized by the common law." > State ex rel. Monongahela Val. Traction Co. v. Beard, 1919, 99 S.E. 452, 84 W.Va. 312

"Sanctions, which are provided upon finding that member of judiciary has violated one or more of the canons of Judicial Code of Ethics and which include admonition, private reprimand, public censure and temporary suspension from duties or fine or both, are punitive in nature, if not penal, and therefore, should be strictly construed in favor of party charged with violating the Canon." Judicial Code of Ethics, > Canon 2, subd. A. > West Virginia Judicial Inquiry Commission v. Casto, 1979, 263 S.E.2d 79, 163 W.Va. 661, rehearing denied.

Procedure of the Judicial Disciplinary is covered by the rules of Judicial Disciplinary Procedure and a special emphasis is Rule Number 2.12 , Limitation of Complaints that states that

any complaint filed more than two (2) years after the Complainant knew or in the exercise of reasonable diligence should have known, the existence of the violation of the code, shall be dismissed by the Commission. This is a mandatory dismissal on the Limitation of Complaints and is not discretionary.

Further, the Rules of Judicial Disciplinary require the service of formal charges upon the Judge in a specific manner under Rule 2.9, and this is a formal document of the charges as such they are limited to the specific charge set forth in the formal charge as part of the Judge's Constitutional Rights.

"No justice, judge or magistrate shall be censured, temporarily suspended or retired under the provisions of this section unless he shall have been afforded the right to have a hearing before the supreme court of appeals, nor unless he shall have received notice of the proceedings, with a statement of the cause or causes alleged for his censure, temporary suspension or retirement, at least twenty days before the day on which the proceeding is to commence. No justice of the supreme court of appeals may be temporarily suspended or retired unless all of the other justices concur in such temporary suspension or retirement. When rules herein authorized are prescribed, adopted and promulgated, they shall supersede all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict."

WV CONST Art. 8, Sec. 8, Censure, Temporary Suspension and Retirement of Justices, Judges and Magistrates; Removal

On June 17, 2005, Charles R. Garten, Judicial Disciplinary Council, filed a Motion of Leave to amend the formal charges. As part of that Motion it was alleged in point three of the motion that the amendment of the formal charges to add two (2) additional counts of the indictment would not prejudice or surprise the Respondent since he faced them in the criminal

trial in the Circuit Court of Wayne County and has responded to the said allegations in the criminal charges, which sets forth the fact that the judicial formal charges he met were identical to the criminal charges with the identical elements in them. This motion was granted by the board although it failed to follow rules 2.8 and 2.9 of the rules of judicial disciplinary procedure. “(Conduct by judge which violates federal or state criminal law may, unless violation is trivial, constitute violation of requirement that judge comply with law found in judicial canon.” Jud.Code of Ethics, > Canon 2, subd. A. > Matter of Vandelinde, 1988, 366 S.E.2d 631, 179 W.Va. 183.)

The Judicial Hearing Board allowed amendment to the petition, record page four (4). Mr. Garten indicates that the Judicial Investigation filed the charges initially in August, 2004 and that the actions complained of by the commission are those actions that are alleged in a various counts of the indictment, record page 5.

Cathy Perry alleged that in November, 2001, that there were certain actions that inappropriate by Magistrate Tom Toler, said allegations are again barred by the statute of limitations and that there was never a complaint brought on those on her behalf and no formal charges were filed by the Office of Disciplinary Counsel until July 16, 2004, which makes these actions barred by the statute of limitations. (No complaint was ever filed by her as required under the rules.)

The remaining two (2) charges, one on Dixie Elkins and one on Kim Thompson. The formal charges were filed within the statute of limitations, however, there was never a complaint filed by either individual and the rules require that a complaint be filed within the two year statute, which has now run.

At the close of the State's case in the Judicial Hearing several of the counts were

dismissed against Magistrate Toler and that one of the essential elements that he was charged with, that being of bribery, there was no evidence to show any bribery and other charges against him were dismissed for the failure of the Judicial Disciplinary Councils to put forth any evidence or testimony from these witnesses even though some were present at the time. Paragraphs 3, Sub-Paragraphs b, c & d and Part 4, J & K were dismissed, record page 66, 67, for the failure to offer any evidence on those issues. Paragraph H concerning the bribes was dismissed on motion because there was no evidence on bribes, record page 67, lines 11-16 and lines 21-22 and page 68, lines 1-15 also dismissed Paragraph F as to bribery, record page 68, lines 16-22 on the issue of forcible compulsion as well as page 69, lines 1-4. The Commission under lines 6-12, even though it initiates that they were not trying it as a criminal case, that you could argue that there was forcible compulsion, however, by being in a situation in an office by themselves or in the elevator by themselves with the door closed, however forcible compulsions clearly defined under the law referenced attached. Said motion was denied and it was objected to by counsel.

Counsel for the Defendant, William Tom Toler, also moved to have the remaining charges against him dismissed and that he was alleged to have unlawfully and feloniously subjected another person to sexual conduct without their consent and such lack of consent resulted in forcible compulsion under WV Code 61-8b Section 7.

“§ 61-8B-7. Sexual abuse in the first degree

(a) A person is guilty of sexual abuse in the first degree when:

(1) Such person subjects another person to sexual contact without their consent, and the lack of consent results from forcible compulsion;”

“(1) "Forcible compulsion" means:

(a) Physical force that overcomes such earnest resistance as might reasonably be expected

under the circumstances; or

(b) Threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or herself or another person or in fear that he or she or another person will be kidnaped; or

(c) Fear by a person under sixteen years of age caused by intimidation, expressed or implied, by another person who is at least four years older than the victim.

For the purposes of this definition "resistance" includes physical resistance or any clear communication of the victim's lack of consent." WV ST Sec. 61-8B-1, Definition of terms

This motion was denied by the Judicial Ethics Board even though there was no evidence as to this necessary element of the formal charges.

The standard proof in this hearing is by clear and convincing evidence. "Allegations of a complaint in a judicial disciplinary proceeding must be proved by clear and convincing evidence". Complaints against Justices, Judges and Magistrates Rule III, subd. C, par. 2. > In re Pauley, 1983, 314 S.E.2d 391, 173 W.Va. 228 None of the individuals who testified provided any collaborating witness testimony or were there any type of documents that would support their allegations. In fact there were numerous witnesses that testified on behalf of the Respondent that were independent eye witnesses that this did not happen as was alleged.

Recommendations of the board exceed their authority. "Sanctions, which are provided upon finding that member of judiciary has violated one or more of the canons of Judicial Code of Ethics and which include admonition, private reprimand, public censure and temporary suspension from duties or fine or both, are punitive in nature, if not penal, and therefore, should be strictly construed in favor of party charged with violating the Canon." Judicial Code of Ethics, > Canon 2, subd. A. > West Virginia Judicial Inquiry Commission v. Casto, 1979, 263

S.E.2d 79, 163 W.Va. 661, rehearing denied.

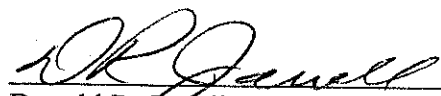
Further, the permissible sanctions are governed under Rule 4.12, which are any one or more of admonishment reprimand censure suspension without pay for up to one (1) year, a fine of up to \$5,000.00 or involuntary retirement for a Judge because of advancing years in attendant mental or physical capacity who is eligible to receive retirement benefits under the Judge Retirement System or the Public Employees Retirement System.

Further, that any further suspension without pay should not interfere with the accumulation of the Judge's Retirement Credit and the State shall continue to pay into the appropriate retirement fund the regular payments as if the Judge was not under suspension without pay.

CONCLUSION

For the foregoing reasons the recommendations of the Judicial Ethics Board should be not adopted by the Supreme Court and this matter should be dismissed as to the charges against William Tom Toler.

William Tom Toler
By Counsel



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IN RE: WILLIAM TOM TOLER
Magistrate Wayne County
Complaint No.: 122-2004
Supreme Court of Appeals No.: 31797

CERTIFICATE OF SERVICE

I, Donald R. Jarrell, counsel for William Tom Toler, certifies that a true and correct copy of the foregoing Brief of William Tom Toler Magistrate for Wayne County, was served upon the following individuals by the United State Mail, postage prepaid, on this 31st day of October, 2005.

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