January 10, 2022

Re: JIC Advisory Opinion 2022-03

Dear Magistrate   ⋮

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. The facts giving rise to your request are as follows:

In mid-March 2021, a local law enforcement agency in your jurisdiction was involved in a drug investigation and attempted a controlled delivery of a narcotic to a suspected drug dealer's home. The controlled delivery went awry and law enforcement ended up knocking on the door and announcing their presence. When the homeowner failed to answer the door, the officers forced entry with a battering ram. They placed the suspect under arrest and confiscated a wad of cash from his person. One of the officers then went to   County Magistrate Court to obtain a search warrant. You issued the search warrant. During the subsequent search, the officers found a handgun but no drugs were found at the residence.

Subsequently, the home owner was charged with a six-count Indictment in the United States District Court for the Southern District of West Virginia. Counsel for the homeowner filed a motion to suppress all evidence seized by police at his home during the night of the controlled delivery attempt. A hearing was held on the motion in October 2021, and the officer who obtained the search warrant testified before the court on the matter. By order entered December 14, 2021, the Court granted the defense motion to suppress the evidence.

Thereafter, you were contacted by phone from someone at the U.S. Attorney's Office and asked to provide a written affidavit about the matter "to try to protect the integrity of the officer." You want to know if you can provide such an affidavit.

To address you question, the Commission has reviewed Rules 1.2, 1.3, 2.3 and 3.3 of the Code of Judicial Conduct which state:

Rule 1.2   Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 1.3   Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow other to do so.

Rule 2.3   Bias, Prejudice and Harassment

(A)   A judge shall perform the duties of office including administrative duties, without bias or prejudice.

Rule 2.10   Judicial Statements on Pending and Impending Cases

(A)   A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in **any** court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

Rule 3.3   Testifying as a Character Witness

A judge shall not testify as a character witness in a judicial administrative or adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding except when subpoenaed to testify.

(emphasis added)

Based upon the foregoing, the Commission is of the opinion that such an affidavit is improper. At all times, a magistrate must remain neutral and detached. To prepare

such an affidavit creates the appearance, however wrong it may be, that you are biased in favor of law enforcement and that you are using your position to improperly bolster the credibility of the officer. Lastly, by taking such action, you would be publicly commenting on a pending case in violation of Rule 2.10(A). Therefore, the Commission finds that it would be improper for you grant the request from the U.S. Attorney's Office.

We hope that this opinion fully addresses the issue which you have raised. Please do not hesitate to contact the Commission should you have any questions, comments or concerns or desire additional advice.

Sincerely,

Alan D. Moats, Chairperson
Judicial Investigation Commission

ADM/tat