

the record, including the Official Court Reporter's transcript of the April 12 and April 13, 2010 show cause hearing, a video of the majority of the proceedings, and the documents judicially noticed by the Special Master, we, for the reasons that follow, overrule Kendall's objection, accept the Special Master's recommendation to deny Kendall's motion for judgment of acquittal, and modify in part and accept in part the Special Master's recommendations with respect to Kendall's motion for mistrial.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This Court, in an August 13, 2009 Order, required Kendall to show cause as to why he should not be held in indirect criminal contempt of court for obstructing the administration of justice ("count one"), failing to comply with this Court's May 13, 2009 Opinion and Order in *In re People of the Virgin Islands*, S.Ct. Civ. No. 2009-0021, 2009 WL 1351508 (V.I. 2009) ("count two"), and for misbehaving in his official transactions as an officer of the court ("count three"). As outlined more fully in the August 13, 2009 Order, all three charges primarily stem from disparaging statements made by Kendall in his opinion in *People v. Ford*, Crim. Nos. 76/2008, 109/2008, 2009 WL 2058701 (V.I. Super. Ct. July 7, 2009), as well as Kendall's decision to recuse himself from the *Ford* matter and apparent refusal to consider a change of venue, a continuance, or other curative measures prior to holding that pre-trial publicity made it impossible for the defendants in the *Ford* matter—Basheem Ford (hereafter "Ford") and Jermaine S. Paris (hereafter "Paris")—to receive a fair trial.

On December 18, 2009, this Court, noting "the numerous motions filed in this case, as well as the absence of any stipulations between the parties with respect to any factual matters," found "that the interests of justice shall be best served by referring the instant matter to a special master, who shall be a retired judge of the Superior Court." *In re Kendall*, S.Ct. Misc. No. 2009-

0025, slip op. at 2 (V.I. Dec. 18, 2009) (citing 4 V.I.C. § 24(b)(3)). In a March 10, 2010 Order, the Special Master, after proposing that Kendall's motion to dismiss be denied¹ and granting one continuance, scheduled a show cause hearing for April 12, 2010.

At the April 12, 2010 hearing, the Special Master heard opening statements by both counsel for the People and Kendall, accepted the parties' request to take judicial notice of numerous exhibits, and allowed the People to present its case. The People called as its first witness Assistant Attorney General Jesse Bethel, Esq., (hereafter "Bethel"), who was counsel for the People in the *In re People* matter. Due to the length of both direct and cross-examination of Bethel, the Special Master authorized a recess and allowed the hearing to reconvene the following day. Once cross-examination of Bethel concluded on April 13, 2010, the People called Janet Lloyd, the Superior Court's librarian, who primarily testified on direct examination to the authenticity of Kendall's July 7, 2009 Opinion and the significance of its "For Publication" designation. Lloyd was then cross-examined by Kendall. Thereafter, the People called its final witness, Stanley Perez.²

After the People rested its case, Kendall orally moved for a judgment of acquittal. However, recognizing that this Court's December 18, 2009 Order only authorized the Special Master to make proposed recommendations with respect to dispositive motions, Kendall requested that the Special Master recess the show cause hearing to allow the parties to file proposed findings of fact and conclusions of law, for the Special Master to produce his written recommendation, and for this Court to then review the Special Master's recommendation. The

¹ On March 23, 2010, this Court entered an order adopting the Special Master's recommendation that Kendall's motion to dismiss be denied.

² Kendall declined to cross-examine Perez.

Special Master granted Kendall's request, and recessed the hearing pending these events.

On April 16, 2010, both Kendall and the People submitted their proposed findings of fact and conclusions of law to the special master. On the same day, Kendall filed a written motion for judgment of acquittal or, in the alternative, a mistrial. The People filed its opposition to Kendall's motion on April 19, 2010. On May 4, 2010, the Special Master submitted his proposed findings of fact and conclusions of law, and recommended that this Court deny Kendall's motion. Kendall filed his objection on May 18, 2010, and the People submitted its response on May 26, 2010.

II. DISCUSSION

A. Standard of Review

Ordinarily, this Court reviews the grant or denial of a motion for judgment of acquittal *de novo*, *United States v. Flores*, 454 F.3d 149, 154 (3d Cir. 2006), while reviewing the denial of a motion for mistrial only for abuse of discretion. *United States v. Diaz*, 592 F.3d 467, 470 (3d Cir. 2010). However, because this Court exercises original jurisdiction over this criminal contempt matter, our review of the Special Master's findings of fact and conclusions of law with respect to both motions must be *de novo*. See *Annenberg v. Commonwealth*, 757 A.2d 338, 342-43 (Pa. 2000) (explaining that findings of special master, appointed by state supreme court to conduct hearings in matter arising from its original jurisdiction, are non-binding and are reviewed *de novo*).

B. Motion for Judgment of Acquittal

"A motion for judgment of acquittal should be denied if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Jimenez*, 513 F.3d 62, 72 (3d

Cir. 2008) (citing *United States v. Leahy*, 445 F.3d 634, 646 (3d Cir. 2006)). In his May 18, 2010 objection, Kendall contends that the Special Master erred in recommending that this Court deny his April 16, 2010 motion for judgment of acquittal because the Special Master’s “[r]ecommendation is fatally defective for ignoring, and failing to even address, the controlling [c]onstitutional principles that govern the use of the contempt power against speech,” (Obj. at 2), and that the People failed to present evidence sufficient to establish beyond a reasonable doubt that Kendall is guilty of criminal contempt. We address each argument in turn.

1. Does the First Amendment Bar a Finding of Criminal Contempt?

According to Kendall, the Special Master erred in recommending that this Court deny his motion for judgment of acquittal with respect to the first allegation and part of the third allegation of the August 13, 2009 Show Cause Order³ because case law “established over half a

³ The August 13, 2009 Show Cause Order required, in pertinent part,

that Judge Leon A. Kendall . . . SHOW CAUSE . . . as to why he should not be held in indirect criminal Contempt of Court for

- (1) Obstructing the administration of justice through
 - a. inflammatory remarks and other characterizations in his July 7, 2009 opinion that appear calculated and intended to prejudice this Court in public estimation, destroy or call into doubt this Court’s function and position as the highest local court in the Virgin Islands, and to reduce confidence in the administration of justice in this jurisdiction; and
 - b. purporting to review the validity and legality of this Court’s May 13, 2009 opinion and order, including, but not limited to, stating that the issuance of this Court’s order was “clearly improper,” that its conclusions “make[] no sense” and are “erroneous,” and that this Court’s mandate should be given “no credence,” despite this Court’s status as the highest local court in the Virgin Islands;

....

- (3) Misbehaving in his official transactions as an officer of the court by
 -
 - b. calling into question, through his July 7, 2009 opinion, the integrity of the Virgin Islands judiciary through inflammatory language directed at this Court and concluding that this Court’s May 13, 2009 opinion and order was “clearly improper,” that its conclusions “make[] no sense” and are “erroneous,” and that this Court’s mandate should be given “no credence,” in violation of Rule 1.2 of

century ago by the United States Supreme Court and recognized by the United States Court of Appeals for the Third Circuit[] provide[s] unequivocally that disrespectful or inflammatory speech critical of a court decision may *not* be punished as criminal contempt because the First Amendment to the United States Constitution prohibits the use of the criminal contempt power against speech except in cases presenting a ‘clear and present danger of the obstruction of the administration of justice.’” (Obj. at 2-3) (emphasis in original). Specifically, Kendall contends that the People have failed to meet this “clear and present danger” standard because the Special Master had only found that the remarks in Kendall’s July 7, 2009 Opinion “prejudice this Court in public estimation,” “destroy or call into doubt this Court’s function and position as the highest local court in the Virgin Islands,” and “reduce confidence in the administration of justice in the jurisdiction,” which Kendall also argues are threats “to the Court’s dignity and public esteem, *not* to the administration of justice.” (Obj. at 4 (quoting Rec. at 4)) (emphasis in original).

As a threshold matter, we note that the three United State Supreme Court cases Kendall cites in support of his argument that the “clear and present danger” standard always applies to criminal contempt actions in which the First Amendment is implicated—*Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941); *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); and *Gentile v. Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991)—do not stand for this broad proposition. Importantly, although “[t]hese cases make it clear that statements about pending cases by *non-lawyers* are protected by the First

the American Bar Association’s Model Rules of Judicial Conduct, made applicable to Judge Kendall pursuant to Supreme Court Rule 205 and Virgin Islands Bar Association Bylaw X.8(D);

Amendment under a ‘clear and present danger’ standard . . . [w]ith respect to lawyers . . . it is not nearly as clear what protection the First Amendment applies.” *Smith v. Pace*, --- S.W.3d ---, 2010 WL 1930948, at *6 (Mo. May 11, 2010) (emphasis added). Notably, in *Gentile* a majority of the United States Supreme Court⁴ “rejected the contention that the same high standard applies to restrictions on speech by attorneys involved in the pending case” because “membership in the bar is a privilege burdened with conditions,” with “lawyers voluntarily accept[ing] a ‘fiduciary relationship’ to the justice system and have ‘a duty to protect its integrity.’” *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 430 (Tex. 1998) (quoting *Gentile*, 501 U.S. at 1066, 1074). Accordingly, because a judge—to an even greater extent than a lawyer—“[i]n taking his office . . . assumes added responsibilities and is held to a higher standard of conduct than the lay person,” *In re Rome*, 542 P.2d 676, 684 (Kan. 1975), we agree with the Special Master’s conclusion that the “clear and present danger” standard does not apply to the charges against Kendall.

Moreover, while judges retain—albeit limited relative to laymen—First Amendment rights with respect to speech made off-the-bench in their capacities as private citizens, courts have universally held that judges possess no First Amendment protection with regard to writings, comments, and other expressions made in their official capacity as judges. *Compare Scott v. Flowers*, 910 F.2d 201, 211 (5th Cir. 1990) (holding judge’s “open letter” to county officials

⁴ We note that Kendall’s objection cites to Justice Kennedy’s opinion in *Gentile* in support of applying the “clear and present danger” standard to all instances where the contempt power implicates speech, regardless of the status of the speaker. (Obj. at 3.) However, Kendall’s objection does not disclose that Justice Kennedy’s opinion only represents the opinion of a majority of the Supreme Court with respect to the issue of whether the challenged Nevada court rule was void for vagueness, and that the remainder of the opinion—including the pages Kendall cites in support of the “clear and present danger” standard—is a dissent that lacked majority support. As indicated in the *Gentile* syllabus, Justice O’Connor’s concurrence, and in Justice Kennedy’s opinion itself, Parts I and II of Chief Justice Rehnquist’s separate opinion—which commanded the support of five justices and expressly limited the “clear and present danger” standard to non-lawyer speech—is controlling precedent as to the issue of what standard applies to out-of-court statements made by lawyers during pending litigation.

attacking county court and district attorney's office was made in capacity as private citizen and thus protected under First Amendment); *Com'n on Judicial Performance v. Wilkerson*, 876 So.2d 1006, 1011 (Miss. 2004) (holding judge's letter to the editor advocating against gay rights constituted speech fully protected by the First Amendment); *Matter of Hey*, 452 S.E.2d 24, 29 (W.Va. 1994) (holding judge's offensive comments made on television show protected by First Amendment); *with Matter of Gorenstein*, 434 N.W.2d 603, 608 (Wis. 1989) (holding judge's racist comments, while perhaps acceptable in other contexts, not protected speech when directed towards litigants and witnesses during judicial proceedings presided over by the judge); *Rome*, 542 P.2d at 684 (holding judge's memorandum opinion ridiculing the defendant, written in the form of a poem, not protected by the First Amendment). *See also Jenevein v. Willing*, 493 F.3d 551, 560-61 (5th Cir. 2007) (holding that First Amendment precludes sanctioning judge solely for contents of his press conference speech, but that judge could be sanctioned for holding press conference in his courtroom, entering from behind the bench, and addressing reporters while wearing judicial robe); *Halleck v. Berliner*, 427 F.Supp. 1225, 1239 (D.D.C. 1977) ("Plaintiff contends that consideration by the Commission of statements he made from the bench or otherwise in connection with his judicial duties violated his First Amendment right to freedom of speech. This court does not agree.").

Here, Kendall does not dispute that all of the speech and conduct forming the basis for each alleged instance of criminal contempt, including issuance of his July 7, 2009 Opinion, arose from Kendall's role as the trial judge in the *Ford* matter. Consequently, the Special Master was not required to analyze the charges against Kendall pursuant to the First Amendment.

2. The Evidence, Viewed in the Light Most Favorable to the People, Supports A Finding of Criminal Contempt With Respect to All Three Charges

In addition to his constitutional argument, Kendall contends that, contrary to the Special Master's recommendations, the People failed to introduce evidence at the April 12, 2010 Show Cause Hearing that, if viewed in the light most favorable to the People, would be sufficient for a reasonable trier of fact to hold Kendall in indirect criminal contempt.

a. *Obstruction of the Administration of Justice*

Although Kendall primarily challenges the sufficiency of the People's evidence with respect to the obstruction of the administration of justice charges in count one and part of count three based on its alleged failure to meet the inapplicable "clear and present danger" standard, Kendall also contends (1) that the Special Master's findings that Kendall's July 7, 2009 Opinion "prejudice[d] this Court in public estimation," "destroy[ed] or call[ed] into doubt this Court's function and position as the highest local court in the Virgin Islands," and "reduce[d] confidence in the administration of justice in this jurisdiction" do not support a criminal contempt finding because these acts represent threats to this Court's dignity and public esteem, and not to the administration of justice, (Obj. at 4 (quoting Rec. at 22)); and (2) no obstruction to the administration of justice occurred because this Court's decision in *In re People* had been final at the time Kendall issued his July 7, 2009 Opinion and Kendall's actions did not cause the *Ford* matter to be delayed because it was not yet ready for trial.

Numerous courts have—in the context of actions by lawyers and other officers of the court⁵—rejected the narrow definition of "obstruction of the administration of justice" proffered

⁵ As Kendall notes, several courts have held that the "clear and present danger" standard precludes a finding of criminal contempt without proof of an actual disruption in judicial proceedings. *See, e.g., In re Turner*, 174 N.W.2d 895, 903 (Mich. Ct. App. 1969). However, as discussed earlier, this standard is inapplicable to the instant case

by Kendall, for “criminal contempt of court that obstructs the administration of justice has generally been defined as *any* willful misconduct which embarrasses, hinders, *or* obstructs a court in its administration of justice *or* derogates the court's authority or dignity, thereby bringing the administration of law into disrepute.” *Black v. Blount*, 938 S.W.2d 394, 399 (Tenn. 1996) (citing *Black’s Law Dictionary* 319 (6th ed. 1990)). As the Tennessee Supreme Court succinctly explained in *Black*,

The Court of Appeals . . . require[d] proof of an actual interruption, hindrance, delay or obstruction of the proceeding from which the charge of willful misbehavior arises. Since Blount's conduct did not disrupt the trial, and indeed, largely transpired following the trial's conclusion, the Court of Appeals found the evidence insufficient to establish that Blount's conduct “obstructed the administration of justice.” Black argues that the Court of Appeals . . . applied an incorrect legal standard when it evaluated the sufficiency of the evidence. We agree.

. . . .

[W]e explicitly hold that criminal contempt of court which obstructs the administration of justice includes all willful misconduct which embarrasses, hinders, or obstructs a court in its administration of justice or derogates the court's authority or dignity, thereby bringing the administration of law into disrepute. We also emphasize that disrespectful conduct by an attorney has a greater impact upon the dignity of a court than does disrespectful conduct of a lay person. Public respect for the law derives in large measure from the image which the administration of justice presents. Lawyers play an integral role in the administration of justice and, as such, their conduct can have a great influence upon the extent to which the proceedings are perceived as fair and dignified by jurors, defendants, witnesses, and spectators. Accordingly, a lawyer's allegations of inequity and unfairness are uniquely denigrating to the dignity of the proceedings. . . . [T]he judgment of the Court of Appeals is reversed, and the trial court's judgment finding Blount guilty of two counts of contempt is reinstated.

Id. at 399-401. See *Tanner v. United States*, 62 F.2d 601, 601 (10th Cir. 1932), *cert. denied*, 289 U.S. 746, 53 S.Ct. 689, 77 L.Ed. 1492 (1933) (rejecting argument that lawyer’s verbal abuse of juror, which occurred one block from courthouse after jury verdict had already been read, could

because all of the charged statements stem from Kendall’s conduct while serving in his official capacity as a Superior Court judge, which, as a matter of law, is not protected speech under the First Amendment.

not constitute obstruction to the administration of justice); *O'Brien v. State*, 248 So.2d 252, 255 (Fla. Ct. App. 1971) (“It is not necessary to show that they actually obstructed, impeded, or embarrassed the administration of justice, although it must appear that their tendency was of that character.”) (quoting *State v. Sullivan*, 26 So.2d 509, 516 (Fla. 1946)); *In re Kafantaris*, No. 07-CO-28, 2009 WL 2917945, at *5 (Ohio Ct. App. 2009) (affirming trial court’s finding that attorney’s statement to jury members, after jury had announced its verdict and been discharged, that they had convicted the wrong man constituted “an unforgivable obstruction to the administration of justice” punishable as criminal contempt because “[i]t called the whole jury trial process into question” and “[t]he obvious proper course of action to contest the verdict is through the appellate process.”). *See also Hirschfeld v. Superior Court*, 908 P.2d 22, 26 (Ariz. Ct. App. 1995) (“Conduct like Hirschfeld’s . . . lessens the dignity and authority of the court. There are a number of cases which support this conclusion. We pass over, without comment, those many cases in which the conduct actually disrupted or delayed court proceedings. The cases we do rely on all concern misbehavior that occurred while court was in recess.”). Accordingly, consistent with the holdings of the above cases with which we concur, we accept the Special Master’s finding that Kendall’s statements in his July 7, 2009 Opinion could, as a matter of law, be punishable as criminal contempt, even if the same statements, if made by an individual speaking in the capacity of a private citizen, may not have been actionable absent a showing that judicial proceedings were actually disrupted.

Nevertheless, the evidence, when viewed in the light most favorable to the People with all reasonable inferences made on the People’s behalf, would support denial of Kendall’s motion for judgment of acquittal even under the higher standard advocated in his objection. Importantly, “certain conduct . . . is so inherently obstructive of the administration of justice that it is

sufficient that [the party] willfully engaged in the underlying conduct” *United States v. Reed*, 88 F.3d 174, 178 (2d Cir. 1996). As this Court indicated in its August 13, 2009 Show Cause Order, “[i]t has been held that, in the rare situations in which a judge has purported to ‘t[ake] it upon h[im]self to pass upon the validity of the [higher court’s] order,’ the lower court judge’s behavior results in an obstruction to the administration of justice that not only constitutes contemptible behavior, but requires the higher court to take whatever action is necessary to ‘reaffirm the structure and validity of our judicial system.’” *In re People of the V.I.*, S.Ct. Civ. No. 2009-0021, slip op. at 10 (V.I. Aug. 13, 2009) (quoting *In re Reed*, 901 S.W.2d 604, 612-14 (Tex. App. 1995)). *Cf. United States v. Engstrom*, 16 F.3d 1006, 1011 (9th Cir. 1994) (“Although an allegation of judicial bias by a court officer, such as an attorney, necessarily undermines the court’s ability to regulate a trial, the same allegation by a non-court officer will not necessarily have the same effect.”). Therefore, because the instant case is one in which “the nature of the charges cuts so deeply into the heart’s core of our judicial system,” *United States v. Henson*, 179 F.Supp. 474, 476 (D.D.C. 1959), the issuance of Kendall’s July 7, 2009 Opinion, when its contents are construed in the light most favorable to the People, itself constitutes an actual obstruction to the administration of justice.

Moreover, sufficient evidence exists in the record that, when viewed in the light most favorable to the People, supports a finding that Kendall’s conduct resulted in an actual delay in the underlying matter. Although Kendall is correct that this Court had entered its final order in the *In re People* matter on May 13, 2009 and issued its mandate on June 10, 2009, this Court’s case file⁶ for *In re People* indicates that on July 17, 2009 Paris filed a motion for extension of

⁶ Although not expressly admitted into evidence at the April 12, 2009 Show Cause Hearing, the parties jointly requested that the Special Master take judicial notice of “all pleadings, transcripts, [and] filings . . . in both the

time to file a petition for writ of certiorari with the Third Circuit, which the Third Circuit transmitted to this Court on July 21, 2009.⁷ In his motion, Paris stated that, although the time for filing a petition for writ of certiorari had expired, “developments in this matter before the Superior Court of the Virgin Islands[] justify an extension.” (Paris Mot. at 4.) Specifically, Paris cited Kendall’s “scathing and extraordinary attack on the legitimacy of the Supreme Court’s decision,” and argued that “[t]he nature of the trial court’s charge . . . is an independent reason justifying a petition for writ of certiorari, and justifying an extension of time” because “[t]he integrity of the administration of justice in the territory has been called into question by the Superior Court’s charge that the Supreme Court’s decision lacked indicia of legitimacy,” which made Third Circuit review “critical in this case.” (Paris Mot. at 4-5.) Notably, Kendall himself acknowledges in his objection that “Bethel’s testimony, which was uncontradicted, established that the case was not ready to proceed even on the November 23, 2009 trial date set by Judge Carroll . . . because the parties were still awaiting a ruling from the Court of Appeals for the Third Circuit on a petition for writ of certiorari. . . .” (Obj. at 7.) Accordingly, a trier of fact could find beyond a reasonable doubt that the charges in Kendall’s July 7, 2009 Opinion—including his allegation that this Court’s “[w]rit was apparently . . . issued to facilitate the Prosecution’s blatant misconduct and perpetrate a fraud on the [Superior] Court”—disrupted the administration of justice by requiring the parties to not just engage in additional proceedings in the Third Circuit that would not have occurred absent Kendall’s conduct, but delay Paris’s trial due to the pendency of those proceedings.

Superior Court and the Supreme Court in the *Paris* matter,” which the Special Master granted at the start of the hearing. (Hr’g Tr., Apr. 12, 2010, at 8-9.)

⁷ The record also indicates that Ford moved to join in Paris’s motion on July 17, 2009.

b. Defiance of Mandate and Recusal

Kendall further argues that the Special Master erred in recommending that this Court deny judgment of acquittal with regard to count two and the portion of count three⁸ that pertains to his recusal in the *Ford* matter and alleged defiance of this Court’s mandate in *In re People*. Specifically, Kendall contends (1) that he did not violate an express order of this Court; and (2) that the evidence introduced by the People not only failed to demonstrate that he intended to defy an order of this Court, but established that he had valid reasons to recuse himself.

Kendall does not dispute that this Court’s May 13, 2009 Opinion and Order in *In re People*—a proceeding to which he was the nominal respondent—was directed towards him, and correctly recognizes that “[f]ailure to comply with a court order cannot be punished as criminal contempt unless the defendant’s conduct constitutes direct defiance of the express and unambiguous terms of a court order.” (Obj. at 8 (citing *Reed*, 91 S.W.2d at 604).) *See also*

⁸ The August 13, 2009 Show Cause Order required, in pertinent part,

that Judge Leon A. Kendall . . . SHOW CAUSE . . . as to why he should not be held in indirect criminal Contempt of Court for. . . .

- (2) Failing to comply with this Court’s May 13, 2009 opinion and order by
 - a. refusing to schedule the matter for trial and proceeding to trial in the absence of a valid plea disposition;
 - b. refusing to consider a change of venue or a continuance to minimize pre-trial publicity in the underlying matter; and
 - c. recusing himself from the matter below for the purposes of avoiding future compliance with this Court’s mandate, leading to additional scheduling delays;
- (3) Misbehaving in his official transactions as an officer of the court by
 - a. failing to comply with this Court’s May 13, 2009 opinion and order in violation of Rule 1.1 of the American Bar Association’s Model Rules of Judicial Conduct, made applicable to Judge Kendall pursuant to Supreme Court Rule 205 and Virgin Islands Bar Association Bylaw X.8(D);
 -
 - c. refusing to hear a matter properly assigned to him by recusing himself for reasons not authorized by law, in violation of Rule 2.11 of the American Bar Association’s Model Rules of Judicial Conduct, made applicable to Judge Kendall pursuant to Supreme Court Rule 205 and Virgin Islands Bar Association Bylaw X.8(D)[.]

Commonwealth v. McMullen, 961 A.2d 842, 849 (Pa. 2008) (“To prove indirect criminal contempt, evidence must be sufficient to establish[] the court’s order was definite, clear, specific, and leaving no doubt in the person to whom it was addressed of the conduct prohibited.”). However, Kendall contends that, regardless of his intent, a finding of criminal contempt is not possible because this Court “said nothing about the conduct of future proceedings beyond that they should be ‘consistent’ with the Opinion, that is, consistent with this Court’s decision that the oral plea offer was not enforceable.” (Obj. 10.) Thus, according to Kendall, “[w]ithout an express order to proceed to trial and/or to preside over the case personally, Judge Kendall’s decision to recuse himself did not—and logically could not—defy an express order of the Supreme Court.” (Obj. at 10.)

“The reasonableness of the specificity of an order is a question of fact and must be evaluated in the context in which it is entered and the audience to which it is addressed. For example, it may well be necessary for the specificity of orders directed to laypersons be greater than that of orders to lawyers.” *United States v. Turner*, 812 F.2d 1552, 1565 (11th Cir. 1987) (citing *In re Williams*, 509 F.2d 949, 960 (2d Cir. 1975)). While Kendall is correct that the May 13, 2009 Opinion and Order did not outright state that Kendall was forbidden from recusing himself and was required to immediately proceed to trial, it did—by its express terms—require that “further proceedings” occur. Additionally, the May 13, 2009 Opinion explained that, as a matter of law, Kendall possessed “an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity,” and thus was obligated to change the venue of the case or order a continuance in the event he believed that pre-trial publicity had prejudiced Ford and Paris’s right to a fair trial. *In re People*, 2009 WL 1351508, at *8.

It can reasonably be inferred that Kendall, as a Superior Court judge, was aware of the

well-established principle that “[a] trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court’s opinion and the circumstances it embraces,” and that “[w]here the reviewing court in its mandate prescribes that the court shall proceed in accordance with the opinion of the reviewing court, such pronouncement operates to make the opinion a part of the mandate as completely as though the opinion had been set out in length.” *Blasband v. Rales*, 979 F.2d 324, 327 (3d Cir. 1992) (quoting *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir. 1985)). Thus, Kendall would have understood the meaning of the phrase “further proceedings consistent with this Opinion” without the need for the additional specificity required had the order been directed towards a layman or even a lawyer. Consequently, at this stage of the proceedings, where this Court is required to view the evidence in the light most favorable to the People and grant the People the benefit of all reasonable inferences, this Court cannot find that the People did not prove that Kendall violated an express order of this Court by failing to schedule the matter for trial, failing to consider a change of venue or continuance, or by recusing himself.

Additionally, Kendall contends that a judgment of acquittal is warranted because the People failed to introduce sufficient evidence to establish beyond a reasonable doubt that Kendall intended to defy this Court’s May 13, 2009 Opinion and Order. According to Kendall, “[t]he People offered nothing more than speculation and conjecture that Judge Kendall’s reasons for recusing himself, which he set forth at great length in his *Ford* Opinion with citations to the record, were a mere pretext to avoid having to carry out the Mandamus order.” (Obj. 11.) Specifically, Kendall notes that at the show cause hearing, “Bethel himself admitted on cross-examination and in papers filed with this Court on mandamus that he too believed Judge Kendall was biased against him,” and “[t]hat evidence, standing alone, prevents a finding beyond a

reasonable doubt that Judge Kendall’s self-assessment of bias was not genuine.” (Obj. at 11) (emphases removed). Kendall further argues that “the evidence offered during the People’s case conclusively established the opposite of pretext – that Judge Kendall had valid and legitimate reasons for recusing himself.” (Obj. at 13.)

We find no merit in Kendall’s argument that the evidence introduced at the show cause hearing is insufficient to satisfy the intent requirement. To satisfy the intent requirement for a finding of criminal contempt, the People must, at a minimum, provide proof of “a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful.” *Pennsylvania v. Local Union 542, Int’l Union of Operating Engineers*, 552 F.2d 498, 510 (3d Cir. 1977) (quoting *United States v. Seale*, 461 F.2d 345, 368-69 (7th Cir. 1972)). Even if this Court were to assume without deciding that Bethel’s speculative testimony that he believed Kendall possessed a bias against him is both relevant and admissible evidence, the legal standard for a motion for judgment of acquittal compels this Court to view the evidence in the light most favorable to the People. *Jimenez*, 513 F.3d at 72. We agree with the Special Master that a reasonable trier of fact, when viewing the evidence in the light most favorable to the People, could find, based upon the statements in Kendall’s July 7, 2009 Opinion that this Court’s May 13, 2009 Opinion and Order “makes no sense,” is “erroneous,” that its findings had “no merit,” and that proceeding to trial “would be a travesty of justice and a fraud upon the Court,” that Kendall recused himself from the matter not because he possessed a bias against the People, but because he disagreed with this Court’s decision and did not wish to proceed to trial.

Moreover, while Kendall challenges the intent requirement with respect to counts two and three, he does so only in the context of Kendall’s decision to recuse from the *Ford* matter. However, this Court’s show cause order not only charged Kendall with failing to comply with

this Court's May 13, 2009 Opinion and Order by recusing himself, but also by refusing to consider a change of venue or a continuance to minimize pre-trial publicity. In his July 7, 2009 Opinion, Kendall stated that "[t]he Supreme Court stated that the Court should have considered other curative measures such as a change of venue," but declined to perform a change of venue analysis because "[i]n the absence of any showing by the Supreme Court that that finding was clearly erroneous, the Supreme Court should have deferred to the Court's findings relative thereto as the fact finder in this matter." Additionally, Kendall observed in his opinion that "[t]he Supreme Court also concluded that the Court could continue the matter until the threat abates," but refused to consider a continuance because "[t]he Court is unable to reconcile such conduct with upholding Defendants right to a speedy trial, a right which neither Defendant has waived," and "[t]hus, constantly continuing this matter to avoid substantially prejudicial pre-trial publicity would surely be contrary to the well-settled law in the United States." These statements, when read in the light most favorable to the People, would allow a reasonable trier of fact to conclude that Kendall was aware that this Court had required him to consider a change of venue or a continuance prior to holding that pre-trial publicity prevented Ford and Paris from receiving a fair trial, yet chose not to consider either option because he disagreed with this Court's decision. Accordingly, we concur with the Special Master's conclusion that Kendall's motion for judgment of acquittal be denied with respect to all counts.

C. Motion for Mistrial

Finally, Kendall requests that this Court "declare a mistrial and dismiss the charges" because of the "unique procedure that is to be followed in this prosecution." (Obj. at 17.) In particular, Kendall argues that there is a "constitutional shortcoming" in the procedures adopted in this case because "[a]ll substantive decisions, including the entry of a verdict in the first

instance, are to be made by the Court based upon a review of the Special Master's written recommendation," and thus "the Justices of this Court will decide the question of guilt or innocence without having actually observed and listened to the witnesses." (Obj. at 18.) According to Kendall, "[t]his approach ignores the importance of seeing and hearing witnesses when making credibility determinations" because "[t]he requirement that a fact finder be present during the presentation of evidence is a foundational concept of due process in criminal proceedings." (*Id.*) The People contend, however, that this Court should defer its ruling on Kendall's motion because, "[a]s the Special Master observed, if the Supreme Court accepts his findings of fact, then the final and binding findings of fact would have been made by him, thus rendering the motion for a mistrial moot," and thus "the motion is not yet ripe for determination." (Resp. at 20-21.) Alternatively, the People argue that Kendall "waived any right to object to the procedure being followed" because Kendall (1) requested, in his October 28, 2009 motion for recusal, that this Court designate another adjudicator to preside over the show cause hearing; and (2) did not object to this Court's order appointing a Special Master and establishing the procedures for the show cause hearing until the second day of the show cause hearing. (Resp. at 22-23.)

As a threshold matter, we reject the People's contention that Kendall's motion for a mistrial is not ripe for review by this Court. While this Court has, in the context of attempted direct appeals from the Superior Court, held that certain motions were not yet ripe for appellate review, *see, e.g., Harvey v. Christopher*, S.Ct. Civ. No. 2007-0115, 2009 WL 331304, at *3 (V.I. Jan. 22, 2009); *V.I. Gov't Hosp. and Health Facilities Corp. v. Gov't*, S.Ct. Civ. No. 2007-0125, 2008 WL 4560751, at *1 (V.I. Sept. 16, 2008), it is well established that, in a criminal case, a motion for a mistrial becomes ripe once the trial has begun. *See, e.g., Sharpe v. State*, 531

S.E.2d 84, 88 (Ga. 2000). Moreover, because deferring a decision on Kendall's motion would result in unnecessary or duplicative proceedings in the event the motion was ultimately granted only after the matter was referred to the Special Master to conclude the present hearing,⁹ principles of judicial economy favor considering Kendall's request for a mistrial at this time. Accordingly, this Court overrules the Special Master's finding that Kendall's motion is not yet ripe for a ruling.

Nevertheless, we accept the Special Master's conclusion that Kendall's motion for a mistrial should be denied, albeit for different reasons. As the People correctly note in their response, it is well-established that even "[t]he most basic rights of criminal defendants are subject to waiver" if not timely asserted through an objection or motion. (Resp. at 21) (collecting cases). Although this Court entered its order appointing the Special Master and establishing the procedures to govern the show cause hearing on December 18, 2009, Kendall did not object to the Special Master presiding over the hearing until more than four months later, after the show cause hearing had already begun and the People had rested its case. Given these circumstances, Kendall has waived, through his implied consent, any challenge to the Special Master presiding over the show cause hearing. *See, e.g., United States v. Lakewood*, 597 F.3d 661, 669 (5th Cir. 2010) (holding defendant's failure to object to magistrate judge presiding over plea allocation constituted implied consent and was constitutional because district judge retained final authority over case); *United States v. Gamba*, 541 F.3d 895, 900 (9th Cir. 2008) (holding

⁹ In his motion for mistrial, Kendall contends that a mistrial would require dismissal of all charges, presumably because jeopardy has already attached. However, "[t]he [United States] Supreme Court [has] held that when a defendant requests a mistrial, even in response to prosecutorial or judicial error, double jeopardy does not bar retrial . . . unless the error that prompted it was 'bad faith conduct by judge or prosecutor.'" *United States v. Pharis*, 298 F.3d 228, 243 (3d Cir. 2002) (quoting *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976)). Accordingly, because Kendall has failed to even allege that the procedures this Court adopted to govern this matter were adopted in bad faith, a mistrial, if granted, would merely result in a new show cause hearing rather than in dismissal of the charges against Kendall.

defense attorney's "tactical and strategic" decision to not object to district judge's decision to allow magistrate judge to preside over closing arguments in felony case resulted in waiver of right to have district judge preside over entire case).

However, even if we were to find that Kendall did not, through his failure to object, implicitly consent to the Special Master presiding over the show cause hearing, Kendall's motion for a mistrial should nevertheless be denied because the procedures adopted by this Court do not violate Kendall's due process rights. Although Kendall contends in his motion that this Court is unable to judge the credibility of the witnesses because the hearing transcript does not allow the justices of this Court to observe their demeanor, Kendall is aware that the show cause hearing was videotaped in addition to being transcribed by a court reporter. Significantly, during direct examination of Bethel, Kendall's counsel expressly requested that that the Special Master authorize that the pertinent portions of People's Exhibit No. 3 be read out loud for the benefit of "those that may be watching on television." (H'rg Tr., Apr. 12, 2010, at 68.)

Moreover, even if the audio and video of the proceedings had not been recorded, it does not appear that any court has held that due process is violated when an appellate court—acting as a trial court in a proceeding arising out of its original jurisdiction—delegates the act of presiding over an evidentiary hearing to a special master. *See Reed*, 901 S.W.2d at 610-11 (rejecting argument that appellate court, in criminal contempt matter, should not have referred evidentiary hearing to special master, and deeming argument that defendant should have been entitled to a *de novo* evidentiary hearing presided by full court waived). On the contrary, the United States Supreme Court, in the context of a district court judge's review of a magistrate judge's decisions, expressly held that due process is not violated when a district court judge, on *de novo* review of a magistrate judge's factual findings, accepts a magistrate judge's credibility determinations

without first holding a new evidentiary hearing for the purpose of personally assessing witness credibility. *United States v. Raddatz*, 447 U.S. 66, 680, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). Accordingly, this Court agrees with the Special Master that Kendall's motion for a mistrial should be denied, albeit for different reasons.

III. CONCLUSION

Because the evidence introduced at the show cause hearing, when viewed in the light most favorable to the People, is sufficient for a reasonable trier of fact to find beyond a reasonable doubt that Kendall has committed the charged acts of criminal contempt, this Court accepts the Special Master's recommendation that Kendall's motion for judgment of acquittal be denied. However, because Kendall's motion for a mistrial is ripe for review by this Court, we decline to accept the Special Master's recommendation that this Court defer consideration of Kendall's motion until after conclusion of the show cause hearing. Nevertheless, since Kendall has waived his objection to the Special Master presiding over the show cause hearing through his implied consent and because such a procedure does not otherwise violate Kendall's due process rights, we accept the Special Master's recommendation that Kendall's motion for a mistrial be denied. Accordingly, consistent with the reasons articulated above, it is hereby

ORDERED that Leon A. Kendall's May 18, 2010 Objection is **OVERRULED**; and it is further

ORDERED that the Special Master's May 4, 2010 Recommendation is **ADOPTED IN PART and MODIFIED IN PART**; and it is further

ORDERED that Leon A. Kendall's April 16, 2010 Motion for Judgment of Acquittal or, in the Alternative, for a Mistrial and Dismissal of Proceedings is **DENIED**; and it is further

ORDERED that copies of this order be directed to the appropriate parties.

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SO ORDERED this 16th day of July, 2010.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court