Report to the
Judicial Council of the Ninth Circuit
from the Committee Convened Pursuant to 20 U.S.C. § 353 (a)
to Investigate the Allegations of Judicial Misconduct
in the Complaints Docketed Under 07-89000 and 07-89020

I. INTRODUCTION

This unanimous report is submitted to the Judicial Council of the Ninth Circuit ("Judicial Council") pursuant to 28 U.S.C. § 353(c) and rule 10(e) of the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability ("the rules"), by the Special Committee appointed to investigate certain complaints involving Manuel L. Real, United States District Judge for the Central District of California ("Judge Real" or "the district judge"). Members of the Special Committee ("the Committee") are Circuit Judge Susan P. Graber, presiding officer; Circuit Judge Richard R. Clifton; District Judge Robert H. Whaley; and District Judge Ronald M. Whyte. Chief Judge Alex Kozinski, formerly a member of the Committee *ex officio*, removed himself from the investigation on June 15, 2008, as a result of developments irrelevant to this investigation. Judith Droz Keyes of Davis Wright Tremaine LLP was appointed counsel to the Committee pursuant to rule 10(c). Aaron A. Roblan, also of Davis Wright Tremaine LLP, assisted Ms. Keyes. Judge Real is represented by Stephen D. Miller, Law Offices of Stephen D. Miller, P.C.; J. David Oswalt, of Arnold & Porter LLP; and Daniel Selmi of Loyola Law School.

The task of the Committee was initially to investigate and make findings and recommendations concerning Complaint No. 07-89020 ("Pattern and Practice Complaint") following a remand of that complaint by the Committee on Judicial Conduct and Disability of the Judicial Council of the United States ("Conduct Committee"). On February 5, 2008, Chief Judge Kozinski assigned Complaint No. 07-89000 (the "Obrey Complaint") to the Committee for inclusion in the investigation. This report addresses both the Pattern and Practice Complaint and the Obrey Complaint.

II. PROCEDURAL HISTORY

A. The Pattern and Practice Complaint

On March 15, 2004, the Clerk of the United States Court of Appeals for the Ninth Circuit received a complaint of judicial misconduct docketed as No. 04-89030 ("2004 Complaint"). The 2004 Complaint, filed by Stephen Yagman, alleged that the materials attached thereto evidenced a "long-standing, chronic, obdurate, and persistent disability and/or refusal . . . to follow orders of the Ninth Circuit . . . actions in excess of . . . lawful jurisdiction, and a usurpation of authority. . . ." The 2004 Complaint cited four cases in support of the allegation: *In re Canter*, 299 F.3d 1150 (9th Cir. 2002), *Brown v. Baden*, 815 F.2d 575 (9th Cir. 1987), *United States v. Sears, Roebuck & Co., Inc*., 785 F.2d 777 (9th Cir. 1986) and *United States v. Nicherie*, (U.S.D.C. Nev. Case No. MJ-S-04-2056;

U.S.D.C. C.D. Cal. Case No. CR-04-0527M; 9th Cir. Case No. 04-71066) ("*Nicherie*").

To investigate the 2004 Complaint and a different complaint, Complaint No. 05-89097, Chief Judge Mary Schroeder appointed this Committee.[1] On September 21, 2006, the Committee notified Judge Real that, in addition to the *Nicherie* case, it had identified seventeen cases that would be considered by the Committee in connection with its investigation of the 2004 Complaint. The Committee articulated the issues presented by those seventeen cases as follows: (1) alleged refusal to follow, or recalcitrance in following, Ninth Circuit orders or directives; (2) possible improper taking of jurisdiction of a case, or improper treatment of jurisdiction in a case; (3) apparent failure to state reasons when required ("the reasons issue"); (4) possible improper reliance on ex parte contact; and (5) apparent abuse of authority.

The Committee convened a hearing on November 8 and 9, 2006, in Pasadena, California. At the conclusion of that hearing, the Committee advised Judge Real that it found no merit to the *Nicherie* complaint or to any of the other

[1] The Committee bifurcated Complaint No. 05-89097 ("the Canter Complaint) from the 2004 Complaint. The Committee presented its report regarding the Canter Complaint to the Judicial Council on October 10, 2006. With modification, that report was adopted by the Judicial Council on November 16, 2006. The Judicial Council's order was affirmed by the Conduct Committee, resulting in a public reprimand of Judge Real issued on January 14, 2008.

2004 Complaint issues except the reasons issue. The Committee informed Judge Real that it had confirmed that eight of the seventeen cases addressed at the hearing involved the reasons issue and that it intended to explore further whether the reasons issue constituted a pattern and practice of misconduct.

After the hearing, the Committee deliberated on the status of the record and determined that it needed to expand the scope of its investigation of the reasons issue. The Committee directed its counsel to review Court of Appeals' records to identify additional cases that might bear on the issue. That review, which was limited to the twenty-year period 1986 to 2006, identified seventy-two additional cases, bringing the total number of cases under investigation to eighty.

On December 18, 2006, the Committee wrote to the district judge to advise him of the additional cases that had been identified. The district judge was invited to address whether the cases demonstrated a pattern and practice of the district judge's failing to give reasons when he was required to do so and, if there was such a pattern and practice, whether it constituted judicial misconduct.

After sending this letter, the Committee discussed the investigation with the district judge and his counsel. Those discussions resulted in the district judge's acknowledging that his failure in some cases adequately to state reasons for his decisions when doing so was required by either prevailing law or direction from the Court of Appeals caused additional expense and delay to the litigants and,

therefore, was a pattern and practice that the Committee had determined was misconduct because it was prejudicial to the effective and expeditious administration of the business of the courts. The district judge stated that he was committed to using his best efforts in the future to adequately state reasons when required to do so.[2]

As a result of that acknowledgment, the Committee bifurcated the *Nicherie* aspect of the 2004 Complaint and renumbered the remaining aspects as Complaint No. 07-87020, the Pattern and Practice Complaint.[3] On February 14, 2007, the Committee recommended to the Judicial Council that there be a finding of no misconduct in relation to any of the other pattern and practice issues, but that there be a finding of misconduct on the reasons issue based on Judge Real's acknowledgement. The Committee recommended that a private reprimand be issued to Judge Real in relation to the reasons issue. On March 21, 2007, the Judicial Council unanimously adopted this recommendation. The Complainant appealed the Judicial Council's order.

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[2] This commitment was reflected in a letter to Judge Graber dated February 8, 2007. (Hearing Exhibit B) The letter is inaccurate in one respect: the Committee had not found there to have been misconduct, but rather had agreed with Judge Real to halt its investigation based on the agreed-upon recognition of his past failure and his commitment to avoiding such failure in the future.

[3] The Committee's recommendation of no misconduct in relation to *Nicherie* was adopted by order of the Judicial Council on March 21, 2007. There was no appeal of that order.

B. The Remand Order

On January 14, 2008, the Conduct Committee issued a Memorandum and Order pertaining to the Pattern and Practice Complaint, rejecting the order of the Judicial Council and remanding the matter for further proceedings ("Remand Order" or "Order"). On January 16, 2008, Chief Judge Kozinski referred the matter to the previously established Committee for further investigation consistent with the Remand Order.

The Remand Order provides controlling guidance to the Committee regarding when a pattern or practice of failing to state reasons when required constitutes judicial misconduct. The Order cautions that the judicial misconduct statute is not intended to permit a challenge to the merits of a district judge's decision and that "[j]udges should render decisions according to their conscientiously held views of prevailing law without fear of provoking a misconduct investigation [citation omitted]. The failure of a judge to give reasons for a decision is . . . a merits issue regarding that decision."

The Order further states, however: "We agree that a judge's pattern and practice of arbitrarily and deliberately disregarding prevailing legal standards and thereby causing expense and delay to litigants may be misconduct." To determine whether a pattern and practice constitutes misconduct, there must be "clear and convincing evidence of willfulness, that is, clear and convincing evidence of a

judge's arbitrary and intentional departure from prevailing law based on his or her disagreement with, or willful indifference to, that law."

Furthermore, in determining whether actions constitute misconduct, the Conduct Committee directed that:

> [t]o the extent that such a finding is based simply on a large number of cases in which reasons were not given when seemingly required by prevailing law, the conduct must be virtually habitual to support the required finding. However, if the judge has failed to give reasons in particular cases after an appellate remand directing that such reasons be given, a substantial number of such cases may well be sufficient to support such a finding.

The Conduct Committee cited *United States v. Hirliman*, 503 F.3d 212, 213 (2nd Cir. 2007), on the latter point.

The Committee considers the Remand Order to be susceptible to interpretation in one respect: whether the second alternative for finding willfulness narrowly means a substantial number of cases in which the district court judge failed to give reasons after a remand *in the same case*, or more broadly means a substantial number of cases where the district judge failed to give reasons after remands *in the same type of case*, such as a case involving sentencing guidelines. The Committee considers the latter interpretation to capture the intent of the Remand Order, in part because of the citation to *Hirliman*.

C. The Obrey Complaint

On January 10, 2007, the Clerk of the United States Court of Appeals for the Ninth Circuit received a complaint of judicial misconduct docketed as No. 07-89000, the Obrey Complaint. This Complaint, filed by Stephen Yagman, cites *Obrey v. England*, 215 Fed. Appx. 621 (9th Cir. 2006), and alleges that Judge Real engaged in a "chronic, regularly-recurring pattern of obdurate disobedience of Ninth Circuit orders and refusals to apply prior Ninth Circuit dispositions in cases assigned to [him]." On March 19, 2008, the Committee advised Judge Real's counsel of its intent to evaluate the Obrey Complaint applying the standards established in the Remand Order.

D. Investigation

1. Pre-Hearing

Upon receipt of the Remand Order, the Committee began by re-examining its prior investigation of the reasons issue up to the point where it had been halted by agreement with Judge Real. Applying the standards identified in the Remand Order and interpreting the "substantial number" standard in the broader sense described above, the Committee determined that forty-four of the eighty cases it had previously identified as bearing on the reasons issue were not appropriate for further consideration. This left thirty-six of the previously identified cases as potentially evidencing a willful failure to give reasons, that is, "an arbitrary and

intentional departure from prevailing law based on his . . . disagreement with, or willful indifference to, that law." (Remand Order)

Next, the Committee searched for Court of Appeals dispositions since December 2006 that might bear on the reasons issue. Two such cases were found. Thus, the total number of cases identified for investigation was thirty-eight, consisting of thirty-four criminal cases and four civil cases. The *Obrey* case brought the total number of cases being considered to thirty-nine. By letter dated March 20, 2008, Judge Real was advised of the Committee's analysis of the Remand Order, and of the cases the Committee intended to examine for evidence of misconduct.

Judge Real delivered to the Committee a memorandum dated March 7, 2008, arguing that the civil cases under consideration (excluding *Obrey*) did not evidence misconduct. The Committee was persuaded by this memorandum that one case, *Beckman Instruments, Inc. v. Cincom Systems, Inc.*, did not involve a failure to state reasons and did not evidence misconduct as defined by the Remand Order and, therefore, it would not be considered further. At the same time, the Committee discovered a civil case out of the Federal Circuit, *International Rectifier Corporation v. Samsung Electronics, Ltd. and Ixys Corporation*, which did involve a failure to state reasons and did potentially evidence misconduct. On

April 24, 2008, Judge Real was advised of the deletion of *Beckman* and the addition of *Samsung*.[4]

Between May 5 and May 9, 2008, the Committee provided Judge Real with all of the documents the Committee had identified as demonstrating what appeared to be a failure to state reasons in each of the thirty-eight cases at issue. Judge Real was invited to identify any additional documents he wished to introduce.

On May 1 and May 20, 2008, the Committee wrote to Complainant Yagman regarding his participation in the hearing. On June 2, 2008, Mr. Yagman advised the Committee that he had no evidence to provide and nothing to add. He was not called as a witness.

On June 9, 2008, Judge Real submitted a pre-hearing brief to the Committee. That brief and the previously submitted March 7, 2008, memorandum were received in the record and have been considered by the Committee.

2. Hearing

The hearing took place on June 23, 2008, at the United States Court of Appeals in Pasadena, California. Judge Real was present with his counsel. Neither Judge Real nor anyone else testified. A court reporter was present, and a transcript of the hearing was prepared. At the beginning of the hearing, Judge

[4] Appendix A to this report is Post-Hearing Exhibit 6, a listing of the cases addressed by the Committee at the hearing. To make the record complete and clear, the Committee continued to use in this hearing the exhibit numbering scheme from the 2006 hearing on the Pattern and Practice Complaint.

Real identified nineteen additional exhibits, thus bringing the total number of exhibits in this record to 821. Two of those additional exhibits were received on the record at hearing; the remaining seventeen are received through this report.[5]

At the beginning of the hearing, the Committee advised the district judge that it had considered and found no merit in the Obrey Complaint (for the reasons described *infra*) and that the hearing would therefore address only the Pattern and Practice Complaint. Judge Graber then summarized the purpose and scope of the hearing, including by stating the following:

> We emphasize, the additional information should be relevant to the only issue before the committee, failure to state reasons. The committee emphasizes that it will not probe the merits of any case or the substantive reasons for Judge Real's decisions. Judge Real can, however, include any information that he or his counsel believe should be considered by the committee in determining whether Judge Real engaged in misconduct as defined by the Remand Order. For example, evidence would be relevant if it showed that, in fact, reasons were given in the manner required by law or by appellate remand and our factual premise is wrong; or the law or a remand did not require reasons. That would be another kind of error in our factual premise; or, another example there was a good reason for Judge Real not to give reasons, a mental state other than willfulness. Those are just some

[5] The complete list of exhibits is attached as Appendix B to this report. Exhibits are first identified with the case to which they pertain. The numbers 1-99 are Committee-introduced exhibits; numbers 100 and above were introduced by the district judge. Also received into evidence at the hearing were the Declaration of Yuri Long (Hearing Exhibit A) and Judge Real's February 8, 2007, letter to Judge Graber (Hearing Exhibit B), both of which were offered by Judge Real.

> examples of the kinds of things that would be relevant to our inquiry.

(Tr. 11:25-12:17)

After the opening argument of Judge Real's counsel, the hearing proceeded with the Committee's counsel making brief presentations of each of the thirty-eight failure to state reasons cases, and the Committee members examining the documents that formed the basis for the inclusion of each case in the investigation. After each presentation, Judge Real was permitted to present any evidence he wished to present, to direct the Committee to any documents he deemed relevant, and to make any argument he wished to make. Judge Real was given the opportunity to testify, but he elected not do so.

At the conclusion of the hearing, the Committee advised Judge Real that it did not consider closing argument or further briefing to be warranted.

III. FINDINGS

A. Analytical Framework

The Remand Order specifies that "a judge's pattern and practice of arbitrarily and deliberately disregarding prevailing legal standards and thereby causing expense and delay to litigants may be misconduct." In the context of a failure to state reasons, misconduct is to be found where clear and convincing evidence demonstrates all of the following: (1) either a directive of the Court of Appeals or prevailing legal standards required that reasons be given; (2) the district

judge failed to give reasons; and (3) the failure to give reasons resulted from an arbitrary and deliberate disregard of an appellate mandate or prevailing legal standard. In the absence of either direct evidence of willfulness or evidence of a virtually habitual pattern, the clear and convincing evidence must consist of a substantial number of cases of the same type.

Applying this analytical framework to the thirty-four criminal sentencing cases and the four civil cases at issue (excluding *Obrey*), the Committee makes the following findings.

B. Criminal Sentencing Cases

1. Legal Requirement to Provide Reasons

Federal Rule of Criminal Procedure 32 requires district courts, prior to sentencing, to state on the record their rulings on any and all objections made to a defendant's presentence report or to state on the record why such rulings are not necessary. The Sentencing Reform Act ("SRA"), 18 U.S.C. §§ 3551 et seq., requires that, when district courts depart from the sentencing guidelines, the judge state on the record his or her specific reasons for doing so.

a. Background Regarding Sentencing Procedures

When a criminal defendant is found guilty, the district court normally refers the matter to the probation department for a presentence investigation and the preparation of a presentence report. 18 U.S.C. §3552; and Fed. R. Crim. Proc. 32(c). The presentence report contains all available relevant information and the

probation department's recommendation to the district court regarding sentencing. Fed. R. Crim. Proc. 32 (c) and (d).

The prosecutor and the defendant then have an opportunity to object to the presentence report, and to present evidence and to argue in support of their respective positions on sentencing. If a party objects to the report, the probation department may respond. District courts are empowered to conduct hearings or request additional information on all of these matters prior to sentencing. *Id.*

b. Requirement to Rule on Objections to Presentence Report

Following briefing, the district court holds a sentencing hearing at which the district judge considers the presentence report, the positions of the parties, and any other information the court deems relevant. The district court may receive additional evidence, including live testimony from witnesses. If objections to the presentence report are made before or during the sentencing hearing, the district court is required to rule on those objections before sentencing or to state why rulings are not necessary. Fed. R. Crim. Proc. 32 (c) and (d)

c. Requirement to Provide Reasons During Initial Sentencing from 1984 to 2004

From 1984 through 2004, criminal sentencing in federal courts was governed by the SRA and the guidelines it spawned. During that period, application of the sentencing guidelines was mandatory. If a district court thought

that departure from a prescribed sentencing range was necessary, the SRA required the court to state "the specified reason for imposition of a sentence different from that described [in the guidelines]." *United States v. Wells*, 878 F.2d 1232 (9th Cir. 1989); 18 U.S.C. § 3553(c).

d. Requirement to Provide Reasons During Initial Sentencing from 2004 to 2007

On June 24, 2004, the United States Supreme Court issued its decision in *Blakely v. Washington*, 542 U.S. 296 (2004), finding unconstitutional the mandatory sentencing guidelines of the state of Washington, which were modeled after the federal guidelines. The widely held belief that *Blakeley* meant the mandatory aspect of the federal guidelines was also unconstitutional was confirmed just over six months later, when the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005). As a result of these decisions, although district courts were required to consider the guidelines in sentencing, they were no longer bound by them.

Until clarification was provided by appellate courts, however, it was not clear to what extent consultation of the guidelines was necessary and to what extent reasons had to be provided for deviating from them. While important guidance was provided quickly (*see United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005)), it was not until December 10, 2007, when the Supreme Court decided

Gall v. United States, 128 S. Ct. 586 (2007), that the requirement to state reasons for deviating from the guidelines was clear. [6]

The confusion on Judge Real's part during the period from June 2004 to December 2007 is evident in six of the cases considered by the Committee. In the first of them, *United States v. Aguilar*, Judge Real addressed the questionable constitutionality of the guidelines post-*Blakeley* and stated, "I will be sentencing you on your plea of guilty under the law as it existed prior to 1983." Aguilar Exhibit 5. In four other cases, *United States v. Hernandez-Gutierrez*, *United States v. FuJen Huang*, *United States v. Martinez*, and *United States v. Medawar*, the records reflect that Judge Real made an effort to comply with what he understood to be the post-*Booker* requirements. In the sixth case, *United States v. Atkinson*,

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[6] It has, however, been clear since 2007 that district courts are required to state reasons for selecting the sentence imposed. As the Supreme Court stated in *Gall v. United States*, *supra*, 128 S. Ct. at 597:

> [A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the §3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. (Citations omitted).

Judge Real was reversed by the Ninth Circuit for failing to consider the sentencing guidelines; however, the transcript of the sentencing proceeding shows that he in fact did state that he had considered the guidelines. (Tr. 179; Atkinson Exhibit 105, pgs. 7-9).

The Committee finds that, for the purpose of assessing misconduct, during the period from June 2004 to December 2007, the requirement to provide reasons for imposition of a particular sentence in relation to the guidelines was sufficiently ambiguous that a clear prevailing legal standard cannot be said to have existed. Accordingly, the Committee concludes that the six cases decided during that period do not provide clear and convincing evidence of misconduct.

e. Requirement to Provide Reasons when Sentencing after Revocation of Probation

There is ambiguity concerning the legal requirement to provide reasons when sentencing a defendant by way of the abbreviated sentencing procedure that results from a revocation of probation or supervised release. *See* Fed. R. Crim. Proc. 32.1. In these situations, district courts are not required to order preparation of a new presentence report, and they retain broad discretion to sentence defendants up to the applicable statutory maximum. *See United States v. Pelensky,* 129 F.3d 63, 68-69 (2nd Cir.1997) (presentence reports are not required when sentencing a defendant post-revocation of probation); *see also United States v. Leonard*, 483 F.3d 635, 639 (9th Cir. 2007) (citing *United States v. Pelensky,* 129

F.3d at 68-69) and *United States v. Garcia*, 323 F.3d 1161 (9th Cir. 2003) (district courts have broad authority when sentencing defendants after revocation of probation).

There have never been *mandatory* sentencing guidelines applicable to probation revocation proceedings. Instead, there are policy statements which, since their inception, have been advisory only. *See United States v. George*, 184 F.3d 1119, 1121-22 (9th Cir.1999). District courts are required to establish only that they considered the policy statements applicable to the charged offense. *United States v. Tadeo*, 222 F.3d 623, 625 (9th Cir.2000). Because the policy statements are advisory and not binding, "the district court need not 'make the explicit, detailed findings required when it departs . . . from a binding guideline.'" *United States v. Anderson*, 15 F.3d 278, 284 (2nd Cir.1994) (quoting, *United States v. Jones*, 973 F.2d 605, 607-608 (8th Cir.1992))

Three of the cases reviewed by the Committee, *United States v. Chau*, *United States v. Jones*, and *United States v. Alvarado-Maldonado*, involve sentencing following revocation of probation. The Committee recognizes that, in each of these cases, the Ninth Circuit held that Judge Real failed properly to articulate his reasons for imposing sentence and that he was required to do so by 18 U.S.C. §3553(c). See also *United States v. Lockard*, 910 F.2d 542, 546 (9th Cir.1990) (when sentencing a defendant on revocation of probation the district

court is required to provide a general statement of its reasons for imposition of the sentence). The Committee finds, however, that with respect to these cases, the requirement to provide specific reasons was sufficiently unclear so as not to support a finding of misconduct as defined by the Remand Order.

2. Failure to Provide Reasons when Required To Do So

Twenty-five sentencing cases under consideration are pre-*Blakeley* and do not involve revocation of probation. As to these cases, the Committee finds that there was a clear requirement to state reasons, that is, that Federal Rule of Criminal Procedure 32 required Judge Real either to rule expressly on objections to presentence reports or to state that ruling was not necessary, and that the SRA required Judge Real to state his reasons when departing from the sentencing guidelines. Accordingly, the inquiry as to these cases becomes whether Judge Real in fact failed to state reasons.

The Committee finds that in eight of the twenty-five cases, *United States v. Riley*, *United States v. Versey*, *United States v. Traversino*, *United States v. Tellio*, *United States v. Recio*, *United States v. Quijano*, *United States v. Green*, and *United States v. Menyweather*, Judge Real did state reasons. While his statement was less than what it might have been and was deemed to be insufficient by the Court of Appeals, misconduct cannot be found because of a district court's failure to provide a *sufficient* reason. To conclude otherwise would be to intrude

impermissibly into the merits of the case. Accordingly, these eight cases do not evidence misconduct.

3. Arbitrary or Deliberate Disregard of a Legal Requirement

In the remaining seventeen sentencing cases, the Committee finds that Judge Real failed to state reasons. Upon examination of the record in each of these cases, however, the Committee concludes that there is not clear and convincing evidence that Judge Real's failure resulted from willfulness, that is, an arbitrary or deliberate disregard for legal requirements or for an appellate mandate because of the judge's disagreement or willful indifference. Instead, the failures appear to result from an attitude that can best be characterized as inattentive or negligently indifferent to the legal requirement or appellate mandate. However erroneous and lamentable this failure of responsibility may be, it does not warrant a finding of misconduct.

In eight of these cases, *United States v. Sanchez Garcia, United States v. Marsh-Romero, United States v. Walker, United States v. Miralda, United States v. Khachatrian, United States v. Iyobebe, United Stated v. Arreola, and United States v. Luna*, the district court records reflect that the sentence Judge Real imposed was based on an acceptance of the recommendations in the presentence reports. Accordingly, while Judge Real did not state his reasoning and the Court of Appeals therefore was faced with a deficient record, Judge Real's unstated reasons are discernible from the record, and it is therefore likely that the parties understood

what his reasons were. Hence, these cases do not evidence deliberate disregard for the requirement to *have* reasons or to see that those reasons are understood by the parties – only a failure to fulfill the requirement to *state* reasons on the record. *See* Remand Order at 6 (citing *United States v. Travis*, 294 F.3d 837, 841 (7th Cir. 2002)).

This situation is perhaps best illustrated by *United States v. Khachatrian*, 172 F.3d 60 (9th Cir. 1999). Here, the defendant appealed his sentence, arguing that the district court had erred by failing to articulate whether the defendant was entitled to an offense level reduction for acceptance of responsibility. (Tr. 109-114, Khachatrian Exhibit 1) The government agreed that the district court had erred by failing to articulate reasons. *Id.* The Ninth Circuit vacated the sentence and remanded the case to the district court for re-sentencing, instructing the district court "to articulate whether Khachatrian was entitled to an offense-level reduction for acceptance of responsibility." (*Id.* Khachatrian Exhibit 1)

On remand, Judge Real confronted counsel for the defense and the prosecution concerning the appeal. (Khachatrian Exhibit 6) Specifically, Judge Real indicated that the defendant had received a two-point reduction for acceptance of responsibility as set forth in the presentence report, and stated: "This was the probation report upon which the court sentenced the defendant." (Tr. 111:18-20; Khachatrian Exhibit 6) The parties agreed. Judge Real then re-imposed the

original sentence, this time expressly adopting the findings of the presentence report.

Plainly, the remand in *Khachatrian*, and similarly in the other seven cases in this category, could have been avoided if Judge Real had done in the first instance what he did on remand – and what the law required him to do, and what he had been told repeatedly by the Ninth Circuit he had to do: state reasons. Nonetheless, the Committee concludes that these cases do not provide clear and convincing evidence of a deliberate or arbitrary refusal.

In another case, *United States v. Hose*, Judge Real made a mistake in imposing a sentence of 14 months (without explanation) when the guidelines range was 7 months. (Tr. 102-105, Hose Exhibit 1) After discovering his mistake, Judge Real issued a written order attempting to correct the sentence. (Hose Exhibit 3) The order was untimely under Federal Rule of Criminal Procedure 35. (Tr. 102-105) Thus, the defendant appealed the 14-month sentence and the Ninth Circuit vacated it and imposed the 7-month sentence. (Hose Exhibit 1) This case does not evidence arbitrary and intentional disregard for the requirement to state reasons.

In the eight remaining sentencing cases, while Judge Real was not explicit either in providing his reasons for departing from the sentencing guidelines or in ruling on objections to presentence reports, the Committee finds Judge Real's

failures do not evidence willfulness. A thorough review of the record in these cases (Ninth Circuit dispositions, sentencing hearing transcripts, presentence reports and briefs of the parties) reveals that, while Judge Real failed to state reasons on the record, a justification for the sentence can be discerned, thus suggesting that Judge Real likely assumed that his reason was sufficiently understood by the parties to relieve him of the obligation to be explicit.

Regardless of the parties' understanding, however, and even if the reasons for his rulings are discernible from the record, Judge Real's failure to state reasons was clearly in violation of an established requirement. Thus, the question becomes whether eight cases where the failure to state reasons is arguably deliberate and arbitrary is a "substantial number" of cases, which would warrant a finding of misconduct.

The Remand Order does not define "substantial number." In the Committee's view, the concept to some degree must be relative. Judge Real asserted in argument that he has decided more than 33,000 cases in his forty years as a district judge and that he has presided over more than 3,500 criminal cases. Although the Committee has not verified this number (and Judge Real did not testify), the Committee concludes that, regardless of the exact number of cases over which the district judge presided, eight cases over a twenty-year period does

not constitute a "substantial number" and, therefore, does not warrant a finding of misconduct under the Remand Order.[7]

C. Failure to State Reasons Cases in Civil Cases

The Committee identified four civil cases in which Judge Real appeared to fail to state reasons on remand when the Court of Appeals had specifically directed that he do so. Two of these cases involved the exercise of discretionary jurisdiction, and two involved an award of attorneys' fees. Because there are only four of these cases, the Committee determined at the outset that the number was insufficient to establish a pattern and practice of misconduct. There is neither a

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[7] The Committee is aware that, during the pendency of these proceedings, some six cases were decided wherein Judge Real was reversed and chastised to some degree by the appellate court, and where the case was remanded with instructions that it be assigned to a different judge. (*Republic of the Philippines v. Pimentel*, 128 S.Ct. 2180 (June 12, 2008); *Bonlender v. American Honda Motor Co.*, 07-55258 (9th Cir., June 6, 2008); *United States v. Clancy*, 06-50624 (9th Cir. 2008); *Research Corporation Technologies Inc. v. Microsoft Corp.*, 06-1275 (Fed. Cir. August 1, 2008); *Rhoades v. Avon Products*, 05-56047 (9th Cir. October 15, 2007); and *Calderon v. IBEW, Local 47*, 05-56937 (9th Cir. November 13, 2007)) None of these cases involved a failure to state reasons and thus was not deemed appropriate for consideration in this pattern and practice investigation.

A seventh case, *United States v. Waknine* (Ninth Circuit Case No. No. 06-50521), was decided on September 10, 2008. That case dealt with a failure to state reasons and a failure of the district judge to properly consider the factors set forth in 18 USC §3553(a) prior to sentencing, as required by *Gall v. United States*, 128 S. Ct. 586 (2007). Judge Real imposed the sentence in question on December 11, 2006, before the Supreme Court's decision in *Gall* and prior to this Special Committee's having received Judge Real's February 8, 2007, letter. For these reasons, and those stated elsewhere in this report, *United States v. Waknine* does not provide evidence of misconduct.

"virtually habitual" pattern of failure to state reasons when required to do so, nor a "substantial number" of cases in which Judge Real failed to give reasons after an appellate remand directing that such reasons be given. Therefore, in the absence of direct evidence of an arbitrary or intentional refusal to follow a directive of the Court of Appeals, there cannot be a finding of misconduct – and there is no such evidence.

1. Discretionary Jurisdiction Cases

In *United National Insurance Co. v. R & D Latex Corp.*, Judge Real exercised discretionary jurisdiction over a declaratory relief action. In the initial remand, the memorandum disposition stated as follows:

> Federal courts should generally "decline to assert jurisdiction in insurance coverage and other declaratory relief actions presenting only issues of state law during the pendency of parallel proceedings in state court . . . ." *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796,798 (9th Cir. 1995) (quoting *American Nat'l Fire Ins. Co. v. Hungerford*, 53 F.3d 1012, 1019 (9th Cir. 1995)). Because the district court did not explicitly consider whether to exercise its discretionary jurisdiction and because the "fitness of the case for resolution' may be 'peculiarly within [its] grasp,'" *id*. at 799 (quoting *Wilton v. Seven Falls Co*., 115 S. Ct. at 2144), we remand for an exercise of discretion as required by our opinions in *Hungerford* and *Karussos*.

(United National Exhibit 1) Thus, the Ninth Circuit did not expressly mandate that Judge Real state reasons – only that he "explicitly consider" exercising jurisdiction.

On remand, Judge Real stated, "I think there's no reason why, under *Karussos*, that I should not have exercised federal jurisdiction over declaratory relief actions, and if you'll prepare that ruling and the reentry of the summary judgment." United National Exhibit 6. Thereafter, Judge Real signed an order that read in pertinent part: "[I]t was proper for the Court to exercise its discretion pursuant to [*Karussos* and *Hungerford*] in accepting jurisdiction over these consolidated matters." (United National Exhibit 7)

On the second appeal, the Ninth Circuit reversed and remanded with an instruction that the case be assigned to a different judge, stating:

> The district court found that it was proper for it to exercise its jurisdiction, but gave no reasons.
>
> When the issue of whether to exercise its discretionary jurisdiction is raised before the district court, it "must make a sufficient record of its reasoning to enable appropriate appellate review." *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220,1225 (9th Cir. 1998).

(United National Exhibit 2) The Committee's investigation determined that the *Dizol* opinion cited by the Ninth Circuit had not been issued when Judge Real entered his order following remand, and that the appellate disposition did not specifically direct Judge Real to state reasons. Accordingly, this case does not provide clear and convincing evidence of misconduct.

Some five years later, in *Homestead Insurance Co., Inv. v. The Casden Co.*, Judge Real declined to exercise discretionary jurisdiction, ordering that the

plaintiff's declaratory relief action be dismissed subject to being refiled in state court. The Ninth Circuit reversed and remanded, stating:

> The district court also improperly dismissed Homestead's declaratory judgment action without stating its reasons for abstaining. *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225-26 (9th Cir. 1998) (en banc) (so holding and identifying considerations relevant to abstention). We reverse the dismissal and remand to the district court so that it may reconsider its decision . . . .
>
> If the district court again decides to abstain, it must "record its reasoning in a manner sufficient to permit the proper application of the abuse of discretion standard on appellate review." *Dizol*, 133 F.3d at 1225.

(Homestead Exhibit 1)

On remand, Judge Real again declined jurisdiction, stating in his written order: "[D]ismissal is proper under the Doctrine of Abstention (as expressed in *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942) etc.) . . . ." (Homestead Exhibit 11) The order then listed the *Brillhart* factors and added:

> The Court finds that application of each of these factors . . . weighs in favor of abstention, establishes that the District Court may properly abstain from jurisdiction over the case and the action may be dismissed without prejudice.

(*Id.*, Tr. 194-195)

The Ninth Circuit again reversed, stating as follows:

> The district court did abstain on remand, but its order simply recites the factors recognized in *Brillhart* . . . and finds that applying them weighs in favor of abstention. This is a statement of the applicable legal principles, but

> not of reasoning. We cannot tell why the district court believed that the record in this case satisfied the *Brillhart* factors. Not only does this fall short of complying with our mandate, but it leaves us without any basis for determining how (or whether) the court exercised its discretion.
>
> We have the same difficulty with the district court's decision to dismiss, rather than to stay, the action. . . . The court's order offers no insight into whether its judgment was soundly exercised.
>
> Accordingly, we again reverse and remand for the court to consider anew whether abstention is advisable, and if so, whether the preferable course is to stay instead of dismiss the action. In any case, a statement of reasons tied to the record as it now appears must be given.

(Tr. 194-195; Homestead Exhibit 2)

On remand, Judge Real decided to exercise jurisdiction. The case then took a different turn and the reasons issue was no longer implicated.

In examining this case, the Committee concluded that Judge Real's listing of the *Brillhart* factors, while insufficient for the reasons identified by the appellate court, was not a *failure* to state reasons. Thus, this case does not provide clear and convincing evidence of misconduct.

2. Attorneys' Fees Cases

Dehertoghe v. City of Hemet was an excessive force/civil rights action against a police department and individual police officers. After granting summary judgment for defendants, Judge Real awarded the city $22,253.90 in attorneys' fees. (Dehertoghe Exhibit 6) The plaintiff appealed.

The Ninth Circuit upheld the granting of summary judgment, but reversed the award of attorneys' fees, stating as follows:

> We have no way of determining the extent to which the court's ruling may have been based on an arguably permissible ground, or was instead based on grounds that are impermissible when the prevailing party is a defendant. (Citation omitted.) A reasoned decision when fees are awarded serves the interests both of fairness to the parties, and to the administration of justice. Appellate review is rendered difficult, if not impossible, when *no* reasons are given. Accordingly, we vacate the award, and reverse and remand . . . . If the court determines that fees should be awarded as to any claim or party, then it must provide a statement of reasons.
>
> Similarly, the amount of the attorney's fees awarded (if any) must be calculated in conformity with this circuit's lodestar/multiplier analysis. See, e.g., *Van Gerwin v. Guarantee Mut. Life Co*., 214 F.3d 1041, 1045 (9th Cir. 2000). If the court on remand determines that any fees are to be awarded, then it must fix the amount as *Van Gerwin* directs, and provide a "concise but clear explanation of its reasons." *Id*. at 1047 (internal quotation omitted)

(Tr. 197-198; Dehertoghe Exhibit 1)

On remand, Judge Real awarded the city fees of $15,000, stating in his order: "There is no basis for plaintiffs' claims against defendant City of Hemet" and the officer, and "Reasonable attorneys' fees for the defense of the City of Hemet and of [the police officer] are $15,000." (Tr. 198-200; Dehertoghe Exhibits 7, 9)

Ruling on plaintiff's second appeal, the Ninth Circuit stated as follows:

> The district court ignored the previous directive of this court on remand and once again abused its discretion in awarding Appellee-Defendants attorney's fees . . . .
>
> In this case, the district court abused its discretion by failing to give any reasons or explanation for its award . . . . Moreover, the district court abused its discretion by failing to calculate the amount of attorney's fees awarded in conformity with the lodestar/multiplier approach used in this circuit. (Citation omitted.)
>
> We find unusual circumstances here and order that the case be reassigned on remand because the original district judge has ignored our previous directive.

(Tr. 199-200; Dehertoghue Exhibit 2)

While this case comes close to evidencing misconduct, Judge Real argued, and the Committee finds, that Judge Real's statement that his award of fees was based on the lack of merit in the underlying case is *some* statement of reasoning, however inadequate. Thus, this case also does not provide clear and convincing evidence of misconduct.

The remaining case, *International Rectifier Corporation v. Samsung Electronics Co. Ltd., Samsung Semiconductor, Inc., and Ixys Corporation*, involved contempt proceedings arising out of a permanent injunction Judge Real had issued. On the first appeal, the Federal Circuit reversed Judge Real's finding that International Rectifier and Ixys had violated the injunction. (Samsung Exhibit 101) Thereafter, Samsung and Ixys both sought attorneys' fees. Judge Real

awarded Samsung half what it sought, saying the request for fees was "overblown" and the case had been "terribly over-lawyered," and that Samsung "took no risk in defending this matter." (Samsung Exhibit 5) Judge Real denied Ixys' fee request in its entirety; here, there was a five-page order in which Judge Real stated his reasons in some detail. (Samsung Exhibit 3) Both Samsung and Ixys appealed.

Applying Ninth Circuit law, the Federal Circuit reversed and remanded. As to Samsung, the court stated as follows:

> We conclude that the district court did not adequately explain its reduction of Samsung's fee request. . . . The Supreme Court has made clear that although district courts have discretion in determining the amount of a fee award, "[i]t remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The Ninth Circuit has explained that "decisions of district courts employing percentages in cases involving large fee requests are subject to heightened scrutiny." *Gates v. Deukmejian*, 987 F.2d 1392, 1400 (9th Cir. 1992) . . . . The court [in Gates] held that the district court failed to provide the "concise but clear" explanation of its fee reduction, despite an explanation that was more focused and clear than the district court's fee reduction, "we are unable to assess whether the court abused that discretion." *Id*. Thus we vacate the fee award and remand for a concise but clear explanation of how the district court arrived at its fee reduction.

(Tr. 208-209; Samsung Exhibit 1)

As to Ixys, the court ruled that Judge Real had abused his discretion in denying fees, and reversed for that reason. (*Id.*) Ixys requested that the case be remanded to a different judge. The Court denied this request, saying:

> Given the extremely high threshold, we do not think reassignment is appropriate in this case. On remand, we are confident that Judge Real can put aside any conviction that Ixys's conduct was somehow wrongful even if not legally sanctionable in considering an appropriate award of attorney fees to both Samsung and Ixys.

Id.

On remand, Judge Real again cut Samsung's fee request in half, thus awarding the same amount he had ordered the first time. Judge Real issued a written order reciting, in some detail, the basis for his conclusion that Samsung's case had been "terribly overlawyered." Following that recitation, the order stated: "Based on these findings and the more than 400 pages of billing statements, the court finds that $650,000 was a reasonable attorney's fees [sic] for Samsung, considering all the relevant factors." (Samsung Exhibit 4)

In the same order, Judge Real awarded Ixys $301,125.17 on its request of $1,282, 867.28. Judge Real stated two reasons for this reduction: because Ixys had not played a significant role in the case, and because Ixys sought fees in connection with opposing International Rectifier's cert petition and failed to cite

"any authority why it should recover those additional fees." (*Id*., Tr. 209-210)

Both Samsung and Ixys again appealed.

The Federal Circuit again reversed, saying:

> We recognize that the Ninth Circuit does not require "an elaborately reasoned, calculated, or worded order; a brief explanation of how the court arrived at its figures will do." *Cunningham v. County of Los Angeles*, 879 F.2d. 481, 484 (9th Cir. 1988). However, there must be "some indication or explanation of how the district court arrived at the amount of fees awarded." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1213 (9th Cir. 1986) . . . .
>
> Here, neither the district court's order nor the record reveals how the district court arrived at the particularly precise award of $301,125 to IXYS . . . .
>
> We likewise find no explanation in the district court's order or in the record for how the district court calculated Samsung's award of $650,000 in fees and $45,000 in costs – figures identical to the amounts originally awarded in the [first order.]
>
> Because the district court has again failed to provide a "concise but clear" explanation of how it arrived at the reduced fee awards of Samsung and IXYS, we are unable to assess whether the court abused its discretion and must vacate the award of attorney fees.

(Tr. 210-212; Samsung Exhibit 2) The case was remanded to a different judge to preserve the appearance of justice. *Id.*

While Judge Real's statement of reasons was inadequate and arguably evidences a begrudging acceptance of the appellate court's reversal of his substantive decision and its directive to award fees, the Committee finds that this

case does not provide clear and convincing evidence of misconduct. As Judge Real's counsel pointed out at the hearing, Judge Real provided five pages of "specific examples of why he thinks it [the *Samsung* case] was overlawyered, all of which dealt into the specific details of the case . . . ." (Tr. 213, l. 1-4).

As for Ixys, Judge Real's counsel argued that, "when the case goes back up, . . . if you read the case carefully, there is a . . . subtle shift in emphasis in the Federal Circuit. Where the Court talks about specific findings to support its conclusion in the first opinion, now in the second opinion, the focus is on amount." (Tr. 213, l. 21-214, l. 2) This observation does not appear to the Committee to be accurate, and hence the Committee is left with no explanation for Judge Real's failure to explain either how he calculated the amount of Ixys' fee award or his reasons for the calculation. Nonetheless, this failure by itself does not provide clear and convincing evidence of willful misconduct.

D. The Obrey Complaint

Obrey v. Johnson (later *Obrey v. England)* involved the claim of Plaintiff Obrey that he had been denied a promotion by the U.S. Navy because of his race. Judge Real presided over the jury trial in the District of Hawaii. At a pretrial hearing, Judge Real excluded three pieces of Obrey's proffered evidence. The jury returned a verdict for the defendant, and judgment was entered. Obrey appealed.

The Ninth Circuit held that Judge Real erred by excluding the three pieces of evidence, and the exclusion was found to be prejudicial. The court stated:

> We hold that the district court's erroneous exclusion of the Dannemiller study, the testimony of Mr. Toyama, and the anecdotal testimony of three Shipyard workers was an abuse of discretion requiring reversal. . . . [T]he judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

(Obrey Exhibit 1; emphasis added)

Judge Real presided over the second jury trial and, although allowing into the record the three pieces of previously excluded evidence, he ordered severe limitations in each instance. The jury again returned a verdict for the defendant, and judgment was entered. Obrey appealed again.

With respect to the three previously disputed rulings and in two other respects, the Ninth Circuit found Judge Real to have erred and the errors to be prejudicial. The judgment was reversed and the case remanded for a new trial before a different judge. The Ninth Circuit stated as follows:

> We agree that the district court committed a number of errors, mostly due to its failure faithfully to apply our prior decision in this case . . . .
>
> [W]e are troubled by the district judge's apparent unwillingness to implement our decision in *Obrey I*. In order to preserve the appearance of justice, we "exercise [our] supervisory power . . . to reassign this case to a different district court judge on remand.

(Obrey Exhibit 2)

Although this case reflects what can generously be described as Judge Real's begrudging adherence to the directive of the Ninth Circuit, it cannot be said that Judge Real completely refused to follow the court's directive. Therefore, this case does not provide direct evidence of misconduct. Moreover, as this case does not involve a failure to state reasons, it is not susceptible to evaluation as a pattern and practice case under the Remand Order.[8]

Moreover, an assessment of Judge Real's evidentiary rulings at the second trial in *Obrey* inevitably involves an assessment of the merits of the case, something the misconduct statute does not permit and the Remand Order warns against. Accordingly, the Committee finds no merit in the Obrey Complaint, either as a stand-alone matter or as part of a pattern and practice, and recommends that it be dismissed.

IV. ANALYSIS

The Remand Order provides controlling guidance concerning the type and level of proof needed to establish that a judge's failure to provide reasons when legally required to do so is misconduct. That standard requires clear and convincing evidence that the judge arbitrarily or deliberately disregarded

[8] The Committee reviewed the five cases involved in the 2006 hearing that presented issues similar to *Obrey* (failure to follow a directive of the Ninth Circuit in cases *not* involving failure to state reasons) and found that each was sufficiently distinct from the others and from *Obrey* so as not to suggest a pattern and practice.

prevailing law because of a disagreement with, or willful indifference to, that law. The Remand Order specifies that clear and convincing evidence can be shown in the pattern and practice context if the judge's conduct is found to be virtually habitual, or if there are a substantial number of cases in which the judge failed to follow the directive of an appellate remand.

"In order to be 'clear and convincing,' evidence must be of 'extraordinary persuasiveness.'" *United States v. Kaluna*, 192 F.3d 1188, 1204 (9th Cir. 1999) (quoting *State v. Johnson*, 886 P.2d 42, 44 (Or. Ct. App. 1994)). To meet the standard, one must overcome a "heavy burden," *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985), significantly in excess of the preponderance sufficient for most civil litigation. *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997). The purpose of the standard is to protect society from the consequences of grave decisions too lightly reached. *Id.*; *also see United States v. Restrepo*, 946 F.2d 654, 659-60 (9th Cir. 1991) (en banc).

Applying this standard to the findings above, the Committee concludes that Judge Real's conduct does not constitute misconduct. This is not to say that the Committee is untroubled by Judge Real's failure to state reasons in many cases when he was required or directed to do so, and his apparent obduracy in implementing directives of the appellate court in *Obrey*, *Samsung*, and other cases. In many of the cases the Committee studied, appellate remand could have been

avoided by a few statements uttered from the bench, and from a fuller acceptance of the legal mandate or the appellate court's instruction. Judge Real's failure in that regard resulted in needless appeals and unnecessary cost to the litigants in both money and time, and has no doubt tended to undermine the public's confidence in the judiciary. Without more, however, misconduct cannot be found under the standard of the Remand Order.

The Committee acknowledges and appreciates the fact that none of the orders involved in this investigation was issued by Judge Real after February 8, 2007, when he wrote to Judge Graber expressing his commitment to use his best efforts to state reasons in the future.[9] The Committee hopes that Judge Real will continue to honor that commitment in spite of the Conduct Committee's rejection of the agreement that gave rise to it.

[9] The Committee is aware that, in *United States v. Patterson* (07-50383, March 10, 2008), the Ninth Circuit reversed and remanded Judge Real's sentencing of a criminal defendant for failure to state reasons and that the sentence in that case was imposed on August 22, 2007. However, that case was a sentencing following revocation of supervised release. Therefore, for the reasons stated in Section III.B.1.(e) of this report, the *Patterson* case does not exemplify misconduct.

V. RECOMMENDATION

Because this Committee finds there not to be clear and convincing evidence of misconduct under the standard established by the Remand Order, we unanimously recommend that Complaints Nos. 07-89020 and 07-89000 be dismissed.

Respectfully submitted,

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September 23, 2008