IN THE SUPREME COURT OF OHIO

Disciplinary Counsel

Relator,

v.

Hon. Daniel Gaul

Respondent.

Case No. 2022-1515

On Certified Report by the
Board of Professional Conduct

Relator's Answer to Respondent's Objections

Joseph M. Caligiuri (0074786)
Disciplinary Counsel
Joseph.Caligiuri@sc.ohio.gov
Relator

Hon. Daniel Gaul (0009721)
Respondent

Matthew A. Kanai (0072768)
*Counsel of Record
Assistant Disciplinary Counsel
Office of Disciplinary Counsel
65 East State Street, Suite 1510
Columbus, Ohio 43215-4215
Telephone: (614) 387-9700
matthew.kanai@sc.ohio.gov
Counsel for Relator

Monica A. Sansalone (0065143)
*Counsel of Record
Shane A. Lawson (0086275)
Gallagher Sharp LLP
1215 Superior Avenue, 7th Floor
Cleveland, Ohio 44114
Telephone: (216) 241-5310
msansalone@gallaghersharp.com
slawson@gallaghersharp.com
Counsel for Respondent

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Introduction

In 2010, this court suspended respondent, Judge Daniel Gaul, for six months with the entire suspension stayed. *Disciplinary Counsel v. Gaul*, 127 Ohio St.3d 16, 2010-Ohio-4831, 936 N.E.2d 28. That suspension expired in April 2011. Just five years later, respondent unconstitutionally coerced Carlton Heard into giving up his right to trial (Count I). Between 2016 and 2021, respondent committed 30 acts of misconduct in eight separate cases. He violated the constitutional rights of multiple criminal defendants, improperly incarcerated defendants, used racially-charged terms to refer to African-Americans in open court, and threatened, demeaned, and belittled litigants and spectators. He also publicly criticized other branches of the judiciary, putting his reputation before the judicial system's integrity.

Throughout the investigation and hearing, respondent refused to admit a single violation. In his post-hearing brief, respondent accepted *some* responsibility for his misconduct by conceding to 10 of the 30 charged violations. But the board found respondent violated all 30 of the charged disciplinary rules. The board found six aggravating factors, including a refusal to acknowledge the wrongful nature of his conduct and a dishonest or selfish motive. It recommended a one-year suspension with no stay. While relator originally asked for a two-year suspension with one year stayed, relator does not object to the board's more lenient recommendation. That recommendation is consistent with the principles of judicial discipline and this court's precedent. Accordingly, this court should adopt the board's recommendation.

Statement of Facts

The board's Findings of Fact and Conclusions of Law are cogently set forth in the board's report and recommendations ("Report").

Argument

ANSWER TO OBJECTION NO. 1: The board's determination that respondent acted with a dishonest or selfish motive is consistent with the evidence taken during the hearing and this court's precedent in *Bachman*.

Respondent asked the board to find the mitigating factor of no dishonest or selfish motive. Report at ¶ 161. However, the panel considered *Disciplinary Counsel v. Bachman*, and determined that respondent had a dishonest or selfish motive. 163 Ohio St.3d. 195, 2020-Ohio-6732, 168 N.E.3d 1178. The respondent in *Bachman* grossly abused his contempt power by holding a woman in contempt after she briefly screamed outside his courtroom. Bachman left the bench, brought the woman back into his courtroom, held her in contempt, and then had her forcibly detained. *Bachman* at ¶¶ 6-10. Although the *Bachman* board found that Bachman did not have a dishonest or selfish motive, this court concluded that he did. *Id.* at ¶ 14. The court noted, "Sending someone to jail is not the adult equivalent to sending a child to his or her room for a time-out." *Id.* at ¶ 35.

Bachman counsels that judges must not be motivated by bruised egos. It found that contempt is "a prodigious power that is not to be invoked for actions that *offend one's sensibilities* or when a *judicial officer feels personally affronted or disrespected*." *Id.* at ¶ 33 (emphasis added). *Bachman* recognized the emotional realities that judges face, *id.* at ¶ 34, but it also counseled that judges must be mindful of the impact of their actions. Bachman "showed a *complete indifference to the circumstances of* [the contemnor's] *life* (e.g., whether she had children or other family members to care for, employment she might lose, or any other harm she could suffer), to *the indignity she endured* by being physically restrained in a crowded courtroom, and ultimately, to the *loss of her liberty*." *Id.* at ¶ 35 (emphasis added). Respondent, like Bachman, repeatedly used his power to punish behavior that offended his sensibilities or that

he felt was personally disrespectful.

A. A judge acts selfishly if they use their judicial authority for personal aggrandizement or emotional vindication.

Judicial authority is not personal power. It is an institutional power that derives legitimacy from the public's confidence in its fairness and impartiality. Therefore, judges must guard against using their judicial power in ways that aggrandize power to themselves or to address things they find personally affronting. Respondent has repeatedly failed to do so.

Respondent starts his argument to this court by turning to Merriam-Webster's secondary definition of "selfish," "arising from concern with one's own welfare or advantage in disregard to others." Respondent's Objections ("Objections") at 5. Presumably, this is because he recognized that Merriam-Webster's *primary* definition was not as helpful, "**1:** concerned excessively or exclusively with oneself **:** seeking or concentrating on one's own advantage, pleasure, or well-being without regard for others." https://www.merriam-webster.com/dictionary/selfish (accessed Jan. 24, 2023). "Concerned excessively or exclusively with oneself" is an apt description of respondent's behavior. Respondent repeatedly disregarded the Constitution, Rules of Evidence, the Revised Code, basic concepts of decorum, and the ethical rules because they would have prevented him from running his court his way.

Nonetheless, respondent claims this court cannot find he acted with a selfish motive unless it finds he took actions for "personal advantage," Objections at 6, or "personal benefit," Objections at 7. Respondent appears to be suggesting that his acts cannot be selfish because he did not "personally gain" anything—that is, he was not personally enriched. This is wrong for two reasons. First, *Bachman* was not personally enriched, and thus respondent's argument contradicts precedent. Similarly, this court found a selfish or dishonest motive in *Disciplinary Counsel v. Repp* because Repp "exhibited arrogance and a desire to prove that his suspicions

about A.O.'s impairment were accurate and consistent with unsubstantiated rumors that he had heard about [A.O.'s] and T.D.'s past drug use[,]" 165 Ohio St.3d 582, 2021-Ohio-3923, 180 N.E.3d 1128 at ¶ 23, even though Repp was not personally enriched. Second, no common understanding of the word "selfish" excludes gaining an improper professional advantage.

i. Respondent aggrandizes power to himself because he acts out of emotion, not careful deliberation.

In the most basic sense, respondent gets in trouble when he lets his emotions take charge. This is not a new observation. In 2010, this court noted that respondent "acted on emotion, or what he termed 'common sense and Psychology 101,' rather than on evidence and careful deliberation." *Gaul*, 2010-Ohio-4831 at ¶ 72. Unfortunately, respondent is still driven by his emotions instead of evidence and careful deliberation.

The most glaring example of this is Count VII (Smiley), where respondent essentially goaded a defendant into a contempt charge. Arthur Smiley was being held on two other cases before Judge Sherrie Miday when he appeared before respondent for a bond hearing. Report at ¶ 116. *After* respondent announced the $25,000 bond, he decided to talk about Smiley's prior criminal record. *Id.* at ¶ 117. Smiley said that there was "nothing to look at" and that he just wanted his case transferred to Judge Miday. *Id*. Despite bond having been set, respondent continued discussing Smiley's criminal record. Smiley correctly pointed out, "I can't get out. I got a hold from [Judge Miday] already. Just give me the same judge, same lawyer, so I can move on with my day." *Id.* at ¶ 118. Shortly after that, in a pique of futile rage, respondent raised Smiley's bond from $25,000 to $100,000, and Smiley told him that he was making himself "look stupid as a judge." *Id.* at ¶ 120. Respondent then immediately imposed a 30-day contempt, *id.* at ¶ 121, and threatened to impose as many contempts for as many years as Smiley wanted. Hearing Transcript ("Tr."), 130:7-11. Yet, as the panel noted, this only occurred because respondent

refused to let the issue drop:

> Respondent admitted in his testimony that there was *nothing further needed after he had set the bond*. Hearing Tr. 124. Nonetheless, he continued talking with Smiley that ultimately led to Smiley making discourteous statements to Respondent and that led to the contempt finding. *However, this was due solely to Respondent's decision to keep talking to Smiley despite the fact that as a matter of law, the bond decision was made and that should have ended the matter.* Instead, Respondent made comments such as calling Smiley, who is black, "brother" which was demeaning and unnecessary. He was not upholding and applying the law after the bond order.

Report at ¶ 127 (emphasis added). Respondent did not deliberate in this case. If he had, he would have realized that Smiley was right. Rather, respondent was driven by the emotional need to punish Smiley because he did not like Smiley's attitude. This is no different than Bachman's behavior. Both judges felt disrespected and abused their judicial power to lash out at the cause of their ire.

Bachman resigned after he was confronted by the Administrative Judge regarding his conduct. *Bachman*, 2020-Ohio-6732 at ¶ 11. By contrast, after the court of appeals reversed respondent, he contacted Smiley's attorney and told her that if Smiley *filed a written apology to him*, he would dismiss the contempt. Tr., 372:24-373:2. Even at the end, respondent found the need to soothe his wounded pride more important than simply doing his job based on careful deliberation.

ii. Respondent selfishly placed his reputation over the judiciary's.

Respondent baselessly impugned the integrity of the judiciary to protect his reputation. In Count I (Heard), the court of appeals reversed respondent's unconstitutionally coerced plea and directed the case to be assigned to another judge, after which Heard was acquitted at trial. Report at ¶ 30. Respondent then baselessly criticized the entire judiciary on a nationally-distributed podcast, saying, "This isn't a case about an innocent man being railroaded by the system. It's a

case that *clearly demonstrates* how defendant and his attorney *manipulated the system of justice* to their benefit and beat the murder case." Tr., 44:13-18 (emphasis added).

Yet, at the disciplinary hearing, respondent admitted that he could not identify a single unethical act by Heard or his attorney in the subsequent proceedings. Tr., 46:24. Respondent simply made up the allegation of manipulation to make himself look better while making the rest of the judicial system look weaker.

Respondent similarly criticized the court of appeals in Count VI (Jackson). After the court of appeals reversed him twice, respondent called another hearing, brought the parties together, and publicly criticized the court of appeals. As the panel noted,

> The panel finds that Respondent's conduct in ignoring the clear mandates of R.C. 2937.222 twice by failing to require the state of Ohio to produce clear and convincing evidence as required by law, making findings prior to offering counsel to present any evidence or argument, *and being critical of the court of appeals for reversing his clearly erroneous decisions* does not promote public confidence in the integrity and impartiality of the judiciary[.]

Report at ¶ 114. At the hearing, respondent attempted to justify his criticisms by saying that he had "so much information about one of the most violent people that has ever been assigned to me." *Id.* at ¶ 113. The board noted, "This argument is without any merit," *id.,* because respondent was essentially criticizing the court of appeals for not being aware of "information" that respondent had *twice* failed to put on the record.

The board had ample evidence of respondent's selfish motive. Respondent aggrandized improper judicial power and publicly criticized the judiciary for no other reason than to protect his personal reputation. The court should adopt the board's finding of a selfish motive.

ANSWER TO OBJECTION NO. 2: Respondent did not acknowledge the "wrongful nature" of his conduct.

A. Respondent's admission of some misconduct is not the same as "acknowledging the wrongful nature" of his conduct because it does not show any appreciation for the harm he caused.

Respondent has argued that because he conceded there was sufficient evidence for some of the violations in his post-hearing brief, the panel erred in finding that he failed to acknowledge the wrongful nature of his conduct. Respondent's argument is based on the faulty assumption that "admitting to a violation" is the same as "acknowledging the wrongful nature of the conduct."

It is clear from *Bachman* that the two terms are not coextensive. Bachman stipulated to *all* the charged violations, but the court found that he failed to acknowledge the "wrongful nature" of his conduct. The court stated that Bachman "*failed to appreciate the inappropriateness of his actions*. Although he testified that he regretted leaving the bench that day, *he expressed no remorse for the harm* that he had caused to K.J.—choosing *instead to focus on the effects of his misconduct on his own career and finances*." *Bachman*, 2020-Ohio-6732 at ¶ 15 (emphasis added). The dispositive question is whether a respondent shows that he "appreciates the inappropriateness of his actions," and, in the case of Judge Gaul, the answer is "no."

During the hearing and in his post-hearing brief and objections, respondent minimized, deflected blame, and indicated he did not believe he did anything wrong. In his direct examination, respondent lamented the disciplinary case's effect on *his* life, Tr., 329:20-330:24, but not on the lives of the people he harmed. In his Objections, he has provided a count-by-count analysis that, upon deeper analysis, is largely more deflection and out-of-context statements.

i. Count I (Heard)

Respondent threatened to impose multiple consecutive 14-year sentences on Carlton Heard if he took his case to trial. Report at ¶ 34. Respondent pressured Heard into accepting the plea bargain that respondent had crafted, telling Heard that the "jury is on its way. If they walk into this room, my deal with you is off." *Id.* at ¶ 23. Respondent also made unnecessary and gratuitous references to Heard's race. *Id.* at ¶ 35.

Respondent claims that he expressed "sincere regret" regarding Count I when he told the panel he "went too far" and "became too involved" in Heard's plea. But these statements are taken out of context.

During cross-examination, the following exchange occurred:

> Q. Okay. Do you think you went too far in this case and abandoned your role as an impartial jurist?
>
> A. I would say this. I – I have handled 41,373 cases in my career. As I've said, I've been assigned almost 2,000 cases in one year alone. I have probably been in chambers discussing with attorneys on the record 150- to 200,000 times.
>
> At – in this particular case, there were exigent circumstances. It was a very serious case. It had been pretried 11 times, set for trial 4 times. I literally had the jury waiting, I believe standing, in the hallway as this colloquy was going on.
>
> And, frankly, would – do I wish I was more tempered?
>
> Q. Judge –
>
> A. Yes.
>
> Q. I just want you –
>
> A. Ask me what it was.
>
> Q. – to answer just the question, please.
>
> Do you think you went too far in this case?

A. Yeah, I do.

Q. Okay. And you abandoned your role as an impartial jurist?

A. No.

Tr., at 39:15-40:16. When initially asked if he went too far, respondent refused to answer and instead evasively redirected his answer to his judicial experience. When asked to answer the question directly, although respondent agreed he "went too far," he refused to agree that he abandoned his role as an impartial jurist. Respondent has continued that argument today and still denies that he violated Jud.Cond.R. 2.2 (A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially). Respondent's Post-Hearing Brief at 8.

Respondent also points to his statement that he "became too involved" as an acknowledgment of the wrongful nature of his conduct. This statement came after he refused to answer the panel's question about whether he coerced the guilty plea to avoid a trial. Tr., 399:22. He then immediately attempted to deflect blame from himself and continued until the panel had to stop him:

> A. * * * I regret that I became too involved. *And quite frankly, you know, Mr. Cheselka's behavior was just so outrageous* that I'm not -- I'm not sure I was as calm and deliberative -- as a matter of fact, I'm sure that I was not as calm and deliberative as I should have been. I was extremely upset that an attorney would try and manipulate this case. And-- and that's exactly the conclusion –
>
> Q. Well, we're not talking about his actions here.

Tr., 400:24-401:9. The panel clarified its question and put it plainly back to respondent:

> Q. So I just want to ask you this one more time. Isn't it clear that the intent – your intent was to avoid a trial and to have this defendant plead guilty or no contest?
>
> A. You're ask -- would you repeat the question, please?

Q. Your intent in the discussion you had that morning was to get this defendant to enter a plea of –

A. No.

Tr., 402:5-14. Respondent then attempted to argue that he was merely trying to communicate with Heard to ensure the case would not be continued, only to have the panel remind him that he had already denied the continuance. Tr., 403:15-16.

Finally, the panel asked *for the third time*, "Why shouldn't we conclude that your intent was to force this defendant to plead guilty or no contest to avoid a trial?" Tr., 404:8-11. At this point, respondent indicated that he regretted giving *the panel* the impression that he committed misconduct: "So I deeply regret *leaving you* or anybody with that assumption or inference." Tr., 404:23-25 (emphasis added). Like *Bachman*, respondent has shown no appreciation for the harm he caused Heard, instead only showing regret for the harm to his own reputation before the panel.

ii. Count II (W.S.)

The board found that respondent aggressively and improperly questioned a defendant during a bench trial, "The improper topics of his questions included juvenile charges, alleged fights with family, DUI offenses and a misdemeanor offense for sexual imposition in Pennsylvania. They covered several pages of the trial transcript. * * * Respondent's conduct far exceeds the 'good faith legal error' description and was so patently improper that it justified disciplinary charges." Report at ¶ 50.

Respondent admitted that he "went too far." Still, he never expressed any remorse or regret for the harm caused to W.S. Indeed, his only regret was related to his reputation before the panel, "As I'll say again, I accept the Court of Appeals decision. I think I went too far. I think it, you know, *is regrettable because it leaves you* [the panel] *with the impression that you have*."

Tr., 409:14-17 (emphasis added). But the "wrongful nature" of the conduct is not respondent's reputation with the panel; it was his overly aggressive questioning of W.S. and the abandonment of his role as a neutral arbiter.

iii. Count III (Callahan)

Of all the cases before the court today, respondent showed the most regret for his conduct during Demagio Callahan's sentencing. During the disciplinary investigation, respondent acknowledged that "he blew it" and admitted that his comment, "I remember this case because he's got an Italian first name and an Irish last name and he's a brother[.]" was undignified and inappropriate. Exhibit 34 at 001145. Yet, respondent then reversed himself during the hearing and stated he did not believe that calling an African-American "a brother" was necessarily undignified and inappropriate:

> Q. Do you agree that the comment was undignified and inappropriate?
>
> A. It was a -- it was an unfortunate use of the word.
>
> Q. Do you agree that the comment was undignified and inappropriate?
>
> A. Yes, it can be interpreted that way.
>
> Q. Do you agree, Judge, that the comment was undignified and inappropriate?
>
> MR. HOUSEL: Objection. He's answered the question, your Honor.
>
> CHAIR COSS: I think he said yes, was his answer to the previous question, so that's asked and answered.
>
> MR. KANAI: The only thing I would ask, Mr. Chair, is that he said, yes, it could be interpreted that way, not that he agrees that it was.
>
> MR. HOUSEL: Objection.
>
> CHAIR COSS: Okay. All right. Well, I'll let you follow up on that point, not by asking the same question but rephrasing it. Overrule the objection.

BY MR. KANAI:

Q. Judge, is it your opinion that the comment that you made was undignified and inappropriate?

A. Not necessarily.

Tr., 61:1-62:3. Respondent, in his Objections, appears to have reversed course again and now acknowledges his conduct was undignified and inappropriate. Objections at 13. But even though he has admitted all the violations, he is still only showing regret for calling Callahan "a brother." Objections at 13. As the board noted:

> The panel finds Respondent's statements to Callahan were intended to be demeaning and were based, in large part, upon Respondent's belief that Callahan had beaten a murder charge. Respondent repeatedly referred to not only the charges of which he was acquitted in the case before him, but also for a prior murder charge of which Callahan was found not guilty by a jury.
>
> Respondent's conduct clearly indicated a bias and prejudice against Callahan that should have caused him to disqualify himself in the trial and sentencing of Callahan.

Report at ¶¶ 62-63. While respondent has admitted the charged violations, he expressed no regret for being personally biased against Callahan or allowing his bias to influence the outcome of the case. Indeed, respondent's statement at the disciplinary hearing that he felt personally and morally responsible for the death of the victim raises serious questions about whether Callahan's sentences were unconstitutionally tainted.

iv. Count IV (Collins)

During a Civil Stalking Protection Order ("CSPO"), respondent made demeaning comments about Natasha Collins and her boyfriend, Sergeant Michael Chapman. Report at ¶¶ 72-73. Collins was the CSPO respondent and Sgt. Chapman was present as a spectator, and neither testified. Respondent also told the CSPO petitioner to file another petition if she received any further communication from Collins and to list him as the prior judge so it would come back

to him. *Id.* at ¶ 71.

Respondent expressed no regrets about how he treated Collins or Sgt. Chapman during the disciplinary hearing. In his Objections, respondent points to his statement, "I went too far. And in an attempt to try and raise the consciousness of these three people, I made some comments that I think were unacceptable. And it is unfortunate[,]" as his acknowledgment of the wrongful nature of his misconduct. Objections at 13.

This "admission" came after the panel asked respondent whether it was "totally improper to go after somebody who was a spectator in the proceedings[.]" Tr., 412:18-19. Respondent deflected by discussing extraneous details, but the panel redirected respondent back to its original question. It noted that Sgt. Chapman "wasn't a party in the proceeding. So there was absolutely no reason to bring him into this." Tr., 413:3-5. Respondent eventually "answered" this question by stating, "Did I try to do too much? Yes, I did try to do too much." Hearing Tr., 413:19:20. In doing so, respondent again avoided answering the more difficult question of whether his actions were "totally improper."

The panel, however, did not let the matter drop, and again asked a *third time*:

> Q. Yeah. Sure. But come on. Let's be – let's be adults here. *That was a threat, wasn't it*?"
>
> A. I would say this, that I was basing my comments on the evidence I heard from one side. The respondent had an opportunity to present evidence; they did it. So the evidence I had before me convinced me that the petitioner had been horribly abused for over a two-year period of time.
>
> *But I would agree with you, I went too far*. And in an attempt to try and raise the consciousness of these three people, I made some comments that I think were unacceptable. And it is unfortunate.

Tr., 415:17-416:6 (emphasis added). Respondent was asked if his statement was totally inappropriate and a threat, but he evaded by answering that he "went too far." Respondent is the

most senior judge on the Cuyahoga County Court of Common Pleas, Tr., 328:14-17, and presumably understands how to answer a direct question. Yet, in both Count I and Count IV, respondent had to be repeatedly asked direct questions, which he evaded by making vague assertions that he went too far without actually admitting he caused any harm.

v. Count V (Viola)

Respondent directed the county treasury to pay litigation expenses for a federal criminal defendant, Anthony Viola. Report at ¶ 86. He then wrote a letter to Viola suggesting that the newly-elected county prosecutor might intervene in Viola's federal case based on prosecutorial misconduct. *Id.* at ¶ 88. Viola's father asked for respondent's permission to send the letter to then-Attorney General Mike DeWine, and respondent agreed. *Id.* at ¶ 89.

Respondent has admitted to no misconduct in Count V and has not acknowledged any wrongfulness in his Objections. He has only stated that he regretted his decision to approve Viola's forwarding of the letter. Objections at 13.

vi. Count VI (Jackson)

Anthony Jackson was being held on two cases and, after posting bond on them, moved to be released from incarceration. Respondent denied the motion. The court of appeals remanded the case back to respondent, directing him to issue findings under R.C. 2937.222(B). Report at ¶ 106. Respondent held a hearing and found the R.C. 2937.222(B) criteria satisfied "without taking any evidence from either the prosecution or the defense[.]" *Id.* at ¶ 108. Jackson appealed and the court of appeals reversed respondent and remanded the case for Jackson's immediate release. *Id.* at ¶¶ 111-112. Respondent then waited a week to have another hearing, at which he publicly criticized the court of appeals for reversing him. *Id.* at ¶ 113.

In his Objections, respondent has only admitted that he was legally incorrect. Objections

at 14 ("Judge Gaul further expressly acknowledged that he was incorrect and made a legal error for which he takes responsibility.") He has not acknowledged the wrongful nature of the conduct. He did not even mention the unlawful incarceration's effect on Jackson or how his public criticism of the court of appeals could erode public confidence in the judiciary.

vii. Count VII (Smiley)

Respondent imposed a 30-day contempt because Arthur Smiley made intemperate comments about respondent:

> However, this was due solely to Respondent's decision to keep talking to Smiley despite the fact that as a matter of law, the bond decision was made and that should have ended the matter. Instead, Respondent made comments such as calling Smiley, who is black, "brother," which was demeaning and unnecessary. He was not upholding and applying the law after the bond order.

Report at ¶ 127.

In his Objections, respondent refused to acknowledge any misconduct. Objections at 14.[1] Instead, he suggests that he was magnanimous because he "dismissed the contempt charge before Smiley (who was incarcerated on other matters) served any portion of contempt sentence." Objections at 14. He neglected to mention that respondent contacted Smiley's attorney and informed her that he would dismiss the contempt if Smiley filed a motion apologizing to respondent. Tr., at 372:24-373:3. Rather than magnanimous, respondent forced Smiley to apologize to him publicly. Yet, respondent has not extended the same courtesy to any of the victims of his various acts of misconduct.

[1] The facts of respondent's misconduct are discussed in Answer to Objection No. 1, § A(i), page 4 above.

viii. Count VIII (Byas)

Finally, in Count VIII, respondent's mistreatment of De'Ontay Byas "was similar to the *Heard* case in Count I. Respondent coerced a plea of no contest to the indictment. He did so in part by threatening to revoke Byas's probation and sentence him to prison merely because he had been indicted for a new felony." Report at ¶ 150. In his Objections, respondent only acknowledged that he "should not have stated that Byas could have been a probation violator in a matter of minutes." Objections at 14. Again, respondent has shown no remorse for his action.

Respondent failed to show genuine remorse for any of his misconduct. Indeed, respondent never mentioned a single regret for his actions' impact on the people he harmed. Accordingly, the board correctly found that respondent does not acknowledge the wrongful nature of his conduct. Moreover, respondent's argument that he was subject to a trial tax is meritless.

B. There was no trial tax in this case.

Respondent argues that the board imposed a trial tax. Objections at 10-12. It did not. A "trial tax" impermissibly punishes a litigant for exercising their constitutionally protected right to a fair hearing. Respondent is presumably aware of the meaning of a trial tax because that is what he did in Counts I (Heard) and VIII (Byas), where he threatened to impose lengthy sentences on defendants if they took their cases to trial.

Respondent argues that Gov.Bar.R. V(13)(B)(7) is a trial tax because it has a "chilling effect" on judges. Objections at 10. Under his theory, if a judge does not stipulate, they may risk a more severe punishment. This is wrong for two reasons. First, as noted above in Answer to Objection No. 2, § A, on page 7, conceding to a violation is not the same as "acknowledging the wrongful nature of the conduct," and second, defendants and disciplinary respondents

necessarily bear some risk when they make strategic litigation decisions.

Risk is inherent in practically every choice a criminal defendant (or disciplinary respondent) must make. Due process does not guarantee risk-free decisions. That principle flows directly from the cases respondent cited. *State v. Rahab*, involves an allegation of retroactive trial tax. 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431. Rahab was offered a plea bargain with three years of incarceration, which he rejected. After he rejected it, the trial court informed him:

> Sir, you understand that the State is offering to do an agreed sentence of three years in prison. The charge that you're facing now, sir, carries a potential sentence of 2 to 8. There's the presumption that you go to prison, okay? And if you didn't take the agreed sentence and you were found guilty, it would be up to the Court to sentence you. And the Court does not look highly on cases where people don't take responsibility and accept that they did something wrong if they're found guilty.
>
> You understand that? Meaning it probably would be more. I'm not going to fool you. You understand?

Rahab at ¶ 20. After trial, the court sentenced Rahab to six years.

The trial court cautioned Rahab that it "does not look highly on cases where *people don't take responsibility and accept that they did something wrong if they're found guilty*." *Id.* at ¶ 20 (emphasis added). This is no different than the situation disciplinary respondents face.

Yet, the *Rahab* Court did not conclude this statement was chilling or a trial tax. Far from it, the court unequivocally stated, "The court's statements allowed Rahab to intelligently evaluate whether he wanted to risk the possibility of a greater sentence." *Rahab* at ¶ 21. After trial, "more information bearing on sentencing will be available to the judge. For example, during the trial, the court may gain further insight into the crime itself and the defendant's '*moral character and suitability for rehabilitation.*'" *Id.* at ¶ 14 (emphasis added, internal citation omitted). That is what happened in case. After the hearing, the board determined that respondent did not acknowledge the wrongfulness of his conduct, which affected his suitability for disciplinary

rehabilitation.

State v. O'Dell, reached a similar conclusion. 45 Ohio St.3d 140, 543 N.E.2d 1220 (1989). The *O'Dell* Court considered whether a judge could impose a stricter sentence after determining that a defendant lied on the stand. This court found that trial courts can because "The applicable statutes do not preclude the sentencing court from considering serious misbehavior by a defendant as observed by the sentencing court during trial. In our view, this position does not inhibit a defendant's exercise of the right to testify." *Id.* at 147. The court also noted that sentencing judges have the authority:

> to evaluate carefully a defendant's testimony on the stand, determine – with a consciousness of the frailty of human judgment – whether that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society.

Id. (emphasis added). Put simply, while a defendant has an absolute right to a trial, they are accountable for their testimony once they take the stand. This is not a "trial tax;" it is the natural consequence of a routine litigation decision.

ANSWER TO OBJECTION NO. 3: Each violation was supported by clear and convincing evidence.

i. Evidence related to Count I (Heard)

Respondent unconstitutionally coerced Heard into entering a guilty plea. As the panel noted:

> Respondent did not merely encourage a settlement of the case, he initiated it, dictated its terms, and repeatedly told Heard what would happen if he went to trial and was convicted of the charges.
>
> Respondent blatantly threatened Heard with a "trial tax" for exercising his right to trial by telling him that if he was convicted Respondent would run his sentences "consecutively* * * up to 42 years."

Report at ¶¶ 33-34. Moreover, "Respondent's statements during the sentencing phase of the hearing included unnecessary and gratuitous references to the race of both Heard and the victim and an apparent reference to the 'Black Lives Matter' movement that was prominent in the national news at that time." *Id.* at ¶ 35. The board also noted, "His comments did not demonstrate that he was impartial, and in fact, the appellate decision clearly indicates he was not as it directed the assignment of the case upon remand to another judge." *Id.* at ¶ 36.

During questioning on Count I, respondent admitted that he had prejudged Heard's future sentence even though the case had not gone to trial and neither party had submitted any evidence:

> Q. Thank you. Do you agree that you had predetermined Mr. Heard's sentence if he were convicted after trial?
>
> A. Yes.

Tr., 29:24-30:2.

> Q. Why shouldn't we conclude that your intent was to force this defendant to plead guilty or not contest to avoid a trial?
>
> ***
>
> A. And *I understand it's unacceptable* because it's giving you the impression that I'm biased and was forcing this guy in a plea.

Tr., 404:8-11, 18-20 (emphasis added). In this case, respondent admitted that he predetermined Heard's sentence without any due process protections. Doing so violates the law, shows a lack of objectivity and open-mindedness (see Jud.Cond.R. 2.2, Comment [1]), and should have been grounds for disqualification under Jud.Cond.R. 2.11(A). Threatening "multiples of 14 year[]" sentences to a defendant solely because they want to exercise their right to a trial is prejudicial to the administration of justice, and therefore violated Prof.Cond.R. 8.4(d).

ii. Evidence related to Count II (W.S.)

In Count II, respondent presided over W.S.'s bench trial. Rather than act as a neutral arbiter, respondent aggressively questioned W.S. in a hostile manner that was so pervasive the court of appeals found structural error. Exhibit 24 at 000851. The court of appeals held that "Based on the record before this court, we find this to be a clear example of bias and prejudice on the part of the trial court. It is also clear that the trial court abandoned its duty as an impartial factfinder and interrogated appellant on matters, not only inadmissible, but wholly immaterial to the instant case[,]" and the board agreed. Report at ¶ 47.

The board also noted:

> During his direct examination in his case, Respondent admitted that he went too far and blamed it in part on the intense nature of his job. Hearing Tr. 352. He also testified that as soon as the defense counsel objected, he stopped his questioning. He argues in his closing brief that this showed that he had 'self-corrected.' However, that testimony was inaccurate.

Id. at ¶ 49. Instead, the board found, "It is clear to the panel, as it was to the appellate court, that the extended questioning of W.S. by Respondent included numerous questions on several topics that were clearly improper under the Ohio Rules of Evidence." *Id.* at ¶ 50.

Respondent admitted that he asked multiple questions that called for inadmissible or immaterial evidence. Tr., 55:11-25, 57:18-58:10. He also admitted that he "went too far" with the questions, Tr., 406:10, and that the questions about W.S.'s "juvenile record or DUI weren't appropriate." Tr., 406:14-15. These admissions show that respondent ignored basic rules of evidence, thereby violating Jud.Cond.R. 2.2 (judges shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially).

Respondent also violated Jud.Cond.R. 1.2 (avoiding the appearance of impropriety), Jud.Cond.R. 2.11(A)(1) (disqualification from a proceeding where impartiality may be

reasonably questioned), and Prof.Cond.R. 8.4(d) (conduct prejudicial to the administration of justice).

Respondent attempted to wave away this issue by suggesting that W.S.'s counsel should have objected earlier. Tr., 407:9-12. As the panel noted, W.S.'s counsel had objected earlier. Tr., 407:13-15. W.S.'s attorney testified that he was dismayed that respondent continued questioning his client, Tr., 178:17, and that respondent was acting like an advocate. Tr., at 183:15. Moreover, even if W.S.'s counsel had not objected, the Code of Judicial Conduct places an affirmative obligation on judges to uphold the law. *See Disciplinary Counsel v. Horton*, 158 Ohio St.3d 76, 2019-Ohio-4139, 140 N.E.2d 561, ¶ 42 (it did not matter if a victim of Horton's inappropriate workplace culture acquiesced). Respondent's conduct was similar to the misconduct in *Disciplinary Counsel v. Campbell*, 126 Ohio St.3d 150, 2010-Ohio-3265, 931 N.E.2d 558. In *Campbell*, the judge "'basically lapsed into a trial lawyer cross-examination,' asking too many questions and pressing too hard to get answers." *Id.* at ¶ 52.

iii. Evidence related to Count III (Callahan)

In his post-hearing brief, respondent admitted to all the misconduct in Count III.

iv. Evidence related to Count IV (Collins)

During a CSPO hearing, respondent repeatedly referred to Collins with the demeaning label "the mistress" and made offensive comments about her boyfriend, Sgt. Chapman, who was not a party or a witness. Report at ¶ 69. He then threatened Collins by stating, "If there is one more text message, if there's one more encounter, if there's one more threat, if there's one more fuck you picture or text message, *at that point I will consider that a pattern of conduct that justifies issuance of the order*." *Id.* at ¶ 70 (emphasis added). He instructed the petitioner that he wanted her to "immediately refile. List me as the judge that had the case prior. It will come to

me." *Id.* at ¶ 71. He instructed her to add Sgt. Chapman's name to the petition. *Id*. He told her if he issued the order, Sgt. Chapman would "lose his job, because he won't be able to carry a firearm." *Id*. He then again stated that he would issue a future order if "there's a text message, if there's a phone call, if this woman back to your house …." *Id*.

The panel correctly found respondent's "comments directing Chapman to file another petition for a CSPO and to have it assigned to him were clearly indications that, if that did occur, he would be biased against Collins and Michael Chapman." Report at ¶ 76. Respondent has not contested the validity of this finding other than to direct the court back to his post-hearing brief.

In his post-hearing brief, respondent admitted he violated Jud.Cond.R. 2.8(B) but denied he violated Jud.Cond.R. 1.2's requirement to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Yet, during an investigatory deposition, respondent stated that *if* the case had come back to him, he would have recused himself "because I probably would have realized * * * that the commentary that was utilized * * * could give people the impression that I was biased." Tr., 87:6-9. Respondent reaffirmed this statement at the hearing.

Moreover, respondent's testimony at the disciplinary hearing was misleading. Respondent attempted to justify his conduct by stating, "So the evidence I had before me [at the CSPO hearing] convinced me that the petitioner had been *horribly abused for over a two-year period of time*." Tr., 415:23-416:1 (emphasis added). However, he never mentioned this prolonged "horrible abuse" during the CSPO hearing. At the disciplinary hearing, he claimed he did not grant the CSPO solely because "I didn't feel that there was violence actually perpetrated." Tr., 410:24-25. Yet, at the CSPO hearing, respondent noted that the standard for approving a CSPO was "a pretty wide open standard[,]" Exhibit 36 at 001190:20, that only

required a pattern of misconduct that the offender will cause the victim "mental distress." *Id.* at 001190:19. He ultimately concluded, "I see a pattern of conduct that probably doesn't meet the legal standard for me at this point to issue the civil stalking and protection order." *Id.* at 001199:10-13.

If respondent had actually believed that the petitioner had been "horribly abused" for over two years, there is no doubt respondent could have found the petitioner proved "mental distress." Respondent's statement that the petitioner was "horribly abused" appears to have been nothing more than an after-the-fact justification for his demeaning and belittling treatment of Collins and Sgt. Chapman.

v. Evidence related to Count V (Viola)

Respondent abused the prestige of his judicial office by assisting a convicted felon, Anthony Viola, with his federal appeal by ordering the production of state court transcripts at the expense of the Cuyahoga County Treasury. Exhibits 43, 45. Respondent then wrote a letter to Viola on court letterhead suggesting that Viola solicit the newly-elected county prosecutor to intervene in his federal case based on the state court prosecutor's "misconduct." Exhibit 46. Respondent did not contest any of these facts.

Respondent undermined his impartiality by showing favoritism to Viola, particularly when compared to how he treated other criminal defendants in his courtroom. Further, respondent's letter to Viola attacked the prosecuting attorney in the federal case, suggesting that "Daniel Kasaris' misconduct in [Viola's] case" might spur the county prosecutor to intervene in the federal appeal. Exhibit 46. This is an extraordinary accusation by a sitting state court judge, but respondent went even further, giving Viola his permission to send the letter to Kasaris's

employer, the Ohio Attorney General. Exhibit 47. Yet respondent did not report "Kasaris's misconduct" to any disciplinary authority. Tr., 96:4.

In his post-hearing brief, respondent argued that he:

> accepts responsibility for his actions, as made clear by his decision to self-report. But, "it is not contemplated that every transgression will result in the imposition of discipline." Respondent respectfully submits that when the facts and circumstances of the *Viola* matter are viewed as a whole, Respondent's limited conduct does not rise to a level warranting discipline under the ethical rules.

Respondent's Post-Hearing Brief at 23 (internal citation omitted). Yet, the panel reached the opposite conclusion when looking at the totality of the evidence:

> The panel finds that by (a) providing transcripts of the trial at county expense, (b) sending letters to Viola suggesting he contact the newly elected Cuyahoga prosecuting attorney about alleged misconduct of an assistant prosecutor involved in the case, (c) offering his assistance or service, and (d) giving permission to Viola to send his letter to the Attorney General, Respondent *was quite clearly using his position as a judge to advance the interest of Viola in vacating his federal convictions and was quite clearly acting in a matter that does not promote public confidence in the integrity and impartiality of the judiciary*.

Report at ¶ 95 (emphasis added). Respondent has not shown that the panel erred in its determination.

vi. Evidence related to Count VI (Jackson)

Jackson was held on two bonds. He posted the bonds and completed an in-patient mental health evaluation. Report at ¶¶ 97, 99-100. After being released from the in-patient evaluation, Jackson moved for his release. *Id.* at ¶ 101. Respondent held a hearing where no evidence was submitted and then made the legally incorrect decision that Jackson's subsequent offense automatically revoked his first bond. *Id.* at ¶ 102.

However, Jackson then appealed, and the court of appeals sua sponte returned the case to respondent with explicit directions to issue the required findings under R.C. 2937.222(B). *Id.* at ¶

106. This is where respondent's conduct departs from normal "procedural error." Respondent called the parties together for a "hearing," but he began the hearing by *announcing* his decision. *Id.* at ¶ 108. No evidence was introduced, and no testimony was taken. This constituted a complete denial of due process rights and a complete abrogation by respondent to perform his duty under R.C. 2937.222, despite being directly ordered to do so by the court of appeals.

Jackson appealed again, and the court of appeals reversed again, finding respondent's "hearing" violated Jackson's constitutional rights. *Id.* at ¶ 110. It then remanded the case for the sole purpose of Jackson's "immediate release." *Id.* at ¶ 112. Rather than immediately release Jackson by order, respondent scheduled *another* hearing a week later. *Id*. At this hearing, respondent ordered Jackson's release only after repeatedly criticizing the court of appeals. The board considered all these facts. It also considered and rejected respondent's post-hearing brief argument:

> On page 27 of his closing brief, Respondent argues: "The failure to take sufficient evidence on the record, however, does not equate to the conclusion that sufficient evidence for Respondent's ruling did not exist." This appears to be based upon Respondent's testimony during the hearing in response to a question about his comments about the appellate court decision in which he stated: "Yeah, I think that it – it was a sign of concern and frustration because I had before me so much information about one of the most violent people that has ever been assigned to me." Hearing Tr. 117. *This argument is without any merit. A judicial decision has to be based on the record before the court, whether it be a trial or appellate court.* The failure of Respondent to require the prosecution to present evidence to justify the criteria required under R.C. 2737.222(B) to revoke the bond was the reason that his decision was reversed. *Respondent cannot justify his decision on the basis of evidence that was not presented in the record.*

Report at ¶ 113. Respondent unilaterally ignored the original court of appeals order, conducted a pointless "hearing" where he did not allow either party to present evidence, waited a week before releasing Jackson, and then only released Jackson after another "hearing" to criticize the court of appeals. Respondent's actions far exceeded the scope of mere procedural error.

In his post-hearing brief, respondent admitted to violating Jud.Cond.R. 2.2, but denied violating Jud.Cond.R. 1.2 (A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety) or Prof.Cond.R. 8.4(d) (It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). In doing so, respondent argued, implausibly, that "the *Jackson* matter involved an *error in procedure*." Respondent's Post-Hearing Brief at 27 (emphasis added). As shown above, the errors in Count VI were far beyond a simple error in procedure. They were, at best, a judge wholly ignoring the law and the direction of the court of appeals, and, at worst, willful acts of obstinate defiance.

vii. Evidence related to Count VII (Smiley)

In his post-hearing brief, respondent argued that Smiley initiated the hostilities against respondent. But the panel found–and the record proved–otherwise:

> Respondent admitted in his testimony that there was nothing further needed after he had set the bond. Hearing Tr. 124. Nonetheless, he continued talking with Smiley that ultimately led to Smiley making discourteous statements to Respondent and that led to the contempt finding. However, this was due solely to Respondent's decision to keep talking to Smiley despite the fact that as a matter of law, the bond decision was made and that should have ended the matter. Instead, Respondent made comments such as calling Smiley, who is black, "brother" which was demeaning and unnecessary. He was not upholding and applying the law after the bond order.

Report at ¶ 127. Respondent was also evasive and misleading in his testimony:

> Despite the stipulations of fact and the stipulated exhibits, during his testimony, Respondent initially claimed that he did not hold Smiley in contempt and did not sign an entry finding contempt. He testified: "I think that they found that the contempt was improper – improper or improperly done or – but I don't believe we ever actually docketed the 30-day contempt finding." Hearing Tr. 363. He further testified: "I don't believe I ever signed an order to incarcerate him for 30 days." Hearing Tr. 367. However, he did

> in fact sign a journal entry filed in the case (Joint Ex. 70) on September 23, 2021 that reads: "Defendant in contempt of court. Defendant to do an additional 30 days at disposition. Hold placed."
>
> After he was shown the entry, Respondent claimed that: "So my thought was that the contempt would not start until his other time had concluded, and I specifically put a hold on him so that we would have a hearing." Hearing Tr. 369. The panel finds that Respondent's evolving claims in his testimony – that he did not actually hold Smiley in contempt or did not intend to hold him in contempt – are clearly contradicted by the evidence and the law.

Report at ¶¶ 124-125.

Respondent has not contested these findings in his Objections. Respondent denied all the charges in Count VII, which are Jud.Cond.R. 1.2 (a judge's action must promote public confidence in the impartiality of the judiciary), Jud.Cond.R. 2.2 (a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially), Jud.Cond.R. 2.8(B) (a judge shall be patient and dignified), Jud.Cond.R. 2.11(A)(1) (disqualification from a proceeding where impartiality may be reasonably questioned), and Prof.Cond.R. 8.4(d) (engage in conduct prejudicial to the administration of justice). But the board's analysis shows that each violation was proven by clear and convincing evidence.

viii. Evidence related to Count VIII (Byas)

In Count VIII, respondent repeated the same misconduct he committed in Count I. Respondent took over the prosecutor's role by crafting a plea bargain and then abused his judicial authority by coercing Byas to accept the plea bargain under the threat of an immediate and harsher sentence for an alleged probation violation. Report at ¶ 150.

Respondent admitted to prejudging Byas's probation status:

> Q: Do you agree that your comments during the plea discussion clearly conveyed that you had already determined that Byas violated probation?

***

A: So the answer is: I pretty much concluded he was a probation violator.

Tr., 143:15-17, 144:1-2.

Q: Do you agree that your comments during plea discussions clearly convey that you had already determined that Byas violated probation?

A: Yes because he had.

Q: Okay. Do you agree that you compounded that by asserting when you said, quote, that "picking up the new case while on probation to this court is a, per se, probation violation"?

A: Correct.

Tr., 144:18-145:2.

Q: Do you agree that any hearing on the alleged probation violation would have been perfunctory at best?

***

A: You can take that as a yes, Mr. Kanai.

Tr., 149:8-10, 149:17.

"A defendant is entitled to a preliminary hearing to determine whether there is probable cause to believe that the defendant has violated the terms of his or her community control. Due process also requires a final hearing to determine whether community control should be revoked." *State v. Cox*, 8th Dist. Cuyahoga No. 105932, 2018-Ohio-748, ¶ 15 (internal citations omitted). Moreover, "Permitting an offender to speak on his or her own behalf at a community-control-revocation hearing serves the criminal-justice system's essential goals of fairness and due process." *Id.* at ¶ 21. Respondent admitted that he predetermined Byas's probation status without any due process protections. Doing so violates the law (see Jud.Cond.R.

1.2, Comment [5]), shows a lack of objectivity and open-mindedness (see Jud.Cond.R. 2.2, Comment [1]), and should have been grounds for disqualification under Jud.Cond.R. 2.11(A).

Respondent also violated Jud.Cond.R. 1.2, Jud.Cond.R. 2.6(B), and Prof.Cond.R. 8.4(d). Respondent violated Jud.Cond.R. 2.6(B) by crafting a plea bargain and then coercing Byas to accept it. Exhibit 78 at 001684. In doing so, he acted in a way that undermined the impartiality of the judiciary, and had the combined effect of prejudicing the administration of justice.

ANSWER TO OBJECTION NO. 4: A one-year suspension is appropriate.

The primary purpose of judicial discipline "is to protect the public, guarantee the evenhanded administration of justice, and maintain and enhance the public confidence in the integrity of the judiciary[,]" *Disciplinary Counsel v. O'Neill*, 103 Ohio St.3d 204, 2004-Ohio-4704, 815 N.E. 2d 286, at ¶ 33. The court previously disciplined respondent with a fully stayed six-month suspension, and it failed to deter respondent from harming the public, unevenly administering justice, and eroding public confidence in the integrity of the judiciary. Respondent has attempted to minimize his prior discipline by arguing that it "was imposed more than a decade ago." Objections at 25. While true, this argument ignores the fact respondent's first act of misconduct occurred in August 2016, barely five years after respondent's first suspension ended.[2]

This case raises serious questions about what steps are necessary to protect the public from a willfully errant judge. Similar questions were raised in *Disciplinary Counsel v. Parker*, where the court imposed an actual suspension after finding: "Protective measures are required here. This is not a case in which a judge committed misconduct without jeopardizing interests at stake in his courtroom. As we have seen, the public remains at serious risk if respondent is

[2] Respondent's six-month suspension ended in April 2011 and he unconstitutionally coerced Heard's plea (Count I) in August 2016.

permitted to remain on the bench unchecked." 116 Ohio St.3d 64, 2007-Ohio-5635, 876 N.E.2d 556, at ¶ 122 (internal citations omitted).

A. Respondent's misconduct is similar in scope and breadth to *Disciplinary Counsel v. Parker*.

In *Parker*, the court imposed an 18-month suspension with six months stayed on multiple counts of misconduct. Respondent committed many of the same acts of misconduct as Parker, including abusing his contempt power, demonstrating a lack of impartiality, coercing two plea bargains in criminal cases, and being discourteous to those in his courtroom.

i. Abuse of contempt power

In his first act of misconduct, Parker improperly used his contempt power to eject a spectator from his courtroom, and then when the spectator said, "I can't believe this," he ordered her back, held her in contempt, and sentenced her to 24 hours in jail. *Id.* at ¶ 8. The court noted, "Respondent stained the integrity of that system with his intemperate, unreasonable, and vindictive decision to eject this spectator from the courtroom and jail her for contempt." *Id.* at ¶ 9. The court found that Parker violated former Canons 2, 3(B)(4) and (8), and 4, and DR 1-102(A)(5). *Id.* In the instant case, respondent vindictively abused the contempt power by sentencing Smiley to 30 days of incarceration merely because Smiley said that respondent was making himself look stupid by raising an irrelevant bond.

Respondent's conduct in Count IV (Collins) is also similar to *Parker*. Parker held a spectator in contempt after the spectator attempted to speak up. While respondent did not hold Sgt. Chapman in contempt, he impugned Sgt. Chapman's character and professional competence—fully aware that a representative for Internal Affairs was in the courtroom—and then threatened Sgt. Chapman's career by instructing the petitioner to include Sgt. Chapman on

any future CSPO petition. Report at ¶ 79. Yet, Sgt. Chapman had not said a single word during the hearing.

ii. Lack of impartiality

Parker had also "cast grave doubt on his ability to act as an impartial arbiter" by being personally involved in the arrest of a defendant who later appeared before him. *Parker* at ¶ 12. Parker had signed a search warrant and then accompanied police to the suspect's house, where he observed the arrest and heard that the police had recovered stolen property. *Id.* at ¶ 10. Five weeks later, respondent presided over the suspect's plea and sentencing, *id.*, violating Canons 1, 2, and 3(E)(1)(a), and DR 1-102(A)(5). *Id.* at ¶ 12. Respondent had an even greater personal investment in Count III (Callahan), where he admitted that he felt personally and morally responsible for the death of the victim before he sentenced Callahan. Tr., 376:2-6.

iii. Coercing plea bargains in two criminal cases

Parker attempted to coerce plea agreements in two cases. *Parker* at ¶ 22. He "predetermined the outcome of the cases and worked to produce that outcome." *Id.* In the first case, Parker tried to assist the criminal defendant by coercing the state to offer a reduced charge. *Id.* at ¶ 15. In the second case, Parker was concerned about a pregnant woman charged with a felony, and he coerced both the state and the defendant into eventually accepting a plea to a misdemeanor charge, presumably to prevent the woman from having an abortion. *Id.* at ¶ 21. In doing so, Parker violated Canons 1, 2, 3(B)(4) and 4, and DR 1-102(A)(5). *Id.* at ¶ 22. Respondent's misconduct was more egregious because respondent unconstitutionally coerced two defendants, Heard and Byas, into entering pleas that resulted in lengthy prison sentences, and in Byas's case, it was after he had been reversed for the same conduct in *Heard*.

iv. Discourtesy towards witnesses

Parker was discourteous to a victim. *Id.* at ¶ 36. Parker forced a domestic violence victim to stand and have her injuries photographed even after the state had offered a plea to a misdemeanor for disorderly conduct. *Id.* at ¶ 24. As the court noted:

> "[D]iscourtesy * * * on the part of a judge is particularly egregious because it undermines respect for the law in a most insidious manner. * * * [A] litigant who is subjected to rude and insensitive treatment is left without recourse. *Whether the litigant wins or loses, the end result is an irreparable loss of respect for the system that tolerates such behavior*." *O'Neill,* 103 Ohio St.3d 204, 2004-Ohio-4704, 815 N.E.2d 286, ¶ 37.

Parker at ¶ 36 (emphasis added). The *Parker* Court found that Parker violated Canon 2 and DR 1-102(A)(5). *Id*. The court also noted Parker's mistreatment of others. For example, he asked a Jewish defendant why he was attending a Catholic high school. *Id.* at ¶ 50. He referred to another defendant as a "frequent flyer" and "snake-bit mean." *Id.* at ¶ 51. The court found these instances violated Canons 2 and 3(B)(4). *Id.* at ¶ 55, *see also Disciplinary Counsel v. Burge*, 157 Ohio St.3d 203, 2019-Ohio-3205, 134 N.E.3d 153, ¶¶ 18-19 (judge referred to Caucasian defendants as "crackers" and African-American or Latino defendants as "homeboys" and said if he believed one defendant was "that stupid *** I would just have Deputy Motelewski shoot you right now[.]").

Respondent was similarly discourteous to Collins and Sgt. Chapman. Collins compared the way she was demeaned to being called a "dog" by a judge. Tr., 218:14-18. Respondent also injudiciously:

- Referred to two prior defendants as knuckleheads. Report at ¶ 21.
- Said he would have "busted a cap" in Callahan. *Id.* at ¶ 172.
- Mocked Callahan's name and ethnicity, stating, "He's got an Italian first name, an Irish last name, and he's a brother." *Id.*

- Referred to Heard's "baby's mama." *Id.* at ¶ 26.
- Questioned W.S. so aggressively and inappropriately that the court of appeals found structural error. Exhibit 24 at 00851.

It is true that Parker committed additional misconduct (including misuse of the 911 system, *Parker* at ¶ 39; telephoning a defendant's drug dealer, *id.* at ¶ 47, and lying during the disciplinary proceeding, *id.* at ¶ 120), but counterbalancing that are the facts that Parker did not have prior discipline and had received mental health treatment with apparent improvement (*id.* at ¶ 86). Further, there was no evidence that Parker previously ignored correction by the court of appeals or repeatedly publicly *criticized* the court of appeals for trying to correct him. Nonetheless, the board recommended a more lenient sanction than the *Parker* Court imposed.

The *Parker* Court also compared Parker's misconduct to *Disciplinary Counsel v. Medley*, 93 Ohio St.3d 474, 756 N.E.2d 104 (2001), noting:

> A prior disciplinary record exacerbated the situation in *Medley*. The judge had already been publicly reprimanded for creating the appearance of bias by giving a defendant a ride after her arrest and then presiding over her case. We suspended the judge's license for 18 months, staying the last six months. Again, however, even if that judge's previous disciplinary record is taken into account, the number and severity of respondent's improprieties surpass those in *Medley*.

Parker at ¶ 126. Respondent, like Medley, has prior discipline and committed violations that surpassed, in number and severity, those of *Medley*. Yet the board recommended *a more lenient sanction* than the 18 months with six months stayed that Medley received.

B. Respondent's misconduct resulted in incarceration and warrants an actual suspension under *Bachman*.

"When a judicial officer's misconduct causes harm in the form of incarceration, that abuse of the public trust warrants an actual suspension from the practice of law." *Bachman*, 2020-Ohio-6732 at ¶ 21. In *Bachman*, a woman identified as K.J. screamed in the hallway

outside of Bachman's courtroom. *Id.* at ¶ 6. Bachman stopped the proceedings, chased K.J. down, directed her back into his courtroom, placed her in the jury box, and then held her in contempt of court. *Id.* at ¶¶ 7, 9-10. He imposed a three-day sentence, which he increased to 10 days after she protested. *Id.* at ¶¶ 9-10. K.J. was forcibly removed from the courtroom in a scene that the Supreme Court described as "difficult to watch." *Id.* at ¶ 30. She served two days before the Administrative Judge ordered her release. *Id*. at ¶ 11.

The court found that Bachman had no prior disciplinary history, made a full and free disclosure to the board, provided evidence of his good character, and had other sanctions imposed for his conduct. The court also found three aggravating factors: the vulnerability and harm to the victim, a dishonest or selfish motive, and the refusal to acknowledge the wrongfulness of his misconduct. *Id.* at ¶¶ 14-15. Bachman was suspended for six months. Respondent should face a more severe sanction because 1) he engaged in multiple acts of misconduct that resulted in incarceration, 2) this was not an isolated act of misconduct, but is part of an overall pattern of misconduct, and 3) he has prior discipline.

Respondent argues, and relator agrees, that "Appellate decisions overturning criminal convictions due to deficiencies in a plea and/or other judicial legal error occur throughout Ohio, and *Bachman* should not stand for the proposition that discipline—much less, an actual suspension—is warranted in each such instance." Objections at 30. But the board correctly concluded that these were not routine cases of simple legal error.

In Count I (Heard), respondent threatened Heard with "multiples of 14 year[]" sentences—effectively a life sentence—if he took his case to trial. The unconstitutional threat resulted in two years of incarceration until Heard was acquitted at trial. This is, arguably, the most routine of the deficiencies the board relied upon. However, even after respondent was

reversed and Heard was acquitted, respondent went on to coerce *another unconstitutional plea in a practically identical matter* in Count VIII (Byas). Once the court of appeals had reversed respondent, his subsequent misconduct against Byas amounted to "strong-arm measures that respondent used to compromise defendants' right to trial." *O'Neill* at ¶ 7. Like *O'Neill*, respondent used "the bond process and jail as leverage[.]" *Id.*

In Count VI (Jackson), the court of appeals directed respondent to issue statutorily required findings. Respondent then affirmatively *ignored* the directions of the court of appeals by holding a hearing in which he announced his judgment before allowing either party to speak, much less present evidence. The court of appeals then ordered Jackson's immediate release, but respondent instead set *another* hearing for a week later. It appears respondent called the third hearing primarily to criticize the court of appeals.

Jackson was improperly incarcerated from June 15, 2021, to December 16, 2021, but the court should focus particularly on the period from November 3, 2021, to December 16, 2021. This is the period that Jackson was incarcerated *after* the Eighth District Court of Appeals issued its November 1, 2021 remand to respondent, ordering him to make findings required by R.C. 2937.222(B). This caused 43 days of unlawful incarceration directly attributable to respondent's misconduct, over 14 times the length of incarceration in *Bachman*.

Respondent's primary argument regarding Count VII is that Smiley did not serve any actual time on the contempt order. But this is only because respondent vindictively attempted to *attach* the 30-day sentence to the end of *any* sentence Smiley might get on his current cases. Far from excusing respondent's behavior, it demonstrates how abusive and punitive respondent was trying to be.

These are not cases of simple legal error. These are cases of a judge impermissibly threatening criminal defendants with years of incarceration if they even tried to take their cases to trial. And, in the case of Jackson, it was a case of a judge receiving legal guidance from the court of appeals and patently ignoring it to extend Jackson's unlawful incarceration.

C. Actual time off is warranted under *Disciplinary Counsel v. Campbell*.

In *Campbell*, the court imposed a 12-month suspension with six months stayed for less egregious misconduct than respondent's. *Disciplinary Counsel v. Campbell*, 126 Ohio St.3d 150, 2010-Ohio-3265, 931 N.E.2d 558. The court found that Campbell had no prior discipline, did not act with a dishonest or selfish motive, and made a full and free disclosure to the board. *Id.* at ¶ 57. The court also found that Campbell engaged in a pattern of misconduct, had multiple offenses, and caused harm to vulnerable persons. *Id.*

Much of Campbell's conduct was similar to, but less egregious than, respondent's conduct. For example, Campbell violated the former canons when he said, in chambers, that one of the attorneys before him was "behaving like a horse's ass" and spoke in a raised voice. *Id.* at ¶ 16. The court concluded Campbell's actions violated former Canons 2 and 3(B)(4). Campbell's statement was less egregious than the many in-court demeaning statements respondent made, which include using the term "a brother" to refer to a defendant's race and referring to one litigant repeatedly as "the mistress" and a spectator as "Mr. Know-It-All."

Campbell also improperly "use[d] his position as a judge to pressure someone, in this instance the law director's secretary, to do something." *Id.* at ¶ 20. Specifically, Campbell asked the law director's secretary to bring him a closed file, although he had no legitimate judicial interest in the file, violating Canon 2. *Id.* Similarly, respondent improperly ordered the county treasury to pay Viola's federal litigation expenses and wrote a letter to Viola attempting to help

him with his federal appeal, neither of which are part of his duties as a state court judge. Report at ¶ 95.

Campbell made a relatively banal comment criticizing the county commissioners after a public defendant failed to show up in his courtroom, stating that the "county commissioners chose not to properly endorse the contract; so, therefore, no county – no public defender is here." *Campbell,* at ¶ 33. The court found it was inappropriate for him to make comments regarding the acts of the county commissioners and that the remarks improperly gave the impression that the three defendants were remanded into custody due to a failure on the part of the county commissioners, violating Canon 2. *Id.* at ¶¶ 34-35. Similarly, but more egregiously, respondent made unfounded allegations that the judicial system had failed and openly criticized the court of appeals in Counts I (Heard) and VI (Jackson).

Campbell misinterpreted a remand order and participated in creating a plea offer that led to a defendant pleading guilty to a misdemeanor obstruction of justice. *Id.* at ¶¶ 44-45. The court found that Campbell violated Canons 2 and 3(B)(2). *Id.* at ¶ 46. By contrast, respondent has ignored multiple directives from the court of appeals, which resulted in incarceration for felony offenses. Moreover, these were not cases where respondent was simply "misinterpreting" an opinion; they were cases where respondent ignored specific directions to him from the court of appeals.

Finally, Campbell was discourteous to two defendants seeking appointed counsel. He "badgered [one] by repeatedly inquiring about his employment history, his efforts to seek employment, why he had not sought employment, and why he did not want to work. Although respondent often cut off defendant's attempts to answer, defendant eventually stated that he had not been employed since 2004." *Id.* at ¶ 48. Campbell repeatedly referred to the second

defendant as "homeless." *Id.* at ¶ 51. The court found that Campbell violated the canons by not treating either of these defendants with the requisite courtesy and because he "'basically lapsed into a trial lawyer cross-examination,' asking too many questions and pressing too hard to get answers." *Id.* at ¶ 52. The court found Campbell violated Canons 2 and 3(B)(4). *Id.* at ¶ 52. Respondent's conduct is far worse. He repeatedly referred to a litigant as "the mistress," used demeaning terms to refer to Sgt. Chapman, who was neither a litigant nor a witness, and used the term "a brother" to describe the race of a criminal defendant. And respondent similarly "lapsed into a trial lawyer cross-examination" of W.S. to the degree that the court of appeals found that respondent's persistent and hostile questions were so egregious that they constituted structural error. Exhibit 24 at 00851.

D. Respondent minimized his prior discipline and his confrontational attitude towards the court of appeals.

In his analysis of *Parker*, *O'Neill*, and *Campbell,* respondent downplays the fact that the judges had no prior discipline, mentioning it only in passing in his analysis of *Parker* and suggesting it was "muted" by the volume of misconduct in *O'Neill*. Objections at 22. But this is no small difference. Judicial misconduct can only be addressed in one of three ways: correction by an appellate court, correction in the disciplinary system, and removal by the electorate once every six years.[3] Unlike non-judicial attorneys, judges are immune from all lawsuits, and they are not subject to adverse employment actions.

Respondent has already shown he is not amenable to correction by the court of appeals. In Count I (Heard), he baselessly criticized the court of appeals. Then, five years later, he committed the exact same misconduct in Count VIII (Byas). In Count VI (Jackson), he

[3] Respondent is not eligible to run for office again, and therefore faces no threat of being removed by election.

obstinately refused to follow the court of appeals order that he comply with the Revised Code, and then publicly criticized the court when it ultimately reversed him. Respondent's repeated rejection and criticism of the court of appeals elevates this case above the normal abuse of discretion that is corrected by the appellate process. As the *O'Neill* Court noted:

> Judges must routinely exercise their discretion in a myriad of ways while executing their duties in the administration of justice, and the abuse of that discretion typically generates an appeal, not disciplinary proceedings. But as the board found, judicial discretion does not extend to these strong-arm measures that respondent used to compromise defendants' right to trial. Thus, rather than classifying respondent's actions as an abuse of legitimate discretion, we agree that respondent's repeated use of the bond process and jail as leverage fell "outside any permissible discretion" and was "totally improper." For such an egregious departure from the bounds of judicial discretion, professional discipline is warranted.

O'Neill, 2004-Ohio-4704 at ¶ 7. The disciplinary process is the only process that can protect the public from respondent's misconduct, and he has already shown that a fully stayed suspension will not deter him.

E. The board did more than simply tally the number of violations to determine the sanction in this case.

Finally, respondent argues that his conduct was less broad than the conduct in *O'Neill* and that he should receive a commensurately lesser punishment. Relator agrees that respondent's conduct was less broad and that the board recommended a commensurately more lenient sanction. O'Neill was suspended for two years with one year stayed, while the board has recommended only a one-year suspension in this case.

Nonetheless, respondent criticizes the board for "merely comparing the number of Rule violations charged by count," Objections at 21. This criticism is unfair and inaccurate. First, while the board did compare the number of counts, it did so in part in response to respondent's own numerical comparison. In his post-hearing brief, respondent argued he "had significantly

fewer aggravating—and meaningfully more mitigating—factors than Judge O'Neill."

Respondent's Post-Hearing Brief at 43. The board disagreed:

> Respondent *argues that O'Neill's conduct was more egregious* than Respondent's conduct in this case *and he has fewer aggravating factors and more mitigating factors.* The panel does not agree with that contention.
>
> The panel has found that Respondent committed 30 violations of the Code of Judicial Conduct and Rules of Professional Conduct. Both Respondent and O'Neill had six aggravating factors. However, one of Respondent's aggravating factors is prior discipline, whereas O'Neill had not been previously disciplined. Further, the Court determined that O'Neill should be evaluated for mental health treatment, which is not an issue in this case. The panel finds that the holding in *O'Neill* supports the conclusion that Respondent should receive an actual suspension rather than a one-year suspension fully stayed.

Report at ¶¶ 175-176 (emphasis added). The board specifically referenced respondent's argument that O'Neill's conduct was more "egregious," not numerous. It also pointed out that it was particularly concerned about respondent's prior discipline and motivated by O'Neill's mitigating mental health treatment.

Indeed, those mental health issues were the primary driver in O'Neill not receiving a stricter sanction. The *O'Neill* Court noted that the sheer breadth of misconduct before it was "unprecedented." *O'Neill* at ¶ 50. Thus, had simple arithmetic been dispositive, the court would have presumably imposed an unprecedented sanction. It did not.

Instead, the court considered the context and circumstances of O'Neill's case. In particular, the court focused on O'Neill's mental health, noting:

> We are persuaded here that respondent's repeated volatile outbursts and unprovoked intemperate actions evidence a potential behavioral cause for her misconduct that would be best addressed by a mental health professional. While this possibility does not diminish the effects of respondent's misconduct, it perhaps explains what the board had "struggled throughout these hearings to understand."

Id. at. ¶ 54. It then crafted a sanction that imposed various conditions of mental health treatment,

including submitting to mental health evaluation, cooperating with any recommended course of treatment, submitting to monitoring if reinstated, and providing a mental health evaluation upon seeking reinstatement.

There is no evidence to support respondent's assertion that the board solely focused on the number of violations in *O'Neill*. However, even if the board had, this court has previously held that a judicial officer can receive an actual one-year suspension for a single act of misconduct. In *Disciplinary Counsel v. Repp*, the court imposed a one-year suspension for a judge who committed a single egregious act of misconduct. 165 Ohio St.3d 582, 2021-Ohio-3923, 180 N.E.3d 1128. Repp ordered a spectator in his courtroom to be drug tested, even though the spectator "did *absolutely nothing* to justify Repp's attention in the courtroom—let alone his order that she be drug tested." *Id.* at ¶ 30 (emphasis sic). When she refused the drug test, Repp held her in contempt and ordered her to serve ten days in jail. *Id.* at ¶ 14.

There is no evidence that the board merely compared the *number* of counts in *O'Neill* to support its recommendation. Even if it had focused on the number of counts, *Repp* establishes that the board could still have recommended a one-year suspension to address respondent's eight counts of misconduct over five years.

Conclusion

Respondent has disregarded the constitutional rights of defendants, the Rules of Evidence, the Revised Code, and basic principles of decorum and impartiality. His misconduct resulted in actual incarceration in multiple cases, and he was demeaning and belittling to parties and spectators in his courtroom. He failed to acknowledge any of the harm he caused to the people he hurt, and he refuses to accept that his baseless criticism of the judicial system erodes public confidence in the judiciary.

He has been given multiple opportunities to correct course, most importantly, by benefiting from a stayed suspension in his first disciplinary case. But he has also received direction from the court of appeals. He has not availed himself of these opportunities, but rather continues to re-offend. Thus, this court should adopt the board's finding of facts and conclusions of law and impose a one-year suspension with no stay.

Respectfully submitted,

/s Joseph M. Caligiuri
Joseph M. Caligiuri (0074786)
Disciplinary Counsel
Relator

/s Matthew A. Kanai
Matthew A. Kanai (0072768)
Assistant Disciplinary Counsel
Counsel for Relator

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Relator's Answer to Respondent's Objections was served on respondent's counsel, Monica A. Sansalone and Shane A. Lawson, by electronic mail at msansalone@gallaghersharp.com and slawson@gallaghersharp.com on this 21st day of February 2023.

/s Matthew A. Kanai
Matthew A. Kanai (0072768)
Counsel for Relator