ORIGINAL
10-0062

**BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO**

FILED
JAN 13 2010
CLERK OF COURT
SUPREME COURT OF OHIO

In Re:	:	
Complaint against	:	**Case No. 09-006**
Judge Daniel Gaul **Attorney Reg. No. 0009721**	:	**Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio**
Respondent	:	
Disciplinary Counsel	:	
Relator	:	

A formal hearing was held in this matter on September 21, 22 and 23, 2009, in Cleveland, Ohio, and on November 11, 2009, in Columbus, Ohio, before a panel consisting of Board members Janica Pierce Tucker, Paul DeMarco, and Roger S. Gates, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint. Respondent Daniel Gaul was present at the hearing. Attorneys Richard C. Alkire and Dean Nieding represented Respondent. Attorneys Joseph M. Caligirui, Assistant Disciplinary Counsel, and Jonathan E. Coughlan, Disciplinary Counsel, represented Relator.

CHARGES

Respondent was charged in a Complaint filed on February 17, 2009, with violations of the following provisions of the Code of Judicial Conduct[1] and the Rules of Professional Conduct:

[1] A revised version of the Code of Judicial Conduct became effective on March 1, 2009. All of the conduct which is relevant to this matter occurred prior to that date, and therefore, all references to the Code herein are to the version of the Code in effect prior to its 2009 revision.

- Canon 2 [A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary];

- Canon 3(B)(5) [A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice];

- Canon 3(B)(9) [While a proceeding is pending or impending in any court, a judge shall not make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing]; and

- 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].

FINDINGS OF FACT

{¶1}. Respondent, Daniel Gaul, was admitted to the practice of law in the state of Ohio on November 6, 1981.

{¶2}. Respondent has served as a Judge of the Court of Common Pleas of Cuyahoga County for more than eighteen years. He was appointed on January 13, 1991, by Gov. Richard Celeste, to fill a vacancy, elected to serve the balance of the unexpired term in 1992, and elected to full terms in 1994, 2000 and 2006.

{¶3}. Respondent is subject to the Code of Professional Responsibility, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Rules for the Government of the Bar of Ohio.

{¶4}. Based upon the testimony of Mary Katherine Whitmer, Richard Glickman, Subodh Chandra and Richard G. Lillie, Respondent generally has a good reputation as a jurist among members of the bar in Cuyahoga County. Respondent has a reputation for thoroughness, decisiveness, fairness and preparedness; he is attentive to detail. Respondent's judicial demeanor is normally professional, respectful and courteous towards those who appear before him. He is

typically willing to listen, to carefully and thoughtfully consider the positions of the parties, and to modify his opinion when the situation warrants. Respondent has a reputation for being brutally honest; he is not a person to mince words or to "pull punches."

{¶5}. Following his arrest on June 6, 2007, by the Cleveland Police Department, Jeffrey Robinson was indicted on June 15, 2007, by the Cuyahoga County Grand Jury on two counts of aggravated burglary and three counts of felonious assault, case no. CR-07-497572-A. The alleged victims of these crimes were Emma Ingram, who was 83 years old at the time of the incident, and her caregiver Mozelle Taylor. The crimes allegedly occurred in Ingram's home.

{¶6}. At Robinson's arraignment on June 20, 2007, Robinson entered a plea of not guilty. The case was randomly assigned to Respondent's docket. Robinson was declared indigent, and Attorney John Parker was assigned to represent Robinson. Since Robinson was incarcerated in the Cuyahoga County Jail, bond was set at $250,000.00.

{¶7}. When the case file was transmitted to Respondent's chambers, the file contained a criminal history report ("rap sheet") regarding Robinson as well as a copy of the indictment and a plea form. The case file also included a LEADS report (which is duplicative of the rap sheet) and a copy of a police report concerning the incident upon which the indictment was based.

{¶8}. While presiding over the Robinson case, Respondent conducted pre-trial hearings in the matter on June 28, 2007, July 12, 2007, August 2, 2007, and November 15, 2007.

{¶9}. After the first or second pre-trial hearing, Respondent directed his bailiff, Mary Jo Simmerly, to research Robinson's prior involvement with the Court of Common Pleas. In the course of doing so, Simmerly printed-out copies of the Clerk's Docket for several prior cases and pulled copies of at least one Pre-Sentence Investigation Report ("PSI") concerning Robinson.

Simmerly read through these documents and highlighted the entries in the Dockets which she believed would assist Respondent.

{¶10}. Since Robinson was incarcerated, the information assembled by Simmerly, and the other information in the case file, was reviewed by Respondent at or before the first or second pre-trial for the purpose of making a decision concerning bond. Because the jail is overcrowded and each day spent in jail counts as three days toward the speedy trial deadline of two hundred seventy days from date of arrest, Respondent generally wants to retain defendants in jail only when necessary.

{¶11}. Trial in the Robinson case was originally set for September 11, 2007, but was continued first to October 10, 2007, and subsequently to October 11, 2007, November 7, 2007, November 15, 2007 and November 27, 2007.

{¶12}. During the time that Respondent presided over Robinson's case, there were at least four different prosecutors on the case, and Respondent believed that he was the person with the most institutional memory about the case. Respondent testified that I "recall sitting down and talking to prosecutors early in this case with defense counsel present. And we talked about the information that was contained not only in the file and in the dockets, but also the information that was contained in the police reports and the medical records. And I specifically remember learning very early on that Mozelle Taylor the caregiver in this case went to the hospital and admitted smoking crack and drinking beer with the defendant Jeff Robinson. And immediately – immediately in my mind there was a huge concern for the elderly victim. I had hoped that the medical professionals or the Cuyahoga County Prosecutor's Office would implement a protocol to safeguard both or one of the victims. And it never happened. I was very concerned throughout this entire case. I was very anxious to get it to trial as quickly as possible." (Tr. 883)

{¶13}. At the time of the commencement of the trial on November 27, 2007, Respondent had been substantially impacted by the information in the file which he had reviewed concerning Robinson's prior criminal history. Based upon this information, he "was reaching the conclusion that there was a pattern where cases of Jeff Robinson would be influenced by witnesses not appearing." (Tr. 880)

{¶14}. From the time he was assigned to the Robinson case, Cleveland Police Detective Joseph Daugenti had met with the victims on several occasions. During a conversation with Daugenti approximately two weeks prior to the scheduled trial date, Emma Ingram indicated that she did not want to go to court to testify. Ingram denied to Daugenti that she was being pressured by either Robinson or Mozelle Taylor to refrain from testifying.

{¶15}. At the request of Assistant Prosecuting Attorney Ralph Kolasinski, Daugenti returned to Ingram's home on the evening of Tuesday, November 27, 2007, to tell Ingram and Taylor that he would pick them up on the morning of Thursday, November 29, 2007, and take them to court so that they could testify. Although Ingram had previously arranged for her son Curtis to take her to court, she agreed to have Daugenti do so. Despite her reluctance, Curtis Ingram believed that, when he had spoken to his mother about taking her to court, she intended to appear in court to testify against Robinson.

{¶16}. The trial commenced on the morning of November 27, 2007. After a brief discussion concerning the availability of the victims to testify and whether a plea bargain was possible, the trial was adjourned until 1:30 P.M. that afternoon to commence voir dire. However, the trial did not actually resume until the next morning (Wednesday, November 28, 2007) at which time the prosecution commenced and concluded its portion of the voir dire.

{¶17}. On the morning of Thursday, November 29, 2007, Det. Daugenti arrived at Ingram's home as arranged. When no one answered the door, Daugenti looked around the house and saw no sign of activity in the house. Daugenti also asked several neighbors if they had seen Ingram leave her home that morning, and no one had seen anything. Daugenti left and went to Court where he informed Kolasinski that he had been unable to locate Ingram or Taylor.

{¶18}. Following Det. Daugenti's arrival at court, Kolasinski informed Respondent, in an off-the-record conference, that Daugenti had been unsuccessful making contact with Ingram and Taylor as arranged and informed Respondent of the efforts Daugenti had made at Ingram's home. Kolasinski requested that Respondent delay the resumption of the trial for one day to give the prosecution time to attempt to locate the victims so that they could testify.

{¶19}. Prior to taking the bench on November 29, 2007, Respondent had formed a belief that Robinson had influenced Mozelle Taylor to not appear pursuant to subpoena to testify against him and to also prevent Emma Ingram from appearing.

{¶20}. Following this conference, Respondent reconvened the trial. The transcript documents that, after Kolasinski explained the circumstances concerning his witnesses' failure to appear and stated his request for a continuance, the following colloquy occurred:

> THE COURT: Thank you very much, Ralph.
>
> A couple other things I want to place upon the record to put this issue in context. The incident in question allegedly occurred March 13th, 2007. And the record will indicate because we are in trial, I have explained the counts to the jury, that this is a serious case involving aggregate *[sic]*burglaries times two, felonious assault times three, it's a five count indictment, two victims, Mozelle Taylor and Emma Taylor. Emma is a 83 year old woman that needs care, and Mozelle Taylor is her caregiver.
>
> Now on the day of the incident, the victim, the caretaker Mozelle Taylor, presented at the hospital and admitted to smoking crack and drinking six beers, and I believe she indicated she was smoking crack with the defendant in this case. I believe she indicated she had some sort of personal relationship with him.
>
> Now, I have spoken to the detective in this case, because he has been present at pretrials.

MR. KOLASINSKI: At the beginning of the trial.

THE COURT: At the beginning of the trial. And he indicated he had contact with both of the witnesses, that he has communicated with them. He had been to their house. He had talked to them on numerous occasions in an effort to secure their participation in this trial, and that he planned to pick them up at 9:00 a.m. this morning.

MR. KOLASINSKI: 8:30.

THE COURT: Okay. The point is this: This is not an 83 year old woman who can just go somewhere on her own. And given the fact that the alleged victim in this case Mozelle Taylor is a drug abuser and has had a relationship with this defendant, I am very suspicion *[sic]*.

I mean, this isn't a case that has to be researched. It's just a case of common sense and Psychology 101, and I am concerned Mozelle Taylor may be trying to manipulate this trial and prevent this 83 year old woman from being here, and I will not permit that to happen under any circumstances whatsoever.

So I'm making a record. I'm laying the cards on the table. I'm telling the transcript what is going on for purposes of appeal so if anybody is reviewing this transcript, they have a full flavor of the relationship between one of the victims and the defendant in this case.

And I'm also going to say this. Jeopardy is not attached. I will grant the State's motion for a continuance. I'm going to note defense's objection. John, if you want to make an objection I will permit you to after my comments.

I will also do this. If the witness is not here tomorrow, I will grant a mistrial, issue a warrant for Mozelle Taylor immediately. She will be arrested, incarcerated, and held in county jail until this case goes to trial, and I don't care if it's a year from now.

We may have speedy trial issues, and the other thing I want to say is this. If there is anybody involved in this case who was involved in what is obstruction of justice, I will see to it that case will be indicted. And if that case comes to me, I will see to it that person gets maximum consecutive time. I let no one manipulate the system of justice. I will not permit that to occur in this case.

This case will go to trial. If we have a speedy trial issue that prevents us ending disposition of the case, I anticipate at that point the State of Ohio will dismiss with the issue *[sic]* to reindict. There is a lot of issues to hear. John?

MR. PARKER: On behalf of Mr. Robinson, we object to a continuance. There are other witnesses the State could present instead of Emma Ingram and Mozelle Taylor. They have the EMS witnesses and the doctors lined up to testify. I have not begun my voir dire with the jury yet. I'm sure it would be quite short. I think we should impanel the jury and go forward.

My client has been in jail since early June, unable to make bond, and we want to proceed.

THE COURT: Thank you, very much. I appreciate your comments.

The obvious problem with going forward with jury selection is jeopardy attaches. If the witnesses absent themselves for even a brief period of time, the defendant's case has to be dismissed and he will receive a not guilty, and I will not permit that to occur.

The witnesses need to be heard. What they say once they get here is something I can't control. But the witnesses must appear in the courtroom.

This Court has taken this position not only with this case, but particularly with other cases. And I have in fact gone out and arrested victims, and I'm prepared to arrest the victim in this case, and we'll see how long this 83 year old woman stays away from the house that she hasn't left for years because she's under care 24/7 and had been with her Alzheimer husband.

The Court is very suspicious. We will look into the matter. At the appropriate time we will reconvene, resuming the trial tomorrow morning at 9:30.

All right. He is remanded to county jail.

MR. PARKER: Thank you, Judge. (Relator's Ex. 4)

{¶21}. Respondent intended his statement on November 29, 2007 concerning obstruction of justice to refer to both the defendant Jeffrey Robinson and the victim Mozelle Taylor.

{¶22}. No one other than the attorneys in the Robinson case, the defendant, Det. Daugenti, and court personnel were present in the courtroom during the foregoing statements by Respondent.

{¶23}. On the morning of Thursday, November 29, 2007, Det. Daugenti had no concern for Ingram's safety, and did not indicate to Kolasinski that he had any such concern. Although, based upon the fact that Robinson had rejected the prosecution's plea offer, Daugenti had suspicions concerning Robinson's possible involvement in Ingram and Taylor's failure to appear, he had no evidence at that time of any such involvement. Because of the relationship between Robinson and the victims, particularly Taylor, Daugenti did not think it was unusual that the victims would be reluctant to testify against Robinson.

{¶24}. After adjourning the trial on Thursday, November 29, 2007, Respondent called his bailiff Mary Jo Simmerly into the courtroom and asked her to contact the media and tell them

he was issuing an "Amber Alert" for the victims in the Robinson case. Simmerly understood from talking to Respondent that he asked her to issue the "Amber Alert" because he "was concerned for both victims" in the case. Although Simmerly had never before been involved with an "Amber Alert," she phoned the members of the media with whom she had dealt on prior occasions and told them that "the Judge is issuing an 'Amber Alert" and that some witness is missing. (Tr. 610)

{¶25}. By issuing the "Amber Alert," Respondent was intending to "saturate the community" to gain the public's assistance in locating Emma Ingram and Mozelle Taylor. In response to Simmerly's phone calls, several television stations and the Cleveland Plain Dealer directed their representatives to attend the resumption of the Robinson trial in Respondent's courtroom on Friday, November 30, 2007.

{¶26}. Respondent also issued a bench warrant for Mozelle Taylor on Thursday, November 29, 2007.

{¶27}. On the evening of Thursday, November 29, 2007, Det. Dagenti returned to Ingram's house and conducted surveillance for about ninety minutes. He observed no activity or any other indication that anyone was at home. That evening, Daugenti phoned Kolasinski's office and left a message that he had been unable to locate the victims.

{¶28}. Prior to reconvening the trial on the morning of Friday, November 30, 2007, Respondent conducted an off-the-record conversation in his chambers with Parker, Kolasinski and Kolasinski's supervisor David Zimmerman and Michael O'Malley, First Assistant Prosecuting Attorney for Cuyahoga County. Kolasinski informed Respondent that Daugenti had still been unable to locate Ingram and Taylor, and that the prosecution was requesting that the

case be dismissed without prejudice with the intention to indict Robinson again once the victims were located.

{¶29}. Respondent told Kolasinski that he was unwilling to grant the prosecution's request to dismiss this case and stated that he was not going grant his request because a dismissal would result in Robinson getting out of jail. Although Respondent told counsel that "we are on the same team," his comments were intended only to reflect his strong feeling that witnesses needed to come to court and testify so that the jury could decide the case.

{¶30}. At some time on the morning of Friday, November 30, 2007, prior to the resumption of the in-court proceeding in the Robinson case, Kolasinski phoned Daugenti and told him that Respondent considered Ingram to have been kidnapped. In response to Kolasinski's request that he try to locate Ingram, Daugenti phoned the dialysis center where he knew Ingram went every Monday, Wednesday and Friday. Although the staff of the dialysis center was reluctant to provide him with information, they eventually told Daugenti that Ingram had been there that morning, and that she was in the process of leaving with her caregiver. Daugenti asked the dialysis center staff to attempt to detain Ingram based upon Respondent's conclusion that she had been kidnapped. However, staff members were unable to stop Ingram before she left. They did, however, provide Daugenti with a license number for the car in which Ingram left the center.

{¶31}. Daugenti phoned Kolasinski and told him that Ingram had appeared that morning for her dialysis appointment, but that he did not know where she went after that. Kolasinski provided this information to Respondent.

{¶32}. After his discussions with counsel, Respondent went into the courtroom and reconvened the trial. The proceedings that morning are documented by the transcript as follows:

THE COURT: All right. You may be seated, everybody. I'd like to go on the record in 497572, the State of Ohio versus Jeffrey Robinson. We're in the middle of trial. We've been selecting a jury and we've had a very unusual occurrence.

I've called my friends in the media, and I've asked them to be here because I thought we were going to nee *[sic]* their help, and I still do think we need their help to find witnesses in this case.

Let me first go on the record and say present in the courtroom is the defendant and his attorney John Parker, and also present and representing the State of Ohio is Assistant County Prosecutor Ralph Kolasinski, Assistant County Prosecutor David Zimmerman, and also present, Ralph, would you introduce the gentleman seated to your right?

MR. KOLASINSKI: Thank you, Judge. This would be First Assistant Mike O'Malley.

THE COURT: Oh, Mike, it's a pleasure to have you in my courtroom. I think this is your first appearance on the record. Nice to have you with us.

Ladies and gentlemen, I want to make a record because it's very important in this case. Jeffrey Robinson, this defendant, is charged with aggravated burglary in two counts of the indictment, two counts of felonious assault in counts three and four, and a count of felonious assault in count five.

The victim in this case -- one of the victims in this case is Emma Ingram. I don't know her. I haven't met her. I don't know where she lives, but I do know that she's 83 years old and allegedly had her hip broken by this defendant.

THE DEFENDANT: She didn't have her hip broken by me.

THE COURT: I'm going to tell you something right now. I'm not here to hear from you, and if you make one more comment to me, I'm going to have you bound and gagged.

MR. PARKER: I object to this, your Honor.

THE COURT: Okay, you may object to this all you want, okay. Your client will not interrupt the Court.

MR. PARKER: Thank you.

THE COURT: As I was saying, the defendant is charged with breaking the woman's hip, and an aggravated burglary.

The other alleged victim in this case is Mozelle Taylor. Mozelle Taylor is allegedly a friend of the defendant. When she appeared at the hospital, that's exactly what she said.

Mozelle Taylor indicated to the Cleveland Police that on March 13th of 2007, that this defendant Jeffrey Robinson assaulted the 83 year old woman and struck her with the chair and broke her hip and kicked her in the face while she was on the ground.

Now Mozelle Taylor unfortunately is the caretaker for the 83 year old woman. Mozelle Taylor became familiar with the 83 year old woman when Mozelle, the caregiver, provided the care to Emma Ingram's aged husband with Alzheimer's disease.

We know that when Mozelle Taylor, the caregiver, presented at the emergency room on March 13th of 2007, she admitted to the medical health professionals that she had been smoking crack with this defendant and drinking six beers, and that a fight erupted over money, and that Jeffrey Robinson assaulted the aged victim Emma Ingram. Those are the allegations. That's what the indictment was about.

This defendant is presumed innocent. We were involved in the trial of this case. We were involved with selecting a jury that began on Wednesday. We had to recess the case yesterday, however, because the 83 year old woman Emma Ingram went missing.

Despite the fact that she had had numerous contacts with the Cleveland Police Department and Detective Joseph Daugenti, D-a-u-g-e-n-t-i, who appeared here for trial, Emma Ingram, the 83 year old woman who was disabled, was not present yesterday at a prearranged meeting at 8:30.

The police went to her home and they were unable to locate her. They were also unable to locate Mozelle Taylor. We recessed the trial, because once a jury is impaneled, jeopardy attaches. And once that occurs, this defendant cannot be tried on those charges again if we don't have the witnesses, and the Court has to dismiss the case. That is what would happen.

I, therefore, continued the case yesterday. And as of 9:30 this morning, we have been unable to locate this 83 year old woman. She was not available to the police. She was not at her home when they stopped there last night.

And I should indicate for the record that yesterday, because both of these witnesses, Emma Ingram and Mozelle Taylor were personally served with a subpoena, because Mozelle Taylor had contact with the Cleveland Police Department, because Mozelle Taylor was controlling the whereabouts of the 83 year old woman, I issued an arrest warrant for Mozelle Taylor yesterday. And there is currently pending an arrest warrant on Mozelle Taylor.

So as of 9:30 this morning as we prepared to try this case, we did not have witnesses, and we have some very tough decisions to make. Because if this case was dismissed after we impanel the jury, we cannot retry the defendant.

But perhaps more importantly, if this case was dismissed, Jeffrey Robinson has to be returned to our community and I am not prepared to do that at this time, because we have issues as to the care and protection of the 83 year old woman. And as of 9:30 this morning, we have no idea where she is.

Now we have learned within the last 45 minutes that Emma Ingram is today in dialysis, but we still cannot find Mozelle Taylor. Mozelle Taylor is a most crucial witness in this case.

And I have to step out of my role now as being a fair and impartial Judge and indicate that I have become an advocate in this case, an advocate for justice. Because justice may be blind, but justice has a heart, and it has a soul, and it has common sense.

And I would bet my life on the fact that you, sir, have been involved in obstruction of justice --

MR. PARKER: Objection, your Honor.

THE COURT: -- through Mozelle Taylor.

MR. PARKER: Objection, your Honor.

THE COURT: Okay. And I also would bet my life, if I had to right now, that you have been involved in a technical kidnapping through Mozelle Taylor.

MR. PARKER: Objection, your Honor.

THE COURT: That's what I would bet.

MR. PARKER: Objection, your Honor.

THE COURT: You may object. You may object. That is this Court's finding, okay. It's not binding. And I'm going to recuse myself from this case, because obviously I cannot be fair and impartial anymore, okay.

But I felt it important to step out of my role as a Judge and to become an advocate to protect the well-being of an 83 year old woman who has no one else in this world.

And if nothing else, even if he's not convicted, we'll know this. We'll know where Emma Ingram is, and she will be in safekeeping, because she's no longer going to be provided care by Mozelle Taylor, your friend who was smoking crack with you. She's not going to be in that household. Because Mozelle Taylor is going to be in the county jail and she's going to sit in the county jail until this case is tried.

What's more important than me stepping off this case is that justice is done. There are 33 other wonderful Judges in this building that are willing to try you, and when you go to trial, I won't be surprised if you face obstructions of kidnapping *[sic]*.

MR. PARKER: Objection, your Honor.

THE COURT: Okay. So what I am prepared to do is this. I am going to recognize the State of Ohio at this time. Mr. Zimmerman.

MR. ZIMMERMAN: Thank you, your Honor. Your Honor, as the State has already stated to this Court, we don't believe that the Court has to recuse himself from this case. We think that this Court can continue to go forward. I understand the Court's position, though.

If the Court is going to declare a mistrial at this time and have the case spun off to another Judge, I understand your ruling. We don't believe that that is necessary at this time, but if that is the Court's decision, that is fine, and we will continue to follow this case no matter to what courtroom this case goes.

THE COURT: In terms of securing the witness Mozelle Taylor, does the State of Ohio have a position?

MR. ZIMMERMAN: We have detectives out there already trying to locate them. We will be continuing to locate them. I'm going to, along with the detectives that

are working the case already, I'm going to employ some of my investigators from the county prosecutor's office. They will be out there, and we will attempt to locate her this weekend and make sure she is safe and secure in a place where the defendant or other people that attempted to influence her won't be able to get to her.

THE COURT: And the woman who has been the caretaker, the caretaker who has been capiased, you know technically does the State make a motion to continue the case until she can be incarcerated?

MR. ZIMMERMAN: We would, your Honor, and as soon as we have information we will bring that to the Court's attention.

THE COURT: All right. Thank you, very much. John?

MR. PARKER: Thank you, your Honor. On behalf of Mr. Robinson, your Honor, we object to any continuance whatsoever. We're prepared to try this case.

Jury selection began on Wednesday. We were prepared to continue with jury selection yesterday. Over my objection you continued the case at the State's request.

It was my understanding this morning the prosecutor was prepared to dismiss the case, until they recently found Emma Ingram. And we are prepared to go forward. We want to select a jury. We are asking that you bring the jury up and let us continue selection, your Honor.

The State has other witnesses which have been present and available to testify. EMS personnel have been here. Cleveland police officers have been here. They can proceed, your Honor.

This Court is preventing my client from exercising his Constitutional right to a timely and speedy trial. We do not think that's proper, with all due respect. We are asking to go forward.

There are 22 citizens that have answered the call for jury duty. They're waiting to perform their service. They're asking you to bring them up here, and let's try this case.

THE COURT: All right. Thanks John, I appreciate that.

You know, what is paramount, even more important than a speedy trial, even more important than the effective administration of justice, what's even more important is the integrity of the system. And there are so many unusual circumstances that have occurred during this case, including the role I had to take on to address this issue.

That the only appropriate thing to do at this point to safeguard the integrity of the criminal justice system in this case is for this Court to recuse itself on Monday, to write a letter to Nancy McDonald *[sic]* and asking the Presiding Administrative Judge to re-assign another judge to take this case over.

In the meantime, Mr. Robinson will be held in the county jail. In the meantime, I'm challenging the law enforcement of the community and of the City of Cleveland, and in Cuyahoga County and in the State of Ohio to find Mozelle Taylor and have her incarcerated so that she may be present so that we may determine when she is sitting in a county jail and being interviewed by the Cleveland Police Department, whether this defendant was involved in the disappearance of this 83 year old woman yesterday.

And I suspect when all said is done, that's exactly what they are going to find out, because I have your rap sheet right here.

MR. PARKER: I object to this, your Honor.

THE COURT: So I am going to hold the defendant in the county jail, continue the case, recuse myself on Monday, ask the Administrative Judge to appoint another Judge to preside over the case.

All right. So at this time I am --

MR. PARKER: Judge, we move to dismiss the case with prejudice at this time.

THE COURT: Okay. I am going to deny the motion. I'm going to declare a mistrial for the jury panel that was selected. Jeopardy has not attached. I will recuse myself and ask the Administrative Judge to appoint another Judge to try this case. Those are my decisions at this point. Anything further, gentlemen?

MR. ZIMMERMAN: No, your Honor. Thank you on behalf of the State of Ohio.

THE COURT: Thank you, Ralph, Mike, John, thank you all very much. We're in recess. (Relator's Ex. 5)

{¶33}. After declaring a mistrial and recessing the proceeding, Respondent agreed to speak in his chambers with several members of the media who had questions concerning what they had just heard in the courtroom. While answering the reporters' questions, Respondent stated: ". . . sometimes you get checked into the boards and sometimes you gotta check somebody else into the boards, but I'm not going to sit idly by and dismiss this case. If I dismiss this case, Jeffrey Robinson wins and he could be out on the streets of our community tonight. He could be at this elderly woman's house again, smoking crack again. And that's not going to happen on my watch. . ."

This comment was broadcast as a part of at least one television station's story on November 30, 2007.

{¶34}. As a result of media representatives attending the proceedings in the Robinson case on Friday, November 30, 2007, at least three television stations, the Cleveland Plain Dealer and several internet news sites published stories concerning the Robinson case and Respondent's

comments concerning his conclusions regarding Robinson's involvement in the failure of Emma Ingram and Mozelle Taylor to attend the trial to testify.

{¶35}. After Respondent declared a mistrial and recessed the proceedings, Daugenti traced the vehicle used to pick up Ingram at the dialysis center to the home of Mozelle Taylor's sister. Mozelle Taylor, later that day, returned Ingram to her home and surrendered herself on the bench warrant as a result of Daugenti's discussion with Taylor's sister. There was no evidence that Ingram was in any danger on either November 29 or 30, 2007; in fact, she told her son that, on Friday, she and Mozelle were just out "visiting."

{¶36}. On Monday, December 3, 2007, Respondent sent a letter to Presiding Judge Nancy R. McDonnell asking her to re-assign the Robinson case to another judge. Respondent described the reason for his request as follows: "I found it necessary to recuse myself after issuing a bench warrant for a witness who failed to appear in Court. Comments made by myself at that hearing could possibly call my impartiality into question. Therefore, to avoid even the appearance of impropriety, I respectfully request you re-assign this matter." (Respondent's Ex. EE)

{¶37}. In response to Respondent's letter, Judge McDonnell immediately re-assigned the Robinson case to Judge Nancy Margaret Russo. Judge Russo immediately recused herself, and the case was reassigned to Judge Kathleen Sutula. Due to Judge Sutula's illness, the case reassigned again to Judge McDonnell on December 18, 2007.

{¶38}. That same day, as a result of a plea bargain, Robinson appeared in Court and pled guilty to one count of the indictment and was sentenced to two years in prison. Taylor was released from jail following Robinson's guilty plea.

{¶39}. While Robinson was in prison, he was indicted for obstruction of justice based primarily on evidence which was unavailable to Respondent during the course of the original proceeding. Although Robinson was subpoenaed to testify on the first day of the panel's hearing, he did not testify because he was arrested when he appeared at the courthouse pursuant to the subpoena, based upon the warrant issued for his arrest following the issuance of this indictment.

{¶40}. Respondent claims that he made his in-court statements on November 29 and 30, 2007, concerning Robinson's involvement in the non-appearance of Ingram and Taylor because he was required to "make a record" as to why he was recusing himself and as to why he was declaring a mistrial; during his testimony Respondent referred to these statements as his "findings."

{¶41}. None of Robinson's conduct in allegedly procuring the non-attendance of the prosecution's witnesses against him occurred in Respondent's presence, or so near Respondent as to obstruct the administration of justice, and therefore, such conduct was not punishable as direct contempt.

{¶42}. Respondent's "findings" were based upon "the information that was contained in the file, the information that was contained in the police reports and medical records that I saw, and numerous statements that were made to me by the Cuyahoga County Prosecutor's Office as well as the defense attorney." (Tr. 888) Although some of these statements might have been made in open court, Respondent stated, "Most of my knowledge came from the information that I gleaned in chambers. By the time I hit the bench I knew what I had." (Tr. 889)

{¶43}. Assistant Prosecuting Attorney Kolasinski did not, either on November 29 or 30, 2007, tell Respondent that he had evidence that Robinson was involved in procuring the non-attendance of Ingram or Taylor pursuant to the subpoenas issued by Kolasinski.

{¶44}. At no time during any of the proceedings on November 27, 28, 29 and 30, 2007, did Respondent receive any sworn testimony or other admissible evidence concerning the reason for the failure of Ingram or Taylor to appear pursuant to the subpoenas served upon them, or provide Robinson with the opportunity to confront witnesses on this subject or to otherwise present evidence in response to the "findings" made by Respondent about Robinson's involvement in the failure of the victims to appear and testify.

{¶45}. Despite his comment on Thursday, November 29, 2007, Respondent knew that, if anyone was charged with obstruction of justice for procuring the non-attendance of witnesses in the Robinson case, Respondent would not be able to hear the case because of his involvement in the original case.

{¶46}. Respondent never considered commencement of proceedings against Robinson for indirect contempt of court based upon Respondent's belief that Robinson had been involved in procuring the non-attendance of Ingram and Taylor as witnesses at his trial.

{¶47}. During his testimony, Respondent was unable to articulate whether his declaration of a mistrial in Robinson's case was due to Respondent's loss of impartiality or to his conclusion that Robinson had interfered with Ingram's and Taylor's appearance, pursuant to subpoena, to testify in his case.

{¶48}. After stating on the record that he had become an advocate to protect Ingram and that he could not be impartial in Robinson's case, Respondent overruled the motion made by Robinson's counsel to dismiss the indictment with prejudice.

{¶49}. At the time of making his comments in the Robinson matter on Friday, November 30, 2007, Respondent had no confidence in the ability or desire of either the prosecuting attorney or law enforcement to protect Ingram and Taylor from harm. Respondent believed that he was

the only one who could protect the witnesses and the integrity of the criminal justice process. Respondent had concluded that Robinson was "evil" and that it was his responsibility to confront Robinson and make sure he didn't "win."

{¶50}. Because of Respondent's on-the-record comments, the proceeding conducted by Respondent on November 30, 2007, in Robinson's case was not fair to Robinson. On the other hand, Respondent's public and non-public statements during the course of the Robinson matter did not actually prevent Robinson from ultimately receiving a fair hearing of the charges against him following Respondent's recusal.

CONCLUSIONS OF LAW

{¶51}. Canon 2 of the applicable Code of Judicial Conduct requires that, "A Judge Shall Respect and Comply with the Law and Shall Act at all Times in a Manner that Promotes Public Confidence in the Integrity and Impartiality of the Judiciary." Although Respondent argues that Canon 2 primarily describes the expectations regarding a judge's personal and extrajudicial activities, the first portion of the Commentary to Canon 2 states:

"Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The admonition of Canon 2 applies to both the professional and personal conduct of a judge. It is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for compliance with Canon 2 appearance of impropriety is whether the conduct would create in

reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

{¶52}. Canon 3 of the applicable Code of Judicial Conduct requires that, "A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently." In performing his/her official duties, a judge is required to comply with all of the divisions of Canon 3(B), which include in part:

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. . .

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice; and

(9) While a proceeding is pending or impending in any court, a judge shall not make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.

The commentary to Canon 3(B)(5) states, "A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as bias or prejudice. . . " The commentary to Canon 3(B)(9) states, "The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition." Since the statements at issue before the Panel were all public statements, the applicable standard under Canon 3(B)(9) is whether Respondent's comment "might reasonably be expected to affect [the] outcome or impair [the] fairness" of the pending proceeding.

{¶53}. In its decision in *Cleveland Bar Assn. v. Cleary* (2001), 93 Ohio St.3d 191, the Court stated that, as used in Canon 3(B)(5), the term "bias or prejudice" when used in reference to a judge:

"[I]mplies a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts." Id. at 201, quoting from, *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, paragraph four of the syllabus. The Court further stated in its *Cleary* decision that, "A trial ruling . . . may be considered to be the product of judicial bias if based on improper extrajudicial motives or if 'it is so extreme as to display clear inability to render fair judgment.'" Id. at 202.

{¶54}. In its decision in *Disciplinary Counsel v. Ferreri* (1999), 85 Ohio St.3d 649, the Court, a judge made comments to a television reporter which were critical of a decision of the court of appeals reversing one of the respondent's decisions. In finding violations of Canons 2 and 3(B)(9), the Court stated: "Canon 2 does not distinguish, as respondent would have us distinguish, between comments on and "off the record." Nor does the canon distinguish between unedited comments to a television reporter and the edited portions of those comments that are ultimately broadcast to the general public. The canon requires that a judge "at all times" conduct himself or herself in a manner that promotes public confidence in the judiciary. We recognize that on occasion a judge may unwittingly make an inappropriate casual remark. However, respondent's remarks about the appellate court were not unwitting, inadvertent "slips." His statements were part of lengthy intemperate comments about the appellate court's reversal of his decision.

By this series of statements respondent Ferreri also violated Canon 3(B)(9) of the Code of Judicial Conduct, which requires that a judge not make any comment about a pending case that might reasonably be expected to affect its outcome. Canon 3(B)(9) does not preclude judges from making "public statements in the course of their official duties or from explaining for public information the procedures of the court." However, at the time of his statements to the television reporter, respondent was not acting in the course of his official duties, nor were his comments limited to an explanation of court procedures." Id. at 652-653.

{¶55}. Prof. Cond. R. 8.4(d) provides that it is misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. As stated by the Supreme Court in its *Cleary* decision interpreting DR 1-102(A)(5) [the predecessor to Prof. Cond. R. 8.4(d)], "a judge acts in a manner 'prejudicial to the administration of justice' . . . when the judge engages in conduct that would appear to an objective observer to be unjudicial and prejudicial to the public esteem for the judicial office." 93 Ohio St.3d at 206. Under Prof. Cond. R. 8.4(d), a judge has a duty to deal fairly with attorneys and litigants who come before the court. A judge's "unprofessional and undignified treatment" of a criminal defendant is a violation of DR 1-102(A)(5). *Disciplinary Counsel v. Parker*, 116 Ohio St.3d 64, 2007-Ohio-5635, ¶48.

{¶56}. A fair hearing in a fair tribunal is a basic requirement of due process. *Withrow v. Larkin* (1975), 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712. "The measured and even-handed administration of justice is central to our judicial system." *Disciplinary Counsel v. Parker*, 116 Ohio St.3d 64, 2007-Ohio-5635, ¶9. A judge is required to "act as an impartial arbiter" and to demonstrate "the integrity and independence that promotes public confidence in the judiciary." Id. at ¶12.

{¶57}. Relator does not dispute that Respondent acted properly when he decided to recuse himself after concluding that he was unable to be fair and impartial due to his personal belief that Robinson had encouraged Mozelle Taylor to refrain from appearing to testify and to hinder Emma Ingram from doing so.[2] Additionally, the Panel does not disagree with Respondent's decision to grant a mistrial based on that recusal. However, even though Respondent claimed that he was required to "make a record" as to why he was recusing himself, he was unable during his testimony to clearly state whether his decision to grant a mistrial was based upon his recusal, or rather upon his determination that Robinson had engaged in misconduct by interfering with the prosecution's ability to present its case.[3]

{¶58}. If the mistrial was based upon his recusal, Respondent's statements on the record on November 29 and 30, 2007, went far beyond what was required to document his reasons for his recusal. Respondent was required by Canon 3(B)(9) to make every effort to prevent his bias from tainting the fairness of the proceedings in Robinson's criminal case. Although Respondent could have complied with his duty by simply stating that he was unable to continue to perform his judicial functions because of personal bias, Respondent made multiple comments, both in court and in his chambers, accusing Robinson of misconduct in the nonappearance of the prosecution's witnesses under the guise of explaining his recusal. Respondent apparently believed that, because he intended to recuse himself, he could make these accusations of

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[2] Canon 3(E)(1) requires that a judge disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned including when "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding."

[3] This distinction is relevant to the impact of the mistrial on Robinson's speedy trial rights. See, R.C. §2945.72(D) (Statutory time period within which an accused must be brought to trial is extended by any period of delay caused by the improper act of the accused); *see, also, State v. Hendricks*, 2009-Ohio-5556, ¶50 (Any prejudice to Hendricks was caused by his own actions and as a result, his speedy trial rights were not violated.)

misconduct even though they were highly prejudicial towards Robinson and his "findings" were unsupported by any evidence in the record.

{¶59}. On the other hand, if the mistrial was based upon Respondent's "findings" concerning Robinson's alleged misconduct in procuring the non-attendance of prosecution witnesses, Respondent failed to comply with legal requirements that findings of misconduct occurring outside the presence of the Court must be based upon evidence presented at a hearing. *See, e.g.*, *State v. Vandyke*, 2007-Ohio-1356, ¶11 (A court is required to conduct a hearing before granting a mistrial based upon juror misconduct involving extrajudicial contact with a witness), *State v. Chavez-Juarez*, 2009-Ohio-6130, ¶41 ("When the court is informed that an act of indirect contempt has taken place, the accused contemnor will be given notice and a hearing held on the charge"), and *State v. Brandon*, 2008-Ohio-403, ¶11-12 (A person accused of criminal contempt has many of the due process rights required in criminal proceedings including notice of the charges and an opportunity to be heard concerning them). In its decision in *Disciplinary Counsel v. Medley*, 104 Ohio St.3d 251, 2004-Ohio-6402, the Court found misconduct when a judge decided the merits of legal issues in both civil and criminal actions without first hearing from parties on both sides of those issues and in derogation of clear procedural rules; the Court stated: "A judge is charged with the responsibility of enforcing the rule of law, both substantive and procedural. A judge may not blatantly disregard procedural rules simply to accomplish what he or she may unilaterally consider to be a speedier or more efficient administration of justice." Id. at ¶42. By making "findings" of defendant's misconduct without conducting a hearing to receive evidence concerning the alleged misconduct, Respondent violated the requirements of Canons 2 that a judge comply with the law in the performance of his official duties.

{¶60}. Respondent's on-the-record comments on November 29 and 30, 2007, and his in-chambers comments to the media following the hearing on November 30, 2007, also constitute a violation of Canon 2 because they could only create in reasonable minds a perception that Respondent's ability to carry out his judicial responsibilities with integrity, impartiality and competence was impaired by Respondent's clearly expressed belief that Robinson was involved in procuring the non-attendance of the prosecution's witnesses at his trial. If those comments had been based upon evidence, presented to the Court during a fair and open hearing, which established a factual basis for defendant's misconduct, the panel may have reached a different conclusion. However in the absence of such a hearing, the panel concludes that Respondent's conduct violated Canon 2.

{¶61}. Respondent also violated Canon 2 by misusing a public service when he directed his bailiff to contact the media and tell them that he was issuing an "Amber Alert" for the two missing victims. *See*, *Disciplinary Counsel v. Parker*, 116 Ohio St.3d 64, 2007-Ohio-5635, ¶41 (Judge abused 9-1-1 system by calling police to respond to a nonemergency). The term "Amber Alert" generally refers to the statewide emergency alert programs regarding abducted children and missing adults who either have a mental impairment or are sixty-five years of age or older. *See*, R.C. §§5502.52(A)[4] and 5502.522. These programs are "a coordinated effort among the governor's office, the department of public safety, the attorney general, law enforcement agencies, the state's public and commercial television and radio broadcasters, and others as deemed necessary by the governor." Even though Emma Ingram was more than 65 years of age, the triggering of the statewide emergency alert program requires a determination by a law

[4] The Governor is also empowered, under R.C. §5502.521, to appoint an AMBER Alert Advisory Committee to "advise the governor, the attorney general, the department of public safety, and law enforcement agencies on an ongoing basis on the implementation, operation, improvement, and evaluation of the statewide emergency alert program created under section 5502.52 of the Revised Code."

enforcement agency that the elderly person's disappearance "poses a credible threat of immediate danger of serious bodily harm or death to the missing individual;"[5] no law enforcement agency made such a determination regarding Emma Ingram in this case.[6]

Additionally, Respondent possessed no actual evidence that Emma Ingram was subject to an "a credible threat of immediate danger of serious bodily harm or death." Rather than relying on evidence to support his conclusions concerning why the witnesses had not appeared, Respondent stated on Thursday November 29, 2007: "I mean, this isn't a case that has to be researched. It's just a case of common sense and Psychology 101, and I am concerned Mozelle Taylor may be trying to manipulate this trial and prevent this 83 year old woman from being here, and I will not permit that to happen under any circumstances whatsoever." (Respondent's Ex. V)

Det. Daugenti testified that it is not unusual for victims of violence to fail to appear to testify against their family members, relatives or acquaintances. Daugenti testified that he did not believe that Ms. Ingram's failure to appear indicated that she was threatened with harm. Ultimately, the evidence presented to the Panel established the lack of any such threat. Although Respondent publicly expressed that he believed Emma Ingram was in danger while in the care of Mozelle Taylor because of Taylor's connection to Robinson, Ingram's son Curtis testified that he had regular contact with his mother, that he knew Mozelle Taylor as his mother's companion and

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[5] Respondent's on-the-record comments fail to make clear the precise reason for his decision to issue an Amber Alert. Although Respondent repeatedly expressed his concerns for the safety of Emma Ingram, he also repeatedly stated that he wanted to find the witnesses to ensure that they would be available to testify against Robinson so that the integrity of the criminal justice process would be protected. An Amber Alert is designed to protect missing persons from harm, not to rectify behavior which is a contempt of court process.

[6] Although R.C. §5502.522(C) provides that the existence of the statewide emergency alert program does not prevent the activation of a local emergency alert program based upon different criteria than specified in the statute, Respondent presented no evidence to establish that he was activating a local emergency alert program which permitted a judge to activate the program.

caregiver and that he believed his mother and Taylor were "playing games" when they decided not to show up in court.

In short, the issuance of an Amber Alert is a law enforcement function, and a judge presiding in a criminal proceeding has no authority to issue an Amber Alert. Respondent violated Canon 2 by misusing the local media's commitment to assisting in the statewide emergency alert program by representing to them that he was issuing an Amber Alert.

{¶62}. Respondent's handling of the Robinson case violated Canon 3(B)(5) because he was clearly prejudiced against Robinson during the course of the proceeding and expressed that prejudice on the record. Even before taking the bench on November 30, 2007, Respondent had clearly decided that, although the trial could not continue, he was going to deny the prosecution's request to dismiss the case without prejudice, and instead grant a mistrial for the sole purpose of keeping Robinson incarcerated until Ingram and Taylor were located and brought to Court to testify against Robinson. Respondent violated Canon 3(B)(5) when he continued to exercise judicial authority in the proceeding (by denying both the prosecution's request that the case be dismissed without prejudice and the defense's motion to dismiss the case with prejudice) even after stating that he could no longer continue to preside in the matter because he had "become an advocate" for the witnesses.

{¶63}. Respondent violated Canon 3(B)(9) by telling Robinson that Respondent would personally see that anyone involved in obstruction of justice would be indicted, convicted and given the maximum sentence; that Respondent was not on the bench to hear from Robinson and that "he would bet his life" that Robinson would ultimately be found to have been involved in kidnapping Emma Ingram. Respondent should have reasonably expected that his comments would impair Robinson's perception of the fairness of the proceedings over which Respondent

was presiding. No reasonable person in Robinson's position would have perceived that he/she was receiving a fair hearing from Respondent. Even if Respondent turns out to have been totally correct in his conclusions about Robinson's involvement in the non-appearance of the prosecution's witnesses, Respondent's "findings" were criminal in nature, and Robinson was entitled to the basic requirements of due process including notice of the charges against him, a presumption of innocence, the opportunity to be heard in response to the charges and the right to confront the witnesses against him. Respondent "impermissibly crossed the line between law enforcement and the judiciary," and his conduct "cast grave doubt on his ability to act as an impartial arbiter." *See, Disciplinary Counsel v. Parker*, 116 Ohio St.3d 64, 2007-Ohio-5635, ¶¶11-12; *see, also, Disciplinary Counsel v. Medley*, 104 Ohio St.3d 251, 2004-Ohio-6402, ¶10 [Judge violated Canons 1, 2, 3(B)(7), and 4, and DR 1-102(A)(5), by improperly assuming the roles of both the prosecutor and defense counsel, as well as that of the court, when he unilaterally negotiated and accepted a plea bargain in the absence of the prosecutor.]

{¶64}. Respondent's on-the-record comments were prejudicial to the administration of justice in violation of Prof. Cond. R. 8.4(d). Respondent's public treatment of Robinson during the course of a criminal proceeding was unfair, unprofessional and undignified, and an objective observer would conclude that Respondent's conduct was unjudicial and prejudicial to the public esteem for the judicial office.

MITIGATION AND AGGRAVATION

{¶65}. Pursuant to BCGD Proc. Reg. 10(B)(1)(g), the Panel finds in aggravation that Respondent refuses to acknowledge that his conduct in this matter violates any of the provisions of the Code of Judicial Conduct. Despite his admission that he misspoke when he stated that he would personally see that anyone involved in obstruction of justice in the Robinson case was

indicted and given the maximum punishment, Respondent otherwise believes that he acted appropriately. *See*, *Disciplinary Counsel v. Kaup*, 102 Ohio St.3d 29, 2004-Ohio-1525, ¶12 ("As an aggravating factor, respondent expresses no regret for his actions and 'insists he did nothing wrong.' Respondent thus refuses 'to acknowledge [the] wrongful nature of [his] conduct.'"). Respondent was clearly proud that he stepped out of his judicial role and became an advocate for the witnesses and the protection of the judicial process. Respondent admitted an absolute lack of confidence in the ability or desire of both the Prosecuting Attorney and the appropriate law enforcement agencies to enforce the law, and seemed to boast that he was the only person able to protect the witnesses in the Robinson case. In his testimony, Respondent directly accused the Prosecuting Attorney of "mailing it in" when Kolasinski asked to dismiss the case without prejudice.

{¶66}. Although Respondent certainly has a right to defend himself against the charges brought by Relator in this matter, his defense was directed primarily at attempting to prove that his conclusions concerning Robinson turned out to be correct, so as to deflect the panel's attention from Respondent's clearly unprofessional and undignified treatment of Robinson.

{¶67}. Respondent also attempted to portray himself as the victim of "persecution" by an overzealous, process-focused disciplinary system that, in his view, cares little for the truth. Respondent testified that he believed his remarks during the Robinson case "received elevated scrutiny" because he had made comments critical of the Office of Disciplinary Counsel while participating in a panel discussion with Disciplinary Counsel Jonathan Coughlin at a conference in May, 2007 (Tr. 162). In response to a question by Relator's counsel as to whether the filing of this case was motivated by "in large part" by those remarks, Respondent stated, "I would not say in large part but I do think that your office's judgment in this case has been influenced by my

criticism of your office at that conference." (Tr. 161). Respondent further testified at the November 11, 2009 hearing: "It's been, you know, just this – this whole prosecution of me, if you will, and some would say persecution of me, I think, is deleterious to the system of justice. Look, I am thoughtful and sensitive enough to know that I have maybe offended some of the tender dignities of the people present in this room. I don't work in the court of appeals or in the cloistered halls of the Supreme Court. I'm a trial court judge at the fiery (sic) line in the front line every day, as Paul Pfeiffer would say, and other judges are alarmed and they're scared. Because, you know, we're all – this really almost isn't about truth anymore. It really isn't about who wins or loses. It's not about truth. It really is about process. And when Disciplinary Counsel uses poor discretion and prosecutes a case like this, I think it's deleterious because it has a chilling effect on the entire judiciary." (Tr. 105) In short, Respondent not only refused to acknowledge the wrongful nature of his conduct but also clearly demonstrated his contempt for the fact that Disciplinary Counsel has called attention to his behavior in this case. He suggests that those "in the cloistered halls of the Supreme Court" could not possibly appreciate what trial court judges face, implying that "the entire judiciary" and "the system of justice" would be harmed if he is found to have committed misconduct as alleged in the Complaint.

{¶68}. Pursuant to BCGD Proc. Reg. 10(B)(2), the panel finds in mitigation: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive;[7] (d) full and free disclosure to disciplinary Board; and (e) character and reputation. The Panel also concludes that Robinson ultimately suffered no actual prejudice from Respondent's misconduct because he ultimately entered a plea of guilty to one count of the indictment resulting in a sentence of two

[7] The Panel concludes that Respondent truly believed that he was protecting the integrity of the criminal justice process and that the public would benefit from his actions. Therefore, the Panel concludes that Respondent did not act with a selfish motive. *See, Disciplinary Counsel v. Runyan*, 108 Ohio St.3d 43, 2006-Ohio-80, ¶18.

years of incarceration, which was a more favorable disposition than the four-year sentence which had been offered to Robinson in plea negotiations while Respondent was presiding over the case.

SANCTION

{¶69}. In determining the appropriate sanction to impose for Respondent's violations of the Code of Judicial Conduct and Rules of Professional Conduct, the Panel must consider the duties violated, respondent's mental state, the injury caused, the existence of aggravating or mitigating circumstances, and applicable precedent. *Disciplinary Counsel v. Parker*, 116 Ohio St.3d 64, 2007-Ohio-5635, ¶56. Relator recommended a suspension for twelve months, all stayed. Because Respondent believes the charges should all be dismissed, he made no recommendation as to a sanction.

{¶70}. Based primarily upon the character evidence presented by Respondent, the Panel concludes that Respondent is normally a fair and even-handed jurist. Although the Panel concludes that this case presents behavior which is an aberration from Respondent's normal judicial behavior, the Panel is unable to dismiss such conduct as being undeserving of some sanction. In reliance on certain language contained in the Preamble[8] to the applicable Code of Judicial Conduct, Respondent's counsel repeatedly argued that not every violation of the Code is deserving of disciplinary action, and that Respondent's conduct in this matter does not warrant a sanction. Although the evidence fails to demonstrate a pattern of improper activity, the Panel

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[8]The Preamble to the applicable Code of Judicial conduct states that the "The Canons and divisions are rules of reason." The Preamble further states:

> The text of the Canons and divisions is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system and for the protection of the public.

disagrees with Respondent's counsel and has concluded that Respondent's misconduct was sufficiently serious to warrant discipline.

{¶71}. In its decision in *Ohio State Bar Assn. v. Goldie*, 119 Ohio St.3d 428, 2008-Ohio-4606, the Court accepted the Board's recommendation of a public reprimand for a judge's failure to comply with the law by flagrantly denying due process to three different criminal defendants. The respondent had been previously publicly reprimanded in her judicial capacity for attempting to preside in a case after she had been removed from the case by judicial order. Id. at ¶2. The Court noted that each of the denials of due process had been corrected on appeal and other mitigating evidence, and stated that since the respondent was no longer serving as a judge, an actual suspension was not required to protect the public. Id. at ¶26.

{¶72}. In its decision in *Disciplinary Counsel v. Runyan*, 108 Ohio St.3d 43, 2006-Ohio-80, the Court publicly reprimanded a judge for violating Canons 2 and 3 of the Code of Judicial Conduct, and DR 1-102(A)(5) by acting outside the scope of his judicial authority in proposing a settlement to a dispute between the prosecuting attorney and a chief of police which arose from a proceeding in which the respondent presided. In determining the appropriate sanction, the Court noted the respondent's lack of a prior disciplinary record, his cooperation in the disciplinary process, the fact that the respondent had apologized for his misconduct and that the respondent truly believed that the public would benefit from his actions as showing that he did not act out of self-interest. Id. at ¶18.

{¶73}. In its decision in *Ohio State Bar Assn. v. Vukelic*, 102 Ohio St.3d 421, 2004-Ohio-3651, the Court approved a Consent to Discipline Agreement in which the respondent agreed to a sanction of a public reprimand for his violation of Canon 3(E)(1) while serving as a part-time magistrate in a mayor's court. Although the respondent realized that the appearance before him

of a client whom he represented in an unrelated matter presented a situation in which his impartiality might be reasonably questioned requiring his disqualification, the respondent failed to immediately transfer the case to another jurisdiction and permitted his client's case to be discussed in his presence. In considering the appropriate sanction, the Court concluded that the panel had found in mitigation that "respondent had no prior disciplinary record, had not acted dishonestly, had cooperated completely in the disciplinary process, and had a reputation for good character in his community." Id. at ¶4.

{¶74}. In its decision in *Disciplinary Counsel v. Ferreri* (1999), 85 Ohio St.3d 649, the Court suspended a judge from the practice of law for eighteen months with the final twelve months stayed for violations of Canons 2, 3(B)(9), 3(C)(1), and 4 based upon statements made to the media on three separate occasions. The panel found that some of the statements contained false and derogatory information and were made with the intention of influencing the public concerning matters before the respondent. The panel further concluded that the respondent "acted without due regard for the impression he left as to the character and reputation of the party against whom he had ruled, the integrity of the court of appeals, the fairness and objectivity of the judicial systm, and his own impartiality and judicial temperament." Id. at 650. The Court stated: "Respondent, like many judges, cares deeply about the area of the law under his jurisdiction. The mitigation evidence introduced in this case is directed to his concern for children, and particularly the welfare of underprivileged children. But strong feelings do not excuse a judge from complying with the judicial canons and the Disciplinary Rules." Id. at 654.

{¶75}. In its decision in *Disciplinary Counsel v. Hoague* (2000), 88 Ohio St.3d 321, the Court suspended a judge for six months, with the entire six months stayed, based upon a

single violation of Canon 2. After the respondent personally observed a motor vehicle being driven recklessly, he discovered the name of the person to whom the vehicle was registered and sent a letter on court letterhead threatening that person with prosecution unless she contacted the court "to discuss [her] involvement in the incident." When the driver of the vehicle appeared at the court, the respondent threatened her with criminal prosecution, told her to "shut your mouth until I'm finished talking," and stated that he would contact the county sheriff's office and make sure they have a "fuller picture of what actually happened." Id. at 322. Although the Court viewed this as an "isolated incident," and the respondent subsequently made a public apology for his misconduct, the Court concluded that the respondent "failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Id. at 324.

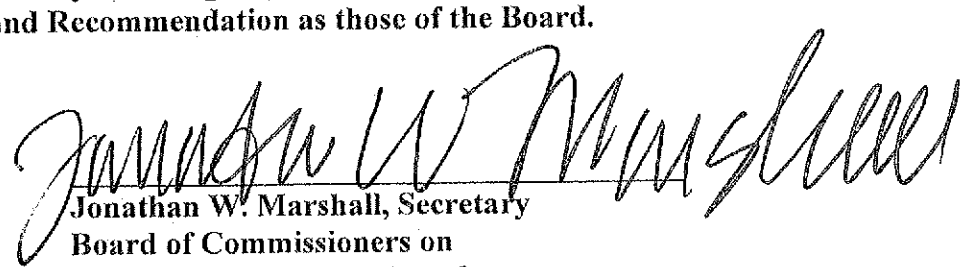
{¶76}. Although Respondent remains in his judicial position, the Panel concludes that, based primarily upon the testimony of Respondent's character witness, the lack of any prior disciplinary record, his state of mind which motivated his actions and the ultimate lack of any actual prejudice to Robinson as a result of Respondent's misconduct, a sanction of a public reprimand is adequate to protect the public from a reoccurrence of this type of behavior. Therefore, the Panel recommends a sanction of a public reprimand and that Respondent be ordered to pay the costs of prosecution in this matter.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Disciple of the Supreme Court of Ohio considered this matter on December 4, 2009. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. The Board , however, amended the panel's sanction based on Respondent's inability to follow a judge's

obligation to decide a matter based on actual evidence in a fair and impartial manner and his refusal to acknowledge his misconduct in making a series of intemperate remarks. The disciplinary sanction must address the damage to the public perception of fairness and the integrity of the judicial process. Therefore, it recommends that the Respondent, Daniel Gaul, be suspended from the practice of law for a period of one year with the entire one year stayed. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.



Jonathan W. Marshall, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio