BEFORE THE BOARD OF PROFESSIONAL CONDUCT OF THE SUPREME COURT OF OHIO

In re:

Complaint against	**Case No. 2021-039**
Hon. Daniel Gaul **Attorney Reg. No. 0009721**	**Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct**
Respondent	
Disciplinary Counsel	
Relator	

OVERVIEW

{¶1} This matter was heard on September 27, 2022 before a panel consisting of Peggy J. Schmitz, Hon. D. Christopher Cook, and Hon. Rocky A. Coss, panel 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 pursuant to Gov. Bar R. V, Section 11.

{¶2} Respondent was present at the hearing and represented by Monica A. Sansalone, Shane A. Lawson, and Robert V. Housel.[1] Joseph M. Caligiuri and Matthew A. Kanai appeared on behalf of Relator.

{¶3} This case involves the conduct of Respondent in eight cases over which he presided as a judge of the Common Pleas Court of Cuyahoga County during a period of five years, including seven criminal cases and a civil stalking protection order case. Relator charged Respondent in the first amended complaint with a total of 27 violations of the Code of Judicial Conduct and four violations of Prof. Cond. R. 8.4(d). Respondent denied committing any violations in his answer and did not stipulate to any violations prior to the hearing. However, in his post-hearing closing

[1] Housel filed a motion for leave to withdraw as counsel on October 4, 2022. The panel chair granted leave to withdraw by order dated October 5, 2022.

brief, he stipulated to ten violations alleged in five of the eight counts in the first amended complaint.

{¶4} Based upon the parties' stipulations and evidence presented at the hearing, the panel finds, by clear and convincing evidence, that Respondent engaged in professional misconduct, as outlined below. Upon consideration of the applicable aggravating and mitigating factors and case precedents, the panel recommends that Respondent be suspended from the practice of law for one year.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} Respondent was admitted to the practice of law in Ohio on November 6, 1981 and is subject to the Rules of Professional Conduct, Rules for the Government of the Bar of Ohio, Code of Judicial Conduct, and Rules for the Government of the Judiciary of Ohio.

{¶6} At all times relevant to this case, Respondent was serving as judge of the Common Pleas Court of Cuyahoga County. He has served on that bench since 1991 and is currently the court's longest serving judge.

{¶7} On October 7, 2010, the Supreme Court suspended Respondent from the practice of law for six months with the suspension stayed on conditions. *Disciplinary Counsel v. Gaul*, 127 Ohio St.3d 16, 2010-Ohio-4831.

Count I—Heard Matter

{¶8} On December 11, 2015, a Cuyahoga County grand jury indicted Carleton Heard on charges of attempted murder, felonious assault, aggravated robbery, robbery, carrying concealed weapons, and having weapons while under disability. *State v. Heard*, Cuyahoga County Common Pleas Court, Case No. CR-15-601703-A. At the time of the indictment, Heard was on probation

before Respondent for carrying a concealed weapon. *State v. Heard*, Cuyahoga County Common Pleas Court, Case No. CR-14-587295.

{¶9} Michael Cheselka was appointed to represent Heard in both cases.

{¶10} On August 15, 2016, the parties appeared for trial before Respondent.

{¶11} Cheselka requested a continuance, which would have been a fourth continuance of the trial date, claiming that Heard had just told Cheselka that he had been covering for the actual shooter.

{¶12} Cheselka claimed that Heard had provided the shooter's name which Cheselka disclosed to the prosecutor. Cheselka requested the continuance to investigate this new, alternate theory of the case. The prosecutor objected to any continuance because the case had been pending since December 3, 2015, and the prosecutor was concerned that "any delay in this case will just allow these witnesses to be approached or spoken to or attempted to be deterred from coming to court."

{¶13} Respondent told Heard that it did not make sense that he would wait so long to offer the name of the real shooter and that Heard was only doing it to get another continuance. Respondent then denied Heard's request stating, "It's not going to happen. * * * If we don't plead the case, we're going to trial right now." Stip. 13.

{¶14} Respondent also stated:

> So in terms of a plea bargain, we've discussed this in chambers, you haven't authorized your attorney to request a plea bargain. But after reviewing the file, the Court made this conclusion, that it is not necessary for the prosecutors to take the case down for a mark, because it's very unlikely that they would offer you anything but a Fl with a 3-year gun spec, or perhaps an F2 with 1-year gun spec, which the Court would reject, because I think if you plead out to a case like this, you need to do somewhere between 13 and 15 years in the State penal institution.
>
> Stip. 14.

{¶15} Respondent told Heard that if he took the case to trial and was convicted, he would "get at least double, perhaps triple or more time. * * * And this Court, given your record, will run the record [sentences] consecutively." This could result in a sentence of up to 42 years on the upper end. Stip. 15.

{¶16} Respondent then stated:

> What I'm suggesting is that you can plead no contest to the indictment and the Court will sentence you. My only promise is I won't consecutively sentence you. If you no contest the indictment, I will sentence you on a concurrent period of incarceration, but you're looking at approximately 14 years in the state penal institution, 3 for the gun and 11 years on the underlying offense, and I would run the other time concurrent.
>
> If you take the case to trial and are convicted, you will do multiples of 14 years, because if you're convicted of these charges, that's what you deserve. You deserve to spend what could be the rest of your life in the state penal institution.
>
> Stip. 16.

{¶17} Respondent reminded Heard that the case would not be continued and that if Heard refused to plead guilty, the trial would begin immediately. At this point, there had already been 12 pretrials and three continued trial dates. Respondent asked Heard what he wanted to do. Stip. 17.

{¶18} Heard asked Respondent, "If I cop out to that, I'm getting over 10 years, regardless?" Respondent replied, "If you cop out today, you're going to do 14 years." Heard told Respondent that he wanted to go to trial, but his mother who was in the courtroom said, "No." Stip. 18-19.

{¶19} Heard's family members, who were in the courtroom, urged Heard to take Respondent's deal. Heard's mother also asked to speak with her son off the record, which Respondent allowed.

{¶20} At one point, Respondent stated, "I don't know what happened, they may have arrested the wrong six-foot-five-inch guy,[2] maybe the victim was confused. Who knows? Maybe the dog ate your homework, right? Anything is possible in today's world." Stip. 21.

{¶21} Respondent then told Heard and his family a story about two "knuckleheads" who took their case to trial after they rejected a similar plea deal that Respondent offered to them. Respondent said that the two "knuckleheads" were found guilty and "both got sentenced to 78 years [in prison]." Stip. 22-23.

{¶22} Heard then asked Respondent whether Heard would be allowed to see his daughter if he pleaded guilty. Respondent replied:

> Let me explain something to you, my friend. I got a daughter, you got a daughter, and I guess the victim, they had a family, too. You weren't thinking about family members when you allegedly did this stuff, so don't be crying crocodile tears with me over your daughter. * * * One thing you have to understand, a guilty plea is a complete admission of your guilt. You accept responsibility for what you did. It's not, "I'm pleading guilty because the man made me do it." That's just the way it is. Why should we care more about your family than the victim's family? * * * What is it you would you like to do? Mr. Heard, for a guy with your criminal record, and for a guy who's been in jail so long, I'm surprised to see you so emotional.
>
> Stip. 24.

{¶23} Heard replied, "I didn't do it." The following exchange then occurred:

> Respondent: You have a beautiful suit on, you can sit there and maybe the jury will think you're a great guy and you're not guilty. * * * We're either going to bring a jury up now and try this case or you're going to enter a plea. * * * The jury is on its way. If they walk into this room, my deal with you is off.
>
> Heard: I'll take it.
>
> Stip.25.

[2] Upon learning the identity of the alleged shooter, the prosecutor immediately obtained the alleged shooter's criminal history and learned he was 5'6" tall. Heard was 6'5" tall.

{¶24} The record reflects that neither the prosecutor nor defense counsel participated in the discussion of the terms of the plea offer. Respondent informed Heard of the terms and suggested that he would enter a plea no contest to all charges.

{¶25} After Heard accepted the plea deal, the prosecutor outlined the counts charged in the indictment and the penalties associated with each count. Respondent told Heard that if he pleaded, he would be sentenced to 14 years in prison, with credit for time served, and would be subject to five years mandatory post-release control. Heard pleaded no contest to each count of the indictment. Stip. 26-28.

{¶26} During the sentencing hearing, Respondent said to Heard:

> There are decent people who try to live over in Outhwaite, I know some of them. * * * And people like you make it nearly impossible. Here this gentleman that was shot had no record whatsoever, he had a job, he just purchased a new car. He was a young person that was securing his portion of the American dream, okay, and because he dated a woman in Outhwaite, his black life didn't matter to you, did it? And your black life didn't matter to you, did it? * * * Then you come into court crying like a little boy after all this time in jail. There are just some things you never understand. And look at all the pain you put your mother through, and look at all the sorrow you're going to put your baby's mama through.
>
> Stip.29.

{¶27} Respondent continued:

> Respondent: And your child is going to grow up, and I'm going to speculate now, just like you did, without a dad. Did you have a father?
>
> Heard: No.
>
> Respondent: No, of course not. But none of us are permitted to talk about the 70 percent of kids born in the city of Cleveland that don't have a mother and father, born out of wedlock. We're not allowed to talk about that, because what I know is, a child of poverty eventually becomes an adult of poverty, and then people like you are hopeless and don't have any stake in the system, and they go out and do stuff like this. But that's a debate for another day.
>
> Stip. 30.

{¶28} Respondent sentenced Heard to 14 years in prison. Respondent also terminated Heard's probation in case number CR-14-587295. In September 2016, Heard filed an appeal with the Eighth District Court of Appeals, alleging that Respondent coerced the plea and, therefore, it was not voluntary. *State v. Heard*, Eighth Appellate District Court of Appeals, Case No. CA-16-104952. Stip. 31-32.

{¶29} The appellate court agreed with Heard, stating, "there is no question that the judge's participation in the plea process could have led Heard to believe he could not get a fair trial or fair sentence after trial." Stip. 33, Joint Ex. 13, ¶19. Further, the appellate court held that Respondent "more than 'actively participated' in the plea process; he created and presented the offer." Stip. 34, Joint Ex. 13, ¶190. The appellate court also found that Respondent totally failed to comply with Crim. R. 11(C) by not explaining the no contest plea consequences to Heard. Joint Ex. 13, ¶31.

{¶30} Accordingly, the court of appeals vacated the no contest plea and the judgment was reversed and remanded, with instructions that the administrative judge assign the case to a different trial judge. Upon remand, Heard's case was assigned to Judge John J. Russo and tried before a jury on July 20, 2018. Heard was acquitted of all charges. Heard was released from custody after serving almost two years of the 14-year sentence imposed by Respondent. Stip. 35-38.

{¶31} During his testimony, Respondent stated that he accepted the decision of the court of appeals and admitted that he had gone too far. Hearing Tr. 40. However, he denied that he had abandoned his role as an impartial jurist and denied that he had committed any violations of the Code of Judicial Conduct or the Code of Professional Responsibility.

{¶32} Respondent admitted that he had failed to comply with Crim R. 11(C) in that he had not advised him of the consequences of a no contest plea. He testified that the reason for this

was "* * * because it was my understanding that he was going to enter a guilty plea, and I didn't under- -- I didn't appreciate that it was going to be a no contest plea until the very last moment." Hearing Tr. 40. However, this is directly contradictory to the stipulations and the hearing transcript as it was Respondent himself who suggested the no contest plea, not counsel.

{¶33} Respondent testified that he was trying to get the case resolved one way or the other but denied that he had coerced the plea to avoid trial. However, when asked to explain why since he had prospective jurors waiting outside the courtroom and all parties were present, he did not commence the trial, he indicated that he wanted Heard to be fully informed of the consequences of a trial if he was convicted. However, the tone of the statements of Respondent to Heard and their effect resulted in a plea that was coerced as determined by the appellate court and as is apparent in the evidence before the panel. 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.

{¶34} 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." "[A] defendant is guaranteed the right to a trial and should never be punished for exercising that right or for refusing to enter a plea agreement * * *." *State v. O'Dell*, (1989) 45 Ohio St.3d 140.

{¶35} 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. During his testimony, Respondent testified that "his black life didn't matter to you, did it?" statement was "a commentary on black-on-black crime" Hearing Tr. 38. However, the record

reflects no evidence that the race of the victim or of Heard was an issue or relevant to the proceeding.

{¶36} The conduct of Respondent during the hearing does not promote public confidence in the integrity and impartiality of the judiciary and not only created the appearance of impropriety but was clearly improper. 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. By coercing a guilty plea, he failed to uphold and apply the law. Respondent conceded in his closing brief that he had violated Jud. Cond. R. 1.2, 2.6(B), and 2.8(B) as alleged in Count I of the first amended complaint.

{¶37} Therefore, based upon the parties' stipulations and the evidence presented at the hearing, the panel finds by clear and convincing evidence, that as to Count I of the first amended complaint, Respondent committed the following violations of the Code of Judicial Conduct and the Rules of Professional Conduct:

- *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];
- *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. 2.11(A)* [A judge shall disqualify himself in any proceeding in which the judge's impartiality might reasonably be questioned];
- *Jud. Cond. R. 2.6(B)* [A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement];
- *Jud. Cond. R. 2.8(B)* [A judge shall be patient,, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, officials, and others with whom the judge deals in an official capacity]; and
- *Prof. Cond. R. 8.4(d)* [Conduct prejudicial to the administration of justice].

Count II—W.S. Matter[3]

{¶38} In May 2016, a Cuyahoga County grand jury indicted W.S. on one count of felonious assault, a second-degree felony, resulting from an altercation he had with J.C. on or about April 3, 2016. *State v. W.S.*, Cuyahoga County Common Pleas Court, Case No. CR-16-60XXXX-X.

{¶39} In December 2016, Respondent presided over a two-day bench trial. On the first day of trial, after J.C. testified, Respondent asked J.C. 15 questions, many of which focused on specific details regarding the April 2016 altercation between W.S. and J.C. Respondent also questioned J.C. about the circumstances surrounding a prior fight between J.C. and W.S. that happened when the two were in eighth grade. Stip. 40-42.

{¶40} After W.S. testified, Respondent asked W.S. approximately 85 questions on a variety of matters, including prior convictions, juvenile charges, and a misdemeanor plea agreement as follows:[4]

Respondent: Let me ask you a question. Take the stand again, if you would be so kind. So how many people were on the party- bus?

W.S.: Around 10, 12, maybe.

Respondent: Male or female?

W.S.: Male and female.

Respondent: A keg of beer on the party bus?

W.S.: Yes.

[Defense Counsel]: I'm sorry, I didn't hear the question.

Respondent: A keg of beer.

---

[3] The criminal case in this count has been sealed. Therefore, the defendant is identified as "W.S."

[4] The transcripts of the trial (Joint Ex. 20) and the sentencing hearing (Joint Ex. 22) were submitted under seal. Therefore, the quotes from the transcript are as set forth in the stipulations of the parties as noted.

W.S.: Oh, keg of beer, I thought you said, like, beer on the bus. No.

Respondent: Was there a keg of beer on the party bus?

W.S.: There was no keg of beer on the party bus.

Respondent: Plenty of alcohol, right?

W.S.: There was alcohol on the bus.

Respondent: And you were doing shots too, right?

W.S.: Yeah, I guess. I guess you could say they were doing shots. I didn't drink until we got to the club.

Respondent: Let's talk about that. Now, you're the guy that likes to go out and party, because you got two DUIs, right?

W.S.: Yes, I have two DUIs.

Respondent: The party bus, let's talk about this party bus. What was the name of the limousine company?

W.S.: I couldn't tell you.

Respondent: Who arranged for the limousine?

W.S.: I'm pretty sure Dominic or his mother.

Respondent: And you said it was $50 a head to get on?

W.S.: Yeah, like 50 bucks a person.

Respondent: Why would you pay $50 a person if you're not going to be partying your keister off?

W.S.: I mean, I'm sure it was like – it was for the majority of, like, everybody on there, make sure nobody were to get any DUIs or anything.

Respondent: No, but what I'm saying, if someone says to me, [h]ey, Judge, you don't want to drink and you're not really a drinker, because it interferes with your workout, but we're going to be on a party bus and it's $50 a person, come and join, I'd say, [h]ey, I don't want to do that because I don't drink that much. And if I only have two beers, like you said you had two beers the whole evening, we're

going to talk more about that later, that comes down to $25 a drink, doesn't it?

W.S.: It does, yes, I guess.

Respondent: Let's back up. When did you get on the party bus, and where did you get on the party bus?

W.S.: We got on the party bus from our house.

Respondent: From our house.

W.S.: Dominic was living with me at the time, we were roommates.

Respondent: Dominic was living with you at the time?

W.S.: Yes.

Respondent: You were roommates?

W.S.: Yes.

Respondent: So the party bus showed up at your house?

W.S.: Yes.

Respondent: What time of day was that?

W.S.: Probably 11:00.

Respondent: 11 p.m.?

W.S.: 11 p.m., yes.

Respondent: Isn't that a little bit late to go out partying?

W.S.: No, because downtown, like, people usually go out around 11 or 12:00.

Respondent: So you're going to go close the bar?

W.S.: Yes.

Respondent: You pay 50 bucks to get on the party bus –

W.S.: It could have been 10:00, 10 to 11:00, right around there.

Respondent: 50 bucks to get on the party bus. How many other people are on the party bus with you?

W.S.: Right, ten or twelve people.

Respondent: You all paid 50 bucks and you're telling me that between 10 p.m. and 2 a.m. you had two beers?

W.S.: I'm saying on the party bus I maybe had one or two, but once we got to the club I wasn't drinking that much. I think I was arguing with my girlfriend. Whatever caused it that night, for whatever reason it was, I was not drinking that much.

Respondent: So you might say you wasted your money.

W.S.: You could say that. I mean, I still –

Respondent: Why have a party bus if you're not going to party?

W.S.: Yeah.

Respondent: Right?

W.S.: Yes.

Respondent: Arguing with your girlfriend?

W.S.: Yeah, we got – whatever it was. I think she was upset because there was some other girl there that I talked to in the past.

Respondent: Do you argue with a lot of people?

W.S.: No. I would say I've been pretty well liked.

Respondent: You say fights were a common occurrence when you were in grade school.

W.S.: I didn't say fights were common.

Respondent: You said a hundred percent of the time. The question was, [d]o people get involved in fights in elementary school, and your answer was, [y]eah, a hundred percent of the time. What did you mean by that?

W.S.: Kids do fight when they're in grade school. * * * I went to

Cleveland schools, I've witnessed kids fight in sixth grade.

Respondent: So a hundred percent of your friends have been involved in fights; is that what you're saying to me?

W.S.: No, I'm saying that kids get into fights in grade school.

* * *

Respondent: How many fights have you been involved in?

W.S.: I've been involved in a couple fights.

* * *

Respondent: What's a couple, so we're clear?

W.S.: Maybe five. I don't know.

Respondent: Five fights. How old are you?

W.S.: 23.

Respondent: Five fights. I'm 63, I don't think I've been involved in more than two physical fights in my entire life. Five fights by age 23. When was the first fight?

W.S.: I fought with my cousins growing up a lot.

* * *

Respondent: How many times did you fight with your cousins? * * * I mean, you know, if you had to estimate how many times you fought with your cousins, what would you say?

W.S.: * * * I couldn't tell you.

Respondent: I mean, less than a dozen?

W.S.: Less than a dozen, yes. * * *

Respondent: Okay, but how many times would you fight with your cousins?

W.S.: * * * I would say just as much as anybody else who fights with their cousins.

Respondent: I don't fight with my cousins, so I can't tell you.

{¶41} Respondent also asked W.S. about his involvement in juvenile court:

Respondent: Let me ask you a question. Were you involved in juvenile court for assaultive behavior?

W.S.: No.

Respondent: You were not?

W.S.: No, not that I can think back.

Respondent: Had you been in juvenile court?

W.S.: I went to juvenile court when I was – I stole from the mall when I was 15 years old and, like, I made a poor decision to try to run away from the security guard and I got tackled, but I –

Respondent: In fact, if I am not mistaken, you were charged with robbery, correct?

W.S.: Yeah, I stole clothes from the mall.

Respondent: And when you were confronted by security – * * * – you assaulted the security officer?

W.S.: I did not assault the security officer.

Respondent: You were charged with it in juvenile court. That was the fourth count of your indictment charging you with robbery, attempting to inflict physical harm during or fleeing after a theft or felony.

[Defense Counsel]: Excuse me, Your Honor. I respectfully must object to this line of questioning.

Respondent: I'm just – he opened the door.

Stip. 46.

{¶42} During his testimony, W.S. mentioned that he and his girlfriend got into a fight before the incident with J.C. When Respondent asked W.S. where he was when he first saw J.C. that night, the topic came up again.

W.S.: We were going back over to [the bar] to go pick up my girlfriend.

Respondent: The one that you had the fight with?

W.S.: Yes.

Respondent: Your fight with your girlfriend, did that involve throwing any punches?

W.S.: Absolutely not. It wasn't a physical fight.

Stip. 47.

{¶43} During the trial, Respondent also questioned W.S. about other topics as follows:

Respondent: Where do you live?

W.S.: I stay on 104th and Madison.

Respondent: With whom?

W.S.: My mom and my dad.

* * *

Respondent: Have you fought with your father?

W.S.: No.

Respondent: Have you fought with your mother?

W.S.: No.

Respondent: Have you been involved in AA, CA, or NA –

W.S.: No.

Respondent: – when you were convicted for driving under the influence of alcohol?

W.S.: No, I got a year of inactive probation.

Respondent: Did you at that point stop drinking?

W.S.: I would say I didn't drink for a while, yes. I was locked up for about two, two-and-a-half months after I got the DUI, because I

was going to court for something else.

Respondent: What was that?

W.S.: I was going to court for a felony in Pennsylvania and ended up, me and my lawyer ended up doing a plea out from a felony to a misdemeanor.

Respondent: What was the original charge?

W.S.: Sexual imposition.

Respondent: Did you do time in a local penal institution?

W.S.: What's that mean?

Respondent: County jail.

W.S.: No, –

* * *

Respondent: Who was the alleged victim in that case?

W.S.: I couldn't tell you her name. I was at a [sic] Edinboro football camp and we were out there, we were drinking and-

Respondent: I thought you told me you quit drinking.

W.S.: This is when I was 19 * * * this is high school.

* * *

Respondent: The alleged victim, do you know her name?

W.S.: I have no idea what her name is.

Respondent: Did she raise allegations that you were violent?

W.S.: No.

Respondent: Did she raise allegations that you forced her?

W.S.: Yes.

[Defense Counsel]: Your Honor, I respectfully must object.

Respondent: I'll sustain your objection * * *.

Stip.48.

{¶44} After a second objection by defense counsel, Respondent stopped his questioning.

{¶45} Respondent found W.S. guilty. Relative to sentencing, Respondent stated:

> And I'm going to tell you right now * * * the issues you have with me are your behavior. I'm going to look at your record in totality from the time you were a juvenile until the time you're sentenced in my courtroom. * * * What you better understand is there's a pattern, I'm seeing a pattern there; I'm seeing you act out often when you use alcohol. * * * You better demonstrate to the court that you are a person that does not have to go to a state penal institution. But if there's any further incidences like this, you will be doing just that, you can go to a place where you can fight all day every day.

Stip.50.

{¶46} Respondent sentenced W.S. to four years of community control. Stip. 51.

{¶47} In 2019,[5] W.S. appealed his conviction in the Eighth District Court of Appeals, alleging that the trial court abused its discretion by considering inadmissible and prejudicial evidence and questioning him in a confrontational manner. *State v. W.S.*, Eighth District Court of Appeals, Case No. CA-17-10XXXX. W.S. also alleged that his felonious assault conviction was based on insufficient evidence. In its decision, the appellate court stated: "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."

{¶48} The trial attorney for W.S., Gary Levine, testified that questions the Respondent asked were clearly objectionable but he was in an awkward situation. Hearing Tr. 181. He further

[5] W.S. filed a notice of appeal on February 10, 2017; however, it was dismissed for failure to file a brief. W.S. filed an application to reopen the appeal on January 17, 2019. In a January 28, 2019 journal entry, the court considered the application to reopen as an application for reconsideration and vacated the dismissal of the appeal and reinstated the appeal to active status.

testified: "In - - in that particular instance, yes. I just thought his inquiries, while lawful under the rules, elicited inadmissible evidence." Hearing Tr. 183.

{¶49} In his testimony, Respondent attempted to minimize the impact of the questioning. During cross examination, he testified: "I think that there may have been one instance of an inadmissible question or two." Hearing Tr. 54. 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. During Respondent's questioning of W.S., his counsel objected twice. The first time, Respondent impliedly overruled the objection by his comment : "I'm just – he opened the door." Stip. 46. Respondent continued asking more questions. Only after the second objection by counsel for W.S., which was sustained, did Respondent cease his questioning. Stip. 48.

{¶50} In his closing brief, Respondent argues that his questioning of W.S. was a good faith legal error that does not rise to the level of a disciplinary violation. 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. It was not as Respondent claimed, "an instance of an inadmissible question or two." 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. The panel finds Respondent's conduct far exceeds the "good faith legal error" description and was so patently improper that it justified disciplinary charges.

{¶51} The appellate court vacated W.S.'s conviction and sentence and ordered the case returned to the administrative judge for reassignment. On remand, W.S. entered a plea to assault, a first-degree misdemeanor. Judge William McGinty sentenced W.S. to time served and ordered $3,500 in restitution to J.C. Stip. 54.

{¶52} Therefore, based upon the parties' stipulations and the evidence presented at the hearing, the panel finds by clear and convincing evidence, that as to Count II of the first amended complaint, Respondent violated the following provisions of the Code of Judicial and the Rules of Professional Conduct:

- *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];
- *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. 2.11(A)(1)* [A judge shall disqualify himself in any proceeding in which the judge's impartiality might reasonably be questioned]; and
- *Prof. Cond. R. 8.4(d)* [Conduct prejudicial to the administration of justice].

Count III—Callahan Matter

{¶53} On or about June 14, 2016, a Cuyahoga County grand jury indicted Demagio Callahan on the following offenses stemming from a shooting in which one person was killed and several others injured *(State v. Callahan*, Cuyahoga County Common Pleas Court, Case No. CR-16-606391-A):

- Aggravated murder, an unclassified felony;
- Murder, an unclassified felony;
- Six counts of felonious assault, a second-degree felony;
- Three counts of attempted murder, a first-degree felony;
- Two counts of discharge of firearm on or near prohibited premises, a first-degree felony;
- Two counts of improperly discharging into a habitation, a second-degree felony;
- Two counts of having weapons under disability, a third-degree felony; and,

➢ Receiving stolen property, a fourth-degree felony.

Stip. 55.

{¶54} Callahan elected to have the two counts of having weapons under disability tried before Respondent. The remaining 16 counts were tried before a jury. On September 22, 2017, a jury found Callahan guilty of one count of receiving stolen property, a fourth-degree felony. The jury acquitted Callahan on the other 15 counts. Respondent found Callahan guilty of the two counts of having weapons under disability. Stip. 56-59.

{¶55} On October 5, 2017, Callahan appeared for sentencing before Respondent. During that hearing the following statements were made:

> Respondent: You know how I deal. You know I've had a relationship with this young man, a professional. I mean, he's been before my court. I know this kid. He's not a kid. Demagio Callahan, I remember the case because he's got an Italian first name and an Irish last name, and he's a brother. So it's just different. Just a little thing. I remember the guy very well, and I remember Demagio because Demagio, I think you recall my comments to you by being such a lucky guy.
>
> Callahan: Yes, your Honor.
>
> Respondent: Because I handled that case where you shot the dude. Quick Draw, Quick Draw Demagio Callahan. You're in a car, according to what you told me, selling drugs, and a guy comes up, passenger window, to rob you. And you somehow were able to quick draw him and shoot him. Got indicted for it, right? But beat the rap, pled to something else, right?
>
> Callahan: Yes, your Honor.
>
> Respondent: Lucky man. Lucky man. If I was standing at the window of a car with a gun on you, you wouldn't have quick drawn me. I would have busted a cap in you, but you were lucky that day * * *.
>
> * * *
>
> Respondent: The whole story is you got away with murder. As far as I'm concerned, you're a murderer. Had I decided those counts, I would

have convicted you in a heartbeat.

* * *

Respondent: And it's almost like these video games, and I would cite this one case, and I would cite the other case I just referenced, the murder case I just referenced as a case that I think was influenced by violent video games, that these young people, who have now set behind the console and for years have shot people in videos, have become so desensitized that it's not that much of a joke to do the real thing, because, in your case, what you were found not guilty of, which I would have found you guilty of, is opening up on a group of people with an AK-47, shooting down the freaking street. Shooting down the freaking street. Shoot this house, shoot that house, shoot this guy, shoot that girl. We saw the ballistics. We saw that. That car was completely shot up.

You didn't know who you were shooting at, right?

And this is what -- this is like, you know what, it's not enough to have 47 guns in the hotel. Let's go see if they work. Let's go shoot it out the window at 2000 people.[6] You're not too far from that. You're not too far from that.

You opened up, as far as I'm concerned, a semiautomatic weapon that may have been fully automated, on a group of people on a public street. That's what you did as far as I'm concerned.

So, and I suppose at some point, you know, if little Rocket Man and the President don't bring the curtain down on us all, we'll find out sometime in the future what we all already know, and that is that violence, video games, that the inundation of children in our country, who are latchkey kids, who sit behind these consoles and learn everything about automatic weapons and explosive devices, how to load them, how many shots they fire, what caliber -- you get extra points for raping the woman or shooting the police officer -- that's not good.

We're going to find out that that's not good, right? Now, we'll wait maybe 25, 35, 50 years like we had with smoking causes. Does smoking cause cancer? Of course, it does. We know smoking causes cancer.

I know I'm getting a little far-afield, but the point is, as far as I'm

[6] Respondent was referring to the October 1, 2017 Las Vegas mass shooting in which Stephen Paddock fired over 1,000 rounds from his hotel room into a crowd of people, killing 60 and injuring over 800.

> concerned, you're a remorseless predator, who deserves every day I can possibly give you.
>
> I don't take pride in putting people in prison, but I do take pride in taking you off the street for as long as I possibly can. You're the luckiest guy in the world you're not doing life in prison without the possibility of parole.
>
> It's a shame that if you appeal this they can't reverse the whole thing and send it back for sentencing again, right? So it's obvious what I'm going to do to you right now, which is max consecutive on everything * * *.
>
> Stip. 61.

{¶56} Respondent sentenced Callahan to 36 months on the receiving stolen property charge, and 18 months on the two having weapons under disability charges. Respondent ordered that the two sentences run consecutively. Stip. 62.

{¶57} Respondent then stated that he was fining Callahan as a penalty to prevent people from putting money in Callahan's prison account:

> He is also -- Demagio, I don't usually do this for guys sent to the institution on consecutive sentences, but in your case, I don't want you having people putting money on your books, so we're going to fine you -- the weapons disability is an F3. You're fined $10,000. On the RSP, it's an F5. You're fined $2500. You're also ordered to pay your court costs.
>
> Stip. 63.

{¶58} Callahan appealed Respondent's finding that Callahan possessed a weapon under disability. Callahan alleged that Respondent's finding of guilt on that charge was inconsistent with the jury's acquittal. The court of appeals affirmed Callahan's conviction. *State v. Callahan*, 8th Dist. Cuyahoga No. 106445, 2018-Ohio-3590. Stip. 64.

{¶59} During his cross-examination by Relator in its case in chief, Respondent was asked if "calling an African-American defendant a brother could have an inappropriate racial tone to it." He replied: "It may have. And it was an unfortunate use of the word at that time, which I admitted

in 2017." Hearing Tr. 60. When asked if it was undignified and inappropriate, Respondent answer was "Yes, it can be interpreted that way," but in answer to a later question, said "not necessarily." Hearing Tr. 61-62.

{¶60} Respondent further testified: "And I was very upset because the sentencing was taking place right after Stephen Paddock's murdered all these people. And I had to deal with Demagio Callahan involved in a very similar situation, shooting an assault rifle down a public highway." Hearing Tr. 386).

{¶61} During his questioning by a panel member, Respondent was asked, "But you said, "I blew it with Demagio Callahan." "What did you mean by--what did you mean?" Respondent answered: "

> What I meant by that is I -- I became emotional. And I used language that was unfortunate; some would say inappropriate. And -- and I -- and I do recognize the importance of a judge to always act with discretion and dignity. And I didn't think I met that standard. I think I dropped the ball. I'm a human being. I don't want to be held, and I don't think it's appropriate to hold judges, to the impossible standard of perfection. I have handled the 41,000 case that we have talked about. I have been on the record in chambers or in the trial probably a quarter of a million times.
>
> Hearing Tr. 387.

{¶62} 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.

{¶63} 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. Respondent's conduct clearly does not promote the public's confidence in the integrity and impartiality of the

judiciary. Respondent conceded in his closing brief that he had committed all violations alleged in Count III of the first amended complaint.

{¶64} Therefore, based upon the parties' stipulations and the evidence presented at the hearing, the panel finds by clear and convincing evidence, that as to Count III of the first amended complaint, Respondent committed violations of the Code of Judicial Conduct and the Rules of Professional Conduct as follows:

- *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];
- *Jud. Cond. R. 2.3(B)* [A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice];
- *Jud. Cond. R. 2.11(A)(1)* [a judge shall disqualify himself in any proceeding in which the judge's impartiality might reasonably be questioned]; and
- *Jud. Cond. R. 2.8(B)* [A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, officials, and others with whom the judge deals in an official capacity.]

Count IV—Collins Matter

{¶65} On August 10, 2020, Tinesha Chapman ("Chapman") filed a petition for a civil stalking protection order ("CSPO") against Natasha Collins ("Collins"). *Chapman v. Collins*, Cuyahoga County Court of Common Pleas, Case No. CV-20-935752. Chapman and her estranged husband, Michael Chapman ("Michael"), had two children together and were going through a divorce. Michael and Collins had been in a romantic relationship for about two years.

{¶66} On August 20, 2020, Respondent presided over the CSPO hearing. Chapman appeared *pro se*, while Collins appeared with her lawyer, Dominic Vitantonio. Stip. 65-68.

{¶67} In the CSPO petition, Chapman alleged that Collins harassed Chapman when Collins accompanied Michael to Chapman's house to pick up or drop off the children. During the hearing, Chapman referred to Collins as her husband's "mistress." After hearing from Chapman, Respondent asked Vitantonio if he or Collins wished to be heard. Vitantonio stated that Chapman

did not meet the evidentiary burden of proof that is required to obtain a protection order for menacing by stalking. Stip. 69-70.

{¶68} Before ruling, Respondent addressed both Collins and Michael Chapman as follows:

> Respondent: So before I make this, you know, important judicial determination, let me just back up for a minute, and let me hopefully impart a little wisdom to you two women. Okay?
>
> What can we objectively view here? Well, we can objectively view that both of you have had or are in a relationship with a guy who hasn't been very honest, that has cheated on you, and used you to cheat on her.
>
> So what that holds for you in the future, Ms. Respondent, you might want to consider.
>
> You also are involved with an individual who, as far as I'm concerned, lacks any degree of common sense whatsoever. Why? Because he brings her over to your house. He uses you to screw with her.
>
> You ought to have enough common sense to say, hey, look – what's his first name?
>
> Chapman: Michael.
>
> Respondent: Hey, Michael, I don't want to be a pawn in your game with your soon to be ex-wife. I don't want to traumatize the children. I don't want to be around your former wife. That's not cool. We know that. Anybody knows that. Instead of getting in the car, go over there, roll your eyes, flip your hair, tell her to fuck herself, tell her you're going to fuck her up.
>
> * * *
>
> Respondent: There is no doubt in my mind that the mediator told what's his name back there, hey, don't bring the mistress over to your wife's house causing a problem. What does he do? He ignores it. Is he a police officer?
>
> Chapman: He's a sergeant.

Respondent: Is he a police officer?

Vitantonio: He is, your Honor, yes.

Respondent: Is that the kind of judgment that we need on the Cleveland Police Department?

* * *

Respondent: He's the reason we're here, ladies. You're both being manipulated by this guy. I have been divorced. I know how it works. I had kids. I paid child support. I didn't necessarily get along with her. I certainly didn't drive my mistress over to my ex-wife's house so she could roll her eyes and flip her hair. Makes no sense.

Stip. 71.

{¶69} On five occasions, Respondent referred to Collins as the "mistress." At one point, Respondent referred to Michael as "Mr. Know It All" stating, "Because you know, Mr. Know It All back there, sergeant in the police department, are [sic] going to bring the mistress to the ex-wife's house, soon to be ex-wife's house." Stip. 72-73.

{¶70} Respondent ruled against Chapman and did not issue the CSPO, and then had the following exchange with the Petitioner:

Respondent: I want you to understand that I'm not happy with your behavior, and I want you to understand that I do believe that you are being manipulated by the guy that cheated on her. Okay?

Collins: Uh-huh.

Respondent: And I think it's reprehensible that he would involve you in this. It's extremely poor judgment that he would ask you to go over there. Okay? And it indicates to me a lack -- a complete lack of judgment and maturity on the part of your boyfriend.

I'm coming down pretty hard on him. And he deserves it. Because he's using you two ladies, okay? He's using you. Keep that in mind.

I am not going to issue this order because there's just a hair short of enough evidence.

But what I will say is this. 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.

Do you get it? Do you understand?

Collins: Yes, your Honor.

Stip. 74.

{¶71} Respondent instructed Chapman to file another petition if Collins did so much as text Chapman telling her:

Respondent: So if in the future, Ms. Chapman, this behavior continues, even once, I want you to immediately refile. List me as the judge that had the case prior. It will come to me. And you know what's going to happen? So if she comes over to your place again, I anticipate you'll file. Okay? And if you refile, that guy in the back of the courtroom, that's the father of your two children that you're going to divorce pretty soon, add his name to the list of Respondents, because if I sign a civil stalking and protection order against him and if he brings her over again, I'm going to -- he's going to lose his job, because he won't be able to carry a firearm.

* * *

Respondent: So to the petitioner, I will not grant it at this time. However, if there is one further incident, Ms. Chapman, you will refile.

Do you understand?

Chapman: Yes.

Respondent: If there's a text message, if there's a phone call, if this woman comes back to your house and she makes any allegations against you, I'm going to issue the order. My advice to you -- I can't order you, because I don't have jurisdiction over the case. Okay? But I'm telling you exactly what your attorney is going to tell you. Don't test me.

You go back over to that place, it's very likely a civil stalking and protection order will be filed.

And you should consider what's gone down here, Ms. Collins.

Stip. 75.

{¶72} Respondent testified that he had not had any prior dealings with Michael Chapman who was a sergeant with the Cleveland Police Department. Hearing Tr. 74. He did not testify in the proceeding, yet Respondent made several demeaning and critical comments about and to Chapman including, calling him a "smart guy," a "know it all," saying that he was manipulating or using both women, and stating that he "lacked any common sense whatsoever." Jt. Ex. 36, beginning at p. 1191.

{¶73} Respondent referred to Collins as "the mistress" five times during his comments. His justification for that is that she was referred to by that term by the petitioner, Chapman, in the affidavit filed in support of the CSPO and in her testimony. Hearing Tr. 75.

{¶74} Respondent at first refused to admit that his comments were demeaning when asked during the hearing. He responded to those type of questions with "I wouldn't say that" (Hearing Tr. 75), and "not necessarily." Hearing Tr. 77. However, when asked: "Is it your personal opinion that calling someone "Mr. Know-It-All" is demeaning," his answer was "Yes." Hearing Tr.78-79.

{¶75} The panel notes that Respondent formulated all of his opinions of Chapman and Collins based upon the testimony of Chapman. He did not ask either of them to make any comments about the testimony of Chapman. The comments were clearly improper, intemperate, and undignified.

{¶76} Furthermore, his 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. While he claimed that he was trying to help the situation and prevent violence, there was no basis for granting the CSPO and his comments were demeaning

and not constructive at all.

{¶77} Both Collins and Michael Chapman testified at the disciplinary hearing. At the time of the hearing on the CSPO, Collins was a Cleveland police officer and had appeared in common pleas court proceedings previously. She testified that she had never been spoken to by a judge in the manner that Respondent spoke to her. Hearing Tr. 207.

{¶78} Michael Chapman testified that as a Cleveland police officer, he had been to court and testified hundreds of times. He had never witnessed a judge talk to anyone the way Respondent talked to and about him. Hearing Tr. 226-227.

{¶79} The panel finds that the conduct of Respondent was not dignified and was discourteous to both Collins, a litigant, as well as Michael Chapman, who was not a party and had not testified. Respondent was aware that an officer from the internal affairs office of the Cleveland police department was present in the courtroom and made unnecessary criticism of Michael that clearly could have harmed his employment status. Respondent's actions clearly did not promote public confidence in the integrity and impartiality of the judiciary and were clearly improper. Respondent conceded in his closing brief that he had violated Jud. Cond. R. 2.8(B) as alleged in Count IV of the first amended complaint.

{¶80} Therefore, based upon the parties' stipulations and the evidence presented at the hearing, the panel finds by clear and convincing evidence, that as to Count IV of the first amended complaint, Respondent violated the following provisions of the Code of Judicial Conduct:

- *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]; and
- *Jud. Cond. R. 2.8(B)* [A judge shall be patient,, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, officials, and others with whom the judge deals in an official capacity.]

Count V—Viola Matter

{¶81} In December 2008, former real estate broker, Anthony L. Viola, was indicted on federal charges resulting from a mortgage fraud investigation conducted by a joint federal and state task force. *United States v. Viola*, U.S. District Court, Northern District of Ohio, Case No. 1:08-cr-00506-6. On or around April 4, 2011, a federal jury convicted Viola of 35 counts of fraud. In January 2012, Viola was sentenced to 12 and one-half years in a federal corrections institution and ordered to pay over $2.6 million in restitution. Stip. 76-78.

{¶82} After Viola's federal conviction, he was tried on similar charges in state court. *State v. Viola*, Cuyahoga County Common Pleas Court, Case Nos. CR-09-527972-BK, CR-10-536877-I, and CR-10-543886-A. Respondent presided over Viola's cases in state court.

{¶83} Several of the same prosecutors who handled Viola's federal case also prosecuted Viola's state cases. Daniel Kasaris was one of the prosecutors involved in Viola's federal and state cases. Stip. 79-81.

{¶84} Viola represented himself in the state court proceeding. However, Respondent appointed "stand-by" counsel to assist Viola during the jury trial. After a lengthy jury trial, a jury acquitted Viola of all charges. Stip. 82-83.

{¶85} In or around 2014, Viola wrote Respondent from federal prison. Specifically, Viola asked Respondent to provide Viola with portions of the trial transcript for use in Viola's federal appeal. Respondent wrote to Viola on at least three occasions—February 7, 2014, May 2, 2014, and February 17, 2017. Joint Ex. 42, 44, and 46. Respondent wrote each letter on official court letterhead and signed each letter, "Daniel Gaul, Judge."

{¶86} In the February 7, 2014 letter, Respondent advised Viola that, in response to Viola's request, he authorized the court reporter, Melissa Jones, to prepare a portion of the trial transcript

that Viola had requested. Respondent advised Viola that the transcript would be provided to Viola "by the court at no cost in the interest of justice." Respondent ordered that the county treasury pay $403 for the cost of the transcript. Stip. 87-88.

{¶87} In the May 2, 2014 letter, Respondent advised Viola that he authorized the court reporter, Carla Kuhn, to email a copy of the transcripts that Viola had requested to Viola's investigator, Martin Yant.

{¶88} In a February 2017 letter, Respondent wrote to Viola:

> Dear Tony,
>
> I hope you are as well as a person can be in federal prison.
>
> Just thought I would write to express my feelings of regret on your continued incarceration. I had hoped that your exoneration in my courtroom would have assisted you in overturning your federal conviction.
>
> In any case, I am writing to inform you that there is a newly elected Cuyahoga County Prosecutor. His name is Mike O'Malley. His office may be willing to take a fresh look at Daniel Kasaris' misconduct in your case. If Kasaris participated in your federal case, O'Malley's office may be able to intervene, or at least support a post-release remedy before Judge Nugent.
>
> Anyway, this is just a thought. Please let me know if I may assist in any way.
>
> I regard you as an extremely decent man and I do hope that you will have your conviction overturned.
>
> Sincerely,
>
> Daniel Gaul
> Judge

Jt. Ex. 46.

{¶89} Viola's father contacted Respondent and requested Respondent's permission to forward the letter to then-Attorney General, Mike DeWine. Respondent consented to Viola sending the letter to DeWine. Stip. 92-94.

{¶90} Viola attached Respondent's letter to multiple federal court filings without Respondent's knowledge. For example, on July 15, 2019, Viola, through counsel, filed a federal appeal in the United States Court of Appeals for the Third Circuit from a judgment denying his Freedom of Information Act request to obtain alleged exculpatory evidence from the FBI and the Executive Office of the United States Attorneys. *Viola v. United States Department of Justice, et al.,* 3d Cir., Case No. 18-2573. In support of his appeal, Viola attached Respondent's letter as an exhibit to the appellate brief. In the introductory paragraph to the appeal, Viola stated:

> Appellant Anthony Viola's case illustrates the critical role FOIA plays in exposing government misconduct. In 2011, an Ohio federal jury found Viola guilty of conspiracy to commit mortgage fraud. But in 2012, an Ohio state jury found Viola *not guilty* on similar charges after reviewing evidence that was not turned over to Viola in his federal case. The judge who oversaw the state case has stated that Viola is innocent; indeed, he has expressed hope that Viola's state-court "exoneration" will assist in "overturning" Viola's "federal conviction." Joint Appendix ("JA") 521.
>
> Stip. 95-98.

{¶91} On February 5, 2020, Viola filed a Writ of Mandamus in the Sixth Circuit Court of Appeals requesting a new trial before Judge Donald Nugent of the United States District Court (N.D. Ohio). *In re: Anthony Viola*, 6th Cir., Case No. 20-3125. Viola attached Respondent's letter to the writ and wrote, "The federal judiciary has denied Petitioner's post-conviction requests for relief, and no evidentiary hearing has ever been held, prompting Judge Daniel Gaul, who presided over the second trial, to take the extraordinary step of stating in writing that the Petitioner is innocent and wrongfully incarcerated, Exhibit A." Stip. 96-100.

{¶92} Respondent self-reported his conduct relative to Viola to Relator, concerned that he should not have authorized the use of his letter in a public filing. Stip. 101.

{¶93} During his testimony, Respondent was questioned about the February 2017 letter that he wrote to Viola (Jt. Ex. 46) and responded as follows:

Q. Okay. In regard to the Viola matter, the letter that you wrote to him, I believe it contains a statement if -- it was on your letterhead. And at the end of it after you -- you know, you'd sent him a letter hoping he was doing as well as could be expected in prison, you said, "If I can assist you in any other way, let me know."

A. Yeah.

Q. So wouldn't you agree that that was an offer to, as judge, try to advance the interest of Mr. Viola and his fight with the federal conviction?

A. Not necessarily . No. You have to understand that people who are in federal prison, they get a couple -- you know, so many pieces of paper a day or a week, so many stamps, so many . . . I truly felt that it was really a way of me just saying to him, "I sat through your case. The jury decided your case. You were acquitted." And the letter speaks for itself. But I wasn't offering him an inducement. I didn't offer to in any way weigh in on his case other than with the attorney general, because I thought it was a legitimate HR issue, the conduct of Mr. Casares [sic].

Hearing Tr. 416-417.

{¶94} During further questioning about his letter of May 2, 2014 (Jt. Ex. 44), when asked about the sentence in the latter that read: "Tony, I hope these documents are useful for your federal appeal." Respondent acknowledged that he was sending documents that Viola might use to advance his interest in the appeal. Hearing Tr. 421. Notwithstanding this testimony, Respondent did not stipulate to violating Jud. Cond. R. 1.3 in his closing brief.

{¶95} 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.

{¶96} Therefore, based upon the parties' stipulations and the evidence presented at the hearing, the panel finds by clear and convincing evidence, that as to Count V of the first amended complaint, Respondent violated the following provisions of the Code of Judicial Conduct:

- *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]; and
- *Jud. Cond. R. 1.3* [A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

Count VI—Jackson Matter

{¶97} On October 20, 2020, a Cuyahoga County grand jury indicted Anthony Jackson on one count of felonious assault, a second-degree felony. Jackson posted a $10,000 bond on November 5, 2020. *State v. Jackson,* Cuyahoga County Common Pleas Court, Case No. CR-20-653683-A (*"Jackson I"*). Stip. 102.

{¶98} Subsequently, on January 21, 2021, a Cuyahoga County grand jury indicted Jackson on charges of robbery, a second-degree felony, and theft, a fifth-degree felony. The court set a $25,000 surety bond. *State v. Jackson*, Cuyahoga County Common Pleas Court, Case No. CR-21-656172-A (*"Jackson II"*). Stip. 103.

{¶99} On January 28, 2021, the court referred Jackson to a court psychiatric clinic for a competency evaluation. On February 23, 2021, the court psychiatric clinic found Jackson incompetent to stand trial. On March 16, 2021, Respondent ordered the sheriff to transport Jackson to Northcoast Behavioral Health ("NBH") for competency restoration. Stip. 104-105.

{¶100} On April 14, 2021, Jackson posted bond in *Jackson 2*, but because he had not yet been transported to NBH for his competency restoration, Jackson remained in custody. On April 22, 2021, Respondent again ordered the sheriff to transport Jackson to NBH. Stip. 106-107.

{¶101} On May 19, 2021, NBH reported that Jackson was competent to stand trial. On

May 26, 2021, Jackson moved the court to release him from custody because he had posted bond in *Jackson 1* on November 5, 2020 and in *Jackson 2* on April 14, 2021. The state did not oppose the motion. Stip. 108-110.

{¶102} On June 8, 2021, Respondent conducted a hearing on Jackson's request for release. During the hearing, Respondent informed Jackson:

> It is the policy of my courtroom, if a person is on bond in their first case, and they pick up a second case, they are reindicted for a second case, that the Court considers that a violation of your first bond, because you were engaged in further criminal activity, or at least there's probable cause to believe because of a grand jury indictment.
>
> Stip. 111-112.

{¶103} Jackson's lawyer informed Respondent that Jackson had posted bond on both cases and that neither bond had been revoked, stating on the record:

> It is, respectfully, our position that his bonds were paid and that the dockets in those cases indicate his bonds were never revoked. So I do--I would, just as a point of clarification, indicate that the docket indicates in both cases that the bonds were paid. There—and I can be wrong on this, but I don't—respectfully, I don't think so. There were no holders and there was no overt revocation of his bond in the first case.
>
> Stip. 113.

{¶104} Respondent then stated:

> So let me just indicate for the record that because he's been at Northcoast, the Court may have not cut an entry revoking the first bond, but we'll do that today. Obviously picking up a second case, a robbery case, an aggravated felony, is a violation of the bond in the first case. So we will note that and revoke the first bond. We'll put a holder on him in both cases.
>
> Stip. 114.

{¶105} On the same day, Respondent revoked the bond in *Jackson 1* because of a "substantive criminal indictment" in *Jackson 2*. Stip. 114-115, Jt. Ex. 57.

{¶106} On June 15, 2021, Respondent denied Jackson's motion for release. Stip. 116, Jt. Ex. 58. Jackson appealed the June 15, 2021 denial to the Eighth District Court of Appeals. *State v. Jackson*, Eighth Appellate District Court of Appeals, Case No. CA-21-110621. On November 1, 2021, the appellate court remanded the case to Respondent to issue findings as required by R.C. 2937.222(B) and to return the case to the appellate court by November 15, 2021. Stip. 117-118, Jt. Ex. 60.

{¶107} R.C. 2937.222(A) places the burden of proof on the prosecution to establish by clear and convincing evidence that:

> [1] The proof is evident or the presumption great that the accused committed the offense with which the accused is charged, [2] of proving that the accused poses a substantial risk of serious physical harm to any person or to the community, and [3] of proving that no release conditions will reasonably assure the safety of that person and the community.

{¶108} On November 3, 2021, Respondent held a video hearing with the parties. Respondent began the hearing by reciting the factors in R.C. 2937.222(B) and then found them satisfied without taking any evidence from either the prosecution or the defense by stating the following:

> We're here on a remand from the Eighth District Court of Appeals. Sua sponte, the court remanded the case to the trial court for the limited purpose of issuing findings pursuant to Revised Code 2937.222(B), which requires the trial court to state whether it found by clear and convincing evidence that, one, the proof is evident or the presumption great that the accused committed the offense for which he was charged, and I do find that in the two cases that he is charged with.
>
> Number two, that the accused poses a substantial risk of serious physical harm to any persons or to the community. I will also find that.
>
> And number three, that no release conditions will reasonably assure the safety of the person and the community, and I will find that.
>
> Stip. 120-121.

{¶109} After he stated his findings on the record, Respondent asked the prosecutor, Jackson's lawyer, or Jackson if they had anything to add. No sworn testimony or evidence was admitted during the hearing. On November 4, 2021, Respondent journalized an entry denying Jackson's motion for release, stating:

> Court found by clear and convincing evidence that the proof is evident or the presumption great that the accused committed the offense of which he is charged, the accused poses a substantial risk of serious physical harm to any person or to the community and no release conditions will reasonably assure the safety of that person and the community.
>
> Stip. 122-124.

{¶110} Jackson appealed the November 4, 2021 entry. On December 9, 2021, the appellate court filed its opinion and reversed. The appellate court wrote, "regardless of what standard of review this court applies, we find that [Respondent] erred in revoking appellant's bond and denying appellant's motions for release on bond." It noted that Respondent "merely tracked the language set forth in R.C. 2937.222(B)." And Respondent "did not state any reasons to support [his] findings." Stip. 125-128.

{¶111} Further, it found:

> [Respondent]'s findings of fact were not supported by the record, and [Respondent]'s decision revoking appellant's bond constitutes an abuse of discretion; [Respondent]'s factual findings were not supported by competent, credible evidence; and there was not sufficient evidence presented by which [Respondent] could have formed a firm belief or conviction in support of its R.C. 2937.222 findings.
>
> * * *
>
> [Respondent]'s judgment in this case violated appellant's constitutional guarantee.
>
> Stip. 129.

{¶112} The appellate court vacated Respondent's decision and remanded the case "for the purpose of reinstating the bond that was previously set and posted and ordering appellant's

immediate release." On December 16, 2021, the state of Ohio filed a motion to revoke bond after Jackson was indicted on a second and third felony case. On that same date, Respondent ordered Jackson released from custody pursuant to the directive of the court of appeals. Jackson had been detained for 184 days. Stip. 130-131.

{¶113} Respondent's comments during the second hearing were critical of the court of appeals decision reversing and remanding the case. 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.

{¶114} 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, was clearly improper, was a clear failure to uphold the law and to perform his duties of judicial office fairly and

impartially, and was prejudicial to the administration of justice. Respondent stipulated in his closing brief that he had violated Jud. Con. R. 2.2 as alleged in Count VI of the first amended complaint.

{¶115} Therefore, based upon the parties' stipulations and the evidence presented at the hearing, the panel finds by clear and convincing evidence, that as to Count VI of the first amended complaint, Respondent violated the following provisions of the Code of Judicial Conduct and the Rules of Professional Conduct:

- *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];
- *Jud. Cond. R. 2.2* [A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially]; and
- *Prof. Cond. R. 8.4(d)* [Conduct prejudicial to the administration of justice].

Count VII—Smiley Matter

{¶116} On August 31, 2021, a Cuyahoga County grand jury indicted Arthur Smiley ("Smiley") on two counts of robbery, a second-degree felony and a third-degree felony. *State v. Smiley*, Cuyahoga County Common Pleas Court, Case No. CR-21-662868. On September 23, 2021, Smiley appeared via video from the Cuyahoga County jail for arraignment before Respondent on Case No. CR-21-662868. After Smiley's arraignment in Case No. CR-21-662868, the case would automatically be transferred to Judge Sherrie Miday's docket because Smiley had previously pled guilty to, and was awaiting sentencing on, two different cases before Judge Miday. Cuyahoga County Common Pleas Court, Case Nos. CR-21-658907 and CR-20-649543. Stip. 128-130.

{¶117} Respondent asked Smiley how old he was. Smiley answered he would be 41 in October and the following exchange occurred:

Respondent: I'm going to set a $25,000 surety bond.

Smiley: Thank you.

Respondent: Pardon me?

[Prosecutor]: I think he said thank you.

[Defense Counsel]: I think he said thank you.

Respondent: Yeah. I mean, and I'm looking at your record. You have -- this is interesting.

Smiley: Ain't nothing to look at, man. Just transferring – same judge, same lawyer so I can take care of my business, please and thank you.

Stip. 131.

{¶118} Respondent had already set bond at $25,000, but he continued with the following exchange occurring:

Respondent: Sixteen prior felony indictments in –

Smiley: Don't matter. It don't matter, man. That's my personal business.

Respondent: Let me explain something to you, friend. It matters to me. It matters to me, my brother.

Smiley: Don't matter, man. Just give me my –

[Defense Counsel]: Mr. Smiley, just listen to the judge.

Smiley: I can't get out. I got a hold from the judge already. Just give me the same judge, same lawyer, so I can move on with my day.

Respondent: No.- No. This isn't the drive-through window at Burger King, my friend. You don't get it your way.

Stip. 132.

{¶119} Later in the proceeding, Respondent stated:

Yeah. Yawn a little bit louder, would you? One more time. Be a little more disrespectful. That makes a lot of -- you know what? I hope you try your case, I hope you go in front of a jury, I hope you act as disrespectful as you acted today so that the judge gives you the maximum amount of time if you're convicted.

Stip. 133.

{¶120} Respondent then indicated that Smiley's attitude was why he was facing a $25,000 bond instead of the $10,000 bond the bond commissioner had recommended, although at the time Respondent imposed the $25,000 bond, Smiley's only interaction with Respondent had been answering Respondent's question about his age. See ¶118, *supra*. After Smiley informed Respondent that the bond was irrelevant because Smiley would be detained on his other two cases regardless, Respondent raised the bond to $100,000:

> Smiley: I can't get out. I got a hold.
>
> Respondent: I just want you to know that you're going to have $100,000 surety bond on top –
>
> Smiley: It don't make a difference. I still got a hold, man.
>
> Respondent: Good. Good. Good.
>
> Smiley: You ain't hurt me. You just made yourself look stupid to how you are as a judge.

Stip. 134-135.

{¶121} At that point, Respondent immediately found Smiley guilty of contempt and imposed the maximum sentence allowed by law, stating:

> Okay. I'm also -- okay. So I'm also going to find this defendant at this time to be in contempt of this court and I am going to add an additional 30 days to his sentence and he -- I'm placing a holder on him now. He will do an additional 30 days of whatever sentence he gets, wherever, whenever. He will not be released until he's returned to my courtroom and the holder is dealt with.

{¶122} As the arraignment concluded, Respondent retracted his decision to increase Smiley's bond to $100,000, stating:

> Then I changed it -- did I change it to $100,000? I'm not going to overreact. He's got a $25,000 surety bond, okay, but he's not going anywhere until I see him again. He will not be released to the street until he meets face-to-face with me. Not digitally, Mr. Smiley.

> I got to tell you something: For a guy your age, you ought to be showing a little better judgment because this is -- you know, when you find yourself in the hole, you know what you do; you stop digging.
>
> Stip. 136-137.

{¶123} Respondent entered the contempt finding and imposed a 30-day sentence. Smiley filed a notice of appeal with the Eighth District Court of Appeals. The appellate court reversed the contempt finding and remanded to the trial court to make findings of fact in the journal entry to allow the appellate court to review to determine whether there was an abuse of discretion. *State v. Smiley*, 2022-Ohio-1242. On remand, Smiley filed a motion to dismiss the contempt charge on May 10, 2022 which was granted on May 12, 2022. Stip. 138-140.

{¶124} 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."

{¶125} 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. Had he not made a finding of contempt and entered that finding into the record by a journal entry, there would

not have been a final appealable order, and the court of appeals would have dismissed the appeal on that basis. Clearly, Respondent held Smiley in contempt and sentenced him to 30 days in jail.

{¶126} The panel finds that Respondent's conduct during the arraignment did not promote public confidence in the integrity and impartiality of the judiciary and was clearly improper. Respondent claimed in his testimony that the reason he continued to talk to Smiley after he had already set the bond at $25,000 was to determine if he needed to put any safeguards in the bond to protect the community. Hearing Tr. 125. However, the transcript clearly shows that Smiley was in custody for two pending felonies and he would not be released on bond in the case after arraignment.

{¶127} 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.

{¶128} Therefore, based upon the parties' stipulations and the evidence presented at the hearing, the panel finds by clear and convincing evidence, that as to Count VII of the first amended complaint, Respondent violated the following provisions of the Code of Judicial Conduct and the Rules of Professional Conduct:

- *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];

- *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, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's directions and control];
- *Jud. Cond. R. 2.11(A)(1)* [A judge shall disqualify himself in any proceeding in which the judge's impartiality might reasonably be questioned; and
- *Prof. Cond. R. 8.4(d)* [Conduct prejudicial to the administration of justice].

Count VIII—Byas Matter

{¶129} On June 11, 2018, De'Ontay Byas appeared before Respondent with counsel and pled guilty in four different criminal cases. *State v Byas*, Cuyahoga County Common Pleas Court, Case Nos. CR-17-615790, CR-17-616251, CR-17-615615, and CR-17-620712 (collectively referred to as "the 2017 cases"). On November 20, 2018, Respondent sentenced Byas concurrently on the 2017 cases to time-served and four years of post-release community control. Byas was released on that day. Stip. 141-142.

{¶130} On April 22, 2019, while on probation, Byas was arrested and charged with several felony drug-related offenses. Byas posted a $10,000 surety bond and was ordered to appear on May 1, 2019. On May 1, 2019, Byas appeared for arraignment via video conferencing, and his bond was continued. Stip. 143-144.

{¶131} On June 24, 2019, a Cuyahoga County Grand Jury indicted Byas with the following felony charges stemming from his April 22, 2019 arrest:

- Two counts of trafficking, a fifth-degree felony and a fourth-degree felony;
- Two counts of drug possession, a fifth-degree felony and fourth-degree felony; and,
- Possessing criminal tools, a fifth-degree felony.

{¶132} On July 9, 2019, Byas failed to appear for the arraignment; consequently, a warrant was issued for his arrest. *State v. Byas*, Cuyahoga County Common Pleas Court, Case No. CR-19-639419, ("the first 2019 case."). Stip. 145-146.

{¶126} On September 25, 2019, Byas was arrested and charged with:

- Drug possession;
- Trafficking offense;
- Having weapons under disability; and,
- Receiving stolen property.

{¶133} Byas was later indicated in *State v. Byas*, Cuyahoga County Common Pleas Court, Case No. CR-19-644464 ("the second 2019 case."). Stip. 147.

{¶134} On September 27, 2019, Byas was arraigned on the first 2019 case. Byas pled not guilty and the matter was set for a pretrial on October 2, 2019, before Respondent. The court set bond at $5,000 cash, surety, or property; however, Respondent placed a hold on Byas' 2017 cases until disposition of the first 2019 case; consequently, Byas remained in custody. On December 3, 2019, after several continuances, Byas and his court-appointed attorney, Timothy Gauntner, appeared before Respondent for a pretrial on the first 2019 case.

{¶135} James Ingalls also appeared on Byas's behalf. Byas had retained Ingalls to represent him on the second 2019 case that ultimately became a federal matter. Stip. 148-152.

{¶136} When Respondent called the case, the following statements were made:

Respondent: I'd like to go on the record. This is the State of Ohio versus De'Ontay Byas. D-E'O-N-T-A-Y Byas, B-Y-A-S. Am I pronouncing your name correctly?

Byas: Yes.

Respondent: How old are you?

Byas: Twenty-one.

Respondent: He is here with his attorney, Tim Gauntner. Also present

representing the State is Assistant County Prosecutor Jimmy Gallagher. Mr. Byas, I wanted to speak with you because I have proposed a resolution of your most recent case which is 639419.[7] You're charged in this case in Count 1, an F-4, trafficking case. You also are on probation to the Court on four separate cases. Are you aware of that?

Byas: Yes, sir.

Respondent: Okay. You've been in jail for how long?

Byas: Um, for like two and a half months.

Respondent: Okay. Count 2 is drug possession. Count 3 in this case is trafficking. Count 4 is drug possession. Count 5 is possessing criminal tools. So you are charged in a five-count indictment. What I have suggested to your attorney is that if you enter a plea on this new case, that I would sentence you to a cumulative total of two years for the four cases that you are on probation for and for this new offense. Waive the fine, waive the fees, and the costs, and send you to prison on one number. Do you want to do that? Let me explain something to you right now. Do you have people in the back of the courtroom?

Byas: Yeah.

Respondent: Who is here with you?

Byas: My mom, my grandmother, and my girlfriend.

Respondent: Okay. Here is the situation. In 2017 I put you on probation on four separate cases. I don't think there is any other judge in the building that would have done that. In the one case, you owe me three years for a probation violation. And, actually, that is an F-3 and an F-4, so you could do 36 months plus 18 months. That is four and a half years on the one case. In the other case you pled guilty to an F-5 and F-4. You could do an additional two and a half years on that case. On the other case, you pled guilty to RSP-MV. You could do an additional 18 months on that case. And there's another F-4. So you could do 18, 18. That is 3 years. Three years on the first case. That is six years. And 18 months on -- Seven and a half years on the cases that you are on probation for. And then, of course, there is a five-count indictment with the new cases. If convicted, you could get in excess of seven years on that case. Now, picking up the new case while on probation to the Court is a, per se, probation violation. Do you understand that?

[7] All italics added for emphasis.

Byas: Yes, sir.

Respondent: Even if somehow you get a not guilty on the new case, you still are a probation violater [sic] on the other four cases. Do you understand that?

Byas: Yes, sir.

Respondent: All that I need to violate you is probable cause. Do you understand that?

Byas: Yes, sir.

Respondent: Do you have any questions?

Byas: Well, if I take two years, will I be eligible for judicial release?

Respondent: I'm not going to judicially release you. You are going to do your time. Have you been down before to a state penal institution?

Byas: Yes. When you let me out, I was on probation to Lake County, and I had to go there. They sentenced me two years. So I got my time served. So I went to Lorain for three, four, months from November to March.

Respondent: Any other questions?

Byas: No, sir. I guess, yeah.

Respondent: I can't hear you. Do you have any others [sic] questions?

Byas: No, sir.

Respondent: Would you like to enter a plea on the new case, or would you like to go forward with the probation violation?

Stip. 152.

{¶137} Gauntner asked to consult with Byas, and Respondent granted the request. Immediately thereafter, Gauntner advised Respondent that Byas no longer wanted Gauntner to represent him. At that point, the following exchange between Respondent and Byas occurred:

Respondent: Mr. Byas, let me explain something to you. I have been considerate

to you, and I have been considerate to your family. I've put more people on probation than any other judge in the State of Ohio. I have been doing this for 28 years, and I work harder than any other judge in the State of Ohio with criminal cases as a result of it. And I have more people in the county jail as a result of it. The county jail is in crisis. I cannot permit people to just languish in the county jail. You either are going to resolve this case today with two years, or you're going to be, in two minutes, a probation violator, and you're going to be sent down for three years on the first probation violation. This has nothing to do with Mr. Gauntner. And your disrespectful behavior to Mr. Gauntner is offensive to my Court. I have treated you with decency and respect. For you to pretend that this is about Mr. Gauntner, who is one of the finest attorneys in Cuyahoga County, is disgraceful. It's flipping the script and blaming somebody else. You're not going to get a new attorney. But what you're going to get is a consecutive period of incarceration if you're probation violated, and then eventually convicted of the new case; okay?[8] Do not come into my courtroom and attempt to blame your attorney or the system. It's not about us. We're here because of your behavior. Now, you have reached the very limit of my patience. I don't have to have this conversation with you. I, right now, could sentence you to six years in a state penal institution and recuse myself from the new case, and send it to a different judge who could give you an additional six years.

Byas: I plead guilty, your Honor.

Respondent: You see. What I know, and I say this to the attorneys all the time, they can't talk to you like I just talked to you because you want to fire them, they're prejudiced, bigoted. It has nothing to do with that whatsoever. It's about your behavior.

Stip. 155.

{¶138} Ingalls then advised Respondent that while Byas wished to accept the plea bargain, he was concerned about the impact on the second 2019 case that had the potential to result in federal charges. Ingalls asked Respondent if the prosecutor might be able to mark the file with something other than a fourth-degree felony drug trafficking. Respondent replied, "No. What do you want it marked to?"[9] Stip. 156-157).

[8] R.C. 2929.14(C)(4) requires the court to consider relevant factors before imposing consecutive sentences.

[9] "Marked" refers to the prosecutor's practice of marking their files with plea offers that have been approved by

{¶139} When Ingalls requested a fifth-degree felony drug trafficking or a fourth-degree felony drug possession, Respondent stated:

> Respondent: Here is my thought so we can lay all the cards on the table because his family is in the back of the courtroom. This is how fair I have been. Mr. Ingalls is another great attorney, by the way. You are represented -- you know what I am going to do? Tim, make a motion to withdraw from this guy's case, and I will appoint Jim on it.
>
> Gauntner: I so move, your Honor.
>
> Respondent: Tim Gauntner is removed from the case because I don't want you to file a grievance or be sued. I'm going to appoint Jim Ingalls to represent him, and he may represent him on the felony thing in Federal Court. Here is what I said about Federal Court. Apparently there is some conversation, jailhouse tapes, of you talking to people about money, and the federal government is now involved. They may or may not be proceeding against you with a criminal matter. We don't know. I've told Mr. Ingalls should you get – we use the phrase jammed up in Federal Court -should you receive a sentence in Federal Court that is in excess of the sentence that I impose, and if it is consecutive, I would consider some kind of a modification of your sentence. And we might have to do it through judicial release. If you get four years in Federal Court on a new thing, I can't modify your sentence but I could judicially release you and you would just do your federal time.
>
> Byas: Yes, sir.
>
> Respondent: I'm going to tell you something right now. *We* are jumping through a bunch of fiery hoops to try and assist you. You are pointing fingers at your attorneys. We're not going to play that game. I'll have more to say later if you do enter a plea, but your behavior is aggravating. It harms the community. Look at what you are putting your mother, grandmother, and girlfriend through. I know if you followed the advice of the wonderful people in the back of the courtroom you would not be sitting here today. More than anything else, your behavior is self destructive. You might as well stand up and start banging your head against that wall. You're killing yourself. I know a lot of judges don't talk like this but hey, man, instead of this being some abstract proceeding, I like to lay it right on the line. My man in the back of the courtroom knows what I am talking about. Do you want to enter a plea or not?

---

a supervisor.

Byas: Yes, sir.

Stip. 158.

{¶140} When the prosecutor stated that it was his understanding that Byas was going to plead to the indictment, Respondent stated: "What I am going to do, Jim, I'll accept a no contest plea. And, Jimmy, you'll make a record, and I'll find him guilty and sentence him out today as indicated; correct?" At that point, the prosecutor told Respondent that the prosecutor would need to make an allocution before Respondent could make a finding on the anticipated no contest plea.

{¶141} Respondent then stated, "Jim, thank you. What I will do is after he enters his no contest plea, I'll ask you for a short allocution about what happened so there is a basis for the no contest plea." Stip. 159-161.

{¶142} Respondent reminded Byas again that even if he received a not guilty verdict after a jury trial on the first 2019 case, Respondent would revoke Byas' probation and send him to prison stating:

> Now, even if you get a not guilty, as we talked about in this five-count indictment, you still have four cases that you are on probation for if you were to get a not guilty. All that I need to violate you is probable cause. It's very likely, regardless of the outcome, you're going to prison. And it was discussed you could go for an extensive period of time. My plea bargain, and I've placed it upon the record, this is a plea colloquy so I should indicate that I've indicated to you should you plead here today, you will be sentenced to an effective two years. We will waive the fine and fees and costs. We'll credit you for jail time served. You're going to the institution on one number, this number. And no sentence will be larger than a year because if you get 18 months, it's a problem. We'll limit it to a year and a year consecutive to get to two. Are you with me? Do you understand what I just said?

Stip. 162.

{¶143} Respondent then began the Crim. R. 11 plea colloquy, during which Ingalls advised Respondent that his client was concerned that if the second 2019 case ended up as a state

indictment rather than a federal indictment, it could be assigned to a different judge. Respondent replied:

> My agreement with you, Mr. Byas, is this. I'll give you more consideration. If you are indicted, whether it's Federal Court or State court, and you are sentenced to more than two years, I can terminate effectively the sentence in this case. Do you understand that?
>
> Stip. 163.

{¶144} After Respondent completed the plea colloquy, Respondent asked Byas, "How do you plead? You're going to plea [sic] no contest. Remember that. How do you plead to Count 1, trafficking?" Byas pled no contest to each count as Respondent instructed. Despite instructing Byas to plead no contest, Respondent did not advise him of the effect of a no contest plea, as required by Crim. R. 11(C). After finding Byas guilty, Respondent asked Byas's mother if she wanted to address the court. After Mrs. Byas said a few words, Respondent stated, "He's fortunate he has a good attorney. I'm not going to pat myself on the back. I take a lot of heat for putting people on probation." Stip. 164-166.

{¶145} Respondent sentenced Byas to two years in prison by imposing one year on each of the five counts but running counts 1 and 3 consecutive and counts 2, 4, and 5 concurrently.

{¶146} On December 14, 2020, Byas filed a notice of appeal in the Eighth District Court of Appeals. Byas raised two assignments of error: that Respondent coerced an involuntary plea; and that Respondent failed to advise Byas of the effect of his no contest plea. On November 4, 2021, the appellate court sustained Byas's assignments of error, vacated Byas's no contest plea, and remanded the matter to the trial court. *State v. Byas*, 2021-Ohio-3924 (8th Dist.). Stip. 167-170.

{¶147} The ruling of the Eighth District in the appeal of the *Heard* case was cited as precedent by Byas's counsel in his appeal brief. In the decision, the Eighth District stated:

> Here, like *Heard*, the plea offer came from the trial court, not the prosecutor. The state concedes that the state did not participate in the plea process at all, except to confirm that the file had not been marked, that Byas could plead no contest to the indictment, and to indicate that the state had been informed that Byas "intends to plead to the indictment[.]"
>
> Here, the trial court offered an ultimatum to Byas with respect to the new case-accept the trial court's plea offer and resolve the new case today, or the trial court would find him in violation of his community control and impose a sentence of three or six years on the violations. Like *Heard*, 2017-Ohio-8310, 87 N.E.2d 245, the trial court's ultimatum in this case can only be considered coercion.
>
> Id. at ¶¶36-37.

{¶148} The appellate court also noted that Respondent's statements to Byas during the hearing that "picking up the new case while on probation to the Court is, a *per se*, probation violation" and that "[e]ven if somehow [Byas was found not guilty on the new case, [he still is] a probation violater on the other four cases" was not accurate as a matter of law.

{¶149} On November 15, 2021, Byas filed a partial motion for reconsideration seeking the Eighth District to order the Administrative Judge to reassign the matter to a different judge on remand. After full briefing, on December 6, 2021, the court of appeals denied the partial motion for reconsideration finding no merit to the request. On remand, due to the pending disciplinary complaint against him involving Byas, Respondent recused himself and sent a letter to Administrative Judge Brendan Sheehan relative to the same on May 26, 2022 and asked him to reassign the case to a different judge. Stip. 171-173.

{¶150} This case 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. His action amounted to a denial of due process as the law as noted in the appellate court decision is quite clear that merely being charged with a crime while on probation cannot be the basis for finding a violation.

His conduct did not promote public confidence in the integrity and impartiality of the judiciary and was clearly improper. Such conduct by a judge is clearly prejudicial to the administration of justice.

{¶151} Therefore, based upon the parties' stipulations and the evidence presented at the hearing, the panel finds by clear and convincing evidence, that as to Count VIII of the first amended complaint, Respondent violated the following provisions of the Code of Judicial Conduct and the Rules of Professional Conduct:

- *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];
- *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. 2.11(A)* [a judge shall disqualify himself in any proceeding in which the judge's impartiality might reasonably be questioned];
- *Jud. Cond. R. 2.6(B)* [A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement]; and
- *Prof. Cond. R. 8.4(d)* [Conduct prejudicial to the administration of justice].

{¶152} Respondent presented testimony as well as Joint Exhibits 6-8 regarding his case load, the number of cases that he has presided over during his career. Many of his character witnesses also referred to his performance as a judge over the years. Respondent commented during his testimony and it was argued in his closing brief with regard to some of the counts, that not every violation of the Code of Judicial Conduct is subject to discipline. Ohio Jud. Scope [6] states:

> Although the black letter of the rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the rules and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

{¶153} The panel considered the seriousness of the transgressions and the seriousness of the facts and circumstances presented in the evidence as they existed at the time of each of the alleged violations set forth in the first amended complaint. It also considered the extent of the improper activity by Respondent that occurred over a period of five years in eight separate cases. The panel also considered that there was a prior disciplinary violation for which Respondent received a fully stayed, six-month suspension for similar misconduct. The effect of the misconduct by Respondent on the judicial system and others in the eight cases was significant. Therefore, the panel rejects the suggestion that Respondent's misconduct in this case does not warrant disciplinary action as to any of the allegations in the first amended complaint.

AGGRAVATION, MITIGATION, AND SANCTION

{¶154} When recommending sanctions for attorney misconduct, the panel must consider all relevant factors, including the ethical duties violated by Respondent, precedent established by the Supreme Court, and the existence of aggravating and mitigating factors. Gov. Bar R. V, Section 13(A).

Aggravating Factors

Prior discipline

{¶155} The panel finds that Respondent was previously disciplined and received a six-month suspension that was fully stayed on conditions. *Disciplinary Counsel v Gaul, supra.*

Pattern of misconduct

{¶156} The panel finds that Respondent engaged in a pattern of misconduct as set forth in the findings of fact and conclusions of law which involved similar and reoccurring violations in

multiple counts.

Multiple offenses

{¶157} The panel finds that Respondent committed multiple offenses including violations of the Code of Judicial Conduct and violations of the Rules of Professional Conduct.

Refusal to acknowledge wrongfulness of conduct

{¶158} Respondent steadfastly denied committing any violations in his answer, his opening statement, and his testimony. He did not stipulate to any violations prior to the hearing. Only after the hearing did he stipulate for the first time in his closing brief, to ten of the violations. In his testimony, he referred to some of his misconduct as being an error of law or "simple legal error" when in fact his actions were clearly improper under the law. His refusal to follow the mandate of the appellate court in Jackson as well as his comments during the hearing after remand and his testimony during the hearing shows that he refuses to acknowledge the wrongfulness of his conduct. The same conclusion applies to his misconduct in the W.S. , Viola, and Smiley matters in which he continues to deny any misconduct.

Vulnerability of victims

{¶159} The misconduct of Respondent harmed multiple victims who were vulnerable because he presided over their cases and had the power to decide the outcome of their cases. In the *Heard* case, Heard served two years of incarceration due to a coerced plea that was reversed due to Respondent's actions. In *W.S.,* while not incarcerated, was on community control until his conviction was reversed. In *Callahan*, Respondent imposed maximum consecutive sentences because he disagreed with the jury's decision and imposed a fine solely to ensure that Callahan could not have commissary funds while in prison.

{¶160} In the *Collins* case, he demeaned Ms. Collins and Mr. Chapman, although neither

person testified at the protection order hearing. He made comments about Mr. Chapman's suitability and judgment to be a Cleveland police officer knowing that an officer from the internal affairs division of the Cleveland department was present in the courtroom. In *Jackson,* Respondent caused the defendant to be incarcerated until the appellate court reversed his order revoking the bonds.

Dishonest or selfish motive

{¶161} Respondent argues that there was no dishonest or selfish motive in the conduct and therefore this should be a mitigating factor. Relator did not argue that this was an aggravating factor. However, the panel finds that in *Disciplinary Counsel v. Bachman*, 163 Ohio St.3d 195, 2020 Ohio-6732, the Board found there was no dishonest or selfish motive in a case that involved a single incident of misconduct in which Bachman abused his power of contempt and unlawfully incarcerated an individual. The Supreme Court disagreed and found the aggravating factor of a dishonest or selfish motive.

{¶162} In this case, the Respondent's misconduct in the *Heard* matter coercing a plea resulted in an unlawful incarceration. His misconduct in the *Jackson* matter resulted the defendant being unlawfully incarcerated until the court of appeals reversed the Respondent's decision. Respondent stubbornly refused to follow the court of appeals mandate to conduct a full hearing pursuant to R.C. 2737.222.

{¶163} In the *Smiley* matter, he sentenced Smiley to 30 days for contempt during a Zoom hearing simply because the defendant said he was making himself look stupid. That finding was reversed by the court of appeals.

{¶164} Based upon the *Bachman* holding and the foregoing analysis, the panel finds that

there was a dishonest or selfish motive in the misconduct of Respondent.

Mitigating Factors

Full and free disclosure to the Board and cooperative attitude

{¶165} The panel finds that Respondent did make a full and free disclosure to Relator and the Board and displayed a cooperative and respectful attitude toward the proceedings.

Character and reputation

{¶166} The panel finds that Respondent provided extensive evidence of his good character and reputation.

Sanction

{¶167} Judges are to be held to the highest standards of professional behavior because they are invested with the public trust., *Disciplinary Counsel v. O'Neill*, 103 Ohio St.3d 204, 2004-Ohio-4704, ¶57, *Disciplinary Counsel v. Carr*, ___ Ohio St.3d ___, 2022-Ohio-3633, ¶86. "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*, *supra*,¶33. Sanctions may also serve to deter other judges and attorneys from engaging in similar conduct, *Disciplinary Counsel v. Horton*, 158 Ohio St.3d 76, 2019-Ohio-4139, ¶60, citing *In re Judicial Campaign against Brigner*, 89 Ohio St.3d 1460, (2000), citing *In re Judicial Campaign against Morris*, 81 Ohio Misc.2d 64, (1997).

{¶168} Relator argues that Respondent should receive a two-year suspension with one year stayed. Relator cites the case of *Disciplinary Counsel v. Parker*, 116 Ohio St.3d 64, 2007-Ohio-5635 in which the Respondent committed numerous acts of misconduct including coercing two plea bargains in criminal cases, demonstrating a lack of impartiality, abusing his contempt power and being discourteous to persons in the courtroom. Parker committed 31 violations of Judicial

Canons and Disciplinary Rules. In this case, the Respondent has been found to have violated 30 violations of the Code of Judicial Conduct of Rules of Professional Conduct.

{¶169} Parker's misconduct has significant similarities to that of Respondent. He held a spectator in contempt who attempted to speak. Respondent held Arthur Smiley in contempt for comments that Smiley made after Respondent continued to question him unnecessarily and escalated the situation by his questions which contributed to Smiley's outburst. While the evidence clearly showed that Respondent held Smiley in contempt, he denied in his testimony that he had signed an entry finding contempt and claimed that he did not intend for the sentence to be served.

{¶170} Parker was found to have failed to act impartially by being personally involved in a case in which he signed a search warrant, accompanied the police executing the warrant to the scene of the search, witnessed the arrest and then presided over the criminal case that was filed. In this case, Respondent presided over the *Callahan* case despite the fact that he felt personally responsible for the death of the victim before he sentenced him. He also directed Tinesha Chapman to file another petition for a Civil Stalking Protection Order against Natasha Collins if there were any more incidents and to request it be assigned to him. His comments about both Collins and Michael Chapman clearly indicated that he lacked impartiality in any future cases that Mrs. Collins might file against them. His comments were critical of Chapman's fitness to be a police officer and were made with the knowledge that an internal affairs officer from the Cleveland Police Department was present in the courtroom.

{¶171} Like Parker, the Respondent coerced two guilty pleas from defendants in criminal cases. However, Respondent's conduct in this case was more egregious than Parker's as it resulted in Heard serving two years for crimes of which he was found not guilty after his plea was vacated and Byas' case occurred after the reversal of Heard's conviction by the Eighth District Court of

Appeals that should have been instructive to Respondent but clearly he did not take heed of it.

{¶172} As in *Parker*, Respondent treated persons in his courtroom in a discourteous, rude, undignified manner. In addition to his mistreatment of Natasha Collins and Michael Chapman, he mocked Callahan's name and ethnicity by stating: "He's got an Italian first name, an Irish last name and he's a brother." He said he would have "busted a cap" in Callahan. He made a remark that "his black life didn't matter." He referred to Natasha Collins as "the mistress." His comments were unnecessary to his actions in the proceedings.

{¶173} Although Parker received an 18-month suspension with six months stayed, Parker had no prior disciplinary action and was receiving mental health treatment. Respondent's mental health was not an issue in this case. Further, Respondent was previously disciplined for similar misconduct while Parker had no prior discipline.

{¶174} Relator also cited *Disciplinary Counsel v. Bachman*, *supra*, in which the Court stated at ¶21: "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." Here, Respondent's misconduct in the *Heard* matter resulted in Heard serving over two years due to a coerced plea to charges of which he was later acquitted in a jury trial after his plea was vacated. In addition to Heard, Respondent's misconduct in not complying with R.C. 2737.222 and the mandate on reversal of the Eighth District Court of Appeals resulted in Jackson being improperly incarcerated in two criminal cases from June 15, 2021 to December 16, 2021, a term that included the period after Respondent refused to follow the mandate of the appellate court to hold an actual hearing to determine if the factors required to hold him without bond had been met.

{¶175} Respondent cites several cases in support of his argument that he should receive a one-year fully stayed suspension including *Disciplinary Counsel v. O'Neill*, *supra*. In that case,

O'Neill was found to have committed 28 violations of the Code of Judicial Conduct and former Code of Professional Responsibility. She received a two-year suspension with one year fully stayed. 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.

{¶176} 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.

{¶177} Respondent also cited *Disciplinary Counsel v. Campbell*, 126 Ohio St.3d 150, 2010-Ohio-3265. In that case, Campbell was found to have committed 14 violations of the Code of Judicial Conduct and former Code of Professional Responsibility over a three-year period involving nine counts. There were three aggravating factors and three mitigating factors present. He received a one-year suspension with six months stayed on conditions. However, Campbell had not been previously disciplined.

{¶178} Respondent also cited in his closing brief *Disciplinary Counsel v. Burge*, 157 Ohio St.3d 203, 2019-Ohio-3205. Burge was found to have committed 11 violations of the Code of Judicial Conduct and the Code of Professional Responsibility involving five counts. His violations included misdemeanor criminal convictions for falsification and tampering with records. He

received a one-year suspension with six months stayed on conditions.

{¶179} Present in *Burge* were the aggravating factors of selfish motive and multiple violations along with six mitigating factors including no prior disciplinary record, free and full disclosure to the board and cooperative attitude towards the proceedings, good character and reputation, imposition of other criminal penalties (criminal convictions), acknowledgment of the wrongfulness of his conduct and remorse. In contrast, the panel has found five aggravating factors present in this case and three mitigating factors.

{¶180} The panel also reviewed the recent case of *Disciplinary Counsel v. Carr*, *supra*, which involved some of the same misconduct and violations that were committed by Respondent in this case. The panel finds that the *Carr* decision supports an actual suspension in this case, but that the misconduct of Respondent in this case, while extensive and egregious, does not rise to the level that would justify an indefinite suspension.

{¶181} After a review of the cases cited by the parties, the panel concludes that the misconduct of Respondent warrants an actual suspension rather than a fully stayed suspension. The panel further concludes that Respondent's misconduct is more similar to that in the *Parker* and *O'Neill* cases than in the other cases cited by Respondent in his closing brief. Neither Parker nor O'Neill had been disciplined previously. Further, Respondent's prior discipline did not dissuade him from further violating the Code of Judicial Conduct and Rules of Professional Conduct as set forth in this report. His misconduct in this case was extensive and occurred over a five-year period beginning in August 2016, less than six years after the sanction in his prior disciplinary case was issued. His refusal to acknowledge the wrongfulness of his conduct and lack of remorse further weighs in favor of a more serious sanction than Parker received and the same

that O'Neill received.

{¶182} Based upon the foregoing, the panel recommends that Respondent be suspended from the practice of law for a period of one year and that he be ordered to pay the costs of these proceedings.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct considered this matter on December 9, 2022. The Board voted to adopt findings of fact, conclusions of law, and recommendation of the hearing panel and recommends that Respondent, Hon. Daniel Gaul, be suspended from the practice of law in Ohio for a period of one year and ordered to pay the costs of this proceeding. The Board further recommends that, pursuant to Gov. Jud. R. III, Section 7(A), the Supreme Court's disciplinary order include a provision immediately suspending Respondent from judicial office, without pay, for the duration of his disciplinary suspension.

Pursuant to the order of the Board of Professional Conduct, I hereby certify the forgoing findings of fact, conclusions of law, and recommendation as that of the Board.

RICHARD A. DOVE, Director