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Gregory Hilton, Clerk,
Supreme Court of Maryland
3/27/2023 11:45 PM

IN THE SUPREME COURT
OF MARYLAND

ATTORNEY GRIEVANCE COMM'N	*	
Petitioner,	*	
		Misc. Docket AG No. 01
v.	*	
		September Term, 2022
ASHER N. WEINBERG	*	
Respondent.	*	

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RESPONDENT'S EXCEPTIONS AND RECOMMENDATIONS

Respondent Asher N. Weinberg, by undersigned counsel, respectfully submits these Exceptions and Recommendations for this Court's consideration.[*]

PROCEDURAL BACKGROUND

When a passionate criminal defense lawyer voiced grievances over his clients' treatment in the Circuit Court for Anne Arundel County, his blunt assessment prompted Bar Counsel to bring a grievance of her own. Representing a young woman accused of robbery in an apparent case of mistaken identity, Asher Weinberg admittedly went too far to protest what he believed to be a miscarriage of justice by judges who sided with a familiar prosecutor, improperly disqualified him as counsel, and removed the only true advocate his client had.

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[*] Petitioner's exhibits shall be designated as "PX" and Respondent's exhibits as "RX." Citations to the hearing transcript shall be designated as "T1" for proceedings held on December 12, 2022 and "T2" for December 13, 2022.

In a March 14, 2022 Petition for Disciplinary or Remedial Action, Bar Counsel charged Respondent with violating, *inter alia*, the following rules:

> **MARPC 1.1. Competence** – claiming that Respondent's arrangement of a meeting to determine whether the victim could identify his client failed to meet the standards of competent practitioners;
>
> **MARPC 1.2(d). Scope of Representation and Allocation of Authority between Client and Attorney** – alleging that, by facilitating a meeting with the victim, Respondent improperly assisted his client in criminal conduct that violated prior court orders;
>
> **MARPC 3.3(a)(1). Candor Toward the Tribunal** – charging Respondent with false statements in two motions designed to call the court's attention to a case of mistaken identity;
>
> **MARPC 8.2(a). Judicial and Legal Officials** – alleging that Respondent impugned the "integrity of a judge" by making knowingly false statements or acting with reckless disregard for their falsity;
>
> **MARPC 8.4(a, c, d). Misconduct** – accusing Respondent of misconduct by violating other ethics rules, by overstating the victim's anticipated testimony in two motions, and by bringing the legal profession into disrepute when criticizing certain judges.[1]

Rather than refer the case to a judge in Anne Arundel County, this Court assigned The Honorable Kathleen M. Dumais to preside over discovery and an evidentiary hearing in the Circuit Court for Montgomery County. Unable to afford counsel of his own, an attorney who had dedicated his career to defend those in similar predicaments represented

[1] Though Bar Counsel never had any evidence to justify three other violations, Petitioner waited until the hearing to withdraw charges that Respondent violated Rule 19-301.l6(a)(1) (Declining or Terminating Representation); Rule 19-303.4(c) (Fairness to Opposing Party and Attorney); and Rule 19-308.4(b) (Misconduct). *See* Findings of Fact and Conclusions of Law ("Conclusions") at 3 n.1.

himself. As his August 1, 2022 hearing approached, Respondent suffered a heart attack which resulted in a stay of the case and a four-month delay in proceedings.

When the stay lifted, Judge Dumais held a two-day hearing on December 12 and 13, 2022. In addition to the parties' exhibits, this hearing featured the testimony of robbery victim Kaija Hirsch, Assistant State's Attorney Glen Neubauer, Anne Arundel County Police Detective Joe Eckloff, and Respondent Asher Weinberg.

Dismissing Respondent's complaints as "reckless," Judge Dumais failed to examine their merit and felt that questions over the propriety of certain judicial rulings were "not before this Court." Conclusions at 16. Rather than hold Petitioner to its burden of proof, she presumed his provocative comments to be false. *Id*. at 27.

Finding his actions unethical, Judge Dumais held that Respondent:

- Improperly arranged a meeting with Ms. Hirsch in violation of an order containing no such prohibition;
- Lacked candor toward the tribunal by overstating Ms. Hirsch's anticipated testimony in motions illustrating the lack of probable cause against his client;
- Improperly impugned the integrity of certain judges by expressing opinions which were not disseminated to the public at large and which reflected his sincere concern over a miscarriage of justice; and
- Failed to justify his opinions with clear and convincing evidence of their truth even though Petitioner had the burden of proving otherwise.

Respondent admittedly went overboard in protesting his removal from the case of a woman considered innocent. But as Judge Dumais correctly observed, he did so out of a

sincere "belief that Ms. Lemons was wrongly accused and prosecuted." *Id*. With an unblemished record that was free of such outbursts in the past, this disillusioned defender ultimately recognized the need to temper his comments and his emotions, while taking steps to ensure that such actions not recur. *Id*. at 29-30.

STATEMENT OF FACTS

Working the graveyard shift as a 7-Eleven cashier, Kaija Hirsch found herself alone at one of its Glen Burnie stores on October 15, 2019. Around 3:00 a.m., an unknown woman approached the counter to buy a pack of cigarettes. As Ms. Hirsch turned to retrieve the item, the assailant grabbed her by the arm and caused her to fall to the ground. Leaping over the counter, the robber then held a knife to the cashier's throat and took $180.00 from the cash register before fleeing on foot.

Describing the robber as a "White female with olive toned skin," PX-1 at 20, the cashier recalled her assailant wearing black leggings and a black hoodie covering her head. Standing at 5'1", Ms. Hirsch recalled that the suspect was "like a head taller than me," T1:74, and told responding officers that "[t]he suspect was 5-7 to 5-8 with a thick build." PX-1 at 20.

Part of the incident was captured on blurry security videos. As the only eyewitness to the theft did not know the culprit, police posted grainy stills from this footage on social media with hopes of getting a lead. *Id*. Some time later, a confidential informant called in to claim that these pictures resembled an acquaintance by the name of Megan Lemons.

Having "noted similarities" between Megan and the suspect pictured, Anne Arundel County Police detectives interviewed three other people who thought she looked like Megan. *Id*.

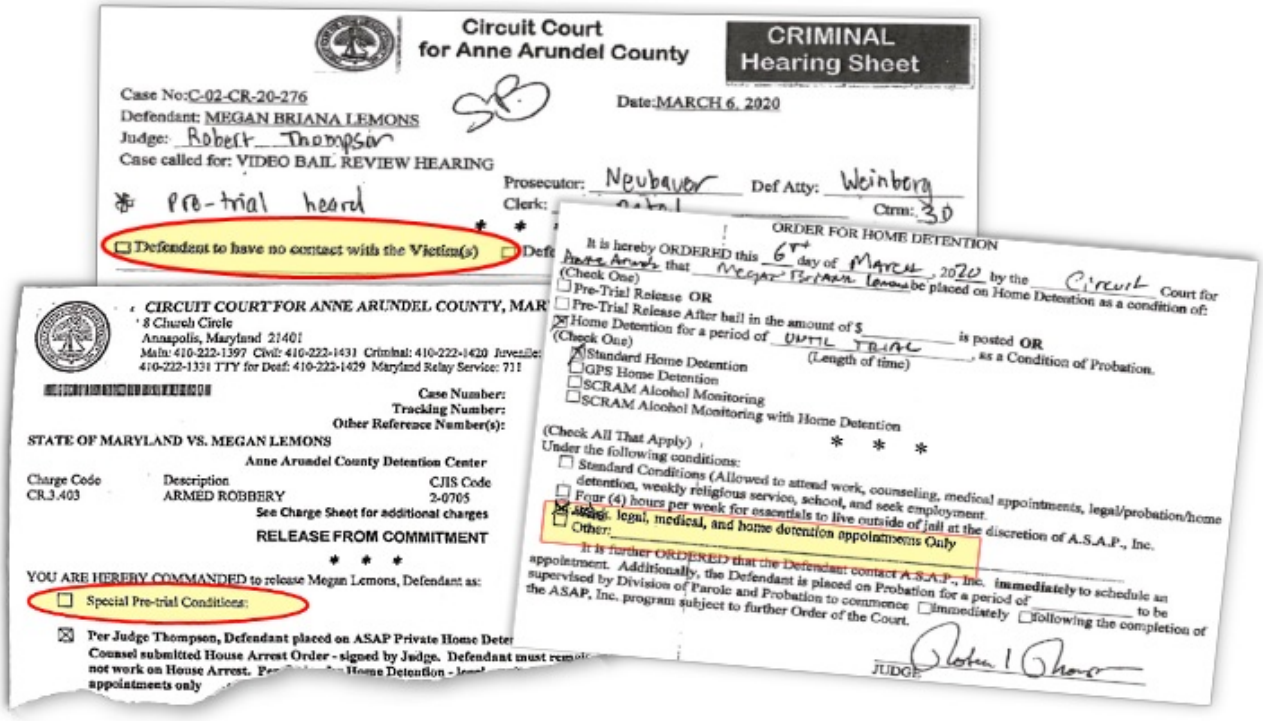
Although this 21-year old resided with her mother in Stafford, Virginia at the time of the robbery, the Anne Arundel County District Court issued a warrant for her arrest on November 15, 2019. *Id*. at 15. Arrested on January 24, 2020, *id*. at 21, Megan was extradited to Maryland on charges of armed robbery, theft, assault, reckless endangerment, the use of a concealed weapon and related charges. *Id*. at 28. At a bond review hearing a few days later, the District Court ordered that Megan be held without bond and imposed "Special Conditions" which, *inter alia*, provided that she have no contact with Kaija Hirsch. *Id*. at 35.

Indicted by a grand jury on February 21, 2020, Megan's case was transferred to the Circuit Court for Anne Arundel County. *Id*. at 37-39. Continuing to hold her without bond, the court's commitment order checked the same "Special Conditions" imposed by the District Court pending a hearing on Megan's status. *Id*. at 56.

After entering an appearance on Megan's behalf, Respondent sought to change her conditions in a Motion to Review and Reduce Bond. *Id*. at 51. Emphasizing that his client "has no prior criminal convictions," Respondent attached photographs to demonstrate that "the Defendant is actually innocent of the charges against her." *Id*. at 51, 53-54. Beyond the fact that Megan resided more than two hours from the crime scene without adequate

transportation, Respondent observed the lack of any eyewitness identification and raised several other shortcomings in the police investigation. *Id*. at 51-52 ¶ 4. Much shorter than the perpetrator described by the cashier, the assailant depicted in security photos wore a hoodie issued by a rehab center which had no record of any association with Megan Lemons. *Id*. at 51 ¶ 4.c., 158-60; T2:105.

At the outset of a global pandemic that spread rapidly in the close confines of incarceration, Respondent asked that her restrictions be lifted and that his client be released on personal recognizance. *Id*. at 52. Although Circuit Judge Robert Thompson would not go that far, he did approve a March 6, 2020 Release from Commitment that placed her on home detention, allowed her to travel for legal appointments, and omitted the special conditions contained in prior orders:


Circuit Court for Anne Arundel County
CRIMINAL Hearing Sheet
Case No: C-02-CR-20-276
Defendant: MEGAN BRIANA LEMONS
Judge: Robert Thompson
Date: MARCH 6, 2020
Case called for: VIDEO BAIL REVIEW HEARING
Prosecutor: Neubauer
Def Atty: Weinberg
Ctrm: 30
Pre-trial heard
Defendant to have no contact with the Victim(s)
CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND
8 Church Circle
Annapolis, Maryland 21401
Case Number:
Tracking Number:
Other Reference Number(s):
STATE OF MARYLAND VS. MEGAN LEMONS
Anne Arundel County Detention Center
Charge Code | Description | CJIS Code
CR.3.403 | ARMED ROBBERY | 2-0705
See Charge Sheet for additional charges
RELEASE FROM COMMITMENT
YOU ARE HEREBY COMMANDED to release Megan Lemons, Defendant as:
Special Pre-trial Conditions:
Per Judge Thompson, Defendant placed on ASAP Private Home Detention
Counsel submitted House Arrest Order - signed by Judge. Defendant must remain on House Arrest. Pre-trial Home Detention - legal appointments only
ORDER FOR HOME DETENTION
It is hereby ORDERED this 6th day of March, 2020 by the Circuit Court for Anne Arundel that Megan Briana Lemons be placed on Home Detention as a condition of:
(Check One)
Pre-Trial Release OR
Pre-Trial Release After bail in the amount of $ _____ is posted OR
Home Detention for a period of UNTIL TRIAL (Length of time), as a Condition of Probation.
(Check One)
Standard Home Detention
GPS Home Detention
SCRAM Alcohol Monitoring
SCRAM Alcohol Monitoring with Home Detention
(Check All That Apply)
Under the following conditions:
Standard Conditions (Allowed to attend work, counseling, medical appointments, legal/probation/home detention, weekly religious service, school, and seek employment.
Four (4) hours per week for essentials to live outside of jail at the discretion of A.S.A.P., Inc.
Legal, legal, medical, and home detention appointments Only
Other:
It is further ORDERED that the Defendant contact A.S.A.P., Inc. immediately to schedule an appointment. Additionally, the Defendant is placed on Probation for a period of _____ to be supervised by Division of Parole and Probation to commence Immediately following the completion of the ASAP, Inc. program subject to further Order of the Court.
JUDGE

No Special Conditions or "No-Contact" Orders Contained in Release Papers

Id. at 60, 66-67. Contrary to the findings below, nothing in Judge Thompson's hearing notes, the hearing transcript, the Release from Commitment or the Order for Home Detention required Megan to stay away from anyone.

When urging Judge Thompson to relax the restrictions previously imposed upon his client, Respondent expressed the view that Megan "was wrongly identified as the suspect in this robbery case." PX-3 at 636-37. Beyond the fact that she was living with her mother in Virginia at the time of the incident, Mr. Weinberg advised that his client "does not look anything like the woman in the photo" taken from security cameras and that she would never fit the description of a much taller assailant. *Id*. at 637. Believing that his client "will be exonerated," Respondent did not find this "to be a case of reasonable doubt or the State didn't prove it. It is just not her." *Id*. Unable to refute that, Assistant State's Attorney Glen Neubauer merely countered that he thought it "a bit early to say that it is for sure a misidentification." *Id*. at 638.

Over the next two months, Respondent urged police and prosecutors to step up their investigation of the perpetrator's identity. Frustrated that "the detective ... has yet to ever return one of [his] calls," Mr. Weinberg emailed Assistant State's Attorney Neubauer and his supervisor in a futile effort to lay this pivotal issue to rest:

> Someone from your side should actually meet [Megan] in person and compare her to the person in the video. If [the detective] won't meet with us, I will contact the victim, and ask her to meet us, and see if she recognizes Megan. If you have another idea, let me know.

PX-1 at 102. Without responding to his offer of cooperation or proposing any other means of investigation, T1:97-98; Conclusions at 7, the State merely proposed that his client plead guilty to armed robbery in exchange for an eight year sentence. PX-1 at 125.

Finding that "Respondent made multiple attempts to engage with Assistant States Attorneys in the case to no avail," the hearing judge believed that Mr. Weinberg "showed extremely poor judgment" when contacting the victim as proposed in his email. Conclusions at 28. Concluding "that he knew or should have known better," neither Judge Dumais nor any of the circuit judges in the underlying case cited any extant order forbidding it. *See id*.

Texting Ms. Hirsch on May 14, 2020, Respondent expressed the desire "to send [her] some photos, and see if [she] recognize[d] the person as the robber," as well as "to find out more information about the height of the woman in relationship to [her]." PX-4 at 647. Wishing to assist his investigation, Ms. Hirsch compared photographs of his client with the low-resolution screenshots that the police previously showed her, and with the actual footage of the incident itself. *See* PX-4 at 645-64; T1:44

Unable to identify Megan Lemons as the culprit, the State's one and only eyewitness believed that her assailant was taller, "big boned statured," and had a "thicker" build than the person charged with this crime. PX-10 at 781. When it appeared that his client could not afford the cost of home detention in early June, Respondent asked Ms. Hirsch if she would be willing to meet them at a time and place of her choosing. PX-4 at

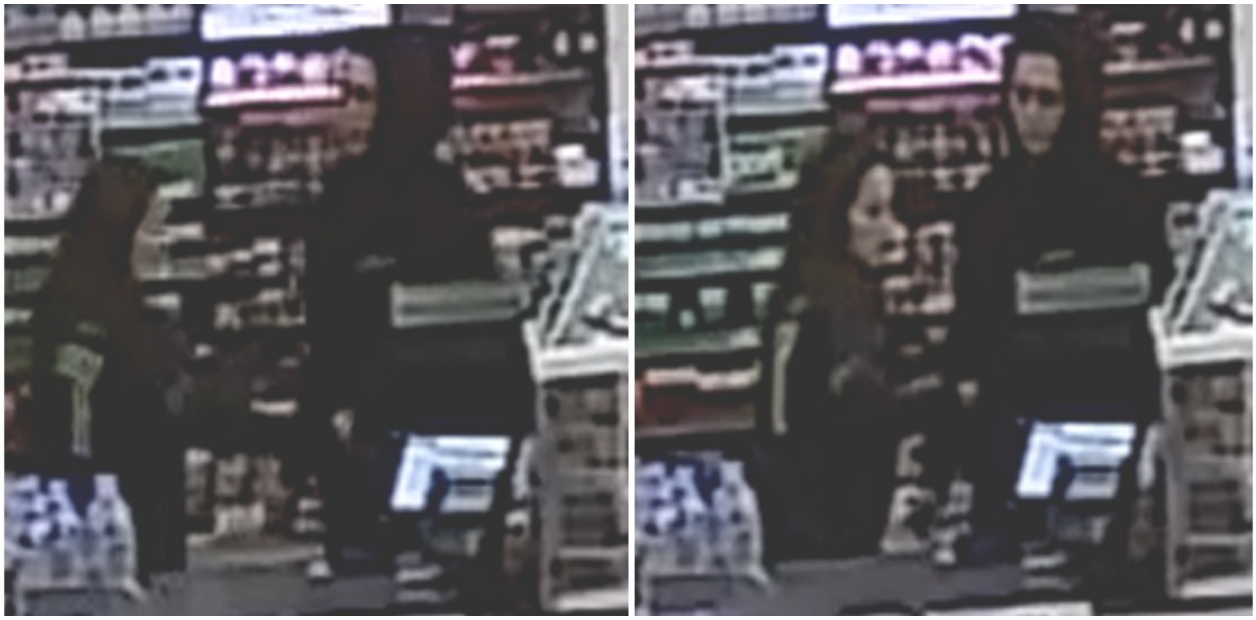
660. Because the pandemic placed a moratorium on "trials until probably November or December," Respondent explained that, "if she is truly innocent, I don't want her sitting in jail until then." *Id*.

Recalling "that he wasn't pushy about it," Mr. Weinberg left the prospect of a meeting "totally up to you, if you're not comfortable with it." PX-10 at 791. Expressing no discomfort, Ms. Hirsch found such a meeting to be "enticing." *Id*. at 792. In fact, she was "discouraged" that detectives never let her meet the suspect and "really would've wished that whoever they ... brought in ... I was able to see them somehow." *Id*. at 782. "Very soon after this incident occurred, I would've been able to 100 percent either identify or ... dismiss whoever they had in custody." *Id*.

At Ms. Hirsch's request, the three met in the presence of her male friend near Sparrows Point High School shortly after noon on Friday, June 5, 2020. *Id*. at 663. Unlike the olive-skinned robber, PX-1 at 20, Ms. Hirsch remarked that Megan "had very light eyes, like a crystal blue" and "did not have broad shoulders." PX-10 at 813. Consistent with her 911 call and Ms. Hirsch's account to police, her assailant as much bigger and taller than this 5'5" defendant. Believing the robber to be closer to Respondent's height than to that of his much shorter client, T1:78, Ms. Hirsch confirmed that "[t]hat's what I recall from being in that situation." *Id*.

Consistent with this recollection and with footage from the robbery itself, "Ms. Hirsch did testify that the robber was more than a head taller than herself." Conclusions at

11; PX-10 at 788. Indeed, as Judge Dumais observed, "[t]his was verified by review of the security video" entered into evidence. *Id*. at 11.



"[T]his woman was at least a head taller than me ... or more," according to 5'1" cashier Kaija Hirsch

Given this evidence, Respondent expected that this witness would ultimately testify that Megan was not the person who committed this robbery. T1:175-76. Questioning whether there was ever any probable cause to arrest her in the first place, this advocate expressed confidence that the only eyewitness to the crime would ultimately "testify that after seeing Megan in person, she is 100% positive that Megan was NOT the robber." PX-1 at 201. Contrary to Petitioner's allegations, he never quoted her as using these words. But, in comparing Megan's features with the victim's description of the robber, he had more than ample evidence on which to elicit such unequivocal testimony.

To establish probable cause for her arrest, the State relied upon "witnesses" who

never witnessed any part of this incident. Boasting of positive "identifications of Megan Lemons" from four of her alleged acquaintances, Detective Eckloff's November 13, 2019 Investigative Report was no more reliable than the crude screenshots shown to them. *See* PX-1 at 176-78. Each saw some resemblance between Megan Lemons and the person shown on the detective's fuzzy picture. But when defense counsel showed them the actual footage, two of these individuals saw things differently.

Contrary to Detective Eckloff's report, Jonathan Olsavsky "found it impossible to confirm identity from one photograph" and told him that he "could not definitively state that was Megan Lemons pictured in the photograph" displayed. PX-1 at 211. Having "reviewed the videos thoroughly" at Mr. Weinberg's request, Mr. Olsavsky actually found "still images that appear to be of more clarity than what Detective Eckloff originally presented me with. While I couldn't say yes or no during his visit with any confidence I can now. I found the posture, face, movement, and size of the person seen committing the robbery to not match any pictures, videos, or memories of Megan Lemons in any way." *Id*.[2]

Like Mr. Olsavsky, Kimberly Franklin took a different view when shown different

[2] Detective Eckloff showed the same "still photograph" to Mr. Olsavsky's mother Theresa in November of 2019, who thought it "was the girl who use to come over the residence," but "was no longer welcome there." PX-1 at 177. According to Jonathan, his "mother, to the best of my knowledge, never officially met Megan Lemons, and only briefly saw her sleeping on the couch on one occasion." *Id*. at 211. Neither Detective Eckloff nor the prosecutor ever followed up with Jonathan or Theresa Olsavsky. T1:139.

views on the video itself:

> I can tell from the Corner View and the Side View videos that it is NOT Megan. This person is too tall and slender. Megan also has larger hips and butt than from what I can see with the person in the videos. I have not spent a lot of time around Megan, and I know her weight has fluctuated, but the person in the video moves/walks differently than Megan from what I'm familiar with. I can see, however, from a still-shot photo (which is what I originally shown by the Detective) this person resembles Megan and from certain angels [*sic*] if a still shot was captured by the video, it would appear to be her. But now that I've seen the videos, I would say that this is definitely NOT Megan.

Id. at 319 (capitalization in original). After Ms. Franklin emailed her affidavit to the prosecutor, Mr. Neubauer questioned her about the circumstances of its creation and found no impropriety on the part of defense counsel: "I understand from your last email and our conversations that you were not threatened or forced into providing your most recent statement." RX-4 at 2 (October 15, 2020 6:10 p.m. Email).

As Mr. Neubauer's case collapsed, Respondent correctly observed that "[t]he only evidence that the State could present to show that Ms. Lemons was the robber is the testimony of one person who was not present at the robbery, and has never been shown the actual security video." PX-2 at 629-30. Initially identified as a "confidential source," Orion Fletcher a/k/a Orrin Fletcher met with Detective Eckloff on November 4, 2019, reviewed additional photographs, and was 80% confident that it was her. But when the detective "asked Mr. Fletcher to sign the flyer identifying Megan Lemons as the suspect depicted," he declined and "advised he didn't want to say for sure." PX-1 at 177.

Unable to identify Megan beyond a reasonable doubt, this alleged "witness" went

missing prior to trial. *Id*. at 506. According to the prosecutor, Detective Eckloff tried to track him down over the Summer of 2020, and "might have been able to get a new phone number," but "wasn't able to get a return call. So, he wasn't even sure if that was the correct phone number." *Id*.

With or without his testimony, the State would have difficulty establishing Megan as the blurred image captured by low-resolution security cameras. As Respondent prepared several witnesses to testify otherwise at her October 8, 2020 trial, the State did not prepare for trial at all. Unlike Mr. Weinberg, Mr. Neubauer did not even submit *voir dire* questions or jury instructions prior to trial. *Cf*. PX-1 at 274-76, 280-86 (Defense Proposed Jury Instructions; Defendant's Request for *Voir Dire*).

In fact, the only thing the State filed before trial consisted of a motion to exclude evidence that Respondent already agreed not to use. Claiming that Mr. Weinberg violated prior court orders, Mr. Neubauer's October 6, 2020 Motion *in Limine* relegated to a footnote the unsupported assertion that a "no contact order was in place on the day of the meeting between Mr. Weinberg, Ms. Hirsch and the Defendant." PX-1 at 278 n.1. Ignoring the terms of a March 6, 2020 Release from Commitment that omitted the restrictions of prior orders, *id*. at 60, 66-67, Mr. Neubauer sought to "preclude the Defendant's use of anything obtained at, or as a result of, the meeting Mr. Weinberg set up between the Defendant and the victim, Kaija Hirsch." *Id*. at 279.

The prosecutor sought this relief even though defense counsel agreed to it more

than two months before. When the two first debated this issue before Judge Crooks on July 28, 2020, this jurist understood that prior restrictions were not expressly incorporated into Megan's release papers and that defense counsel "construed those terms, I guess, ultimately literally." *Id*. at 492. Lamenting that "the triumph of literalism might have kicked in," *id*., the judge took a less literal reading and eliminated "any confusion that might have existed" by ordering that the defendant "have no contact whatsoever with the alleged victim ... going forward." *Id*. at 500, 502; *see also id*. at 268 (July 28, 2020 Criminal Hearing Sheet: "Δ to have NO contact w/ victim @ all") (emphasis in original).

To resolve any evidentiary issue arising out of the earlier meeting, Judge Crooks recognized that, as "a respected officer of the Court," Mr. Weinberg "has committed to not using that interview" at trial. *Id*. at 502. Reaffirming this commitment prior to trial, defense counsel also filed pretrial stipulations to assure the court, *inter alia*, that the "Defense will not attempt to impeach Kaija Hirsch using the conversation I had with her when we met." *Id*. at 287.

Though the prosecutor claimed otherwise on the morning of trial, Mr. Weinberg never wavered on this stipulation. In an apparent effort to raise the wrath of the trial judge, Mr. Neubauer claimed that his opponent somehow "altered his position," and "was intending to potentially impeach the victim with information that was derived as a result of that meeting." *Id*. at 519. If so, this prosecutor "might call him as a witness" to this meeting and questioned whether Mr. Weinberg could use evidence derived from it and

testify about it at the same time. *Id*. at 542.

Assuring Judge Pamela Alban that this would not happen, Respondent pledged no less than *seven times* that he would not use any part of the meeting in any way:

(1) "I do not intend to impeach anything Ms. Hirsch says concerning our meeting. I do not intend to ask her about anything that she said at our meeting." *Id*. at 520.

(2) "I can't imagine a situation where I am going to try to impeach her with anything about that meeting." *Id*. at 523.

(3) "I do not intend to use anything she may have said at that meeting" *Id*. at 526.

(4) "I don't intend to bring up any of those phone conversations [with Ms. Hirsch]." *Id*. at 527.

(5) "I do not intend to impeach her with anything about anything from that meeting." *Id*. at 529.

(6) "I will not reference that meeting." *Id*. at 543.

(7) "I will not refer to that meeting at all. It is as if that meeting did not exist." *Id*. at 545.

This resolved the State's written motion, but it did not stop the prosecutor's plot to disrupt Megan's defense by raising a frivolous issue that he never raised before. *See id*. at 534. Without any impropriety in Respondent's questioning of witnesses, Mr. Neubauer implied that his opponent's diligence as counsel rendered him unfit to try it.

No court rule or order ever prohibited Respondent from contacting or interviewing witnesses. But the prosecutor expressed outrage that two of "*his*" identification witnesses "flipped" their testimony after Mr. Weinberg contacted them. *Id*. at 549. Although

Jonathan Olsavsky and Kimberly Franklin thought Detective Eckloff's crude screenshot resembled Megan, each took a different view when shown different views on the video itself. *Id*. at 211, 319.[3]

Ignoring affidavits that both witnesses sent to him months before trial, Mr. Neubauer blamed their "flip" on "interaction of varying degrees with just Mr. Weinberg." *Id*. at 549, 531. "[W]hen every witness that winds up speaking with Mr. Weinberg, winds up doing a 180 degree turn," the prosecutor desperately argued that "not only does it make it difficult for me to explore that, it also just generally integrates him as a factor in the case." *Id*. at 537.

Hardly exercising undue influence over either witness, Respondent had "never spoken to [Ms. Franklin] over the phone," communicating exclusively over emails that he produced to the prosecution. T2:103. Similarly, Respondent left Mr. Olsavsky to "[l]ook at the videos" on his own and "[l]et [him] know whether you think it's her or not." T2:104. In both cases, he provided the witness with a template of an affidavit, told them

[3] Apparently satisfied with their earlier view, neither the detective nor Mr. Neubauer gave either witness the opportunity to view the full footage. Yet, contrary to Mr. Neubauer's claims of spontaneous flipping, one of these witnesses "found it impossible to confirm identity from one photograph" and previously told Detective Eckloff that he "could not definitively state that was Megan Lemons pictured in the photograph." PX-1 at 211. To the extent that any of these witnesses changed their views based on information that the State kept from them, Mr. Neubauer has only himself to blame. Despite the State's failure to show them this footage, Mr. Neubauer found it outrageous that "they reviewed the video and completely all of them, flip their testimony around." *Id*. at 531.

to "make whatever changes you want," and "send it to the State's Attorney." T2:103-04. By suggesting some form of unspecified impropriety, Mr. Neubauer used a defense attorney's routine case investigation as a pretext for eliminating his opposition.[4]

Denying that he wanted "to short change the Defendant's ability to elicit any evidence and testimony that the Court would deem probative and relevant," Mr. Neubauer questioned whether that can "happen considering Mr. Weinberg's involvement?" PX-1 at 533. Without any basis for calling his adversary as a "necessary witness," Mr. Neubauer never moved to disqualify Megan's chosen lawyer. But this did not stop Judge Alban from proposing this very "solution." *Id*. at 530.

Stepping into the shoes of the prosecutor, this former prosecutor proposed and then gave him a far more onerous remedy than he ever asked for. *Id*. Echoing the dubious pleas of a prosecutor desperate to derail the defense, Judge Alban claimed that "we are going to end up in a mistrial," and asked Mr. Neubauer whether he would like his

[4] Incredibly, this prosecutor failed to do his own case investigation prior to the scheduled October 8, 2020 trial. Only after he succeeded in eliminating his competition did he reach out to one of these witnesses, Kimberly Franklin. Hoping to line her up as a witness for the State, Mr. Neubauer asked Ms. Franklin about the circumstances surrounding her recent affidavit exonerating Megan. RX-4 at 2. In their conversations, she told the prosecutor that she was "not threatened or forced into providing" it in any way. *Id*. Replying to his email seeking more information on the circumstances surrounding this document, Ms. Franklin confirmed that his "understanding of [their] previous conversations is correct. I was NOT threatened or forced into providing my most recent statement." *Id*. at 1. Far from being fed the information contained on her affidavit, she was merely provided an "affidavit template ... in an MS Word document for me to edit to my liking, print, and sign it, which I did." *Id*.

opponent "struck as counsel? Is ... that what your ask is?" *Id*.

Seizing the opportunity before a judge with whom he was "certainly friendly" after spending five years together in the State's Attorney's office, T1:148-49, Mr. Neubauer took her up on the offer. PX-1 at 530. "[W]hen it comes to these two witnesses and the affidavits, my unfortunate position is, I do have to ask for recusal unless the Defendant is willing to forgo that testimony." *Id*. at 532.[5]

Ambushed on the morning of a trial he was poised to win, Mr. Weinberg argued in vain to a judge that failed to respect his client's choice of counsel. Even though the prosecutor thought "it is really up to the Defendant in terms of this to make a decision," *id*. at 526, Judge Alban overruled Megan's objection to her lawyer's removal. *Id*. at 555. Unwilling to honor her decision, the judge told a distraught defendant that she "can't just leave that up to you because unfortunately, his actions created a scenario that the State may need to call him. And that compromises his ability to just be a lawyer in this case. He has inserted himself as a factor in this case." *Id*.

Overruling Megan's Sixth Amendment right to counsel of her choice, Judge Alban rejected Mr. Weinberg's request that she examine two witnesses waiting in the hall to testify at trial. Refusing to bring Ms. Franklin or Ms. Olsavsky into the courtroom, the

[5] In sharp contrast with a prosecutor who did not even submit *voir dire* questions, Mr. Weinberg was well "prepared for trial. I am more prepared than I have ever been for a trial. I have two or three binders. Color photos printed out. Hundreds of pages of cross for all of the various witnesses." T2:107-08. All he needed was a jury.

judge quipped, "[t]hat is me being a prosecutor. That is not my job. That is not my job." *Id*. at 553.

But it *was* her job. Before stripping the accused of her chosen counsel, this Court requires the trial judge to hold an evidentiary hearing to "scrutinize closely ... whether there is 'actual or serious potential for conflict' that overcomes the presumption the defendant has to his or her counsel of choice." *State v. Goldsberry*, 419 Md. 100, 123–24, 18 A.3d 836, 850 (2011).

Unwilling to make the required "evidence-based findings" to decide whether Mr. Weinberg was "likely to be a necessary witness." *Goldsberry*, 419 Md. at 123, 125, 18 A.3d at 850-51; MARPC 3.7, Judge Alban disqualified him as counsel on the word of a former colleague whose own comments suggested otherwise. Unable to predict whether he would call Mr. Weinberg as a witness, Mr. Neubauer confessed that "no one has a crystal ball." PX-1 at 537. Conceding that "[i]t is a little hard to determine exactly how that would unfold right now," *id*. at 550, he thought it might depend on the testimony of the very witnesses that Judge Alban refused to question. "I don't know exactly what they are going to wind up saying." *Id*. at 537.

Making no effort to find out, Judge Alban disqualified Respondent as counsel on nothing more than the prosecutor's speculation that he "*might* call him as a witness." *Id*. at 542. Rather than articulate how his adversary's testimony would favor the State, Judge Alban struck Respondent's appearance on the "*potential possibility*" that "he *may* need to

call [Mr. Weinberg].” *Id*. at 554-55 (emphasis added).

Taking the prosecutor’s side in a diatribe devoid of any legal reasoning, the judge claimed to be “looking at it as a totality of the circumstances” in striking his appearance. *Id*. at 559. “I don’t need to rehash all of it again for you but the problem becomes that the effects of what occurs after your meetings, I think opens the door and allows Mr. Neubauer more latitude in cross examination and potential witness calling.” *Id*. at 559-60. Shutting down Mr. Weinberg’s arguments to the contrary, she boldly proclaimed, “***I am not changing my mind***.” *Id*. at 560 (emphasis added).

Keeping this vow while breaking her oath to uphold the Constitution, Judge Alban stubbornly refused to change her mind even after being presented with a reinstatement motion that quoted this Court’s firm pronouncements. *See id*. at 390-99. Without further hearing, Judge Alban summarily denied the request and deprived Megan of her only true defender against the power of the State. *Id*. at 405.

Robbed of her Sixth Amendment rights, and a trial that could have exonerated her, Megan stood alone before another judge who failed to offer her any legal counsel before putting her to the Hobson’s choice of trying the case on her own, or waiting for the pandemic to lift on a future trial date.

Appearing before County Administrative Judge Laura Ripken, this bewildered defendant declined to proceed without counsel, but expressed the desire to get a new trial date “as soon as possible.” *Id*. at 584-85. Expressing concern that she could not afford

house arrest monitoring for an indefinite period, Megan asked Judge Ripken if its "okay if [Mr. Weinberg] represents me for this case?" *Id*. at 587. Without answering the question or permitting Respondent to speak on her behalf, the judge set a bail review for the following week. *Id*. at 588.

Represented by Maria Mena, Judge Ripken revoked Megan's bond eight days later. *Id*. at 574. Concerned for the welfare of a client about to be thrown in jail, Mr. Weinberg asked to address the issue as her "counsel of choice," but was denied permission to do so. *Id*. at 576. After spending the weekend in jail, Megan appeared in court once again on Monday, October 19, 2020, where Judge Richard Trunnell put her back on house arrest at her sole expense. *Id*. at 601.[6]

Relegated to the sidelines, Mr. Weinberg had to watch his former client and the system he believed in "go downhill." T2:121. "I'm watching the continuation of the crumbling of what I believe to be a good system ... and I'm falling apart. I'm watching a disaster. It's a train wreck. A plane crash. And the victim is now not only Megan, but the Constitution, the justice system, everything." T2:120.

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[6] Respondent "stood in the gallery and provided information which Ms. Mena was not familiar with and the judge ... needed to know," including details on Megan's home detention. T1:188. Introduced to the court as "her prior attorney," Judge Trunnell did not object to the information he provided. PX-1 at 599. Enlisting Respondent's assistance to finalize these arrangements, Ms. Mena dictated a proposed order for Judge Trunnell's signature which he transmitted to his chambers from his laptop that afternoon. T2:117-18; PX-5 at 665-687. The next day, Judge Trunnell wrote to Respondent to request that he refrain from contacting his chambers unless his appearance is reinstated. PX-1 at 688-89.

Powerless to protect a client he fought to exonerate, Mr. Weinberg hoped she would still "be alive in time for when trial comes." T2:121. Facing numerous delays in the midst of a pandemic that strained the meager resources of an impoverished defendant, Megan could not "afford her ankle bracelet. She's going to be removed from her ankle bracelet, and she's going to go back to jail and her choice becomes at this point, take a plea or sit in jail. If you really want to go to trial, sit in jail until this whole COVID mess is over and you have an opportunity to present your case." T2:121-22.

Ultimately, a client whose "Sixth Amendment rights were just trampled on" succumbed to the pressures of a prosecutor who used a flawed system and the postponements of the pandemic as leverage. T2:134. After yet another postponement of her December 17, 2020 trial date, PX-1 at 412, Megan gave up the fight and pled to two misdemeanors in return for a suspended sentence, credit for time served, and probation. *See* PX-1 at 439-43.

"[A]s somebody who was concerned for Megan" and "cared about innocent people not being forced into convictions," Respondent "hoped beyond hope, that Ms. Hirsch would contact [the prosecutor] and do the right thing and tell him that Ms. Lemons was not the robber." T2:124. In a caustic text that he regrets sending, Megan's former lawyer appealed to her conscience in advance of Megan's February 5, 2021 plea hearing, claiming that she was as "guilty of victimizing an innocent woman as the real robber is." PX-4 at 664. While he hoped this might prompt her to break her silence with the

prosecutor, Respondent agrees with Judge Dumais' opinion that his text showed "extremely poor judgment." Conclusions at 17.

The lower court felt the same way about Mr. Weinberg's blunt criticism of judges who played a role in what he believed to be a miscarriage of justice. Rather than question Judge Alban's authority to strike his appearance, the lower court felt that "[t]hat question is not before this Court." *Id*. at 16.

Rather than examining the merits of his comments, Judge Dumais questioned Respondent's view "that Bar Counsel had the burden of proving by clear and convincing evidence that the statements were false." *See id*. at 17. Shifting this burden to Mr. Weinberg, Judge Dumais claimed that "Respondent failed to provide any competent evidence that ... his statements were true," ignored the evidence he did present, and presumed otherwise. *Id*. at 21.

Although he never published these statements to the public at large, he did not mince words when criticizing Judge Alban's failure to uphold her constitutional duties in accordance with this Court's own pronouncements. Breaking her oath to protect his client's Sixth Amendment rights, this judge "completely ignored all controlling law that was presented to her in order to do what she wanted to do." T1:198-99. Accusing her of "stepping into the shoes of the prosecutor," Mr. Weinberg did not believe it was "her place to ask him to do more than he had asked for. That's what I considered stepping into the shoes of the prosecutor. He's asking for one thing, she says to him, you're asking me

for this much larger thing, right?" T1:209.

Considering his past experience with Judge Alban in this case and others, T1:205-06; T2:10, Mr. Weinberg moved for her recusal in an August 6, 2021 hearing in *State v. Harrod*. PX-6 at 707. Asked for the basis of his request, he expressed his unfiltered feelings without any pretense of diplomacy:

> You are a liar, you are biased, you have demonstrated bias, you have stepped into the shoes of the State's Attorney on occasion, you refuse to apply the law when it doesn't suit your purposes or when you don't agree with it. You are complicit in kidnapping and basically you are corrupt for a judge. So, I have to ask you that you recuse yourself.

PX-6 at 707, 709.[7] Apparently unpersuaded, Judge Alban denied his request. *Id*.

Wishing to prevent such abuses in the future, Respondent raised his concerns with Judge Glenn Klavans. T2:148. Since he succeeded Judge Ripken as County Administrative Judge, Mr. Weinberg thought "[h]e would be in the best position to discuss with those judges, my issues." *Id*. In his view, Judge Klavans was "the one judge who I thought might have, if not the authority to do something, might be able to sit down with them and go over the issues." *Id*.

Asking "that a number of the Judges in your courthouse be permanently recused from any case I am named in," his August 8, 2021 email to Judge Klavans expressed

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[7] Resorting to hyperbole, Mr. Weinberg's reference to "kidnapping" stemmed from the fact that Judge Alban's refusal to respect Megan's choice of counsel caused a continuance of her October 8, 2020 trial and her incarceration shortly thereafter. T1:211-13.

similar complaints about Judge Alban, and raised concerns about bias on the part of two others. PX-7 at 717. With it, he attached the draft of a flyer expressing unfavorable opinions of Judges Alban and Wachs. PX-7 at 719. This flyer would refer readers to a website where they could sign a petition demanding their recall from office. *Id*. Although Respondent expressed the intention of distributing it to the public, he never did so. T2:57, 148. Nor did he establish the website to which it refers.

In hindsight, Respondent recognizes that he did "go overboard" in "trying to get somebody to recognize the, and I'll use the word lawlessness, of what is going on in this case" and others. T2:121. An "idealist" with a low tolerance for injustice, T2:125, Mr. Weinberg saw "the futility of expecting justice" from judges who refused to respect the law. T2:120. "I'm seeing the futility of our system, and it's sad, and it's devastating me. ... I'm watching State's attorneys putting their own interests first. I'm watching judges just rubber stamp denial, denial, denial. ... And yeah, I'm devastated. And I'm trying to get the truth out there. I'm trying to get it out there through the judges. Through the courts. And nothing. Nothing is happening here." T2:121.

During the course of a punishing pandemic that caused many of his clients to languish in jails awaiting justice, this lawyer faced unprecedented challenges of his own. As he watched Megan "spiral down," T2:101, his own life started to unravel. While fighting to free an innocent woman, Mr. Weinberg's marriage failed, forcing him "to move out of [his] wife's house." T2:128. Having "never been a good businessman," he

had more accounts receivable than money and had to live on an air mattress in his office for six months. T2:126, 128-29.

All of this took a toll on his ability to cope with the mistreatment of his clients. Ruminating over this case in particular, Mr. Weinberg "could not sleep. I'd wake up every two hours. I couldn't be in a silent room. I couldn't have the ability to think because this, by this, the whole situation, I could not get out of my mind." T2:126. After her case concluded, he closed his practice and left to hike the Appalachian Trail for a couple of months. T2:126. Unable to escape his outrage, he suffered a heart attack at the end of May, 2022. T2:129.

This may not excuse his intemperate comments. But it may help to explain why a dedicated attorney with an unblemished record of service to indigent clients reacted as he did. Indeed, as Judge Dumais observed after spending two days with him, "his actions, though misguided, were based on his belief that Ms. Lemons was wrongly accused and prosecuted." Conclusions at 27.

Considering several factors which mitigate any misconduct alleged in this case, Judge Dumais found "by a preponderance of the evidence that Respondent expressed sincere remorse and that it is unlikely that the behavior that forms the basis of the Petition will be repeated. Further, Respondent credibly testified to the remedial actions he has already taken. He no longer handles Circuit Court cases and/or felonies. He is currently employed by the understaffed St. Mary's County Office of the Public Defender and is

handling District Court cases only." *Id*.

Reflecting on the issues raised in this case, Mr. Weinberg has learned to live with flaws in the system. Cherishing his ability to help others as an attorney in good standing, Respondent "would have done everything differently." T2:68. Given the personal and professional price he has paid through unrestrained discourse, he "would not have made the comments about the judges." T2:68. Rather than ruminate over their rulings, "I would have washed my hands of the whole thing" and "would not have communicated with any of the judges" in a "negative light." T2:71-72.

Having survived a heart attack that has helped to put many things into perspective, he has since found happiness working with indigent clients as a public defender before the District Court for St. Mary's County. Despite a shortage of lawyers within his office, he has found his congested docket "[m]uch less stressful than Circuit Court" and sees it as an opportunity to make amends for the actions that prompted these proceedings. T2:130.

Recognizing the reputational injury he has inflicted upon himself, he is "trying to change that reputation in ways that I can. Whenever there's a client with mental health issues, rather than passing that client off to whoever has the next docket, I am sticking with them." *Id*. Finding a purpose in representing clients that others prefer to avoid, he has developed a niche fighting for the most vulnerable members of our society. *Id*.

Though he regrets many things which prompted these proceedings, an attorney who always put his clients first cannot let go of his deepest regret in this case – that

"Megan did not get her day in court. She did not get an opportunity to prove her innocence." T2:168.

ARGUMENT

Given the gravity of disciplinary proceedings, this Court places the burden on Petitioner to prove all of "the averments of the petition by clear and convincing evidence." Maryland Rule 19-727(c). Described by the Supreme Court of the United States as "adversary proceedings of a quasi-criminal nature," *In re Ruffalo*, 390 U.S. 544, 550-51 (1961), the charges brought in disciplinary proceedings are subject to the highest standard of proof which can be applied in civil cases. Far beyond a mere preponderance of the evidence, these charges cannot be sustained without evidence that is "'clear' in the sense that it is certain, plain to the understanding, and unambiguous and 'convincing.'" MPJI-CV 1:15; *see also Sass v. Andrew*, 152 Md. App. 406, 832 A.2d 247 (2003); *Spengler v. Sears*, 163 Md. App. 220, 878 A.2d 628, *cert. denied*, 389 Md. 126, 883 A.2d 915 (2005).

I. SHIFTING THE BURDEN OF PROOF TO RESPONDENT, THE LOWER COURT REFUSED TO EXAMINE THE TRUTH OF HIS OPINIONS

Relieving Petitioner of its evidentiary burden, the lower court improperly shifted it to Respondent instead. Requiring that he "provide competent evidence to support the allegations he made," the hearing judge refused to examine the judicial rulings which prompted his rebuke. Conclusions at 16, 21. Believing that such questions were "not

before the Court," *id*. at 16, she attended to the reckless *tone* of his comments rather than to their substance and found them to be untrue.[8]

But they were true. Mr. Weinberg did not dream about a circuit court judge and disingenuous prosecutor working in tandem to trample upon his client's constitutional rights. That nightmare was real, and the undisputed evidence of this miscarriage of justice was, in fact, entered into evidence. *See*, *e.g.*, PX-1 at 511-60.

A. ***Trampling Upon Megan's Sixth Amendment Rights***

Though she claimed that "being a prosecutor ... is not my job," Judge Alban stepped into the State's Attorney's shoes by proposing and then granting a "solution" that

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[8] Beyond her disregard for the clear and convincing evidence standard, Judge Dumais' failure to hold Petitioner to its burden of proof disregards the First Amendment rights of government critics. A generation ago, courts "presumed that all defamation was false" and ruled that "the defendant had the burden of proving its truth." *Kapiloff v. Dunn*, 27 Md. App. 514, 530, 343 A.2d 251, 262 (1975), *quoting* Prosser, LAW OF TORTS § 116 at 798 (4th ed. 1971). This antiquated approach did not survive the Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

"[T]o protect the interest of the First Amendment in the free dissemination of information concerning the conduct of a public official ..., the Supreme Court shifted that burden. It is now incumbent upon the public official ... to prove that the statements concerning his conduct were false, and that they were published with actual malice." *Kapiloff*, 27 Md. App. at 530-31, 343 A.2d at 262. "[B]ased on free speech principles, this Court has emphasized that "the burden is on the public official ... to prove the falsity of the facts underlying the opinion and, provided such facts are false, the actual malice of the defendant." *Id*. In fact, "to provide maximum protection for the free speech rights of defendants, the plaintiff's burden is ... one of clear and convincing proof" even in *non*-disciplinary cases. *Id*. at 531, 343 A.2d at 262.

he never even asked for. T1:209; *see* PX-1 at 530. Refusing to hold the evidentiary hearing which this Court requires, *Goldsberry*, 419 Md. at 123, 125, 18 A.3d at 850-51, this former prosecutor lacked any legally-sufficient basis for overriding a defendant's Sixth Amendment right to choose her own counsel.

Rather than "scrutinize closely ... whether there is 'actual or serious potential for conflict' that overcomes the presumption the defendant has to his or her counsel of choice," *State v. Goldsberry*, 419 Md. 100, 123–24, 18 A.3d 836, 850 (2011), Judge Alban removed Megan's only advocate on the morning of trial without the slightest concern for this Court's pronouncements.

Finding it unnecessary to make "evidence-based findings" to determine whether Mr. Weinberg was "*likely* to be a <u>*necessary*</u> witness," *id*. (emphasis added); *see also* MARPC 3.7, Judge Alban removed him as counsel on the word of a former colleague who could not even commit to calling him.

Saying that "no one has a crystal ball," PX-1 at 537, Mr. Neubauer admitted that "[i]t is a little hard to determine exactly how that would unfold right now." *Id*. at 550. Nor could he articulate what, if anything, he would call Mr. Weinberg for. Lacking any evidence that his opponent tampered with any witness in the case, Mr. Neubauer suggested that Respondent *might* testify to his "interaction" with two state witnesses who "flipped" to the defense side. *Id*. at 549. Hardly swayed by Mr. Weinberg, each witness swore that their views of the security video disproved the State's case. *Id*. at 211, 319.

Mr. Neubauer had their affidavits for months, but never questioned either witness or uttered a word of objection prior to the morning of trial. T1:139 (had not spoken with them "prior to the hearing"). In fact, the Motion *in Limine* which he placed before Judge Alban neither raised this issue nor any other basis for his opponent's disqualification. *See generally* PX-1 at 277-79. Even if the State had evidence of impropriety, Mr. Neubauer could not explain what he hoped to gain by calling his adversary as a witness.

Perplexed by his newly-concocted objection, Mr. Weinberg asked "what testimony could he garner from me that is relevant and necessary? ... Does he think I am going to testify that 'yes, I tried to influence them and I tried to convince them?' ... what kind of testimony would the State expect to get from me concerning my interaction with the witnesses?" *Id*. at 548, 552; *see also* T1:147 (State had yet to put him on a witness list).[9]

Neither the current prosecutor nor the former prosecutor could answer these

[9] To the extent that anyone might be questioned about witness tampering, it would be none other than the prosecutor himself. In his very first conversation with the lone eyewitness to the crime, he advised Ms. Hirsch that "a number of other witnesses identified Ms. Lemons" as the 7-Eleven robber. T1:51-52. When her recollection differed, Mr. Neubauer questioned her clarity by suggesting that she was "under stress" or "duress" at the time of the robbery and "may not be the best witness anyway." PX-10 at 792; T1:51. As she was "going through the actual incident" in an unrecorded July 1, 2020 phone call, he said that "possibly my recollection or recall of, you know, step by step, you know, height, weight, anything that happened, may be not as, you know, it might not be, I might not be a good witness because of that." T1:51. Hardly denying his effort to undermine her account, Mr. Neubauer admitted to "having a conversation with her about whether or not she would make a good I.D. witness, because she only saw the defendant for a brief period of time." T1:122 ("also told her that other people had positively identified Ms. Lemons").

questions or provide any evidence that Respondent was "likely to be a necessary witness." Nor could they show that he did anything wrong in contacting two individuals on the State's list. Any diligent defense lawyer would have done the same. If he "hadn't interviewed any of the witnesses," Mr. Weinberg argued that "there would be a claim of ineffectiveness of counsel, rightly so." T2:138-39.

If anything, Judge Alban disqualified him as counsel because he was *too* effective. By showing two witnesses footage of the robbery, Mr. Weinberg gave them more information than the State did. After viewing the assailant's "posture, face, movement, and size" from different angles, these individuals were convinced that Megan was <u>*not*</u> the person on these videos. PX-1 at 211, 319. As their testimony would serve to exonerate her as the 7-Eleven robber, the prosecutor and the judge agreed in unison that Respondent's work had become "a factor in the case." *Id*. at 537, 555. By working in tandem to remove him, they eliminated this very diligent and effective advocate as a factor in the case.

Disregarding the constitutional standard for disqualification of counsel, Judge Alban discharged Respondent on nothing more than the prosecutor's dubious speculation that he "*might* call him as a witness." *Id*. at 542. Looking at the "totality of the circumstances" instead of Sixth Amendment jurisprudence, Judge Alban struck Respondent's appearance on the "*potential possibility*" that "he *may* need to call" him. *Id*. at 554-55, 559 (emphasis added).

Overruling Megan's own objection to the loss of her counsel on the morning of

trial, *id*. at 555, the judge did not seem to care that "disqualification of the attorney would work substantial hardship on the client" under MARPC 3.7(a)(3). But by eliminating Mr. Neubauer's only competition, she did save a former colleague who could not positively identify Megan as the 7-Eleven robber and was so unprepared for trial that he did not even file standard *voir dire* questions. Before dispatching an *unrepresented* defendant to Judge Ripken's courtroom and the postponement of a trial that Respondent was poised to win, Judge Alban exclaimed, "***I am not changing my mind***." *Id*. at 559-60 (emphasis added).

This judge did not keep her oath to uphold the Constitution, but she did keep her vow to ignore it. Even after receiving motions to reinstate him setting forth this Court's constitutional prerequisites to such extraordinary action, *see* PX-1 at 390-99, Judge Alban showed a blatant disregard for the law and summarily denied the request without further hearing. *Id*. at 405.

B. ***Protesting the Mistreatment of His Client***

Under these remarkable circumstances, Respondent had more than ample reasons for believing that Judge Alban broke her oath to uphold the Constitution, "demonstrated bias," "stepped into the shoes of the State's Attorney," and "refused to apply the law." Understandably concerned that his "clients cannot get a fair hearing in front of [her]," he felt justified in moving to recuse her in a later case. PX-6 at 707, 709.

Tinged with hyperbole that this judge was a "liar," "complicit in kidnapping" and

"corrupt," his comments were both disrespectful and imprudent. Regretting the tone of his statements, Respondent understands that attorneys should be careful to express themselves in a civil manner with due respect for the court even when specific judges within it display little respect for the rights of those before them.

But before this Court may punish him for his provocative comments, Bar Counsel must produce clear and convincing evidence that they were uttered with actual knowledge of their falsity or with reckless disregard for their truth. MARPC 8.2(a). Borrowing this language from libel law, Rule 8.2(a) incorporates the "actual malice" standard of *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964). Rather than require critics to conduct a "reasonable investigation" before expressing themselves, the Supreme Court of the United States will only penalize lawyers who actually "entertained serious doubts as to the truth" of their comments or uttered them with a "high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *St. Amant v. Thompson*, 390 U.S. 727 (1968), *quoted with approval in Attorney Grievance Comm'n v. Stanalonis*, 445 Md. 129, 145, 126 A.3d 6, 15 (2015).

Neither can be said of Respondent, who sincerely believed the opinions expressed and had substantial evidence to back them up. Thus, whether this Court adopts *Sullivan*'s "subjective" test, or imposes more onerous demands on judicial critics, *Stanalonis*, 445 Md. at 144, 126 A.3d at 15 (issue undecided), Petitioner has failed to prove that he expressed these views with actual malice.

Although this Court would afford the "highest level of First Amendment protection" in connection with judicial elections, *id*. at 141, 126 A.3d at 12, the "operations of the courts and the judicial conduct of judges are matters of utmost public concern" on election day and every day. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978). As Justice McDonald observed, "the primary purpose in attorney discipline is to protect the public from inept or errant lawyers, not to protect public officials from criticism, even if unjustified." *Attorney Grievance Comm'n v. Frost*, 437 Md. 245, 272, 85 A.3d 264, 280 (2014) (McDonald, J., dissenting). Since "[l]awyers are specially situated to assess the official performance of judges and other judicial and legal officers," he believed that the constitutional principles developed in libel cases "require that lawyers have broad latitude in criticizing such officers" in disciplinary cases as well. *Id*. at 273, 85 A.3d at 280, *quoting* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 114, comment b (2000 & 2013 Supp.).

Ironically, those who are best equipped to critique the judicial system are the least likely to do so. Seeking the approval of judges to protect their clients' interests, lawyers are understandably reluctant to question their intellect, temperament or integrity. If anything, lawyers hoping to curry their favor are more likely to lavish them with undue praise than to alienate them with unfair criticism.

When lawyers like Mr. Weinberg overcome these inhibitions and share candid concerns, judges should listen. Lest they "forget their common human frailties" and abuse

"the paraphernalia of power" to uphold their self-proclaimed "dignity," one legendary jurist counseled his brethren to stay "mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt." *Bridges v. State*, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting).

Though Rule 19-300.1[6] of the Rules of Professional Conduct encourages members of the Bar to "further the public's ... confidence in ... the justice system," lawyers should not serve as judicial cheerleaders who may only speak out when they have nice things to say. A healthy respect for the rule of law does not require that "Officers of the Court" gratify the "chain of command." As active participants in the system of justice, attorneys should have the latitude to expose its flaws. When courts punish their most effective critics, pick at their manner of expression, or fail to set clear standards for protecting their speech, they impede the critical information needed to improve justice for all.

Seeking justice for all, Respondent has not been prosecuted for disregarding the truth about certain judges, but for his brutal honesty in exposing their shortcomings and saying exactly what was on his mind. While his blunt assessment was not a smart career move, this Court leaves "'the decision as to what views shall be voiced largely into the hands of each of us.'" *Independent Newspapers, Inc. v. Brodie*, 407 Md. 415, 427, 966 A.2d 432, 440 (2009), *quoting Cohen v. California*, 403 U.S. 15, 24 (1971).

Speaking his mind may have been imprudent, but "[t]he 'freedom to think as you

will and to speak as you think' is a 'means indispensable to the discovery and spread of political truth' and is essential both to 'stable government' and to "political change.'" *Eanes v. State*, 318 Md. 436, 445-46, 569 A.2d 604, 608 (1990), *quoting Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis & Holmes, JJ., concurring). Though his words were certainly "provocative," we do not punish critics who punctuate their points with "a vigorous epithet" or "rhetorical hyperbole" – regardless of how much that may offend judges and other public officials. *Greenbelt Co-op. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970); *Cohen*, 403 U.S. at 23; *Street v. New York*, 394 U.S. 576, 592 (1969) ("expression ... may not be prohibited merely because ... [it is] offensive to some of their hearers"). Lest we inflate the public image of judges by censoring their most informed critics, lawyers like Respondent should not be stripped of what this Court "described as 'the Constitution's most majestic guarantee.'" *Eanes*, 318 Md. at 446, 569 A.2d at 608, *quoting* Tribe, *American Constitutional Law* § 12–1 at 785 (2d ed. 1988).

Contrary to the lower court's opinion, Respondent did nothing "to discredit the public's trust and confidence in the judiciary and judicial system." Conclusions at 33. While he did consider setting up a website and distributing a flyer to non-lawyers, he never did so. Rather than "bring the legal profession into disrepute," *id*. at 37, he kept his comments within the profession itself, sharing his concerns with Administrative Judge Klavans, with Judge Alban herself, and on a closed platform where members of the Maryland Criminal Defense Attorneys' Association ("MCDAA") may share their views

in private. T2:57.

While uttered in a public courtroom, there is no basis for sanctioning Respondent for statements in an August 6, 2021 hearing before Judge Alban in *State v. Harrod*. Concerned about whether the judge would treat him and his client fairly, Mr. Weinberg moved for her recusal. PX-6 at 707, 709. Asked for the basis of his request, he expressed his unfiltered feelings about her qualities as a judge. *Id*.

Though Judge Alban complained to Bar Counsel about his answer, RX-6 at 7, even "an attorney's defamatory statement is *absolutely privileged* ... if it has some relation to the judicial proceeding." *Norman v. Borison*, 418 Md. 630, 651, 17 A.3d 697, 709 (2011) (emphasis added), *quoting Adams v. Peck*, 288 Md. 1, 3 n.1, 415 A.2d 292, 293 n.1 (1980). The same may also be said of his *private* correspondence to Judge Klavans, asking that Judge Alban and two other judges "be permanently recused from any case [he is] named in." PX-7 at 717.[10]

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[10] Milder in tone than his complaints with Judge Albin, Respondent shared his concerns about the performance of Judges Michael Wachs and William Mulford. In his opinion, Judge Wachs "demonstrated bias against the Defense Bar," showed "hypocrisy," and "refus[ed] to apply the law" to the detriment of some of his clients. PX-7 at 717.

Asked to support these views, Mr. Weinberg testified to his personal experience and to the information posted by other MCDAA members. T1:15. In short, Judge Wachs' supervision of the criminal docket left much to be desired, including, *inter alia*, denying defense requests for bond review while granting those of the State; allowing prosecutors to use "stand-in" attorneys without extending the same courtesy to defense counsel; summarily denying motions that he believed merited hearings; and refusing to release presumptively innocent defendants who did not need to be confined. T2:40; T1:13-16.

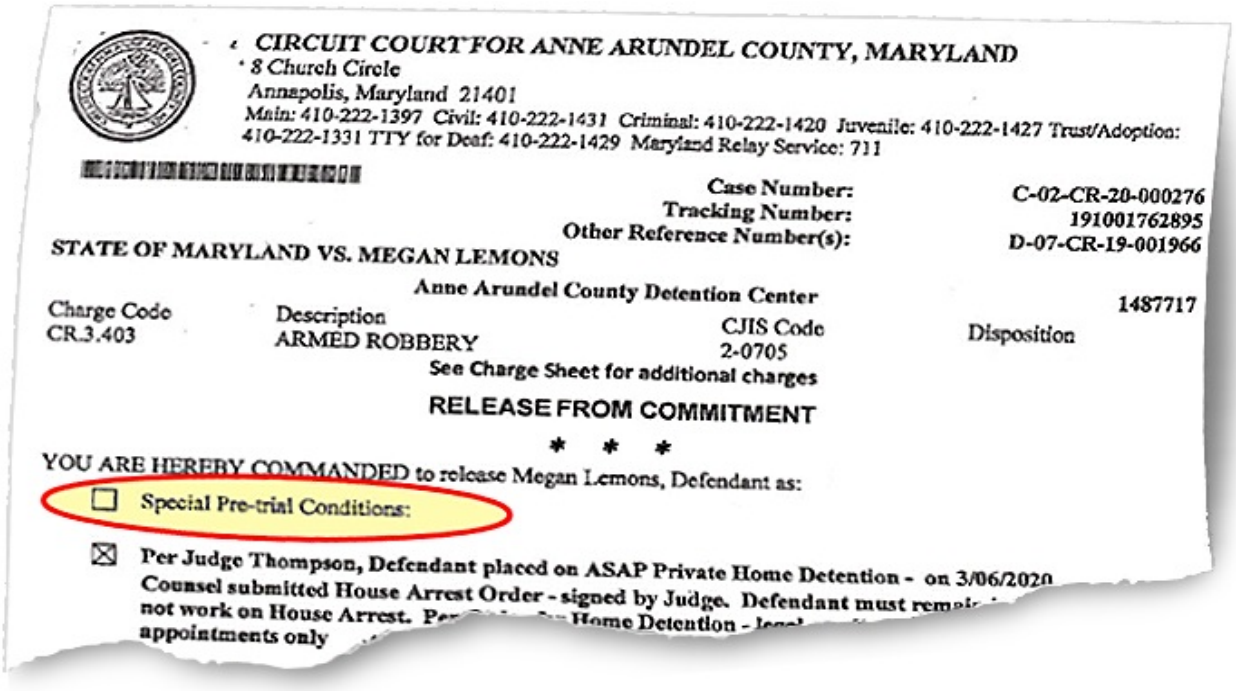
If, as Judge Dumais opined, his views were "a gross departure from the understanding that a reasonably prudent lawyer in his position would have," Conclusions at 35, expressing them to a group of reasonably prudent lawyers and judges hardly impaired anyone's confidence in the judicial system. But, even if it did impair a judge's image *within* the profession, Bar Counsel has failed to prove that his opinions, however blunt, provocative or hyperbolic, violated MARPC 8.2(a) or 8.4(d).

Hypocritically, Judge Wachs pretended to welcome feedback from lawyers, but curtly stated that he was "not going to respond" when Respondent called problems to his attention. PX-9 at 771-72; T2:16-17. In Megan's case alone, he showed a callous indifference to her confinement, denied bond without a hearing, and refused to grant permission to visit her dying fiancé until after he passed away. T2:101-02. Considering these experiences and others, the draft flyer that he shared with Judge Klavans expressed the opinion that he "[r]efuses to apply the law when it is inconvenient," [r]efused to consider evidence of actual innocence," kept an "innocent woman in custody, and "[a]pplies rules to one side only!" PX-7 at 719.

Respondent did not mention Judge Mulford in the flyer, but did express to Judge Klavans his perception that this judge had a "bias" and could not "be fair and impartial to me or my clients." PX-7 at 717. He is certainly not the only lawyer to have expressed concerns over Judge Mulford's performance. *See* Plymyer, *Judge Mulford Ignored State Law in Freezing Anne Arundel Restaurant Dining Ban*, THE CAPITAL GAZETTE (December 21, 2020) ("baffling" and "dangerous" ruling defied Maryland law).

II. RESPONDENT DID NOT VIOLATE COURT ORDERS IN ARRANGING A MEETING WITH KAIJA HIRSCH

Though earlier commitment orders included "Special Conditions" restricting Megan's contact with this victim, nothing in her *Release* from Commitment or related paperwork required her to stay away from anyone:



CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND
8 Church Circle
Annapolis, Maryland 21401
Main: 410-222-1397 Civil: 410-222-1431 Criminal: 410-222-1420 Juvenile: 410-222-1427 Trust/Adoption: 410-222-1331 TTY for Deaf: 410-222-1429 Maryland Relay Service: 711

Case Number: C-02-CR-20-000276
Tracking Number: 191001762895
Other Reference Number(s): D-07-CR-19-001966

STATE OF MARYLAND VS. MEGAN LEMONS

Anne Arundel County Detention Center 1487717

Charge Code	Description	CJIS Code	Disposition
CR.3.403	ARMED ROBBERY	2-0705	

See Charge Sheet for additional charges

RELEASE FROM COMMITMENT

* * *

YOU ARE HEREBY COMMANDED to release Megan Lemons, Defendant as:

☐ Special Pre-trial Conditions:

☒ Per Judge Thompson, Defendant placed on ASAP Private Home Detention - on 3/06/2020 Counsel submitted House Arrest Order - signed by Judge. Defendant must remain ... not work on House Arrest. Per ... Home Detention - legal ... appointments only

PX-1 at 60; *see also id*. at 66-67. In granting Respondent's Motion to Review and Reduce Bond, *id*. at 51, Judge Thompson relaxed the restrictions of prior orders that jailed her without bond.

Judge Crooks believed that his colleague should have imposed the same conditions as before, but he knew that these restrictions were not checked off. *Id*. at 492. Lamenting "the triumph of literalism," he understood that defense counsel "construed those terms ... literally." *Id*. at 500. Wishing to eliminate "any confusion that might have existed," Judge

Crooks added these conditions himself. *Id*. From July 28, 2020 onward, Megan was to "have no contact whatsoever with the alleged victim." *Id*.

Unlike Judge Thompson's hearing sheet, *id*. at 66, Judge Crooks' version provided, "Δ to have NO contact w/ victim @ all." *Id*. at 268 (emphasis in original). Following his new order as "a respected officer of the Court," Mr. Weinberg pledged that his client would have no further contact with Ms. Hirsch and also agreed not to use the earlier interview at trial. *Id*. at 502.

Though Judge Dumais thought he "knew or should have known" better, Conclusions at 12, Mr. Weinberg had every reason to believe that the Release from Commitment replaced any prior conditions in vacated commitment orders. T2:100. Rejecting his belief, the lower court accepted Mr. Neubauer's unqualified "expert" testimony that such "Special Conditions" were really just "standard." *Id*., *citing* T1:93.[11]

Even if it would have been commonplace for Judge Thompson to check off and

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[11] Judge Dumais found that "Respondent's *position*" on this point "is not credible," but did not actually find that Mr. Weinberg lied about his belief that no such conditions were in place. *See* Conclusions at 12 (emphasis added). In rejecting his position, the lower court acknowledged the possibility that he did not "know" of such restrictions, but maintained that he "*should have known* the no contact order was in place." *Id*. (emphasis added). Noting that "Respondent had access to Ms. Lemons' entire court file through the Maryland Electronic Court ('MDEC') e-filing system," Judge Dumais thinks he should have researched older orders. *Id*. Beyond the fact that Maryland's online document retrieval is not currently integrated with its "e-filing system," this Montgomery County lawyer practiced predominantly in a jurisdiction that had yet to adopt it and lacked familiarity with its use. T1:161. Even if he had retrieved old commitment orders, they were replaced by a *Release* of Commitment that simply *did not* include such special conditions.

enumerate a "no contact" provision, the undisputed fact is that he *did not do so*. No matter how much Judges Dumais, Crooks and Alban believe he *should have* imposed special conditions of this kind, neither Respondent nor his client violated Judge Thompson's order.

If Respondent really thought he was violating court orders in requesting an appointment with Ms. Hirsch, he would not have volunteered this information in motions filed on behalf of his client. Indeed, as Judge Dumais observed, "the State first learned of [the meeting]" from Respondent himself. Conclusions at 11, *citing* PX-1 at 234-42; T1:98-99.

Though Judge Thompson's orders never prohibited such meetings, he expressly permitted Megan to attend "legal appointments." PX-1 at 60, 67. In Mr. Weinberg's estimation, there is nothing "more important to a person's legal defense, than to find out whether the victim is able to identify them or not. How could that not have been a quote 'legal appointment?'" T2:138.

This meeting was particularly important in light of the State's refusal to fully investigate the identity of the perpetrator. Rather than arrange a lineup during which Ms. Hirsch could see his client, the State made no effort to obtain her positive identification. Incredibly, Mr. Neubauer claimed that the only eyewitness to the crime "was never a component of the identification as far as the investigation was concerned." T1:124. Testifying that he never asked a victim who stood face-to-face with the assailant whether

she thought Megan was that robber, Mr. Neubauer pretended that he "never would have had any reason to ask her that question." T1:124; *but see*, *infra*, at 31 n. 9 (prosecutorial interference with eyewitness account).

Ms. Hirsch herself expressed frustration with the State's approach. She was "discouraged" that detectives never let her meet the suspect and "really would've wished that whoever they ... brought in ... I was able to see them somehow." PX-10 at 782. Had they done so "soon after this incident occurred, I would've been able to 100 percent either identify or ... dismiss whoever they had in custody." *Id*.

After leaving several messages with the detective assigned to the case, Mr. Weinberg urged that Mr. Neubauer and his supervisor have "[s]omeone from your side ... actually meet [Megan] in person and compare her to the person in the video. If [the detective] won't meet with us, I will contact the victim, and ask her to meet us, and see if she recognizes Megan. If you have another idea, let me know." PX-1 at 102.

Unable to get the State to do its job, Respondent exercised great care in setting up an appointment that Ms. Hirsch found "enticing." PX-10 at 792. Recalling that "he wasn't pushy about it," she stated that Mr. Weinberg left the prospect of meeting "totally up to [her], if [she was] not comfortable with it." *Id*. at 791.

Meeting on Ms. Hirsch's terms in the presence of her male friend, Mr. Weinberg and his client "got there early because I wanted to make sure we were going to be there when she got there so she could see us, because if she was going to see Megan and freak

out, let her just keep driving. I think I actually told her that." T1:171.

When Ms. Hirsch arrived, he initially left his client in his car, and "walked to her and her friend" in theirs. T1:170-71. Giving Ms. Hirsch yet another opportunity to back out of it, Mr. Weinberg told her, "Megan's in the car. I'd like to see whether you can identify her or not." T1:171. Only after she gave her approval did Ms. Hirsch and Megan exit their respective vehicles in what would be a short but cordial meeting. After having Megan walk and talk at Ms. Hirsch's request, Ms. Hirsch did not recognize her as the 7-Eleven robber and confirmed that the real robber was much taller. T1:171.

Ms. Hirsch corroborated Mr. Weinberg's account in a July 2, 2020 interview with Mr. Neubauer and his detective, and in testimony before Judge Dumais on December 12, 2022. *See* PX-10; T1:32-34. Having arranged this critical legal appointment with due respect for her feelings, neither Respondent nor his client violated the letter or the spirit of Judge Thompson's ruling. There is simply no basis on which to sustain charges under MARPC 1.1 or 1.2(d).

III. WITHOUT A SINGLE WITNESS WHO COULD POSITIVELY IDENTIFY HER, RESPONDENT HAD SUBSTANTIAL JUSTIFICATION FOR THE MOTIONS FILED ON MEGAN'S BEHALF

With "a big belief supported by much evidence that Megan was completely innocent," Respondent tried in vain to persuade the prosecutor that he had the wrong suspect in custody. T2:102. When they refused to engage in any dialogue on the issue, Respondent sought a dialogue with the court in two motions designed to secure the

release of an innocent woman who did not match the description of the 7-Eleven robber. PX-1 at 200-01, 629-30.

Asking the court "whether probable cause still exists to hold Ms. Lemons," Mr. Weinberg believed that the witnesses listed by the State would testify otherwise. In addition to Mr. Olsavsky and Ms. Franklin, who provided affidavits exonerating his client, his June 18, 2020 motion for a probable cause hearing accurately stated that "[t]he Cashier refused to identify the photo of Ms. Lemons as that of the robber, stating that the person who robbed her was larger." *Id*. at 200. Without quoting prior statements, he expected that "Ms. Hirsch will testify that after seeing Ms. Lemons in person, she is 100% positive that Ms. Lemons was NOT the robber." *Id*. at 201.

A week later, he repeated these grounds in a June 25, 2020 Petition for Writ of Habeas Corpus. *Id*. at 628-30. Disclosing that he "arranged for Ms. Lemons and the victim of the robbery to meet," Respondent anticipated that, like other witnesses, "Kaija Hirsch will testify that Ms. Lemons was not the robber." *Id*. at 630 ¶ 14. Although he did not quote her precise words, Mr. Weinberg referred to a recent phone call in which she "stated with absolute certainty" that "Ms. Lemons was not the robber." *Id*. at 629 ¶ 7. Arguing that "there is no more probable cause to hold, or even maintain the charges against Ms. Lemons," Respondent asked the court to "release her from custody until her trial." *Id*. at 630 ¶ 18.

Under Maryland Rule 1-311(b), the "signature of an attorney on a pleading or

paper constitutes a certification that ... to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for improper purpose or delay." Hardly interposed for an improper purpose or to delay anything, Mr. Weinberg had more than ample grounds to support his request for the release of a presumptively innocent defendant for whom no real evidence existed.

As the only eyewitness to the robbery, Ms. Hirsch cast more than reasonable doubt of Megan's guilt. Coming face-to-face with the real robber, Ms. Hirsch's accounts, combined with other undisputed evidence, undermined the prosecution of a defendant with very different characteristics:

- Unlike Megan, Ms. Hirsch believed the 7-Eleven robber to be more than a "head taller" than this 5'1 cashier [Conclusions at 11; PX-10 at 788];
- As Judge Dumais herself confirmed, Ms. Hirsch's account of the significant height difference was "verified by review of the security video" entered into evidence [*Id.*];
- Within minutes after the robbery, Ms. Hirsch told responding officers that "[t]he suspect was 5-7 to 5-8 with a thick build" [PX-1 at 20];
- After reviewing the footage themselves, police published a flyer searching for "Suspect: W/F, approximately 5-08", heavy build" [PX-1 at 144];
- The person they actually arrested an charged with the crime was two to three inches taller than the victim and could never be described as a head taller [T2:143];
- After seeing Megan in person, Ms. Hirsch confirmed that her assailant was taller, "big boned statured," and had a "thicker" build than Megan [PX-10 at 781];

- ➤ Ms. Hirsch believed the robber to be closer to Respondent's height of 5'8 than to that of his much shorter client, who " was at most 5'4", closer to 5'3 [T1:78; T2:143];

- ➤ Megan "did not have broad shoulders" like the woman that robbed her [PX-10 at 813];

- ➤ Ms. Hirsch consistently described a robber with darker, "olive toned skin." But the most striking feature she noticed about Megan were her "very light eyes, like a crystal blue" [*Compare* PX-1 at 20, 140 *with* PX-10 at 813].

If he had "been able to put her on the stand" at an hearing on either of his motions, Mr. Weinberg had every confidence that "she would have testified that Megan Lemons was not the robber." T2:143. In describing her anticipated testimony, defense counsel "was trying to get out there that when put on the stand, confronted with this evidence, she would say that. And based on what she told me, I believed she would be prepared to say that." *Id*.

Lacking a signed affidavit to corroborate a phone call in which she expressed a more definitive view, PX-2 at 629 ¶ 7, Respondent could not prove the victim's statements to Judge Dumais' satisfaction. Conclusions at 11. But Mr. Weinberg never quoted her statements in his motions and had every reason to expect that he could elicit such testimony when placing her under oath. Whether or not he could ultimately deliver, he had more than substantial factual justification on which to allege what he expected and hoped to prove. *See* Maryland Rule 1-311(b). In the final analysis, his likelihood of

success would ultimately depend on his ability to meet this expectation.[12]

Abusing his power to derail the defense, the prosecutor tried to shake the confidence of her account. Telling her that several "other people had positively identified Ms. Lemons," T1:122-23, he admits to having a "conversation with her about whether or not she would make a good I.D. witness, because she only saw the defendant for a brief period of time." T1:122. As Ms. Hirsch recalls, he suggested that she was "under stress" or "duress" at the time of the robbery, and that she "may not be the best witness anyway." PX-10 at 792; T1:51.

Doing his best to plant these seeds of doubt, Mr. Neubauer was intent on prosecuting Megan without this eyewitness. Pretending that the only eyewitness to the crime "was never a component of the identification as far as the investigation was concerned," T1:124, he denied that he ever asked her whether she thought Megan was that robber and stated that he "never would have had any reason to ask her that question." T1:124; *but see*, *infra*, at 31 n. 9 (prosecutorial interference with eyewitness account).

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[12] Contrary to Bar Counsel's charges, Respondent never misquoted her – *or quoted her at all* – in either motion. *See* PX-1 at 200-01, 629-30. Nor did he testify otherwise in proceedings below. Asked whether Ms. Hirsch expressly stated "that she was 100 percent positive," Mr. Weinberg stated that "she did not use those words." T1:176. Consistent with her prior statements, Ms. Hirsch reaffirmed that "[t]he robber was much bigger than her" and that her "[w]alk was different." T2:144. Though she never used the words "absolutely" or "100% positive," Respondent sensed "no equivocation" when she agreed "that it was not Megan." *Id*. According to phone records, this conversation occurred on June 17, 2020 at 7:26 p.m., the evening before he filed his first motion, and lasted for three minutes and 23 seconds. PX-4 at 645.

Rather than prosecute Mr. Neubauer for conduct prejudicial to the administration of justice or a lack of candor toward the tribunal, Bar Counsel has relied on that testimony to charge Mr. Weinberg with lying instead. Without any evidence that he did so, Petitioner has failed to carry its burden of proving violations of MARPC 3.3(a)(1) or 8.4(a, c, or d).

IV. THIS COURT SHOULD NOT PUNISH AN ATTORNEY WHO WENT ABOVE AND BEYOND TO FIGHT FOR A CLIENT DIVESTED OF FUNDAMENTAL RIGHTS

Handling Megan's case without any compensation whatsoever, the vigorous defense he provided is worthy of commendation, not condemnation. Even after his unceremonious discharge, he continued to help her in any way he could.

Having fought for her for eight months, Mr. Weinberg was not about to abandon this client in her time of greatest need. Dispatched to Judge Ripken's courtroom, this administrative judge "did not try to provide any legal counsel to Megan" or "give her an opportunity to have a counsel there" to represent her at a hastily-held October 8, 2020 hearing on a possible postponement. T1:212-13.

Recalling the trauma of that awful day, Respondent remembers that "Megan had no clue what to do." T2:116. Sitting in the pews of the courtroom to help her along, Respondent did ask Judge Ripken for permission to speak on her behalf, but was denied permission to do so. He did not like it, but respected the Court's decision and did not speak further.

After persuading one of his colleagues to assume Megan's representation, Mr. Weinberg worked to assist Ms. Mena in passing the legal baton. Given his encyclopedic knowledge of Megan and the particulars of her case, he attended a later hearing before Judge Trunnell. Introduced to the court as "her prior attorney," Judge Trunnell did not object to the information he provided on arrangements for her home detention and other particulars. PX-1 at 599.[13]

Convinced "by much evidence that Megan was completely innocent," T2:102, Respondent found it painful to watch a client he fought so hard for succumb to the pressures of the State. Forced to the sidelines by a judge who trampled on her Sixth Amendment rights, he made one last-ditch effort to save her from the injustice of a conviction. As a defense lawyer who cared for Megan and did not wish to see "innocent people ... forced into convictions," Respondent hoped that she would still come forward to exonerate his former client. Appealed to her conscience in advance of Megan's February 5, 2021 plea hearing, he exercised poor judgment in a brief but caustic text. PX-4 at 664. Though Bar Counsel subsequently dismissed charges based upon that message, he regrets it just the same.

In retrospect, he would have done many things differently, and recognizes that his

[13] Respondent did err in sending a motion that Ms. Mena dictated to him from his own email address, prompting Judge Trunnell to ask that he refrain from contacting his chambers unless his appearance is reinstated. PX-1 at 688-89. Petitioner has not charged Mr. Weinberg with any ethical violation arising out of that, or with any violation arising out of his continuing effort to assist Ms. Mena in helping his former client.

manner of protest did not have their desired effect. But he does not, and should not regret his work in thoroughly investigating Megan's case, fighting for her rights, and standing up to a system that let her down. By this Court's grace, and with the recognition that he must exercise more restraint moving forward, he hopes to continue the good fight in St. Mary's County for many years to come.

AGGRAVATING AND MITIGATING FACTORS

This Court has identified several aggravating and mitigating factors which it will consider in determining an appropriate sanction for professional misconduct. *Attorney Grievance Comm'n v. Johnson*, 462 Md. 422, 433, 200 A.3d 811, 817 (2019). Although Petitioner has the burden of proving aggravating factors by clear and convincing evidence, Respondent need only prove mitigating factors by a preponderance of the evidence. *Id*.; Maryland Rule 19-727(c).

A. *Aggravating Factors*

Out of twelve aggravating factors which this Court articulated, *Attorney Grievance Comm'n v. White*, 448 Md. 33, 72, 136 A.3d 819, 842 (2016); *see* Standard 9.22 of the American Bar Association Standards for Imposing Lawyer Sanctions, Petitioner only produced clear and convincing evidence of one: Experience in the practice of law.

But Respondent's experience in defending clients like Megan could not have prepared him for the extraordinary miscarriage of justice inflicted upon her. Prepared to win at a trial in which the State had no competent evidence of identity, a prosecutor who

had not even prepared for trial found salvation in a "certainly friendly" judge who served with him in the State's Attorney's office for five years before taking the bench. T1:148-49.

Erroneously stating that the merits of her rulings were "not before the Court," Judge Dumais failed to examine the truth of Respondent's complaints and presumed their falsity. She also presumed that he violated court orders which were superseded by a release of commitment lacking similar restrictions, and found him to lack candor toward the tribunal in motions that had more than ample factual support. Though she correctly observed the presence of substantial mitigating factors, her findings of a "pattern of misconduct" where none existed cannot be sustained. Accordingly, Respondent takes vehement exception to the remaining aggravating factors found.

B. ***Mitigating Factors***

Adopting Standard 9.32 of the American Bar Association Standards for Imposing Lawyer Sanctions, this Court has articulated 13 factors which may justify a reduction in the degree of discipline to be imposed. *White* , 448 Md. at 73, 136 A.3d at 842. Of these, eight mitigating factors are present in this case; namely, the absence of a prior disciplinary record, the absence of a dishonest or selfish motive, personal or emotional problems, good faith efforts to rectify the alleged misconduct, full and free disclosure to the disciplinary board, a fine character or reputation, remorse, and the unlikelihood of misconduct in the future.

1. Absence of a Prior Disciplinary Record

Considering how hard he fights for his clients, Respondent's unblemished record as an attorney is not surprising. This case does not arise from any neglect of clients or lack of diligence in their representation, but from the opposite. If anything, he cared a bit *too much*. Neither Megan nor any other client has ever had any cause for complaint against a dedicated advocate who takes pride in helping society's most vulnerable. Mr. Weinberg deeply values his spotless record and, notwithstanding his overzealous protest of certain rulings, hopes to keep it when this Court decides the case.

2. Absence of a Dishonest or Selfish Motive

In this case, Mr. Weinberg's "most selfish motive is wanting to see a justice system that works." T2:163. Indeed, his passionate protest and brutal honesty reflect a deep desire to change the system for the better. Whether or not this Court shares his opinion, it cannot deny his dedication to vulnerable clients who often face unfair treatment in the criminal justice system.

Dedicating his life to the pursuit of justice, Respondent has "almost never turned down a case because the person couldn't afford it." T2:93. Even before returning to a public defender role in St. Mary's County, this "private public defender" took cases regardless of his client's ability to pay. T2:93. In many cases, including Megan's, he never got paid at all. T2:124.

Admitting that he has "never been a good businessman," T2:126, Respondent's

actions were always motivated by the needs of his clients. A self-described "idealist" with a passion for justice, T2:125, Mr. Weinberg collected more accounts receivable than legal fees. But that never stopped him from giving his clients the very best effort he could muster. T2:94-95.

Unfortunately, his lack of funds did prevent him from retaining counsel in proceedings below. Like so many of his indigent clients, he could not afford representation and has devoted his meager resources to proceedings before this Court. T2:96. As Bar Counsel herself acknowledges, there is no evidence of a dishonest or selfish motive in this case.

3. Personal or Emotional Problems

As Megan's life unraveled, his own did as well. While fighting for her rights, Mr. Weinberg's marriage failed, forcing him "to move out of [his] wife's house." T2:128. For most of the time he represented Megan, this impoverished lawyer lived on an air mattress in his office. T2:126, 128-29. In the midst of an unprecedented pandemic that took its toll on everyone, it hit Mr. Weinberg particularly hard. Taking his clients' problems to heart, his anxiety ultimately resulted in a heart attack which delayed these very proceedings. T2:129.

4. Remedial Actions

His heart attack and this very case were critical "wake up calls" that told Respondent he needed to change his outlook and his approach to his professional and

personal life. As Judge Dumais observed, "Respondent credibly testified to the remedial actions he has already taken." Conclusions at 27. Accepting a position with "the understaffed St. Mary's County Office of the Public Defender," he handles "District Court cases only. He no longer handles Circuit Court cases and/or felonies." *Id*. Though the lack of staffing in southern Maryland provides for extremely busy dockets, he is very happy to be there and hopes to continue his life of service in that jurisdiction for the remainder of his career. T2:130.

Recognizing his own challenges in this very case, he has developed a bit of a niche in representing clients with mental health issues. While others prefer to avoid these understandably difficult clients, he works with compassion and follows society's most vulnerable members as they navigate the treacherous terrain of the criminal justice system. T2:130.

5. Full and Free Disclosure to Disciplinary Board

Though he has not had the help of counsel until now, he has fully cooperated with Bar Counsel's investigation, responded to every request with diligence, and produced all information in a timely manner. T2:133. When he found further information responsive to requests, he promptly supplemented it by sending it to Bar Counsel. *Id*. Though the lower court did not attend to this particular factor, there is no dispute that he has fully and freely disclosed all information requested of him.

6. Character and Reputation

Although Bar Counsel correctly observes that he did not call character witnesses, his dedication to his clients and deep commitment to justice speak volumes for his qualities as an attorney and public servant. Putting his own reputation on the line, Respondent continued to champion the rights of his clients even when influential judges and prosecutors disapproved.

Respondent would be the first to concede the need to temper his approach in the future. But regardless of his overzealous advocacy, even Bar Counsel concedes that his heart was in the right place – focused on "fealty" to his clients, even when his efforts cost him professionally and financially.

That shows character. And, even as an unrepresented respondent without a parade of witnesses lined up to testify, Asher Weinberg has shown more than a preponderance of it in his life and in these proceedings.

7. Remorse

Championing the rights of vulnerable clients in a system that often takes these rights away, Respondent does not regret his advocacy on Megan's behalf. But he does regret the manner in which he protested the rulings against her. T2:67. This case has certainly taught him the value of diplomacy and the diminished returns of unfiltered feelings.

But let's face it: Any lawyer who cares about justice and the rule of law ought be

outraged at the system's treatment of Megan Lemons. The blatantly unconstitutional rulings against her, combined with the overreaching of a prosecutor who enlisted a friendly judge's assistance in derailing her defense, should not have been tolerated in silence.

Considering the consequences to a client poised to win at trial, this miscarriage of justice invites legitimate protest by those who care about our system. Yet, as Mr. Weinberg has learned in this case, free speech comes at a cost. Learning that lesson the hard way, he regrets that his manner of speech overshadowed the content of his message. T2:168.

8. Unlikelihood of Repetition of Any Misconduct

As Judge Dumais found below, and as Bar Counsel concedes, "Respondent expressed sincere remorse and that it is unlikely that the behavior that forms the basis of the Petition will be repeated." Conclusions at 27. Although he limited his protest to a very limited audience of those within the bench and bar, he would not have drafted the flyer, moved to recuse a judge with unfiltered feelings, or reacted as he did. T2:68.

Having reflected on this situation, Mr. Weinberg has a different outlook on life and on the practice of law. Today, he "would have just stepped back, washed my hands of it, and be done with it." T2:71. Faced with a similar scenario more recently, he took a very different tact when another prosecution-friendly judge rescued the State from acquittal. As the State was about to rest its case, the judge stepped into the shoes of the prosecutor

to ask, "aren't you going to ask him what county this happened in?" T2:125. Rather than protest, Respondent exercised his right to remain silent.

Sadly, that is one lesson learned from these proceedings.

CONCLUSION

Respondent Asher Weinberg is guilty of a breach of etiquette, not a breach of ethics. Providing stellar representation in the underlying case, his outrage over his client's treatment should be shared by any lawyer dedicated to the sound administration of justice and to each member of this Court. For these reasons, Respondent respectfully requests that this Court sustain Respondent's exceptions and dismiss the charges against him.[14]

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[14] Though Bar Counsel agrees that Respondent's actions are not likely to recur, and has taken no exception to the substantial mitigating factors cited in this case, she would nonetheless take him away from his clients for at least a year, cost him his livelihood, and place even greater burdens on a public defender's office that is already understaffed. If this Court truly believes that attorney discipline is designed to protect the public rather than punish attorneys, a suspension that would remove a dedicated advocate from a vulnerable class of under-served clients would be a strange way to show it.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 27, 2023, a copy of the foregoing was served via MDEC upon:

Kelly A. Robier, Esquire
Assistant Bar Counsel
Attorney Grievance Commission
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Irwin R. Kramer