IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF:
THE HONORABLE C. CARTER WILLIAMS,
JUDGE OF THE 22ND JUDICIAL CIRCUIT

SUPREME COURT NO. 21-0878
JIC COMPLAINT NOS. 78-2021
& 81-2021

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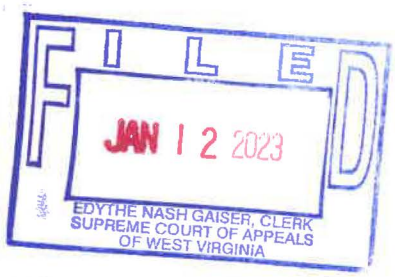

JUDICIAL DISCIPLINARY COUNSEL'S REPLY BRIEF

Respectfully submitted,

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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF:	**SUPREME COURT NO. 21-0608**
THE HONORABLE C. CARTER WILLIAMS,	**COMPLAINT NOS. 78-2021**
JUDGE OF THE 22ND JUDICIAL CIRCUIT	**81-2021**
	& 12-2022

JUDICIAL DISCIPLINARY COUNSEL'S REPLY BRIEF

I.

INTRODUCTION

"Behavior is the mirror in which everyone shows their image."[1] Someone "who is knowingly bent on bad behavior, gets upset when better behavior is expected of them."[2] Rather than admit his wrongdoing, Respondent attempts to justify his intemperate behavior by hiding behind a non-existent free speech privilege, casting blame on others for his misconduct and placing all his eggs in the proverbial "rehabilitation" basket. Respondent's conduct is egregious. He has cast the West Virginia judicial system as a whole in disrepute as evidenced by newspaper stories, editorials and social media comments. Respondent's discipline must be such that it deters other members of the judiciary from engaging in similar conduct and restores the public's confidence in judicial integrity, independence and impartiality. Therefore, the undersigned respectfully requests that this Court adopt the proposed discipline set forth at the conclusion of the brief.

II.

STATEMENT OF THE CASE

JDC realleges, reincorporates and makes a part hereof the Statement of the Case contained in its brief filed on or about November 17, 2022. In reply to Respondent's brief filed on or about December 29, 2022, JDC states as follows:

---

[1] Johann Wolfgang von Goethe, German author, scientist and statesman.
[2] Jane Austen, English novelist.

Prior to the filing of his Response Brief in the Supreme Court of Appeals of West Virginia, Respondent never specifically alleged that his comments made in connection with the July 11, 2021 incident were protected by the First Amendment to the United States Constitution or Article III, § 7 of the West Virginia Constitution. In his answer to the 1st Formal Statement of Charges, Respondent only generally pleaded the protections of the Constitution in his 3rd and 4th defenses:

THIRD DEFENSE

> At all times relevant to this judicial disciplinary proceeding, Judge Williams possessed a number of legal rights, in his personal and extrajudicial circumstances, which are clearly protected by the constitutions of the United States and West Virginia and statutes of this State, to challenge and communicate his objections, in a non-obstructive way, to the local municipal police officer and officials of the Moorefield Police Department, as to the basis of the traffic stop; the failure of the officer to reasonably investigate whether his cell phone had been used; and the manner in which the officer encountered and communicated with Judge Williams during the brief traffic stop, all of which occurred within a matter of a few hours . . . .

FOURTH DEFENSE

> The *West Virginia Code of Judicial Conduct,* as promulgated by the Court, and the responsibilities and obligations imposed upon Judge Williams and all other members of the Judiciary in this State are critically important to maintaining the prestige and integrity of the judicial system and its members; however, such Canons and Rules, contained therein, are inferior and subordinate to the constitutional and statutory rights employed by Judge Williams on the day of the traffic stop and encounter with the local municipal police officer and contact with officials of the Moorefield Police Department and should not be applied to impose any sanction in this judicial disciplinary proceeding.

(Joint Exhibit No. 3 at 2). Respondent never addressed the free speech argument in his second answer pertaining to the 2nd Formal Statement of Charges (Exhibit No. 4). On or about January 25, 2022, Respondent filed a Motion to Continue Hearing, He did not address the free speech argument in any fashion in this document. On or about February 1, 2022, Respondent filed a Motion in Limine pertaining to social media evidence, Dr. Clayman's report and other extrinsic act evidence. Again, Respondent did not make any free speech argument in this document.

These motions were argued during the pre-hearing held on February 4, 2022. A review of the hearing transcripts indicates that Respondent failed to raise any free speech argument. In subsequent

orders, the JHB denied Respondent's Motions to Continue and In Limine. No mention is made of any free speech argument by the JHB. On or about May 23, 2022, Respondent filed a Motion to Dismiss the 2nd Formal Statement of Charges. No free speech argument was raised in this document. In a subsequent Order, the JHB denied the Motion to Dismiss. No mention of the free speech argument is contained in that Order.

Respondent did not raise any free speech argument during the JHB hearing which took place from June 14-16, 2022. In fact, Respondent admitted into evidence as Joint Exhibits all evidence pertaining to the comments made by him in connection with the July 11, 2021 incident. Respondent also failed to raise any free speech argument in his post-hearing brief. The JHB recommended decision does not contain any discussion of free speech. Lastly, in his objections to the recommended decision, Respondent fails to raise any free speech argument. In fact, he only generally objects to the JHB recommended decision. Thus, Respondent waived any argument with respect to free speech as set forth in Argument Section A(1) below.

In footnote 2, page 1 of Respondent's brief, he states that this Court's Order of September 30, 2021, "finding probable cause and remanding the matter to JIC for 'proceedings in accordance with Rules 2.7(c) and 4,' thereby effectively denying the motion to suspend and resolving the first disciplinary proceeding initiated by JIC against Judge Williams." It appears from this statement and another contained in footnote 22, page 32 that Respondent is claiming that the JIC was required to issue an admonishment per RJDP 2.7(c). This is not correct. It is likely that the reference to (c) in the Order was a mistake because the order also mentioned RJDP 4 which deals with the hearing process. The JIC is the sole authority to determine whether an admonishment or a formal statement of charges issues pursuant to Rule 2.7. If formal charges are warranted then the provisions of RJDP 4 are triggered. The fact that RJDP 4 was cited in the order indicates that JIC had the option to either issue an admonishment or formal charges. It opted by unanimous vote for formal charges.

On page 3 of Respondent's brief he states that Judge Williams never asked anyone not to give him a ticket and that on twelve occasions during the stop he asked the officer to give him a ticket. In reality, Lt. Burrows testified that she believed Respondent contacted her during the stop so that a ticket would not be issued, that she then called Officer Johnson to tell him not to issue the ticket and then called Respondent back and told him that a ticket would not be issued. The majority of the twelve occasions where the Respondent told the officer to give him a ticket were in quick succession just before Officer Johnson went back to the patrol car and any subsequent statement occurred after he knew he was not getting the ticket.

In footnote 14, page 17 of Respondent's brief, he complains that the undersigned "falsely" indicated that it was unclear whether he was talking on the phone. Respondent has maintained that he did not talk on the phone while Officer Johnson told Lt. Burrows that he observed Respondent talking. Respondent relies on his phone records to say that he was not talking at the time of the stop. The undersigned has not challenged that and Respondent has not been charged with violating the cell phone statute in the Formal Statement of Charges. However, Respondent was talking on his cell phone to Lt. Burrows during the stop and as he drove away from the scene.

In footnote 17, page 27, Respondent blames the "injection of race" and "shoplifting" allegations on the JDC. Respondent repeatedly used the term "boy" in discussing Officer Johnson and twice left Walmart without paying. Thus, Respondent is the genesis of the issues and the charges resulting therefrom and not the JDC. The let's blame the JDC defense has been used repeatedly over the years to deflect blame by various judicial officers charged with violations of the Code of Judicial Conduct and is nothing more than a smoke screen to deflect culpability away from a Respondent. Respondent is charged in both instances with creating, however wrong it may be, the appearance that he is biased against African Americans or young police officers and that he received preferential treatment in the non-payment of a charge.

In footnote 18, page 28 of Respondent's brief, he incorrectly states that "[n]o witness testified that Judge Williams' use of the word "boy" demonstrated any racial animus toward Officer Johnson." When asked about the compilation of evidence, Lt. Burrows stated that looking back on his statements about "boy," "thugs" and "drugs" as a whole it could be taken as racially charged.

On page 29, Respondent complains about members of the public calling him a racist, a thief and a liar. The fact that the public called him a racist and a thief is illustrative of the perception however wrong it may be, that he is biased and that he received favorable treatment in connection with his failure to pay Walmart a second time. Sadly, the JHB found that Respondent lacked candor when he denied trying to get Officer Johnson fired.

On page 30, Respondent complains that the undersigned recorded his verbal self-report of July 15, 2021, without his "knowledge or permission." West Virginia is a one-party consent state. W. Va. Code § 62-1D-3(e) provides that "[i]t is lawful . . . for a person to intercept a wire, or electronic communication where the person is a party to the communication . . . ." Thus, the undersigned did not need Respondent's permission to record the telephone conversation and was under no obligation to advise him of the same. The fact that Respondent raised this non-issue is because he was caught in a lie – the having found that he lied about trying to get Officer Johnson fired.

In footnote 21 on page 30, Respondent claims that the undersigned told him he was going to be suspended prior to his sworn statement on October 6, 2021. The undersigned is required when filing a Rule 2.14 petition to provide notice to Respondent beforehand. The undersigned did inform him that she was seeking a suspension but never said he "was going to be suspended." Obviously, this Court did not impose a 2.14 suspension and thereafter, the position of the undersigned is that she would seek suspension. However, she has never told Respondent he "was going to be suspended." That decision is left solely to this Court. The undersigned recognizes the Court's role and her role and would never intimate that the Court would do something that it may not do.

REDACTED

Respondent's brief is replete with references to testimony about his good character. It should be noted that almost everyone who testified for Respondent as to his good character was either related to him, a personal friend, worked for him, appeared in front of him on a regular basis and/or had cases in his court. The witnesses called in the JIC's case-in-chief were reluctant to testify against the Judge for fear of retaliation and rightly so. This is why all of their affidavits and prior statements were admitted into evidence as joint exhibits. The entirety of their statements must be considered and not just their testimony on June 14, 15 or 16.

III.

ARGUMENT

JDC realleges, reincorporates and makes a part hereof the original Arguments contained in its brief filed on or about November 17, 2022.

A. RESPONDENT'S RELIANCE ON FREE SPEECH CLAUSES CONTAINED IN STATE AND FEDERAL CONSTITUTIONS IS MISPLACED.

1. Respondent Failed to Raise a Free Speech Argument Below and has Waived Raising the Issue Before this Court.

This Court has consistently held in both civil and criminal that the failure to raise an issue below or to object below constitutes a waiver of the argument/issue. *See Lin v. Lin*, 224 W. Va. 620, 687 S.E.2d 403 (2009) and *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). Specifically, this Court stated that it "will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." *Lin* at 624, 687 S.E.2d at 407. In *LaRock*, the Court explained the rationale for the raise or waive rule:

> Our cases consistently have demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights . . . . When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complaint at a later time. The pedigree for this rule is of ancient vintage, and it is premised on the notion that calling an error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs.

LaRock at 316, 470 S.E.2d at 635. The Court also stated:

> There is also an equally salutary jurisdiction for the raise or waive rule; It prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result.) In the end, the contemporaneous objection requirement serves an important purpose in promoting the balanced and orderly functioning of our adversarial system of justice.

Id.

In the instant case, Respondent only tangentially raised constitutional issues in his Answer to the Formal Statement of Charges. He never specified that the issues were related to the 1st Amendment to either the State or Federal Constitutions. More importantly, he never mentioned it again until his December 29, 2022 Response Brief to this Court. He never filed a motion concerning the same before the JHB. He did not raise it at hearing. Respondent did not address the issue in his post-hearing brief

or in his general objection to the Recommended Decision. As such, Respondent is deemed to have waived the argument and this Court is precluded from addressing the same at this stage of the proceedings.

2. Assuming *Arguendo* that this Court Finds Respondent did not Waive his Free Speech Claim, the Type of Comments made should not be afforded Constitutional Protection.

Without waiving Argument A(1) and assuming this Court finds Respondent did not waive his free speech claim, the comments charged should not be afforded constitutional protection. The 1st Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." Article III, § 7 of the W. Va. Constitution states:

> No law abridging the freedom of speech . . . shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation.

Freedom of speech is not absolute. Restrictions have been applied to control speech "of slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992). Courts have carved out various exceptions including obscenity, child pornography, defamation, speech integral to criminal conduct, fraud, fighting words, and true threats and speech presenting some grave and imminent threat that the government has the power to prevent. *U.S. v. Alvarez,* 567 U.S. 709 (2012).

In Syllabus Pt. 2 of *In the Matter of Hey*, 192 W. Va. 221, 452 S.E.2d 24 (1994) (*Hey* II), this Court recognized that West Virginia judges and judicial candidates are not entitled to unfettered free speech:

> The State may accomplish its legitimate interests and restrain the public expression of its judges through narrowly tailored limitations where those interests outweigh the judges' free speech interests.

In *In the Matter of Hey*, 188 W. Va. 545, 425 S.E.2d 221 (1992), a circuit judge appeared on a nationwide television program titled "Crossfire" on November 8, 1989, and discussed specific facts and issues of a case which was pending before the Supreme Court pursuant to a petition to prohibit enforcement of an order entered by the judge. During the program, the judge made negative comments about a subject child's educational performance, the child's church attendance, and cast aspersions on the mother's fitness and character as a custodial parent. *Id.* No evidence was taken below as to any of these matters no one knew where the judge came into possession of this information. *Id.* As a result formal charges were brought against the judge, and this Court disciplined him by way of public censure. *Id.*

On the day following the Court's issuance of the censure, the judge appeared on a local radio talk show and complained about one of the JHB members. *Hey II.* The judge stated that the member "[d]idn't even view 15 minutes of [the Crossfire videotape] so I'm not done with her yet. I want her to understand that. I hope she or one of her friends are listening." *Id.* at 224, 452 S.E.2d at 27. The JHB member did not hear the comments but was told of the statement by friends and warned that she needed to be careful. She filed a judicial ethics complaint against the judge. In answer to the complaint, the judge answered that he did not threaten the JHB member. He also argued that this statement was protected free speech. Nonetheless, the JIC issued a new statement of charges against the judge. During the hearing, the judge testified that the comments were intended to indicate that he would subpoena and depose the member in a related civil proceeding against him. *Id.* At the conclusion of the hearing, a special JHB voted to recommend dismissal of the charges stating that "[a]lthough a circuit judge's conduct and speech is limited in many ways by the Code of Judicial Conduct, a circuit judge does not lose the full protection of the First Amendment . . . especially when he is a party litigant." *Id.*

In agreeing to dismiss the complaint, this Court noted:

> The evidentiary support for the charges in this case stems from the stray ramblings of Judge Hey during a radio program interview. The evidence, although conflicting in part, can be summed up by the statement that no one offered any substantial or persuasive information from which it can be shown that Judge Hey's comments conveyed a physical or otherwise improper threat. As stated above, [the JHB member testified that she did not hear the actual airing of the comments of Judge Hey. The only witness with firsthand knowledge who testified in support of the complaint . . . . felt that Judge Hey's comments were unprofessional, but she did not remember Judge Hey's comments as being of a threatening nature.

Id. at 225, 452 S.E.2d at 225. The Court also stated:

> The State has compelling interests in maintaining the integrity, independence, and impartiality of the judicial system – and in maintaining the appearance of the same – that justify unusually stringent restrictions on judicial expression, both on and off the bench. As the Fifth Circuit Court of Appeals has noted, a "state may restrict the speech of elected judges in ways that it may not restrict the speech of other elected officials."

Id. at 227, 452 S.E.2d at 227, quoting *Scott v. Flowers*, 910 F.2d 201, 212 (5th Cir. 1990).

Importantly, with respect to West Virginia's Rule of Professional Conduct 8.2(a), the State Supreme Court, in suspending a lawyer who made false statements about an administrative law judge, stated:

> The Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges, but this protection is not absolute. A lawyer's speech that presents a serious and imminent threat to the fairness and integrity of the judicial system is not protected. When a personal attack is made upon a judge or other court official, such speech is not protected if it consists of knowingly false statements or false statements made with a reckless disregard of the truth. Finally, statements that are outside of any community concern and are merely designed to ridicule or exhibit contumacy toward the legal system, may not enjoy First Amendment protection.

Syl. pt. 4, *Lawyer Disciplinary Board v. Hall,* 234 W. Va. 298, 765 S.E.2d 187 (2014). The Court also held:

> Within the context of assessing an alleged violation of Rule 8.2(a) . . . a statement by an attorney that such attorney knows to be false or with reckless disregard as to

> its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office is not protected by the First Amendment as public speech on a matter of public concern where such statement is not supported by an objectively reasonable factual basis. The State's interest in protecting the public, the administration of justice, and the legal profession supports use of the objectively reasonable standard in attorney discipline proceedings involving disparagement of the credibility of the aforementioned judicial officers.

Syl. pt. 5, *Hall.*

In applying these principles to the case at hand, the charged comments that Respondent made cannot be afforded First Amendment protections. The comments involved threats and/or violations of specific provisions dealing with restrictions on judicial speech. For example, Respondent tried to get Officer Johnson fired as found by the JHB. He threatened to contact the State Police if he saw any Moorefield Police Officer on their phone to get them in trouble. He threatened to look at Moorefield Police Department cases differently in the future which is also a comment on pending/impending cases and was made at a time when they actually had cases in front of him. He repeatedly referred to Officer Johnson, who is African American, as "boy" thereby creating the appearance, however wrong it may be, that he was biased against him because of his race and/or age. When pulled over on three different occasions, he referenced himself as a Judge in violation of Rule 1.3. These comments, because they are specific threats and or violate definite Code provisions which deal with judicial speech are not protected by the 1st Amendment. Therefore, Respondent's claims are without merit. Moreover, Respondent can also be charged with and found to have violated Rule 1.2 and 3.1 provisions, which are more general in nature, because a finding that he violated the more specific violations means that he has harmed the integrity, independence and impartiality of the judiciary which is of paramount importance to the Court system as a whole.

B. RESPONDENT'S INVOLVEMENT IS ONLY ONE FACTOR TO CONSIDER IN DETERMINING JUDICIAL DISCIPLINE.

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REDACTED

REDACTED

IV.

CONCLUSION

WHEREFORE, the JDC respectfully requests that this Court impose the following sanctions:

a Respondent receive a suspension for two years without pay. At a minimum he should serve one year of suspension without pay and the remaining one year of suspension without pay be held in abeyance pending successful completion of his monitoring agreement with WVJLAP. Any breach of the WVJLAP agreement shall result in Respondent's immediate suspension without pay for the remaining one year;

b. Respondent receive a public censure for all violations of the Code of Judicial Conduct and the Rules of Professional Conduct pursuant to Rule 4.12 of the Rules of Judicial Disciplinary Procedure;

c. Respondent be fined a total amount of $5,000.00 for all violations of the Code of Judicial Conduct and Rules of Professional Conduct;

d. Respondent be required to complete his five-year monitoring agreement with WVJLAP; and

f. Respondent be ordered to pay the costs of the investigation and prosecution of the disciplinary matter in the amount of $11,129.06.

Respectfully submitted,

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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF:	**SUPREME COURT NO.**	**21-0608**
THE HONORABLE C. CARTER WILLIAMS,	**JIC COMPLAINT NOS.**	**78-2021**
JUDGE OF THE 22ND JUDICIAL CIRCUIT		**81-2021**
		& 12-2022

CERTIFICATE OF SERVICE

I, Teresa A. Tarr, JDC Counsel, do hereby certify that on the 12th day of January 2023, I served a true and accurate copy of the JDC Reply Brief as well as a redacted copy by placing the same in the United States mail, first-class postage prepaid, to Respondent and addressed to J. Michael Benninger, Counsel for Respondent, Benninger Law, PLLC, 10 Cheat Landing, Suite 100, Morgantown, WV 26507 and by email to: mike@benningerlaw.com

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