FILED

SEP 23 2016

BOARD OF PROFESSIONAL CONDUCT

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

In re:

Complaint against

James Michael Burge
37852 Colorado Avenue
Avon, OH 44011

Attorney Registration No. (0004659)

Respondent,

No. 16-044

COMPLAINT AND CERTIFICATE

(Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.)

Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411

Relator.

Now comes the relator and alleges that James Michael Burge, an Attorney at Law, duly admitted to the practice of law in the state of Ohio, is guilty of the following misconduct:

1. Respondent, James Michael Burge, was admitted to the practice of law in the state of Ohio on November 7, 1975. Respondent is subject to the Code of Professional Responsibility, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Rules for the Government of the Bar of Ohio.

2. On April 15, 2015, respondent was suspended from the practice of law based upon a felony conviction. *In re Burge, 04/15/2015 Case Announcements,* 2015-Ohio-1434.

3. On August 10, 2015, respondent was reinstated to the practice of law based upon the fact that his felony convictions were reduced to first-degree misdemeanors. *In re Burge, 8/10/2015 Case Announcements*, 2015-Ohio-3170.

4. Respondent's criminal case is currently on appeal.

COUNT ONE

Criminal Convictions

5. On or about September 24, 2014, respondent was indicted by a Lorain County Grand Jury on 12 counts of criminal conduct, including:

   - Three counts of Falsification in violation of R.C. 2921.13(A)(7), 2921.13(F)(1), a first degree misdemeanor;
   - Three counts of Tampering with Records in violation of R.C. 2913.42(A)(1), 2913.42(B)(4), a third-degree felony;
   - Three counts of Soliciting Improper Compensation in violation of R.C. 2921.43(A)(1), 2921.43(D), a first-degree misdemeanor;
   - Three counts of Having an Unlawful Interest in a Public Contract in violation of R.C. 2921.42(A)(1), 2921.42(E), a fourth-degree felony.

6. Respondent's case, *State of Ohio v. Burge*, 14CR090303, was assigned to visiting judge Dale Crawford in the Lorain County Court of Common Pleas.

7. On April 6, 2015, Judge Crawford dismissed one count of Soliciting Improper Compensation and one count of Having an Unlawful Interest in a Public Contract before the trial started.

8. At the close of the state's case, respondent moved for dismissal under Crim. R. 29. Judge Crawford dismissed the remaining two counts of Soliciting Improper Compensation and the remaining two counts of Having an Unlawful Interest in a Public Contract; consequently, the case proceeded on six counts—three counts of Falsification and three counts of Tampering with Records.

9. On April 8, 2015, the jury found respondent guilty on all six counts, including the three third-degree felony counts of Tampering with Records. Judge Crawford set sentencing for May 14, 2015.

10. On April 14, 2015, respondent resigned his position as a judge on the Lorain County Court of Common Pleas.

11. On or about April 15, 2015, the Supreme Court of Ohio suspended respondent's license to practice law on an interim basis, based upon his felony conviction. *In re Burge, 04/15/2015 Case Announcements* 2015-1434.

12. On May 14, 2015, Judge Crawford granted respondent's motion to reduce the three Tampering with Records accounts from felonies to misdemeanors due to Judge Crawford's erroneous preparation of the Jury Verdict Forms, which failed to specify the appropriate level of offense for the Tampering with Records charges. Consequently, respondent was sentenced on six *misdemeanor* offenses.

13. Judge Crawford sentenced respondent by imposing three $1,000 fines.

14. Respondent's convictions arose from his submission of his Financial Disclosure Statements in the years 2010, 2011, and 2012.

15. In each of those years, respondent failed to list information relating to his interest in Whiteacre North, LLC, ("Whiteacre"), whose sole asset was an office building located at 600 North Broadway in Lorain, Ohio.

16. Respondent and his wife had purchased 600 North Broadway in 1985, then, in 1997, respondent and his wife transferred title to 600 North Broadway to a newly-formed company called "Whiteacre North, LLC", of which respondent and his wife owned a 50% share along with two other attorneys (Sam Bradley and Michael Tully) who each owned a 25% stake in Whiteacre.

17. Whiteacre leased office space to Lorain County attorneys, many of whom received court-appointed work from the Lorain County Court of Common Pleas.

18. In or around September 1998, Whiteacre, by and through its members, secured a $365,000 mortgage from Lorain National Bank, with respondent and each shareholder signing as a joint and several personal guarantor.

19. On November 6, 2006, respondent was elected Judge of the Lorain County Court of Common Pleas.

20. In January 2007, the Whiteacre shareholders assigned their full interest in Whiteacre to Shimane and Azurree Smith ("Smiths") in return for $70,000 and the Smiths assuming the debt owed to Lorain National Bank, despite the fact that the mortgage with Lorain National Bank expressly prohibited an assignment. Even so, respondent remained a personal guarantor on the loan from Lorain National Bank.

21. Neither respondent nor any of the Whiteacre shareholders ever notified Lorain National Bank of the assignment.

22. As per the contract between Whiteacre and the Smiths, if the Smiths defaulted on the $70,000 payment or the mortgage, ownership of Whiteacre would revert back to respondent, his wife, and Attorney Bradley, who had since acquired Tully's 25% stake.

23. In or around February 2011, the Smiths defaulted; consequently, Whiteacre reverted back to respondent (25%), his wife (25%), and Attorney Bradley (50%).

24. On January 24, 2011, respondent filed his 2010 FDS; however, he failed to list:

- Lorain National Bank as a creditor, despite the $365,000 mortgage.

25. On or around June 7, 2011, respondent transferred his 25% ownership interest in Whiteacre to his wife for $1; however, respondent failed to notify Lorain National Bank of the change in ownership and remained a personal guarantor of the loan from Lorain National Bank.

26. On January 26, 2012, respondent submitted his FDS for the year 2011; however, respondent failed to list:

- Lorain National Bank as a creditor;
- His ownership interest in Whiteacre from approximately February 2011 until June 2011 when respondent transferred his shares to his wife for $1; and,
- His wife's ownership interest in Whiteacre.

27. On February 13, 2013, respondent filed his FDS for the year 2012; however, respondent failed to list:

- His wife's ownership interest in Whiteacre.

28. Respondent's conduct in Count One violates Jud. Cond. R. 1.2 [A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety]; and Prof. Cond. R. 8.4(b) [A lawyer shall not commit an illegal act that adversely reflects on the lawyer's honesty or trustworthiness).

COUNT TWO

Failure to Disclose Relationship between Whiteacre and Tenant-Lawyers

29. Relator incorporates paragraphs 1-27 as if fully rewritten.

30. Between approximately February 2011 and June 2011, while respondent held an ownership interest in Whiteacre (see ¶¶ 22, 23), several of respondent's tenants—all of whom were lawyers—regularly appeared before respondent in the Lorain County Court of Common Pleas.

31. Between approximately February and June 2011, and in addition to the appearances noted in the preceding paragraph, respondent made at least ten court appointments to five

different lawyers, all of whom were renting space from respondent via Whiteacre at the time of their appointments.

32. Between approximately February and June 2011, respondent also approved the payment of court-appointed fees to two lawyers who were renting space from respondent via Whiteacre.

33. Despite the relationship between respondent, via Whiteacre, and the tenant-lawyers who appeared before him, respondent failed to disclose the relationship to the prosecutor assigned to each case or recuse himself from those cases.

34. Respondent's conduct in Count Two violates Jud. Cond. R. 1.2 [A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety]; and Jud. Cond. R. 3.11 [A judge shall not engage in financial activities permitted under divisions A and B of this rule if they involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves].

COUNT THREE

Rude and Discourteous Behavior

The Slaby Letter

35. In July 2011, Ohio State Rep. Lynn Slaby sponsored House Bill 265 in the General Assembly, which would have required a prosecutor to consent to a defendant's request to be tried before a judge, rather than a jury.

36. Before being elected to the House, Slaby had served as a judge on the Ninth District Court of Appeals for 14 years.

37. On July 20, 2011, respondent, while a judge on the Lorain County Court of Common Pleas, authored a letter on official court stationary to three state representatives, Matt Lundy, Dan Ramos, and Gayle Manning, regarding his views on Slaby's proposed legislation.

38. In his letter, respondent characterized Slaby and his proposed legislation as "nothing more than the hobgoblin of a small-minded, mouth-breathing, Tea Party type whose political style and abilities uniquely qualifies him to do nothing."

39. In his letter, respondent also stated, "Until recently, the Ninth District Court of Appeals (Lorain, Medina, Wayne, Summit Counties) was nothing more than an affirmative action program for intellectually challenged, Summit County Republican lawyers. That's how Lynn got elected."

40. In his letter, respondent stated:

> In my first year on the bench, I presided over 29 trials. Twenty-six of these trials were trials to the Court. Criminal defense attorneys try their cases to the court: (1) when they have a technical defense which is more suitable to a trial to the court rather than a jury, and (2) when the defendant is clearly not guilty. Defense attorneys opt for a jury trial only when they need smoke and mirrors to win, i.e. when the defendant is guilty but they may be able to show reasonable doubt based upon the state's evidence. This is the same strategy which underlies Lynn's bill. He wants prosecutors to be able to use smoke, mirrors, emotion and bias to carry the day when their cases are not supported by proof beyond a reasonable doubt. Ask yourselves, if the state is able to prove its case beyond a reasonable doubt, why would the prosecutor not want to present the case to a judge.

41. Respondent concluded by stating in the second-to-last paragraph, "You have my permission to read this letter to the General Assembly."

Derogatory Comments from the Bench

42. Respondent has frequently referred to Caucasian defendants as "crackers" and African-American or Latino defendants as "homeboys."

State v. Hatfield

43. On August 3, 2012, respondent presided over the case of *State v. Hatfield*, 11CR086378, in which the defendant, Cecil Hatfield, Jr., appeared with his lawyer on a third-degree felony drug charge.

44. Due to the defendant's admission into the Community Based Correctional Facility (CBCF), respondent continued the sentencing to August 10, 2012.

45. At the conclusion of the proceeding, respondent stated to Hatfield's lawyer, "I want you to show this cracker what I was going to do to him." At that point, Hatfield's lawyer informed Hatfield that respondent had intended to sentence Hatfield to three years in prison, at which point respondent stated, "I'm sick of you, boy. You hear me?"

46. Respondent then stated, "You know what? In fact, you've been such a headache, I was looking forward to putting you in the pen. And I would have paid somebody 50 bucks to give you a beating before you went. So you finish up that CBCF and you do everything right."

47. Respondent concluded by stating, "I'm aggravated with myself that I can't do it."

State v. Bernhardt

48. On October 10, 2012, while presiding over the sentencing hearing in the case of *State v. Bernhardt*, 11CR084147, respondent engaged in a colloquy with the defendant regarding the defendant's possession of stolen property.

49. After the defendant explained how he came into possession of the stolen property, the following exchange occurred:

> Respondent: Now, if I were to believe you were that stupid, James, I would just have Deputy Motelewski shoot you right now, because I know you're not going to make it through life. Just tell me you knew it was stolen, that's all.
>
> Defendant: It was a possibility, yes, sir.
>
> Respondent: Possibility?
>
> Defendant: Yes, sir.
>
> Respondent: Jesus Christ.

State v. Nail

50. On October 12, 2012, while presiding over the case of *State v. Nail*, 12CR085624, there was a disturbance in the courtroom, at which point respondent stated to his bailiff on the record, "Quiet those homeboys down."

State v. Lopez

51. On December 28, 2012, while presiding over an extradition matter in the case of *State v. Lopez*, 12CR086434, the defendant agreed to waive extradition back to Georgia. When the defendant's lawyer informed respondent that the charge in Georgia was a misdemeanor, respondent stated, "They've got some angry crackers in Florida, don't they?"

52. After the defendant's lawyer informed respondent that it was Georgia, not Florida, the defendant stated, "Yes, they do."

53. Respondent's conduct in Count Three violates Jud. Cond. R. 1.2 [A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of

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

COUNT FOUR

The *Boros* Matter

54. On or about February 6, 2014, Kelly Boros was indicted by a Lorain County Grand Jury for Having a Weapon Under Disability, a third-degree felony; Inducing Panic, a fourth-degree felony; Resisting Arrest, a fourth-degree felony; Obstructing Official Government Business with Specification, a fifth-degree felony; and, Domestic Violence, a fourth-degree misdemeanor.

55. Respondent presided over Boros' case, 14CR088611, and appointed Attorney Tony Manning to represent Boros. At the time, Manning was representing Boros on another unrelated criminal case.

56. In February 2014, respondent referred Boros for an evaluation to determine if Boros was competent to stand trial.

57. Boros was found to be competent.

58. On May 16, 2014, Boros entered a plea of guilty to the charges as contained in the indictment. Respondent placed the defendant on a personal bond and set sentencing for October 10, 2014.

59. Shortly after Boros pled guilty, he learned that his minimum sentence would include a three-year prison term, rather than the one-year term he had anticipated; consequently, Boros wanted to withdraw his previously-entered guilty plea.

60. At Boros' request, Boros' father drove him to the Lorain County Court of Common Pleas to speak with respondent about the possibility of withdrawing his plea.

61. After several unsuccessful attempts, Boros finally spoke to respondent on two separate occasions in the hallway of the Lorain County Court of Common Pleas. The ex parte conversations centered on Boros' wish to withdraw his plea.

62. Without the prosecutor or Boros' lawyer present, respondent engaged in an extensive ex parte conversation with Boros, ultimately telling Boros that if he wanted to withdraw his plea, respondent would allow it.

63. Boros left the ex parte meeting with respondent feeling as though "he was in good hands"; however, shortly thereafter, respondent was indicted on several felony charges (see Count One), which prompted the appointment of a visiting judge in Boros' case.

64. Worried that the visiting judge would not permit Boros to withdraw his plea, Boros failed to appear for his sentencing on October 10, 2014 resulting in a capias.

65. On November 20, 2014, Boros was arrested on the outstanding capias.

66. On December 12, 2014, Boros appeared for sentencing with Manning. In open court, and in the presence of the prosecutor, Boros referred to the ex parte communication; however, after speaking with Manning, Boros elected to proceed with sentencing.

67. Respondent's conduct in Count Four violates Jud. Cond. R. 1.2 [A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety]; and Jud. Cond. R. 2.9(A) [A judge shall not initiate, receive, permit, or consider ex parte communications].

COUNT FIVE

The Nieves Matter

68. Samuel Nieves was indicted on one count of Rape and one count of Gross Sexual Imposition, *State v. Nieves*, Lorain County Court of Common Pleas, 10CR081259.

69. On June 11, 2012, respondent presided over the bench trial in *State v. Nieves*.

70. On direct examination, the victim, a 14 year-old female, testified as follows:

Q: All right. When you say he's trying to force sex upon you, what do you mean?

A: He was trying to put his penis in my vagina.

Q: Was he able to do that?

A: Not all the way.

Q: Okay. Where did it—where did it go?

A: Between the lips of my vagina.

71. On cross-examination, the victim testified as follows:

Q: All right. So basically he touched his penis against your vagina; is that fair?

A: Yes, sir.

Q: Okay. While you were on the couch?

A: Yes, sir.

Q: And it never went inside?

A: No, sir.

72. At the close of the state's case, the defendant's lawyer stated that he would like to make a motion; however, respondent replied, "If I believe—I have to act as though everybody

told the truth on the State's side, and assuming they did, then they've at least made a prima facie case. So I'll overrule your Rule 29 motion."

73. The defendant's lawyer then made a Rule 29 motion to acquit the defendant on the Rape charge based upon the victim's testimony on cross examination that the defendant's penis never went inside her vagina.

74. Respondent granted the motion, stating, "Correct. I will grant the 29 motion to the extent the Court would be unable to find the defendant guilty of the principal offense of rape. Whether there was an attempt would be another consideration."

75. At that point, the prosecutor reminded respondent that the victim testified that the defendant's penis went between the lips of the vagina, to which respondent stated, "Right."

76. The prosecutor continued, "—which is sufficient to establish penetration under numerous case law, both the Ninth District and the Ohio Supreme Court."

77. Respondent replied:

> That is for oral sex. In fact, there needn't be any penetration. However, the statute, notwithstanding what Judge—some judge might think, says that rape is the penetration of the vaginal cavity. The vaginal cavity begins at the introitus, which is well beyond the labia. So to that extent, I don't care what anybody says, I'm right. In fact, the more I talk, the righter I get.

78. At the close of the case, respondent commented on the victim's testimony, stating:

> With respect to the charges themselves, the testimony of [the victim] was that the penis may have gone past the labia and then the defendant stopped. [The victim] was unable to speculate as to why. The Court would find that if there were an attempt to rape [the victim], that that attempt was abandoned.

79. Respondent found the defendant guilty of Gross Sexual Imposition and set the matter for sentencing on November 30, 2012.

80. Respondent sentenced the defendant to 17 months in prison; however, on March 4, 2013, respondent granted the defendant's motion for judicial release over the state's objection.

81. Despite the acquittal on the Rape charge and the fact that Double Jeopardy had attached, the state filed an appeal in the Ninth District alleging that respondent "applied the incorrect standard of penetration in a rape case in direct contradiction of *State v. Melendez*, 9th District, Lorain County No. 08 CA 009477, 2009-Ohio 4425."

82. A unanimous panel of the Ninth District Court of Appeals agreed, holding:

> The trial court granted Nieves' motion for acquittal after refusing to recognize established case law. This Court, after extensive research, joined with our many sister districts in holding that "insertion, however slight, of a part of the body or other object within the vulva of the labia is sufficient to prove vaginal penetration for purposes of proving sexual conduct as defined in R.C. 2907.01(A) and rape in violation of R.C. 2907.02" *State v. Melendez*, 9th Dist. Lorain No. 08CA009477, 2009-Ohio-4425, ¶ 14. We reiterated that holding in *In re T.L.*, 186 Ohio App.3d 42, 2010-Ohio-402, ¶ 21 (9th Dist.). *vacated in part on other grounds*, 127 Ohio St.3d 9, 2010-Ohio-4936,. In both cases, the relevant holding was rendered by a unanimous panel. Nevertheless, the trial judge in the instant case eschewed established precedent, refusing to recognize that penile penetration within the labia or vulva is sufficient penetration for purposes of rape. The judge stated:
>
> > That is for oral sex. In fact, there needn't be any penetration. However, the statute, *notwithstanding what* Judge—*some judge might think*, says that rape is the penetration of the vaginal cavity. The vaginal cavity begins at the introitus, which is well beyond the labia. *So to that extent, I don't care what anybody says, I'm right. In fact, the more I talk, the righter I get.* (Emphasis added).
>
> Accordingly, in the face of such an expressed disregard for the precedent of this higher court, such action is not only capable of repetition, but is highly likely to be repeated by this particular trial judge. Moreover, without review, other trial courts within this district may disregard our established precedent and grant directed verdicts in rape cases on the basis that the State only proved penetration within the labia or vulva. Accordingly, this Court concludes that the State's appeal is properly before us.

* * *

> That the trial judge personally disagrees with this Court's holding in Melendez "cannot be used as a basis to find that the evidence presented by the [S]tate on the material elements of the charge was insufficient." * * * Accordingly, this Court reverses the trial court's decision on this issue. However, this decision has no effect on Nieves' acquittal because double jeopardy precludes retrial.

The Rivera Matter

83. On October 12, 2012, respondent presided over the sentencing hearing in the case of *State v. Rivera*, 12CR085527.

84. The defendant's lawyer informed respondent that his client was fluent in Spanish, but spoke broken English. He then stated:

> And as the State has indicated, that upon a change of plea, they'd have no objection to probation in this case. I've indicated that to Mr. Rivera. We've gone over the necessary waive of rights forms. I've talked to him, discussed it with him, and it seems, for the most part, he understands that, and would ask the Court to consider acceptance of his change in plea.

85. Respondent then stated, "Okay. Well, I don't know how to gauge Mr. Rivera's ability to understand. I'm going to speak with him in Spanish, and then I'm going to tell, for the record, what I just said. Is there an objection to that?"

86. Neither the defense lawyer nor the prosecutor objected.

87. R.C. 2311.14 requires the court to appoint a qualified interpreter whenever a party in a legal proceeding cannot readily understand or communicate.

88. Rather than postpone or reschedule the hearing, respondent conducted the sentencing hearing in Spanish, while translating what he was saying into English with no objection from the defense attorney or the prosecutor.

89. At the conclusion of the proceeding, respondent stated, "I know that was rough, but I understood it."

90. Respondent then stated to the prosecutor in jest, "Don't tell on me. I don't want you to indict one more human being that doesn't speak English."

91. Respondent then stated to his bailiff that respondent only speaks "hillbilly Spanish."

92. Respondent's conduct in Count Five violates Jud. Cond. R. 1.2 [A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety]; and Jud. Cond. R. 2.2 [A judge shall uphold and apply the law, and perform all duties of judicial office fairly and impartially].

CONCLUSION

Wherefore, pursuant to Gov. Bar R. V, the Rules of Professional Conduct, and the Code of Judicial Conduct, relator alleges that respondent is chargeable with misconduct; therefore, relator requests that respondent be disciplined pursuant to Rule V of the Rules of the Government of the Bar of Ohio.

Scott J. Drexel (0091467)
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CERTIFICATE

The undersigned, Scott J. Drexel, Disciplinary Counsel, of the Office of Disciplinary Counsel of the Supreme Court of Ohio hereby certifies that Joseph M. Caligiuri is duly authorized to represent relator in the premises and has accepted the responsibility of prosecuting the complaint to its conclusion. After investigation, relator believes reasonable cause exists to warrant a hearing on such complaint.

Dated: September 23, 2016

Scott J. Drexel, Disciplinary Counsel

Waiver of Probable Cause

The Office of Disciplinary Counsel has informed me of its intent to file a formal complaint for the October 2016 meeting of the Board of Professional Conduct against my client, James M. Burge, Attorney Registration No. 0004659. Under Gov. Bar R.V, Section 11(A), I have advised my client that the Board must make a finding of probable cause before certifying the complaint.

Having discussed this matter with my client, I hereby waive probable cause and accept certification on behalf of James M. Burge.

Signed on this 22nd day of September, 2016.

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Counsel for respondent, James M. Burge