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IN THE DISCIPLINARY DISTRICT V  
OF THE  
BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

BOARD OF PROFESSIONAL  
RESPONSIBILITY

*[Signature]*

EXEC. SECRETARY

IN RE: KRISTEN ELIZABETH MENKE,  
BPR No. 24600, Respondent,  
an Attorney Licensed to Practice  
Law in Tennessee  
(Davidson County)

DOCKET NO. 2016-2553-5-KH

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

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STATEMENT OF THE CASE

A Petition for Discipline was filed against Respondent, Kristen Elizabeth Menke ("Ms. Menke") on February 19, 2016, alleging violations of Rules of Professional Conduct 3.4(e)(1), (2), and (3), Fairness to Opposing Party and Counsel, and 8.4(a) and (d), Misconduct. Ms. Menke filed an Answer on April 1, 2016. A Hearing Panel was appointed on April 13, 2016, and a substitution for one of the Panel members was made on April 21, 2016. A conference call was held on May 5, 2016, to establish a trial schedule. Case Management Order No. 1 was entered on May 6, 2016, setting deadlines and trial dates. Following a discovery period and Case Management Order No. 2, a telephonic hearing was held on November 1, 2016, to resolve outstanding discovery issues. The Hearing Panel entered Case Management Order No. 3 on November 7, 2016, concerning the remaining discovery issues. On December 29, 2016, the Hearing Panel granted a motion filed by the Board to reschedule the pre-trial conference for

January 11, 2017 at 2:00 p.m. On January 9, 2017, a substitution was made for one of the Panel members. The final hearing on this matter was held on January 17 and 18, 2017.

As a preliminary matter to the hearing, the parties and Hearing Panel agreed to entry of a Protective Order requiring that the child victim's name be redacted from any public dissemination of the Board's public record.

At the final hearing, the Board called the following witnesses: Kristen Menke, Bernard McEvoy, Patrick McNally, and William Killian. Mr. Killian was an expert witness for the Board. Ms. Menke testified on her own behalf and she called two other witnesses: Rob McGuire and David Raybin. Mr. Raybin was an expert witness for Ms. Menke. The parties introduced thirteen (13) exhibits.<sup>1</sup>

Within the time permitted by the Panel, the parties submitted detailed, proposed findings and conclusions. Counsel for the parties did an excellent job of summarizing the evidence adduced at the hearing and outlining the applicable law. The arguments advanced for acceptance by the Panel were valuable and expedited the Panel's deliberations. Evidence and proof was then closed February 22, 2017.

Respondent timely moved for inclusion in the record of this proceeding (1) a Certified Copy of Conviction entered on February 10, 2017 in *State of Tennessee v. Adam Wayne Robinson* before the Criminal Court of Davidson County, Tennessee, and (2) the transcript of the February 10, 2017 hearing in *State of Tennessee v. Adam Wayne Robinson* in said Court. The Panel is allowing these two (2) matters to be included in the record. However, the Panel has deemed these matters to be irrelevant to the issues before it. The Panel believes that the Petition

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<sup>1</sup> The expert witnesses provided valuable assistance to the Panel, especially in understanding the criminal trial process and issues facing prosecutors. However, the Panel did not defer to any of the expert witnesses on the ultimate issues of whether Ms. Menke violated any Rules of Professional Conduct.

for Discipline against the Respondent must be resolved by the facts and circumstances presented at the original trial against Adam Wayne Robinson and not affected by his subsequent plea.

#### **RULES AT ISSUE**

In its Petition, the Board alleges that Ms. Menke violated the following Rules of Professional Conduct:

##### **RULE 3.4: FAIRNESS TO THE OPPOSING PARTY AND COUNSEL**

A lawyer shall not:

- (c) in trial,
  - (1) allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence; or
  - (2) assert personal knowledge of facts in issue except when testifying as a witness; or
  - (3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;...

##### **RULE 8.4: MISCONDUCT**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;  
....
- (d) engage in conduct that is prejudicial to the administration of justice[.]

The Board asserts that discipline is appropriate because these alleged violations were not merely negligent, but that Ms. Menke “intentionally and knowingly inserted improper comments to the jury.” In summary, the Board alleges that Ms. Menke violated these Rules by improperly commenting to a jury upon a criminal defendant’s right to remain silent and not be compelled to testify against himself, arguing that the jury should send a message to the community about child abuse, and personally opining on the justness of the State’s charges against the defendant.

### **Respondent's Education, Licensure, and Professional Background**

Respondent has been licensed as a lawyer since 2005. Currently in private practice in Nashville, she practiced for approximately seven years as a prosecutor with the office of the Davidson County District Attorney General. The Panel found Ms. Menke to be a serious, passionate advocate for the State and victims of crimes drawn into the criminal justice system. Ms. Menke has tried approximately thirty jury trials as lead counsel or co-chair.

### **Respondent's Disciplinary History**

Respondent has an unblemished formal disciplinary record. No lawyer disciplinary complaint has ever been filed concerning her conduct and no discipline of any kind has ever been imposed on her. However, the Panel has also noted that, prior to the events forming the basis for the pending disciplinary charges, Respondent was found by a Tennessee appellate court to have made improper closing arguments.

Ms. Menke was previously involved in another case in which her improper closing argument was a partial basis for reversal of a conviction. In the *State v. Bakari* case, the Court of Criminal Appeals determined that Ms. Menke's closing argument contained personal statements to vouch for the credibility of the victim. Ms. Menke used personal examples of her "sex life" and a personal story about speaking to a five (5) year old child to "rebut the fact that the victim, or victims because there were two victims in that case, couldn't recall all of the specific details regarding each incident of abuse."

The Court of Criminal Appeals held that Ms. Menke's comments were reversible error:

Turning to the instant case, we agree with the appellant that the prosecutor used personal examples as a way to vouch for the victims' credibility. Although the trial court instructed the jury during the charge that "remarks of counsel are intended to help you in understanding the evidence and applying the law, but they are not evidence," the prosecutor's statements were not brief and were made despite the trial court's warning not "to get

too personal.” The victims' testimony was the primary evidence against the appellant, and the fact that the jury found him guilty only of the lesser-included offense of attempted rape of J.W. demonstrates the weakness of the State's case. Finally, we have determined that additional errors are in the record. The cumulative effect of the prosecutor's statements with the other errors leads us to conclude that the appellant's conviction should be reversed.

*State v. Bakari*, No. M201001819CCAR3CD, 2012 WL 538950, at \*13 (Tenn. Crim. App. Feb. 15, 2012).

### FACTS AND CONCLUSIONS

1. On June 26, 2015, the Board opened an investigative file based upon a decision of the Tennessee Court of Criminal Appeals in the matter of *State of Tennessee v. Adam Wayne Robinson*, No. M2013-02703-CCA-R3-CD, (June 23, 2015). The alleged ethical misconduct by Ms. Menke arises from her actions while serving as Assistant District Attorney General for Davidson County in the prosecution of Adam Wayne Robinson.

2. Ms. Menke was an Assistant District Attorney in Davidson County from approximately June 2007 until September 2014. She had been employed by the District Attorney's Office for approximately six (6) years at the time of the Robinson trial.

3. On June 25, 2012, a Grand Jury of Davidson County indicted Adam Wayne Robinson (“defendant”) on three (3) counts of aggravated sexual battery in violation of Tenn. Code Ann. § 39-13-504. The True Bill is signed by John Farrell, a police detective, who appeared before the Grand Jury.

4. Ms. Menke was a member of the Child Abuse Unit for the District Attorney's Office. She was not involved in the Grand Jury presentment of the case and does not recall if she was involved in preparation of the indictment, but she believes she was. She was assigned to prosecute the case against defendant.

5. At some point during preparation for trial, Assistant District Attorney Rob McGuire joined Ms. Menke as co-counsel.

6. The trial began on May 7, 2013, and concluded on May 9, 2013. The prosecution called only two (2) witnesses, the child victim of the crime ("B.C." or "child") and B.C.'s mother.

7. The State alleged that the defendant engaged in sexual touching of B.C.'s genitals and buttocks on three (3) occasions. The defendant was a maintenance worker at the apartment complex where B.C. resided. According to the State's proof, the criminal acts occurred when the defendant asked B.C. to follow him to a hidden area near the tennis courts of the apartment complex.

8. The State's proof was largely circumstantial and, at several points during her closing argument, Ms. Menke noted that the only two people who could know what happened were the child and the defendant. The State offered four (4) collective exhibits at trial.<sup>2</sup>

9. At trial, Ms. Menke asked the child to identify the defendant; however, the child could not identify him.

10. The defense called four (4) witnesses, including Detective John Farrell, who interviewed the defendant during the investigation of the alleged crime. The defense introduced a recording of Detective Farrell's interview with the defendant. At trial, the defendant exercised his constitutional right to remain silent and he did not testify.

11. Mr. McGuire delivered the first closing argument for the prosecution.

12. Mr. McEvoy delivered the closing argument for the defendant.

13. Ms. Menke delivered the prosecution's second closing argument.

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<sup>2</sup> The State's Exhibit 1 consisted of two (2) anatomical drawings. State's Exhibit 2 consisted of five (5) photographs of the apartment complex from various angles. State's Exhibit 3 consisted of eight (8) photographs of the apartment complex from various angles. State's Exhibit 4 was the State's election of offenses.

14. Mr. Robinson was found guilty by the jury and sentenced to nine (9) years and six (6) months in prison.

15. Mr. McEvoy filed a Motion for New Trial and an Amended Motion for New Trial, both of which focused primarily on the impropriety of statements made by Ms. Menke during her closing argument. The trial court did not grant a new trial.

16. The defendant hired attorney Patrick McNally to represent him on appeal. Mr. McNally, on behalf of the defendant, also asserted that Ms. Menke engaged in prosecutorial misconduct by repeatedly injecting improper comments during closing argument. The Court of Criminal Appeals held that Ms. Menke's comment on the defendant's right not to testify was reversible, non-structural constitutional error. The Court of Criminal Appeals also held that Ms. Menke engaged in a persistent pattern of other improper prosecutorial argument constituting plain error.

17. The comments made by Ms. Menke formed the basis for reversal by the Court of Criminal Appeals. The Board asserts that these statements also violated the Rules of Professional Conduct.

18. During closing argument, Ms. Menke made the following statement:

The other thing that we get from (B.C.'s mother's) testimony is corroboration from Mr. Robinson. She only knows what she saw and what she witnessed and what she heard. She has got her sensation and that's what she testified to on the witness stand. She wasn't behind building H. She saw them coming up from behind the dumpster, coming from someplace that that man had no business being with a six year old little girl. What in the hell was he doing behind that apartment building. What were they doing. If they weren't doing what B.C. said they were doing, what were they doing, because he hasn't offered any explanation for that through any of his witnesses.

19. Following this statement, Mr. McEvoy objected, stating: "Objection, Your Honor. If I may approach on this occasion?" Ms. Menke replied: "It's closing argument." The

Court responded: "I know what it is. All right, let's approach." Mr. McEvoy declined because he did not want to make a speaking objection. The Court did not rule on the objection and Ms. Menke immediately continued:

Mr. Robinson obviously doesn't have to testify. Everybody knows that, right. We have all been told that since Jury selection. I'm not talking about his testimony. I'm talking about the witnesses from the witness stand. He chose to put on proof, and he didn't offer you any proof from any of those witnesses as to what else was going on and what he was doing with B.C. He chose to play his statement. He didn't offer Detective Farrell in that connection. He doesn't have to, once again, but he didn't.

20. Neither Mr. McEvoy nor the Court stated the basis for the objection, but Ms. Menke appeared to understand that this was an objection related to her comment about the defendant's right not to testify.

21. In addition to the statement above, Ms. Menke's closing argument made numerous references to the fact that the child and the defendant were the only two people who knew what happened:

He is in the power seat. Who is going to believe the words of a little girl over a grown man, right. He has got all of these people at the apartment complex that love him. He would never do anything like that. He is now in a swearing match with an eight year old girl, who had, by the way, no motivation to lie, and the man sitting across the room from you has every motivation to lie.

\* \* \*

But what their testimony did give us was corroboration not only for that, but for the fact that nobody really knew where anybody was at any given time. Sometimes Mr. Williams is walking his dogs this way, sometimes his mother is going out – or his grandmother is going out to find Mr. Robinson at various places on the complex. Sometimes she calls him, she doesn't always know exactly where he is. And on February 5<sup>th</sup> of 2012 she can't remember which she did, what she did, anything about it. And what all of their testimony says is that nobody ever went behind Building H where (child) said this happened. Not a single one of those people. None of them would have seen. And you know who would have known that? Mr. Robinson. He was familiar with everybody's schedule. He



knew where everybody was supposed to be at every time. He knew when they walked their dogs, he knew what days they were at work. I mean his grandmother came at the same time everyday to give his mother her medication. He's the person in the power position. He knows.

22. Ms. Menke admitted that indirect references to a defendant's right not to testify can also violate a defendant's constitutional rights.

23. Ms. Menke and Mr. McGuire sought to exclude the detective's recording of the Robinson interview, which they deemed a self-serving statement by the defendant. However, the defense was ultimately allowed to play the recording due to the prosecution's questioning of a witness which "opened the door."

24. Ms. Menke maintains that it was necessary to make the statements on the defendant's right not to testify and his lack of an explanation in order to respond to the proof that the defendant presented at trial, particularly the detective's recording.

25. Ms. Menke admitted that it would have been possible to use information contained in the recording to her benefit without making reference to the defendant's right not to testify.

26. Mr. McEvoy testified that he made the objection to Ms. Menke's statements because it appeared to him that "when she was saying he hasn't explained this or offered any testimony about this, that that is a comment on his decision not to testify."

27. In the Motions for New Trial, Mr. McEvoy argued that Ms. Menke had made an improper reference to his client's decision not to testify.

28. Mr. McGuire and Ms. Menke filed a response to the Motions for New Trial which addressed relevant case law and argument from the State's perspective.

29. After the trial court denied the Motions for New trial, Mr. McNally also raised the issue of Ms. Menke's comments on the defendant's right not to testify on appeal.

30. The Court of Criminal Appeals determined that Ms. Menke's comments on the defendant's right not to testify constituted reversible non-structural constitutional error. As found herein, the Panel has determined that these statements constitute unprofessional, sanctionable conduct.

31. The State's proof in the Robinson case was largely circumstantial. As noted by both Ms. Menke and the defense, only the defendant and the child could testify about what occurred behind the apartment building.

32. Ms. Menke made direct reference to that fact several times during her closing argument. This is an important factor because when Ms. Menke makes the following statement: "What in the hell was he doing behind that apartment building. What were they doing. If they weren't doing what B.C. said they were doing, what were they doing, because he hasn't offered any explanation for that through any of his witnesses", she is making an indirect reference to the fact that the defendant has not testified. He is the only other person who could have known what happened.

33. At the beginning of her closing argument, Ms. Menke even refers to the testimony of the child and the defendant as a "swearing match" and poses the rhetorical question, "[W]ho is going to believe the words of a little girl over a grown man, right."

34. Ms. Menke argued that the defendant's witnesses could have not seen anything because no one ever went behind Building H: "And what all of their testimony says is that nobody ever went behind Building H where (child) said this happened. Not a single one of those people. None of them would have seen."

35. Immediately after Ms. Menke made the statement "[I]f they weren't doing what B.C. said they were doing, what were they doing, because he hasn't offered any explanation for that through any of his witnesses", Mr. McEvoy objected.

36. Although Mr. McEvoy did not state the basis of his objection, Ms. Menke immediately knew her comments were problematic. She continued by making a direct statement about the defendant's decision not to testify as a "curative" instruction.

37. Ms. Menke repeatedly reminded the jury that the defendant did not have to testify. It is well established that such comments may be improper. See *State v. Hale*, 672 S.W.2d 201 (Tenn. 1984) (reversing a conviction based upon a prosecutor's statement advising the jury that the defendant has a right not to testify and that the jury should not consider the defendant's silence at trial against him).

38. Ms. Menke's statements were both a direct reference to the defendant's right not to testify and an implicit invitation to the jury to use the defendant's silence against him.

39. Ms. Menke argues that she was invited to make these comments based upon the introduction of the recording of the detective's interview with the defendant. She maintains she is referring to that self-serving statement and the testimony of his other witnesses.

40. The Hearing Panel does not find this argument persuasive. Obviously, Ms. Menke is permitted to address the evidence. However, Ms. Menke went far beyond the content of the evidence. She could have addressed the content of the self-serving statement, or testimony of other witnesses, without making repeated reference to the fact that the defendant did not testify.

41. Ms. Menke relies upon *United States v. Young*, 470 U.S. 1 (1985) and *United States v. Robinson*, 485 U.S. 25 (1988) to justify her argument that the defense invited her

statements. These cases address whether statements of a prosecutor which normally may be viewed as improper can be invited by the defense without resulting in reversible error. In short, both cases look at the context of the arguments to make that determination. In *Robinson*, the Supreme Court held that a prosecutor could make reference to a defendant's right not to testify when the defense counsel had argued that the prosecution had never given him a fair opportunity to tell his side of events. *United States v. Robinson*, at 31. Similarly, the Supreme Court in the *Young* case held that the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. *United States v. Young*, 470 U.S. 1, at 12, (1985)

42. Despite Ms. Menke's reliance on this case law to justify her statements, the Panel notes that the Court of Criminal Appeals made no mention that the defense counsel, Mr. McEvoy, invited a response by the prosecution to the defendant's right not to testify. (Perhaps, the appellate court was not impressed with the State's argument of "invited response" on only one page of its appellate brief.) To the contrary, the Court of Criminal Appeals held that Ms. Menke's argument "directly and indirectly referenced the defendant's failure to testify several times" and that her comments "implicitly invited the jury to use the defendant's silence as a tacit admission of guilt." Ms. Menke's comments were held to be reversible error. *State of Tennessee v. Adam Wayne Robinson*, No. M2013-02703-CCA-R3-CD, (June 23, 2015)

43. Ms. Menke also testified that she was referring to the defendant's right to remain silent in his interview with the detective, not his right not to testify. This is also unpersuasive in light of her statement:

Mr. Robinson obviously doesn't have to testify. Everybody knows that, right. We have all been told that since Jury selection. I'm not talking about his testimony. I'm talking about the witnesses from the witness stand. He chose to put on proof, and he didn't offer you any proof from

any of those witnesses as to what else was going on and what he was doing with B.C. He chose to play his statement. He didn't offer Detective Farrell in that connection. He doesn't have to, once again, but he didn't.

44. The Hearing Panel finds Mr. Killian's testimony to be credible and we agree with his analysis of the care a prosecutor must take to avoid constitutional violations:

In a situation where the defendant has made a prior statement that is introduced, yet the defendant does not testify at the trial, itself, those comments have to be restricted to the content of that statement. It can't be – it has to be very limited and you have to be cautious to do that because you can't comment on their not testifying at trial.

45. The Hearing Panel finds that Ms. Menke improperly introduced an irrelevant argument in her closing argument when she repeatedly referred to the defendant's right not to testify.

46. We find that Ms. Menke has violated RPC 3.4(e)(1), which states that a lawyer shall not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."

47. We find that Ms. Menke violated RPC 8.4(d) when she repeatedly referred to the defendant's right not to testify. RPC 8.4(d) states that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice."

48. The defendant's decision not to testify was not relevant and an experienced prosecutor should know the constitutional limitations with respect to this issue. It appears that Ms. Menke may have known that she made an improper reference to the defendant's right not to testify. After Mr. McEvoy made a non-specific objection, she immediately tried to cure her error by referring to the defendant's right not to testify. Unfortunately, she compounded the error.

49. Based on the foregoing, we also conclude that Ms. Menke violated RPC 8.4(a), which states that it is professional misconduct for a lawyer to "violate or attempt to violate the

Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

50. During her closing argument, Ms. Menke made the following statements:

Here's what we do, Ladies and Gentlemen. We put out public service announcements to tell children to tell if something is happening to them. Because sexual abuse occurs in private. It doesn't happen in the open eye, that's true, but it certainly can happen in public places. And we worry about that. It happens with coaches at ball fields. Mr. McEvoy talked about that. We tell them to tell because we are worried about the youth pastor at church. Right there in church in the middle of everybody. We are worried about the teacher at school. We are worried about the Boy Scout leader, the Girl Scout leader. We tell them to tell because we know that it happens right under our noses all of the time. And the only way we are going to know about it is if they come forward and give us the information. That's it. They have a right to be believed. And, you know, we don't know what is happening to them if they don't tell us.

And so what Mr. McEvoy and Mr. Robinson want you to do is say, well, you know, thanks for coming forward, I'm so proud of you, I'm glad you spoke up for yourself, I'm glad you said your Boy Scout Leader was diddling you, but you don't have any proof. Your word is not good enough. We're not going to accept that at face value. You have got all of these reasons to lie and all of this stuff. So sorry. It flies in the fact of everything you know. It's not reasonable. It's a ridiculous hypothesis. If you believe everything that she said from that witness stand you have all of the proof that you need to convict him of the charge and offenses. That's it. You have everything you need

I told you in opening statement that her truth was what was most important, right. Her truth. What she says from that witness stand. Send her a message that you believe her truth, that she did the right thing by telling. Send that message with a conviction. Send Mr. Robinson a message that all of the dollars in the world are not enough to buy you a child, to buy silence, to buy open season as a pedophile. Convict him because you know in your heart to a moral certainty that he is guilty of everything that B.C. says he did.

51. As more detailed herein, the Panel finds that this was not an intentional attempt to impermissibly allude to a matter neither relevant nor supported by admissible evidence;

Respondent permissibly requested the jury to find the child victim credible and send her that message.

52. The Panel noted Mr. Raybin's testimony, consistent with its understanding of applicable case law, that a prosecutor may ask a jury to send a message to the victim or a defendant, but not to the community (concerning "crime in the streets" or "general deterrence").

53. The Board alleged that Ms. Menke improperly asked the jury to "send a message" in her closing argument. In order to evaluate Ms. Menke's comments, they must be considered in context.

54. McEvoy's closing statement for the defense included the following discussion of sexual abuse broadly, which was not based on testimony at the trial:

[Describes B.C.'s testimony.] Is that how sexual abuse occurs? We know sexual abuse occurs in the following manner. It involves fathers, stepfathers, uncles, grandfathers, teachers, coaches. People who have access to a child. They have a relationship to a child. They build trust on the part of the child. And then using that trust, they take the child to an area where nothing can be seen; a bedroom, a basement, a garage. I would submit that the allegations against Adam Robinson are too implausible to be believed.

55. McEvoy also stated in his closing argument:

I suspect that we have all heard, we have all seen perhaps on television or in the newspapers situations where public school teachers are placed in where public school teachers are afraid to be alone with children because of possible allegations of wrongdoing. The teachers say, the way things are nowadays I don't touch kids, I don't pick up kids, I don't hug kids. Nothing suspicious about that formulation or those words.

56. The plain language of Ms. Menke's statements, and the context, demonstrate that Ms. Menke was *not* arguing that the jury should "send a message" to the public at large so other potential abusers would be deterred; rather, the "messages" Ms. Menke asked the jury to send were expressly and specifically directed to the victim and the defendant.

57. Ms. Menke asked the jury to send a message to B.C. that they believed her - "Send her a message that you believe her truth, that she did the right thing by telling."

58. Ms. Menke also asked the jury to send a message to Defendant Robinson himself that he could not do this to a child – “Send Mr. Robinson a message that all of the dollars in the world are not enough to buy you a child, to buy silence . . .” The Hearing Panel has found no Tennessee precedent, and the Board has offered none, that prohibits a prosecutor from asking a jury in closing argument to “send a message” to the defendant in a case, based on the facts in the record.

59. Thus, Ms. Menke’s comments in this regard are not sanctionable.

60. But, Ms. Menke did inject personal testimony and personal opinion about the justness of the case by making the following statement:

I have an ethical obligation to be truthful and honest in my charging decisions. I can't put an indictment in front of a Grand Jury unless I believe in the case.

Mr. McEvoy objected to this statement, and the following exchange occurred:

Mr. McEvoy: Objection.

General Menke: It was open season on my ethical conduct, Your Honor.

The Court: I know.

General Menke: I’m responding to that.

The Court: All right. Move on.

General Menke: Mr. McEvoy has an ethical obligation to defend his client. That’s his obligation. Make no mistake. If Mr. Robinson confesses to him in the hallway this morning, his job is still to do the best job that he can do to defend him. He’s not constrained like the State is.

Mr. McEvoy: Objection, Judge.

The Court: Well, you know, let’s get away from that.



General Menke: All right. Well it's fair game then obviously for Mr. McEvoy to say I am unethical. Obviously the same rules don't apply. It's okay to criticize the State and say they're putting false allegations up.

61. According to Ms. Menke, she was permitted to make the statements noted above because she was responding to an attack on her ethics by Mr. McEvoy. Mr. McEvoy's statements, and the responsive statements by Ms. Menke and the Court, are as follows:

Mr. McEvoy: And I would submit to you that when the State of Tennessee brings a criminal charge against a person, and not merely a criminal charge but a charge of sexually abusing a child, a depraved, heinous and horrible allegation against a person, is it too much to expect that the State of Tennessee can even agree on what happened. I would submit that when the State of Tennessee brings an allegation like this the State of Tennessee has a duty, they have a moral obligation to have at least some certainty as to what happened. It is wrong. It is wrong to charge a person with an offense like this when you don't know what happened, and you don't know where it happened and you don't know what happened.

General Menke: Your honor, --

The Court: It's argument.

General Menke: It's hard to believe that accusing me of unethical conduct is argument, but okay.

The Court: It's argument. Closing argument.

General Menke: Okay. I'll keep that in mind.

62. The Panel does not find that defendant's counsel personally attacked the ethics of Respondent. The Panel does not find that Respondent's statement "I have an ethical obligation to be truthful and honest in my charging decisions. I can't put an indictment in front of a Grand

Jury unless I believe in the case” was “invited” by defendant’s counsel, or was a fair or proper response under the circumstances.

63. In addition to the comments relating to the defendant’s right not to testify, Ms. Menke engaged in a pattern of cumulative comments that were also violative of RPC 3.4 and 8.4. RPC 3.4(e)(2) and (3) states that a lawyer shall not:

(2) assert personal knowledge of facts in issue except when testifying as a witness; or

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused

64. Ms. Menke’s statement about the justness of the cause was clear: “I have an ethical obligation to be truthful and honest in my charging decisions. I can’t put an indictment in front of a Grand Jury unless I believe in the case.”

65. Ms. Menke’s statement is almost identical to the statement of the prosecutor in the *State v. Vader* case, decided only months before the trial against defendant. In that case, the Court of Criminal Appeals analyzed a number of improper statements made by a prosecutor, including this one: “I don’t bring a case to a jury if I don’t believe it.” *State v. Vader*, No. M2011-02394-CCA-R3CD, 2013 WL 1279196, at \*5 (Tenn. Crim. App. Mar. 28, 2013) After analyzing the prosecutor’s closing argument, the Court of Criminal Appeals referred the attorneys to RPC 3.4(e)(2).

66. Ms. Menke maintains that she was invited to make these statements in order to rebut the closing argument made by Mr. McEvoy. She believes Mr. McEvoy’s closing argument, in which he casts doubt on the strength of the State’s case, was a personal attack on her ethics.

67. Mr. McEvoy made a reasonable, if aggressive, effort to defend his client. Mr. McEvoy presented a methodical argument which was designed to show that the State's allegations were implausible. He pointed to the inconsistencies in timing, location, and corroboration.

68. Even if Mr. McEvoy's argument invited a response from the prosecution, Ms. Menke should have framed her response so that she did not insert her personal opinion of the justness of the case. Nothing prevented Ms. Menke from rebutting Mr. McEvoy's defense by explaining the proof and law that supported the State's indictment of the defendant.

69. After Mr. McEvoy made an objection to Ms. Menke's opinion of the justness of the cause, the trial court told her to "move on." Undeterred, Ms. Menke persisted in drawing a comparison between his ethical obligations and those of the prosecution: "Mr. McEvoy has an ethical obligation to defend his client. That's his obligation. Make no mistake. If Mr. Robinson confesses to him in the hallway this morning, his job is still to do the best job that he can do to defend him. He's not constrained like the State is."

70. Mr. McEvoy objected again and the trial court advised Ms. Menke to "get away from that." For a third time, Ms. Menke complained that her ethics are under attack: "All right. Well it's fair game then obviously for Mr. McEvoy to say I am unethical. Obviously the same rules don't apply. It's okay to criticize the State and say they're putting false allegations up."

71. This sarcastic response appears to be directed toward the trial court, yet it was made in the presence of the jury as a continuation of Ms. Menke's closing argument.

72. Based on the foregoing, we find that Ms. Menke violated RPC 3.4(e)(2) and (3), and 8.4(a) and (d) in stating her opinion as to her personal belief in the justness of her cause.

73. Pursuant to Tenn. Sup. Ct. R. 9, Section 15.2(h), the Board has shown by a preponderance of the evidence that Ms. Menke has violated certain Rules of Professional Conduct. Based on the facts recited above, the Board has proven that Ms. Menke has violated the following Rules of Professional Conduct (hereinafter "RPCs"): 3.4(e)(1), (2), and (3), Fairness to Opposing Party and Counsel; and 8.4(a) and (d), Misconduct.

74. As an Assistant District Attorney, Ms. Menke was accountable to the State, the public, victims of crimes, the accused, and the criminal justice system. When a prosecutor's conduct violates a defendant's constitutional rights, it may be deemed reversible error by an appellate court using authority and analysis of criminal law and procedure. However, such misconduct may also be subject to disciplinary sanction by a self-regulating profession. See *Imbler v. Pachtman*, 424 U.S. 409, at 429 (1976) (While a prosecutor is not civilly liable for error, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.)

75. Respondent is charged with knowing the applicable law of Tennessee.

76. The Court of Criminal Appeals found prosecutorial misconduct by Ms. Menke which justified reversal of defendant's conviction. The Panel does not equate "prosecutorial misconduct" as per se sanctionable as a violation of the rules of Professional Conduct. The Panel has independently reviewed Respondent's conduct and the applicability of the Rules to her conduct to resolve the issues raised by the Petition for Discipline against Ms. Menke.

#### *Considerations for Discipline*

77. Once a disciplinary violation has been established, this Panel must consult the ABA Standards for Imposing Lawyer Sanctions ("ABA Standards") to determine the appropriate discipline. Tenn. Sup. Ct. R. 9, § 15.4(a).

78. The Hearing Panel finds that the following aggravating factors should apply: a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of her conduct, and substantial experience in the practice of law.

79. The Hearing Panel finds that the following mitigating factors apply: absence of a prior disciplinary record, absence of a dishonest or selfish motive, and full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

80. The Hearing Panel recognizes the difficulty in prosecuting child physical and sexual abuse crimes.

81. Respondent accurately described, in her correspondence with the Board, the “pressure cooker” environment of a child abuse case for all involved.

82. The Panel also finds that the developments at the *Robinson* trial were unusual, and the case was not routine (i.e. the defendant’s recorded statement being admitted into evidence). Respondent accurately reported to the Board and communicated to the Panel the unique and challenging defense tactics offered at trial.

83. The Hearing Panel credits Respondent’s training efforts and teaching at the annual Tennessee Connecting for Children’s Justice Conferences, as well as at Tennessee District Attorney General Conferences.

84. No Tennessee prosecutor has previously been formally, publicly disciplined, for violating Rule 3.4(3) by comments in a closing argument.

85. The defendant, Mr. Robinson, was negatively affected by the unprofessional conduct by Ms. Menke. The judicial system was negatively affected by the problematic statements.

86. The Hearing Panel finds that mitigating factors justify a reduction in the potential degree of discipline and therefore, a public censure is the appropriate discipline.

### JUDGMENT

Ms. Menke engaged in misconduct by making statements in closing argument that referred to the defendant's right not to testify. Further, Ms. Menke engaged in cumulative, improper comments about the justness of the case and about matters that were not relevant and not supported by admissible evidence. Ms. Menke's misconduct caused actual injury to the opposing party, to third parties who participated in the trial, to judicial resources, and to the administration of justice. Ms. Menke's misconduct was a violation of Rules of Professional Conduct 3.4(c)(1), (2) and (3), and 8.4(a) and (d). Based on the violations and application of the ABA Standards, and all relevant factors, the Hearing Panel finds that a public censure is the appropriate discipline.

It is so ORDERED.

Date: 3/14/17

For the Panel

William R. O'Bryan, Jr.  
William R. O'Bryan, Jr.

Panel Members: William R. O'Bryan, Jr.  
Gareth S. Aden  
Michael M. Castellarin

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing has been sent to Respondent, Kristen E. Menke, 114 30<sup>th</sup> Avenue South, Nashville, TN 37212, and her counsel, Lucian T. Pera, 6075 Poplar Avenue, Suite 700, Memphis, TN 38119, by U.S. First Class Mail, and hand-delivered to Krisann Hodges, Disciplinary Counsel, on this the 14th day of March, 2017.

A handwritten signature in cursive script, appearing to read "Rita Webb", written over a horizontal line.

Rita Webb  
Executive Secretary

**NOTICE**

**This judgment may be appealed pursuant to Tenn. Sup. Ct. R. 9, § 33 (2014) by filing a Petition for Review in the Circuit or Chancery court within sixty (60) days of the date of entry of the hearing panel's judgment.**