

**STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION**

IN RE HON. TRACY GREEN

3rd Circuit Court
Wayne County, MI

Complaint No. 103

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**RESPONDENT, JUDGE TRACY GREEN'S RESPONSE TO
DISCIPLINARY COUNSEL'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Respondent, Judge Tracy Green ("Judge Green"), through her attorneys, Plunkett Cooney, respectfully submits the following Response to Disciplinary Counsel's Proposed Findings of Fact and Conclusions of Law:

FAILURE OF REQUIRED FACTUAL & LEGAL PROOFS

1. In their Proposed Findings of Fact and Conclusions of Law, Disciplinary Counsel have failed to establish upon legal authority and by a preponderance of the evidence the existence of "child abuse" prior to June 24,

2018, the date on which Respondent, Judge Tracy E. Green's two grandsons, Gary Davis-Headd, Jr. ("Gary, Jr.") and Russell Davis-Headd ("Russell") (collectively "her grandsons" or "the boys") were removed from the home of their father.

2. In their Proposed Findings of Fact and Conclusions of Law, Disciplinary Counsel have failed to establish upon legal authority and by a preponderance of the evidence the existence of "child abuse" prior to June 24, 2018 and that Respondent, Judge Tracy E. Green, was aware that her grandsons were victims of child abuse at the hand of their father prior to June 24, 2018.

3. In their Proposed Findings of Fact and Conclusions of Law, Disciplinary Counsel have failed to establish upon legal authority and by a preponderance of the evidence that a red handprint left on the cheek of a child as a result of a slap to the face is child abuse.

4. In their Proposed Findings of Fact and Conclusions of Law, Disciplinary Counsel have failed to establish upon legal authority and by a preponderance of the evidence that the red handprint left on the cheek of Gary, Jr. was a bruise.

5. In their Proposed Findings of Fact and Conclusions of Law, Disciplinary Counsel have failed to establish upon legal authority and by a preponderance of the evidence that Judge Green's application of makeup to the

red handprint left on the cheek of Gary, Jr. was the covering up of evidence of child abuse.

6. In their Proposed Findings of Fact and Conclusions of Law, Disciplinary Counsel have failed to establish upon legal authority and by a preponderance of the evidence that Respondent, Judge Tracy E. Green, ever saw a bruise on the body of either of her grandsons.

7. In their Proposed Findings of Fact and Conclusions of Law, Disciplinary Counsel have failed to establish upon legal authority and by a preponderance of the evidence that Judge Green applied makeup to a bruise on the body of either of her grandsons.

8. In their Proposed Findings of Fact and Conclusions of Law, Disciplinary Counsel have failed to establish upon legal authority and by a preponderance of the evidence that Judge Green applied makeup to the body of either of her grandsons in an effort to cover up evidence of child abuse.

9. In their Proposed Findings of Fact and Conclusions of Law, Disciplinary Counsel have failed to establish upon legal authority and by a preponderance of the evidence that Judge Green knowingly made a false statement to the Commission related to her application of makeup to the cheek of one of her grandsons.

10. In their Proposed Findings of Fact and Conclusions of Law, Disciplinary Counsel have failed to establish upon legal authority and by a preponderance of the evidence that Judge Green knowingly made a false statement to the Commission when earlier stating that she had told CPS that she had both observed a red handprint on the cheek of one of her grandsons and applied makeup to the handprint.

DISCIPLINARY COUNSELS'

"JURISDICTION & STANDARD OF PROOF"

11. Judge Green, as a presiding judge in the State of Michigan, acknowledges that she is subject to the provisions of MCR 9.202. MCR 9.233(A) does hold that Disciplinary Counsel have the burden of proving the allegations of the Amended Complaint by a preponderance of the evidence. *In re Haley*, 476 Mich 180, 189 (2006). The standard does require that they demonstrate the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence. *Blue Cross and Blue Shield of Mich v Milliken*, 422 Mich 1, 89 (1985). MCR 9.233(A) mandates that Disciplinary Counsel "at all times shall have the burden of proving the allegations by a preponderance of the evidence." Disciplinary Counsel have failed to establish the charges in the Amended Complaint upon legal authority and by a preponderance of the evidence and, critically, have not done so with respect to the required

foundational elements of the existence of “child abuse” and Judge Green’s actual “knowledge” of child abuse.

12. While MCR 9.233(A) holds that Disciplinary Counsel have the burden of proving the allegations of the Amended Complaint by a preponderance of the evidence, and there has been no such showing, Judge Green respectfully contests the applicability of this standard of proof to the underlying, foundational elements of child abuse.

13. In this case, Disciplinary Counsel have alleged two, specific violations of The Michigan Penal Code, Act 328 of 1931, specifically MCL §750.483a(5)(a) and MCL §750.505. [*Amended Complaint*, ¶¶15(e) & 15(f)] The Michigan Penal Code refers to a violation of either of these sections as a crime. [MCL §750.483a(6) and MCL §750.505] Each and every element of a crime must be proved beyond a reasonable doubt. Case law is clear that this standard applies to criminal cases in Michigan: “It is a fundamental principle of our system of justice that an accused’s guilt must be proved beyond a reasonable doubt to sustain a conviction.” *People v Hubbard*, 387 Mich 294, 299 (1972).

14. MCL §750.483a(5)(a) states:

(5) A person shall not do any of the following:

(a) Knowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding.

The statute clearly contains the elements of “knowingly,” “intentionally,” “conceal[ing]” “evidence” “to be offered” “in a present or future official proceeding.” Disciplinary Counsel have not proved, beyond a reasonable doubt nor by a preponderance of the evidence, any one of these elements. In addition to the testimony of Forensic Interview Protocol and Child Protection Law expert Nancy Diehl, the only expert that testified in this case, who testified that to her knowledge no one had ever been charged for abuse based upon a child being slapped in the face, the strongest proof that the slap to the cheek of Gary, Jr. was *not* child abuse is the fact that his father was *not* charged with an offense for having done so.

15. MCL §750.505 references, in pertinent part: “Any person who shall commit any indictable offense at the common law...” Disciplinary Counsel has not proved, beyond a reasonable doubt nor by a preponderance of the evidence, that Judge Green committed an “indictable offense at the common law.” The only indictable offense that could be considered would be MCL §750.483a(5)(a) which, likewise, is not supported by the evidence in this case.

16. M Crim JI 3.2, “Presumption of Innocence, Burden of Proof, and Reasonable Doubt,” defines the standard applicable to each element of a criminal charge:

(1) A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty.

(2) Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove [his/her] innocence or to do anything.* If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

(3) A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that: a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case.

17. Disciplinary Counsel have not proved “each element” of MCL §750.483a(5)(a) and MCL §750.505 “beyond a reasonable doubt” and have, in essence, foisted back on Judge Green the burden of proving that the elements have not been proved.

18. Requiring Judge Green to essentially show that, the required foundational elements of the existence of “child abuse” and her actual “knowledge” of child abuse have not been proved under a preponderance of evidence standard, amounts to a violation of due process in that those elements must be proved beyond a reasonable doubt.

DISCIPLINARY COUNSELS’

“STATEMENT OF PROCEEDINGS”

19. Judge Green relies upon the record to confirm the specifics of the procedural history of this case.

20. In the last of seventeen, individual bullet points, Disciplinary Counsel provide a footnote related to the inclusion of Count III in the Amended Complaint. Specifically, Disciplinary Counsel state: “Because Russell Davis-Headd no longer remembered respondent putting makeup on his face, disciplinary counsel deleted that allegation from the amended complaint.”

21. The footnote is nothing more than argument and is not supported by a single citation or fact in the record. A review of the myriad KidsTalk interviews, transcripts of testimony, CPS reports, and interviews performed by Disciplinary Counsel, there is no allegation by Russell that Judge Green ever put makeup on his face. Not until June 10, 2021, during a preparation session with Disciplinary Counsel just before he testified on June 28, 2021, did Russell ever

make such an allegation. This is a significant fact supporting the clear coaching that occurred at the hand of his mother, Choree Bressler. By this time, Russell had been in the custody of his mother for more than three years. Ms. Bressler's disdain for Judge Green because she allegedly "...took [her] children from [her]..." is objectively clear throughout her video rants. (Exhibit 36A @ 8:57-9:02)

DISCIPLINARY COUNSELS'

"PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW"

"Background"

22. Disciplinary Counsel state that CPS came to Gary, Jr. and Russell's home at least three times prior to June 24, 2018. Leslie Apple testified that she had, in fact, appeared at the home on June 22, 2018, only two days before the boys were removed. Her CPS report reflects investigation of "physical abuse" allegations and a "Rejected complaint." (Exhibit 18, p 4) Had Ms. Apple seen evidence of abuse she would have been obligated to record it and take the steps necessary to protect the boys. That did not occur. Nowhere in the record is there evidence that supports the allegation that Judge Green's grandsons were physically abused at the hand of their father prior to June 24, 2018, the day they were removed from his custody.

“Count 1”

23. Glaring and unmistakable in Disciplinary Counsel’s submission is the absence of any specific factual bases offered to prove an instance of *child abuse* before June 24, 2018 and Judge Green’s *knowledge* of child abuse.

24. Disciplinary Counsel cite to vague references to the testimony of Gary, Jr. and Russell in which the boys equivocally and generally claim that Judge Green “knew” they were being abused and “saw” marks on their bodies. They do not, however, cite to specific instances with factual bases demonstrating the who, what, when, where, why, and how of a single occurrence. There is no legal support in the record that allows such general allegations to suffice for necessary factual bases supporting charges.

25. Because there is no credible evidence serving as factual underpinnings to this alleged knowledge of *child abuse* and *knowledge* of child abuse, Disciplinary Counsel take quantum leaps in attempting to connect alleged facts. They argue that, because Judge Green was aware that her son abused Katy, though there is not a scintilla of evidence in the record that there was abuse or that Judge Green was aware, they claim that she would have been sensitive to signs that her son was *also* abusing her grandsons. Disciplinary Counsel interviewed Katy more than once and had her listed as a witness. Remarkably, despite this alleged base of purported knowledge, they did not call

Katy to testify. Instead of going to the source, they attempt to bootstrap that factual basis through the testimony of Gary, Jr. and Russell.

26. Disciplinary Counsel go on to try to interpret Judge Green's acknowledgement that she knew that her son was stern in his discipline of the boys into an admission that she was aware of systematic physical abuse. This is nothing more than argument for which there is no factual support in the record.

27. Confirmation that factual bases are lacking, Disciplinary Counsel attempt to hold Judge Green responsible for being aware that Gary, Jr. was smacked across the face leaving a red handprint when there was an order in place prohibiting either of the boys' parents from using corporal punishment. Judge Green admitted to being aware of the smack to the cheek; she has acknowledged exactly what occurred and precisely what followed. (Transcript, Volume XI, pp 1973-1974) Critical, however, is the fact that Judge Green is not being charged with knowledge that her son once violated a no-corporal punishment family court order; instead, she is being charged with covering up evidence of child abuse, making false statements about her knowledge of child abuse, and knowingly making a false statement to the Commission. There is no such evidence in the record.

28. By way of the bold-type, italicized word “recent,” Disciplinary Counsel conflate the testimony of Judge Green concerning when she was aware that her son used corporal punishment with her grandsons. Judge Green testified that she was aware that had occurred prior to 2015 when the no corporal punishment order was implemented by the family court. The word “recent” is ascribed to Judge Green’s base of knowledge by Disciplinary Counsel. There is no evidence in the record that supports a single inconsistent statement by Judge Green concerning what she knew and when. Indeed, Judge Green was not impeached in a single instance in this regard.

29. Disciplinary Counsel actually acknowledge that Judge Green stated in her responses to questions during the investigation of this case that she was aware of corporal punishment being used by her son on her grandsons “in the past.” The investigation alone lasted for more than a year. At no time was Judge Green asked to clarify her answer or to state a specific date when something was known. Disciplinary Counsel now fault her for responding to the question with “in the past” without further clarification. Imprecise questioning does not support allegations of a lack of candor when the resulting answers are precise to the questions as posed.

30. Disciplinary Counsel also ascribe an apparent threshold to the standard of proof. They argue that, “The totality of the evidence clearly shows

that respondent was aware that her son was abusing her grandsons.” There is no such standard that abrogates the requirement of individual proofs as to each element of a charge. Notably, this appears to be the construct designed to circumvent the lack of factual bases, the who, what, when, where, why, and how, of the claim of child abuse and actual knowledge of child abuse.

31. In conclusion, Disciplinary Counsel ascribe knowledge of “abuse” to Judge Green, but admit that the only uncontroverted instance of the use of makeup, i.e., purported covering up of abuse, related to the single slap to the face of Gary, Jr. As to that, they concede that there are no cases in which a parent was prosecuted for slapping a child across the face. Thus, by definition, the single occurrence of Judge Green using makeup on the red handprint left on the cheek of Gary, Jr. cannot amount to covering up evidence of child abuse.

32. Count I fails for lack of factual and legal support.

“Count II”

33. Disciplinary Counsels’ submission fails to demonstrate any specific factual bases offered to prove an instance of *child abuse* before June 24, 2018, Judge Green’s *knowledge* of child abuse, and any false statement about her knowledge of child abuse.

34. Disciplinary Counsel repeat the same allegation, without factual bases, alleging that Judge Green made false statements concerning her

knowledge of child abuse. The allegations simply appear premised upon the fact that Judge Green denied having ever seen *bruises* on the bodies of her grandsons and not having knowledge that her grandsons were the victims of physical child abuse. There is no evidence in the record that Judge Green had seen *bruises* and had knowledge of child abuse. Disciplinary Counsel were careful while introducing testimony from Gary, Jr and Russell and using the words “abuse,” “bruises,” and “marks.” Absent from the record, however, is any statement or testimony from Judge Green that is inconsistent or contradictory of what she has acknowledged from the beginning of this case - - she never saw any bruises or evidence of child abuse and never used makeup to cover up a bruise or evidence of child abuse.

35. Not a single citation to the testimony of Judge Green demonstrates an inconsistent statement. In the cited juvenile court trial testimony, Judge Green is asked if she ever used makeup to cover up bruises on the face of Gary, Jr. She stated unequivocally in response that she never saw any bruises. The follow-up question asked that she answer the question as worded, i.e., had she ever used makeup to cover up *bruises* on the face of Gary, Jr. Judge Green responded “no” to the question. (Exhibit 2, pp 65-66) The answer was in no way false. As she has admitted throughout this proceeding, and testified clearly during this proceeding, there was a single occurrence when she applied liquid

foundation to a red handprint, not a bruise, on the cheek of Gary, Jr. after he had been slapped in the face by his father. The Judge explained precisely what had occurred in her response to the very first request for comment and the explanation has remained the same since that time. (Exhibit 3 & Transcript, Volume XI, pp 1969-1979) The explanation has been consistent from day one. Disciplinary Counsel has not introduced any evidence to suggest that the single event did not occur exactly as described by Judge Green. Of significant note here is that Judge Green applying makeup to the cheek of Gary, Jr. to cover a red or “pinkish” handprint following a slap from his father, is a fact in which all three of the only present, fact witnesses fully corroborate one another.

36. Judge Green testified that she never covered up marks that were evidence of child abuse and, while she was familiar with a slap to the face from personal experience, she did not consider it child abuse nor did it ever occur to her that it would be considered child abuse. (Transcript, Volume XI, p 1979)

37. Disciplinary Counsel cite to Judge Green’s testimony in this proceeding regarding her Juvenile Court testimony to support what appears to be a new theory or charge of misrepresentation by “omission.” Specifically, Disciplinary Counsel cite to the fact that Judge Green did not *volunteer* to the lawyers in the Juvenile Court case that she put makeup on a handprint on the face of Gary, Jr. to cover something “other than a bruise.” In all fairness, that

was not the question. A full citation to the exchange puts the answer into proper context and shows that Judge Green was not being disingenuous. Immediately following the exchange cited by Disciplinary Counsel, the record reflects the following:

Q. Well, you didn't put makeup on him for Halloween, did you?

A. No.

Q. Or because he was in a school play?

A. No.

Q. Or for any other legitimate reason?

A. Well, I do think that the reason that I did it was a legitimate reason.

Q. So are you telling us in March of 2019 when you testified in juvenile court you simply forgot that you put makeup on this boy?

A. Well, Ms. Weingarden, the question was whether I put makeup on bruises. So that never put me in the mindset of, oh, they must be talking about the handprint. This was at least two years from the handprint incident. I had completely forgotten about the makeup, because it was just incidental. It wasn't something that I found remarkable. I found remarkable the handprint. He didn't ask me about a handprint. He asked me

about bruises, and I emphatically denied that I ever even saw any bruises.

Q. And you didn't say I put makeup on a handprint, right, because you completely forgot all about the makeup; right?

A. At that moment, yes, I wasn't thinking about that at all.

(Transcript, Volume XI, pp 2061-2062)

38. Regardless how Disciplinary Counsel choose to argue Judge Green's denial of ever covering up bruises on the bodies of her grandsons, and acknowledgment that she had applied makeup to a red handprint on the cheek of Gary, Jr., there is no evidence in the record that demonstrates that her statements and testimony were ever false or inconsistent in any respect.

"CREDIBILITY"

39. Disciplinary Counsel attempt to demonstrate the credibility of Russell and Gary, Jr. by aggregate citations to various statements and testimony. Notable here is that they do not, and cannot, say that the testimony of the boys is based upon factual recollection of specific events and occurrences (the who, what, when, where, why, and how) and that it is consistent.

40. As to Russell, Disciplinary Counsel hold that, despite his tender age, his testimony is "quite consistent and credible" and claim that he was "too young to have the sophistication needed to make up a big lie about her and tell

it consistently over a period of years.” Disciplinary Counsel sidestep three critical points: (1) Russell’s testimony is replete with answers in which he repeatedly states, “I don’t remember;” (2) Russell was impeached numerous times during his testimony and shown to have given diametrically inconsistent statements; and, (3) Russell was in the consistent custody of his mother, Choree Bressler, from the first point of time when he ever stated that Judge Green was aware that he had been physically abused and saw marks on his body.

41. For example, Russell tried to maintain the impression that he had a recollection of details, most importantly that Judge Green put makeup on his face which was one of the charges against Judge Green, but he had to concede that he did not remember:

Q. Okay. Now, did you ever have any marks on your face that Grandma Tracy put makeup on?

A. Yeah, I don't really remember, so, no, I can't say for sure. I don't remember.

Q. Okay.

(Transcript, Volume II, pp 314) On cross-examination, Russell was uncertain about the makeup in all respects:

Q. Now, you just testified that your grandmother, Tracy Green, put makeup on your face to conceal abuse; right?

A. Yeah. No, not on my face. Well, I really can't remember if she did to my face, but I know for a fact that she did to my brother's face.

Q. Well, you also testified that she put makeup on your forearm, your hand, and your leg; is that right?

A. Yeah.

Q. This is the first time you have ever testified to that, isn't it?

A. I've told people that she put makeup on me before. But this was years ago so I don't remember exactly where it was at.

(Transcript, Volume II, pp 339-340) Russell testified in this case that he saw Judge Green put makeup on his brother's face, but when he was impeached with his statement to Disciplinary Counsel on September 9, 2019 that his brother told him and he had "never" seen that happen, he admitted that he did not know which answer was the truth:

Q. Did you hear that, Russell?

A. Yeah.

Q. You said you never saw it but Gary told you. Which is the truth?

A. I don't know because this was a while ago. But I do feel like I remember seeing it, but this was, like, at least three years ago, so.

Q. Well, actually, that was September 9 of 2019.

A. I'm talking about when it happened.

(Transcript, Volume II, p 353)

42. With regard to nearly every instance of impeachment with his prior statements or testimony, Russell conceded in some form or another the following: "I don't remember a lot of this stuff because it was so long ago."

(Transcript, Volume II, p 401)

43. Russell's testimony was not credible. His lack of credibility is not surprising. He was interviewed or examined countless times, by numerous different people, at all times when he was of a tender age, including the following, the videos and transcripts of which are admitted exhibits in this case:

- KidsTalk, 6-28-18, **age 8** (Exhibit 25)
- KidsTalk, 8-15-18, **age 8** (Exhibit 26)
- Juvenile Court Trial, 3-12-19, **age 9** (Exhibit 28)
- Criminal Court Trial, 8-30-19, **age 10** (Exhibit 24)
- KidsTalk/Lora Weingarden, 9-9-19, **age 10** (Exhibit 30)
- Lora Weingarden, 6-10-21, **age 11** (Exhibit 46)
- MJTC Formal Hearing, 6-28-21, **age 11**

44. In addition to these instances, Russell was interviewed multiple times by CPS investigators, police officers, prosecutors, defense attorneys, investigative reporters, and others. Nancy Diehl, the only expert witness who

appeared in this case, testified that she would be troubled as it relates to the reliability and credibility of statements given by children who were interviewed multiple times in those situations. (Transcript, Volume IX, pp 1672-1674)

45. Prior to the time Choree Bressler regained custody in late June 2018, there is not a single occurrence in the record in which Russell ever claimed that Judge Green was aware that he had been physically abused, saw marks on his body, or applied makeup to any mark. Tellingly, Disciplinary Counsel do not, and cannot, cite to a single occurrence.

46. As to Gary, Jr., Disciplinary Counsel surprisingly appear to give him a pass on his faulty memory by claiming that his recollection has been “largely consistent over time.” As with Russell, that is simply not the case. His eagerness to testify against Judge Green, and his clear lack of recollection, is well-documented in the record.

47. For example, when called to testify in this case, Gary, Jr. immediately acknowledged that he did not remember what was discussed at the KidsTalk interview that occurred just after he was removed from his father’s custody and went to live with his mother:

Q. After you were removed from your home you were interviewed by Kids-TALK a few days later. Do you remember that or not?

A. Yeah, I remember that.

Q. Do you remember that at Kids-TALK the person who interviewed you showed you a camera on the wall and told you that the interview was being recorded?

A. Yes.

Q. Do you remember what you and that person talked about at that interview?

A. No, I don't -- well, I remember it was stuff about my dad, but I don't remember what I said. I don't remember anything about the actual interview.

(Transcript, Volume III, p 595) Notwithstanding his admission that he did not “remember anything about the actual interview,” he quickly and eagerly recalled that Judge Green came up in the conversation:

Q. Do you remember if Tracy Green's name ever came up in the conversation?

A. Probably. That's probably when I said something about the makeup.

(Transcript, Volume III, p 595) This surprised and alarmed Disciplinary Counsel because it was not true. In an effort to cure the obvious error and pre-

emptively avoid the impending impeachment on cross-examination, Gary, Jr. was, in essence, told what he should and should not recall:

Q. Are you guessing or do you know for sure?

A. I don't know for sure, but I'm pretty sure. Like, I can't say a hundred percent, but I'm pretty sure.

Q. So if I told you that the -- that at that interview there was no mention of Tracy Green's name or Grammy's name, could you be mistaken?

A. Yeah, I guess I'd be wrong, then.

Q. Okay. Do you know at that first Kids-TALK interview whether you were asked any questions about Tracy Green putting makeup on you?

A. I don't remember.

Q. Do you know who the topic of conversation was?

A. I guess it was my dad. I don't remember everything, but I guess so.

(Transcript, Volume III, pp 595-596)

48. After being rebuffed on what he claimed to be his memory, Gary, Jr. became hesitant and unsure what he should remember and how he was to answer questions. For example, in response to an important question related to Judge Green's purported knowledge of he and Russell being beaten by their father, Gary, Jr. conceded that he barely remembered anything:

Q. Max, did you ever hear your dad tell your Grammy that he beat you kids?

THE MASTER: One moment. Any objection to that question?

MR. ASHCRAFT: Yes, Judge. It's the same objection based upon hearsay.

THE MASTER: All right. Ms. Weingarden, any response?

MS. WEINGARDEN: My response is the same that it does not go to the truth of the matter asserted.

THE MASTER: Max, I'm going to allow you to answer that question. Did you hear the question?

THE WITNESS: Yes, I did.

THE MASTER: All right. Go ahead.

THE WITNESS: Well, I'm not even going to lie. All this stuff I barely remember. So I don't remember how I knew that or any of that stuff. I barely remember anything, so I don't know. That's what I'm going to say.

(Transcript, Volume III, p 602)

49. At that point, with credibility lost, Disciplinary Counsel attempted to refresh his recollection by showing him the KidsTalk transcript from his interview. (Transcript, Volume III, pp 602-604) Even with his recollection

refreshed, Gary, Jr. still denied that he recalled making such a statement about Judge Green:

A. I don't know. I don't remember that, but I guess I did say it.

But I don't remember that.

(Transcript, Volume III, p 604)

50. Gary, Jr. acknowledged a lack of recollection or memory throughout his testimony. (See, e.g. Transcript, Volume III, pp 608-609) At another point involving Judge Green's purported knowledge of having heard him screaming from another room during a beating at the hand of his father, Gary, Jr. could not recall what Disciplinary Counsel tried to get him to admit despite an attempt to refresh his recollection:

Q. Okay. Did you ever tell the lady at Kids-TALK the second time you went there that Tracy Green could hear you screaming from another room during the beating?

A. I can't think of any specific ones. I remember a lot of them specifically, but I can't remember any specific ones what happened.

Q. Okay. I'm going to screen share.

* * *

Q. Max, can you see what I'm looking at right now?

A. Yes.

Q. Did the interviewer say, "Okay. All right. You told me that Tracy did not see...your grandmother Tracy did not see anything."

Did you say, "But she heard"? And then you say -- the interviewer said, "But she heard."

Did you say, "She knew what was happening because he told her"?

And the interviewer said, "Okay. What helped you know that she heard it?"

And you said, "Well, how couldn't you know [sic]? I am screaming at the top of my lungs and she is in the other room."

A. I don't remember anything from Kids-TALK, but you got it here in writing. I said it. I just don't remember it.

(Transcript, Volume III, pp 610-612) Even when offered another pass on his lack of memory, Gary, Jr. conceded that he his credibility was lacking:

Q. Okay. So it's understandable that you don't remember. But when you went to Kids-TALK and told the lady whatever you told her, did you tell the truth?

A. I don't remember anything. I remember telling the truth, but, like, I don't remember saying this and I don't remember it happening. It just don't remember. It was a long time ago for me.

(Transcript, Volume III, p 612)

51. In an astonishing statement, Disciplinary Counsel actually argue that, “there is no evidence that Max has any motive to make up anything negative about respondent.” The argument strains credulity. By his own admission, conveniently summarized for him by Disciplinary Counsel both at the time and when testifying in this case, Gary, Jr. admitted that he had lied to Disciplinary Counsel for *months* about lies that he had told them *about Judge Green!* During his testimony, he was forced to admit that: he started the lie and continued it during an hour-and-a-half interview with Ms. Weingarden; during that hour-and-a-half interview he literally lied to her face about all aspects of the Uncle John letter; he purposely tried to trick her; the only reason that he admitted it was a lie was because he was in the middle of tricking Ms. Weingarden and she talked about having a police officer get a warrant to check his electronics; and, the *only* reason he confessed the lie was that he panicked because he thought he was going to get caught. (Transcript, Volume III, pp 722-723, 725)

52. The testimony of Gary, Jr. was not credible. In addition to his orchestrated deceit in this very case, his statements and recollection were explored in interviews and court proceedings countless times, by numerous different people, at all times when he, too, was of a tender age, including the following, the videos and transcripts of which are admitted exhibits in this case:

- KidsTalk, 6-28-18, **age 10** (Exhibit 31)
- KidsTalk, 8-15-18, **age 10** (Exhibit 32)
- Juvenile Court Trial Transcript, 3-12-19, **age 11** (Exhibit 29)
- Criminal Court Trial Transcript, 8-30-19, **age 11** (Exhibit 35)
- KidsTalk/Lora Weingarden, 9-9-19, **age 11** (Exhibit 34)
- KidsTalk, 5-12-21, **age 13** (Exhibit 33)
- Lora Weingarden, 6-1-21, **age 13** (Exhibit 44)
- Lora Weingarden, 6-11-21, **age 13** (Exhibit 45A & 45B)
- MJTC Formal Hearing, 6-28-21, **age 13**

53. Gary, Jr. was also subjected to numerous interviews that, according to the expert testimony of Nancy Diehl, would be troubling in terms of reliability and credibility of the statements.

54. Prior to the time Choree Bressler re-established contact in December 2017 and later regained custody in late June 2018, there is not a single occurrence in the record in which Gary, Jr. ever claimed that Judge Green was aware that he had been physically abused, saw marks on his body, or applied makeup to any mark. Tellingly, Disciplinary Counsel do not and cannot cite to a single instance.

“Count III”

55. Disciplinary Counsel admit that Count III alleging a knowingly false statement being made by Judge Green to the Commission does not rest on any evidence from Gary, Jr. or Russell.

56. The fact that Judge Green told CPS investigator Leslie Apple that she had observed a red handprint on the face of Gary, Jr. is not contested. (Transcript, Volume VII, pp 1309-1310) Whether Judge Green also told her that she had applied makeup to the handprint is unclear.

57. As demonstrated, the testimony of Ms. Apple concerning the CPS reports and her notes within the reports, as well as the reports themselves, are neither reliable nor credible.

58. Ms. Apple was biased towards Judge Green. After the claim of bias was addressed, Ms. Apple was reassigned off of the underlying case. (Transcript, Volume VII, p 1375 & Volume VIII, p 1534)

59. In addition, when forced to explain her bias and failure to investigate Judge Green’s reported placement disqualification concerns regarding Choree Bressler, Ms. Apple claimed that the CPS reports had been altered and sections of her notes had been removed without her knowledge and without explanation. (Transcript, Volume VII, pp 1371-1373) Such testimony clearly demonstrates that the reports are not reliable or credible.

60. Judge Green was certain at the time that she made the statements and submitted her Answer to Complaint in December 2020 that she had advised Child Protective Services of both the handprint and makeup being applied during an interview clearly demonstrating that she was not attempting to cover up alleged evidence of child abuse or making a false statement about her knowledge. Judge Green believed to the best of her knowledge, information, and belief at the time she made the statements that she *had* advised Child Protective Services that she applied some foundation to the cheek of Gary, Jr. on that occasion; however, upon further reflection, the passage of time, and the testimony and documents presented during the course of this case and Formal Hearing in this matter, she could no longer say with *certainty* at a later date whether that had occurred. (Transcript, Volume VI, p 1154)

61. Prior to her Answer to Complaint, Judge Green had given several sworn responses to questions from the Commission in which she did not mention that she had told Ms. Apple of both the handprint and makeup. It does not make sense that Judge Green would have suddenly changed a knowingly inaccurate response unless there had been a genuine lack of specific recollection. Such a change does not equate to a knowingly false statement.

62. Disciplinary Counsel have not, and cannot, cite to any evidence in the record that the lack of certainty later expressed by Judge Green was

anything less than a sincere lack of specific recollection. There are no grounds upon which to consider it a knowingly false statement. No evidence exists in the record to conclude that it was a false statement. Judge Green is the only person who can testify to the details of her lack of certainty and validate it for what it was. There are no bases in fact or law to hold that a later lack of certainty in the accuracy of a statement previously made converts that statement to a *de facto*, knowingly false statement.

63. Disciplinary Counsel have not submitted evidence proving by a preponderance of the evidence that Judge Green made a knowingly false statement to the Commission.

CONCLUSION

64. For the reasons stated here, and those detailed in Respondent's Proposed Findings of Fact and Conclusions of Law, incorporated here by reference, Judge Green respectfully requests that the Honorable Master conclude that Disciplinary Counsel have not met their required burden of proof as Count I, Count II, and Count II of the Amended Complaint.

Respectfully submitted,

PLUNKETT COONEY

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Dated: January 31, 2022

PROOF OF SERVICE

The undersigned certifies that on the 31st day of January 2022, a copy of the foregoing document and this Proof of Service were served upon Hon. Betty R. Widgeon, Appointed Master, Lynn Helland, and Lora Weingarden via electronic mail. I declare under the penalty of perjury that the foregoing statement is true to the best of my information, knowledge, and belief.

/s/ Michael P. Ashcraft, Jr.
Michael P. Ashcraft, Jr. (P46154)

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