**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 OBJECTIONS TO REPORT OF MASTER

Respondent, Judge Tracy Green ("Judge Green"), through her attorneys, Plunkett Cooney, respectfully objects to the Master's Findings of Fact and Conclusions of Law dated February 28, 2022, as follows:

## INTRODUCTION

In this administrative proceeding, pursuant to MCR 9.233(A), Disciplinary Counsel had the burden of proving the allegations of the Amended Complaint by a preponderance of the evidence. *In re Haley*, 476 Mich 180, 189 (2006). MCR 9.236 required the appointed Master to consider all of the

evidence admitted during the public hearing and prepare a report containing findings of fact and conclusions of law with respect to each of the three counts contained in the Amended Complaint. Judge Green did not have a burden to prove that the allegations in the three counts were untrue; rather, Disciplinary Counsel "at all times [had] the burden of proving the allegations by a preponderance of the evidence." MCR 9.233(A). In fact, Judge Green did not carry a legal burden in this proceeding in any respect. Ascribing such a burden would have been tantamount to paradoxically requiring her to prove a negative. Yet, because this matter turned on the credibility of three witnesses, Judge Green and her two grandsons, a burden of self-defense was foisted upon her. Despite the fact that this is an administrative proceeding, Judge Green nevertheless is entitled to certain constitutional safeguards, specifically, due process and fundamental procedural fairness. Disciplinary Counsel did not meet their burden. The Master did not consider all of the admitted evidence. Most disturbing and prejudicial is the denial of Judge Green's constitutional rights. As detailed hereafter, the conclusions of the appointed Master related to Count I and Count II of the Amended Complaint lack factual and legal bases and the constitutional rights of Judge Green have been violated. For these reasons, those counts should be dismissed. In the event the Commission

concludes otherwise, at a minimum, the denial of Judge Green's constitutional rights entitles the Judge to a re-hearing.

## DUE PROCESS & FUNDAMENTAL PROCEDURAL FAIRNESS

### *Direct Application to Judge Green and this Proceeding…*

Citizens of the United States are guaranteed due process of law, and fairness in the application of law, under the Fifth Amendment to the United States Constitution. *US Const, Am V.* The Fourteenth Amendment applied the Due Process Clause to each of the United States of the Union. *US Const, Am XIV, § 1.* Michigan has adopted the due process and procedural fairness provisions of the United States Constitution. *Const 1963, Art I, § 17.* The United States Supreme Court has held that due process and fairness apply to administrative agencies as well as courts:

> A fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness.

*Withrow v Larkin,* 421 US 35, 46-47, 95 SCt 1456, 43 LEd 2d 712 (1975) (internal citations and quotations omitted). Judge Green has been denied these fundamental rights in this proceeding.

## DUE PROCESS & FUNDAMENTAL PROCEDURAL FAIRNESS

### ***<u>Violation</u>: Hybrid Investigative and Prosecutorial Role of Disciplinary Counsel…***

The Michigan Supreme Court has held as uncontroverted that "judges, like all other citizens, have protected due process interests under the … Due Process Clause of the Fourteenth Amendment of the United States Constitution." *In re Chrzanowski,* 465 Mich 468, 483; 636 NW2d 758 (2001). The existence of that constitutional guaranty demonstrates that Michigan's judicial discipline system is unconstitutional. In *Williams v Pennsylvania,* 136 S Ct 1899, 1910 (2016), the United States Supreme Court held that the Due Process Clause prohibits those who make prosecutorial decisions from participating in the adjudication of the same case. In this proceeding, the Commission "authorized [the] complaint against Honorable Tracy E. Green" and "directed that it be filed." (*Complaint*, Introductory Paragraph). The Executive Director and General Counsel of the Commission, Lynn Helland, along with Staff Attorney, Lora Weingarden, both employees of the Commission, conducted the investigation of Judge Green and also served as prosecutors on behalf of the Commission. Now, pursuant to MCR 9.244(A), the Commission is deciding whether its own allegations and the findings of fact and conclusions of law issued by the appointed Master have merit. The Commission must make

its findings of fact and conclusions of law on its own allegations, as well as prepare its recommendations for action to be considered by the Michigan Supreme Court. MCR 9.244(B). Under the holding in *Williams*, such a constitutional error is serious and goes beyond a mere "harmless error" analysis. Pursuant to *Grievance Administrator v Fieger,* 476 Mich 231, 254; 719 NW2d 123 (2006), the Michigan Supreme Court is the only authority that can address and resolve this constitutional issue. Judge Green has raised these arguments in order to preserve them for further consideration.

In the case of *In Re Morrow*, the Michigan Supreme Court observed that, "*Withrow v Larkin*, 421 US 35 (1975)… supports the conclusion that, *generally*, an administrative body of sharing investigative and adjudicatory roles is not a due-process violation." [*In Re Morrow*, Docket No. 161839, p 2, ¶2 (January 13, 2022), emphasis supplied.] This does not preclude a determination that due process has been violated *in a specific case* because the administrative body shared investigative and adjudicatory roles. Further, the Court also acknowledged that it had instituted some degree of separation between the Judicial Tenure Commission's investigatory and prosecutorial functions, versus its adjudicatory functions, by requiring the appointment of a master. In this particular case, however, the involvement of the appointed Master did not cure this due process violation. Judge Green's right to due process has been violated

because the investigator and co-disciplinary counsel were one in the same person. Lora Weingarden, as investigator, was free to ignore and, in at least one instance conceal, any evidence favorable to Judge Green. In essence, Ms. Weingarden was able to "cherry-pick" the evidence she deemed favorable to her theory of the case that she knew she would, ultimately, also prosecute. There were no checks-and-balances in place. This due-process violation compounded the already existing conflict of interest detailed below that Ms. Weingarden had in even being involved in *any* capacity in this case. Indeed, had the roles of investigator and prosecutor not been fulfilled by the same person, specifically, Ms. Weingarden, this conflict of interest would not have been possible. Ms. Weingarden's personal involvement as an investigator in a critical decision (i.e., whether to seek the Commission's permission for filing a complaint) regarding Judge Green did create an "impermissible risk of actual bias" in violation of *Williams v Pennsylvania* (2016). Unlike in *Morrow*, Ms. Weingarden's clear conflict of interest is one of those "special facts and circumstances" that could render the risk of unfairness in the judicial disciplinary system "intolerably high."

The merging of the executive director and general counsel roles also left Judge Green little recourse before a neutral decisionmaker regarding any complaints concerning the fairness of the investigation.

These due process violations created a structural error requiring a new hearing. (*Williams,* 136 S Ct at 1910)

## DUE PROCESS & FUNDAMENTAL PROCEDURAL FAIRNESS

### ***Violation*: Failure to Disclose and Recuse Due to Conflict of Interest…**

Judge Green's relative was charged in an adult felony case. Then, Wayne County assistant prosecuting attorney, now Disciplinary Counsel, Lora Weingarden, was the prosecutor assigned to the case. The defendant was a minor at the time he allegedly committed the offense. Ms. Weingarden correctly decided to dismiss the case in adult felony court. She never consulted Judge Green, who was then an attorney, nor did she even know Judge Green. Judge Green was not involved in the case. In a radio interview during Judge Green's campaign, Choree Bressler accused "the prosecutor" in the relative's case of having acted under the influence of then, Attorney Tracy E. Green, in deciding to dismiss the felony case. This created a clear conflict of interest in Ms. Weingarden either investigating or prosecuting in this case. Bressler is on record in the media of accusing a prosecutor, specifically, Ms. Weingarden, of making a favorable decision in Judge Green's relative's case *because of Judge Green's influence*. As that very prosecutor, Ms. Weingarden obviously wanted

to avoid Bressler accusing her, again, of making a prosecution decision favorable to Judge Green and her family. Ms. Weingarden correctly assumed that if Bressler made such an accusation in the past, she would certainly make it again if Ms. Weingarden, as investigator, had decided not to pursue a case against Judge Green.

Ms. Weingarden was duty-bound to immediately recuse herself from Judge Green's investigation in this case and, at the very least, to disclose her conflict of interest to Judge Green, Executive Director and General Counsel, Lynn Helland, and to the Commission. She did neither. Judge Green does not know whether she even made her supervisor, Mr. Helland, aware of this conflict. Even after Judge Green, through counsel, raised the issue of this obvious conflict of interest with Ms. Weingarden during a phone call, she still did not recuse herself from further involvement in Judge Green's case. Judge Green's case could have easily been reassigned to another staff investigator/staff attorney in the Commission's office. Yet, in order to ensure that the outcome of this investigation would not be met with another false accusation by Choree Bressler of Ms. Weingarden's bias toward Judge Green, Ms. Weingarden needed to have control over the investigation. (In fact, Ms. Weingarden refused to fully investigate this case, before the filing of the

complaint, by failing to interview any witnesses who were not adversarial to Judge Green.)

Simply stated, Ms. Weingarden had a personal stake in the outcome of this case that casts considerable doubt on the objectivity of the investigation and ultimate prosecution, and undermines the fairness of this entire proceeding. By failing to disclose her conflict of interest and recuse herself in this case, Ms. Weingarden created an ethical violation. The due process and procedural fairness rights of Judge Green have been violated as a result.

## DUE PROCESS & FUNDAMENTAL PROCEDURAL FAIRNESS

### ***Violation*: Failure to Disclose the Existence of Exculpatory Evidence…**

During the investigatory stage of this proceeding, it appeared that Disciplinary Counsel was only interviewing the boys and those who would be supportive of the boys' claims. Interviews had not been conducted of teachers, ministry leaders and church workers, and even Choree Bressler's own family members. Judge Green specifically requested that Disciplinary Counsel interview a number of witnesses. Lora Weingarden conducted those interviews. On August 24, 2020, Ms. Weingarden interviewed Linda Perkins. During this interview, upon information and belief, Ms. Perkins advised Ms.

Weingarden of a photograph that Gary, Jr. had shared with Ms. Perkins. Choree Bressler is the mother of Gary, Jr. The photograph was of one of Choree Bressler's other children, the half-sister of Gary, Jr., whom he had not yet met. Gary, Jr. told Ms. Perkins that he had received the photograph directly from his mother. Choree Bressler shared this photograph, electronically, with Gary, Jr. during the period of December 26, 2017, and June 24, 2018. This was a critical period highlighted during the formal hearing because it was the time frame in which Judge Green alleged that Choree Bressler was coaching the boys in her scheme to regain custody of her children. Gary, Jr. testified during the hearing that he had only been in contact with his mother during this critical period once on December 26, 2017, and then again merely days before the boys' removal from their father's custody on June 24, 2018.

The photograph was evidence of Gary, Jr.'s false testimony concerning the number of times he had been in contact with his mother during the relevant time frame. After hearing about this photograph, upon information and belief, Ms. Weingarden asked Ms. Perkins who else knew about the existence of the photograph. Ms. Perkins reported that she had not told anyone. Despite her knowledge, Ms. Weingarden failed to advise Judge Green of the existence of this evidence and, critically, she did not include the information about this exchange with Ms. Perkins and the photograph in the written summary of the witnesses'

statement that Ms. Weingarden provided Judge Green in discovery. As a former prosecutor, she certainly knew the *Brady* implications of her failure to do so. This evidence was favorable to Judge Green yet not disclosed as was required by MCR 9.232(A)(1)(a). The concealment of this evidence, evidence related to a material issue in the proceeding (i.e., the credibility of Gary, Jr., one of only two of Disciplinary Counsel's fact witnesses with actual knowledge), might have impacted the weight and credibility ascribed by the Master and affected the outcome in Judge Green's favor.

In *Brady v Maryland,* 373 US 83, 87, 83 SCt 1194, 10 LEd 2d 215 (1963), the U.S. Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In *Strickler v Greene*, 527 US 263, 281-282, 119 SCt 1936, 144 LEd 2d 286 (1999), the U.S. Supreme Court articulated a three-part test to be applied in identifying the essential components of a *Brady* violation: 1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; 2) the evidence must have been suppressed by the State, either willfully or inadvertently; and, 3) prejudice must have ensued.

The Michigan Supreme Court considered the proper test for applying *Brady* in *People v Chenault,* 495 Mich 142, 845 NW2d 731 (2014). In *Chenault,* video recordings of interviews of two witnesses to a shooting death were not provided to defense counsel prior to trial. However, the witnesses' written statements and the police report summarizing the interviews were provided. The *Chenault* Court first stated that the three factors set forth in *Strickler* are fairly settled, with the government being responsible for evidence within its control, even evidence that is unknown to the prosecution, and without regard to the prosecution's good or bad faith. *Chenault,* 495 Mich at 150. Evidence is considered favorable to the defense if it is either exculpatory or impeaching. *Id.* To show that evidence is material, a defendant must show "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome," which does not require a demonstration by a preponderance that disclosure of the suppressed evidence would have ultimately resulted in acquittal. *Id.* [citations and quotations omitted] Instead, the question is whether, in the absence of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence. In assessing the materiality of the

evidence, courts are to consider the suppressed evidence collectively, rather than piecemeal." *Id.* at 150-151 [citations and quotations omitted]

The coaching of Gary, Jr. and Russell by their mother, Choree Bressler, was a key defense of Judge Green in the proceedings. So, too, was the credibility of Gary, Jr. concerning when he had contact with Bressler. By way of her interview of Ms. Perkins, Ms. Weingarden learned of the photograph and unauthorized contact between Bressler and Gary, Jr., contact that Judge Green argued during the formal hearing *had* to have occurred yet was denied by Gary, Jr. Bressler was only entitled to supervised visits with the boys. Her contacts with them were in direct violation of a court order. In *People v Dimambro,* 318 Mich App 204, 897 NW2d 233 (2016), the prosecution's failure to learn of and disclose additional autopsy photos that were in the exclusive possession of the medical examiner constituted a *Brady* violation. As a result of the failure to disclose exculpatory and impeaching evidence, a *Brady* violation has occurred and the due process and procedural fairness rights of Judge Green have been violated. Counts I and II of the Amended Complaint should be dismissed, Judge Green should be granted a new hearing, or, at a minimum, the Commission should order a hearing for the taking of additional evidence (examinations of Ms. Perkins, Ms. Weingarden, Gary, Jr., and Choree Bressler) pursuant to MCR 9.243.

**DUE PROCESS & FUNDAMENTAL PROCEDURAL FAIRNESS**

***<u>Violation</u>: Unlawful/Unsanctioned Use of Wayne County Child Advocacy Center (a/k/a "Kids Talk") and Facilitation/Control of Key Witness…***

Disciplinary Counsel, Lora Weingarden, utilized her connections at Kids Talk (as a former Wayne County prosecutor, supervisor in the Child Abuse Unit, and as a contractual interviewer) to interview Gary, Jr. and Russell. The opportunity was not available to Judge Green. This was not a harmless situation and resulted in prejudice to Judge Green. The boys had each been interviewed there at least twice before. To the extent that the previous interviewer had established a good rapport with the boys (which they are trained to do), this would certainly have been advantageous for Ms. Weingarden to interview them there. The facility creates a formal and sobering atmosphere of importance with multiple cameras, microphones, and positioned furniture. The boys would have been more likely to believe that they should testify consistently with their previous testimonies given there.

MCL 722.628 restricts the use of the Child Advocacy Center to certain agencies: "…*prosecuting attorney and the department* shall develop and establish procedures for involving … children's advocacy centers." (Emphasis added) Disciplinary Counsel are neither prosecuting attorneys for Wayne County nor the Department of Health and Human Services. Ms. Weingarden

leveraged her earlier positions and connections with the Center and took advantage of an opportunity to utilize the Center for her interviews of Gary, Jr. and Russell. This was clearly in an effort to leverage the trust and comfort level that the boys displayed in previously sanctioned interviews at the Center. On cross-examination, Ms. Weingarden admitted:

-She had interviewed Gary, Jr. on the phone, at his home, and at Kids Talk (*Transcript*, Vol XI, p 2100);

-She had Gary, Jr. picked up from his home and driven to the offices of the Commission to testify during the hearing (*Transcript*, Vol XI, p 2100);

-She interviewed both Gary, Jr. and Russell at Kids Talk as a staff member of the MJTC (*Transcript*, Vol XI, p 2102);

-She was unaware of any rule or policy that allowed the MJTC to use Kids Talk to interview witnesses (*Transcript*, Vol XI, p 2102);

-She brought the boys into the Kids Talk facility so she could sit them in a facility that has cameras in the corner and contact microphones all around so that they could be recorded in that atmosphere (*Transcript*, Vol XI, p 2103);

-She is the custodian of the interview disks (*Transcript*, Vol XI, p 2103); and,

-She is not aware of any authority that allows the MJTC to use the Kids Talk facility and then be the custodian of the recordings (*Transcript*, Vol XI, p 2104)

Disciplinary Counsel also violated MCL 600.2163a (and MCL 712A.17b, which is almost identical) in multiple respects. These statutes govern the handling of videorecorded statements and other matters, including use of the Kids Talk facility. First, by interviewing the boys at Kids Talk, Ms. Weingarden assumed the role of "custodian of the videorecorded statement" under MCL 600.2163a(1)(a), which states: "'Custodian of the videorecorded statement' means the department of human services, investigating law enforcement agency, prosecuting attorney, or department of attorney general or another person designated under the county protocols established as required by … the child protection law ..." As Disciplinary Counsel in a Commission case, Ms. Weingarden did not qualify as "Custodian of the videorecorded statement." Further, subsection (1)(c) states that a "'[v]ideorecorded statement' means a witness's statement taken by a custodian of the videorecorded statement ..." Subsection (1)(e) states: "'Witness' means an alleged victim of an offense listed under subsection (2)." Yet, subsection (2) expressly limits application of MCL 600.2163a(1) to "prosecutions and proceedings" enumerated in this subsection. MJTC proceedings are *not* listed among those "prosecutions and

proceedings." Based upon the forgoing, Ms. Weingarden clearly abused her contractual access to Wayne County's Child Advocacy Center by interviewing the boys at the Kids Talk facility.

Further, Ms. Weingarden ignored the privacy protections of MCL 600.2163a (and MCL 712A.17b, which is almost identical). Subsection (9) of MCL 600.2163a states, "A custodian of the videorecorded statement may release or consent to the release or use of a videorecorded statement or copies of a videorecorded statement *to a law enforcement agency, an agency authorized to prosecute the criminal case to which the video recorded statement relates, or an entity that is part of the county protocols established under … the child protection law* …" (Emphasis added.) Yet, in this case, Ms. Weingarden released the boys' videorecorded statements to persons and entities who are not permitted by the statute to receive them. In fact, as stated above, Disciplinary Counsel was not authorized by law to have access to the statements. This amounted to serious violations of the applicable law.

## DUE PROCESS & FUNDAMENTAL PROCEDURAL FAIRNESS

### ***<u>Violation</u>: Warrantless Search of Respondent's Phone Records…***

As an arm of the Michigan Supreme Court, the MJTC is a state agency. Therefore, its agent, Disciplinary Counsel, is a state actor. Judge Green had a reasonable expectation of privacy regarding her phone records under the Fourth Amendment to the United States Constitution. *US Const, Am IV* "[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures…" is a fundamental right not just applicable to criminal proceedings. State actors must obtain a warrant to obtain phone records, which by their very nature are private. As former prosecutors, Mr. Helland and Ms. Weingarden certainly knew the Fourth Amendment implications of their warrantless search. Thus, when Disciplinary Counsel obtained Judge Green's cell phone records in June 2021, they needed to secure a warrant in order legally to do so. A warrant was not obtained. This was an obvious violation of Judge Green's privacy rights. If such action could be taken by the MJTC without securing a proper warrant, it would allow Disciplinary Counsel a mechanism while serving as an investigator, as opposed to a prosecutor, to obtain *any* judge's private phone records for *any* reason under the guise of an investigation without the safeguards of judicial scrutiny.

Disciplinary Counsel's violation of due process and invasion of privacy were demonstrated when they obtained Judge Green's cell phone records which disclosed the date, time, and duration of every single telephone call and text exchange between Judge Green and her counsel in this proceeding from January 1, 2021, through June 3, 2021, as well as every other call and text during that period.

MCR 9.221 allows Disciplinary Counsel to take evidence during a Commission investigation. MCR 9.221(C) permits the issuance of a subpoena for that purpose but with limitations. The specific Rule states, in pertinent part:

> The commission may issue subpoenas for the attendance of witnesses to provide statements or produce documents or other tangible evidence exclusively for consideration by the commission and its staff during the investigation.

The Rule only allows the issuance of subpoenas for "witnesses" to either appear to provide statements *or* to produce documents or other tangible evidence. The Sprint/T-Mobile phone company was not a "witness" in Judge Green's case. Disciplinary Counsel's violation of the applicable Rule, and Judge Green's due process rights and privacy protections in obtaining her phone records, is further magnified by the fact that her name was disclosed on the subpoena, contrary to the express prohibition of the Rule. MCR 9.221(C) goes on to say, "Before the filing of a complaint, the entitlement appearing on the subpoena

shall not disclose the name of the respondent under investigation." Disciplinary Counsel claimed that Judge Green's phone records were obtained in a separate investigation and not for use in *this* case. That claim is belied by the fact that additional investigation was underway concerning a possible amendment to the claims in this proceeding. Indeed, the Commission did secure leave to amend the original Complaint, but not with regard to information related to the phone records. Regardless, if it was a separate investigation, it never resulted in the filing of a complaint. The investigation involving the phone records, therefore, occurred "before the filing of a complaint" in that separate investigation in violation of the Rule.

In *People v Chapel,* unpublished per curiam opinion of the Court of Appeals, 2021 WL 1338071 (4/8/2021), a search of cell phone records was determined to be unlawful. Chapel was sentenced to life imprisonment without parole for first-degree murder and conspiracy to commit murder, among other sentences for other crimes. On appeal, Chapel argued that the trial court erred by denying his motion to suppress evidence concerning data extracted from his cell phone and presented as evidence at trial. The data had been pulled from Chapel's cell phone when the phone had been seized during an investigation of an unrelated homicide. The *Chapel* Court determined that remand was necessary to determine by way of an evidentiary hearing whether the phone

had been unlawfully seized and whether review of the phone's data was reasonably directed toward obtaining evidence of the unrelated homicide, or whether the search exceeded the scope of the warrant and constituted a warrantless search that was unlawful under the Fourth Amendment.

The Court of Appeals relied on the Fourth Amendment to the U.S. Constitution and its counterpart in the Michigan Constitution which guarantee "the right of persons to be secure against unreasonable searches and seizures," stating the basic purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Id.* at *2 (internal citations and quotations omitted). The Court went on to state that "[t]he Fourth Amendment protection against unreasonable searches and seizures applies to cell-phone data. *Id.*, relying on *People v Hughes,* 506 Mich 512, 958 NW2d 98 (2020). **The Court also stated that "[a] warrantless search and seizure is per se unreasonable**," and that "the right to be secure against unreasonable searches and seizures absent a warrant based upon probable cause is subject to several specifically established and well-delineated exceptions." *Id.* (internal citations and quotations omitted). Those exceptions include search incident to arrest, the plain-view exception to the warrant requirement, and whether the phone was seized because of the incriminating nature of the phone was immediately apparent when

interviewing Chapel in the unrelated matter, none of which were applicable in the case.

In *People v Hughes,* supra, the Michigan Supreme Court held that "a search of digital cell-phone data pursuant to a warrant must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in *that* warrant. Any search of digital cell-phone data that is not so directed, but instead directed at uncovering evidence of criminal activity not identified in the warrant, is effectively a warrantless search that violated the Fourth Amendment absent some exception to the warrant requirement." *Id.*, 506 Mich at 516.

In *Hughes,* law enforcement successfully obtained a search warrant to search Hughes's cell phone for evidence relating to drug trafficking while the defendant was under investigation for that crime. After the cell phone was seized and data was extracted from the phone, Hughes was charged with armed robbery and ultimately convicted of armed robbery. On appeal, Hughes argued his phone records should have been excluded from trial because the warrant that supported the search of the data on the phone only authorized a search for evidence of drug trafficking, not armed robbery. The Supreme Court agreed, concluding that the seizure and search of the cell-phone data pursuant to a warrant does not extinguish the "otherwise reasonable expectation of privacy in the entirety of that seized data." 506 Mich at 529.

One of the cases that the *Hughes* Court relied on was *Riley v California,* 573 US 373, 134 SCt 2473, 189 LEd 2d 430 (2014), wherein the U.S. Supreme Court held that officers must generally obtain a warrant before conducting a search of cell-phone data, rejecting with respect to such data, application of the "search incident to lawful arrest" exception to the warrant requirement. The *Hughes* Court went on to state that *"Riley* makes clear that, in light of the extensive privacy interests at stake, general Fourth Amendment principles apply with equal force to the digital contents of a cell phone." *Id.*, 506 Mich at 527, referring to *Riley* at 396-397, 134 SCt 2473 ("[A] cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form – unless the phone is.")." *Id.*

Disciplinary Counsel violated Judge Green's entitlement to due process and protection of her privacy interests when they obtained her cell phone records without a warrant and by way of a subpoena that failed to comply with MCR 9.221(C). Even if the records were obtained as part of a separate investigation, due process prohibited Disciplinary Counsel from obtaining the records without a properly issued warrant.

## DUE PROCESS & FUNDAMENTAL PROCEDURAL FAIRNESS

### ***<u>Violation</u>: Denial of In-Person Public Hearing Where Credibility of Witnesses Was the Main Issue in the Proceeding…***

On March 23, 2021, the Master issued a Scheduling Order stating that the public hearing in this matter required pursuant to MCR 9.233(A) would be held virtually, via the ZOOM virtual platform, and live-streamed on YouTube. (*Scheduling Order*, Paragraph No. 2) Given the gravity of the allegations, potential penalties, and possible repercussions and ramifications, Judge Green filed a Motion for In-Person Proceedings on March 31, 2021, respectfully requesting that the public hearing in this matter occur in-person rather than via the ZOOM virtual platform to avoid undue prejudice to her defense.

In the motion, Judge Green argued that she was entitled to present a defense to the allegations in the complaint and should be afforded the opportunity to present the most effective defense possible using the most effective methods possible in an in-person presentation. Specifically, Judge Green explained that she would be unduly prejudiced if the public hearing were to be conducted virtually because she and her counsel would be prevented from maintaining the same level of engagement with witnesses and assessing their countenance and demeanor during examination; and, further, they could not assess the credibility of witnesses by reading body language or seeing the entire

actions of the witness, including whether the witness was looking at something or someone off camera if the hearing were conducted virtually. Judge Green pointed out that, because two of the main witnesses were minors, it was especially critical to guard against them looking at something or someone off camera. This was especially important given the fact that Judge Green insisted that the boys had been coached by their mother to make statements that would undermine Judge Green's ability to be awarded custody or placement of the boys, instead of their mother.

At the time the motion was filed, the CDC had recognized that the spread of COVID-19 could be mitigated through prevention measures including social distancing and the wearing of face masks. The Michigan Department of Health and Human Services' March 19, 2021 "Emergency Order under MCL 333.2253 – Gatherings and Face Mask Order," allowed for workplace gatherings to occur consistent with the Emergency Rules issued by MIOHSA on October 14, 2020. Under guidance issued as of March 19, 2021, the Michigan Department of Health and Human Services provided that up to 25 Board members could gather for a public meeting. In addition, the effort to vaccinate the United States population had been tremendously successful, with over 100 million individuals already vaccinated and an expected 200 Million people being vaccinated by April 23, 2021. Given the circumstances, Judge Green argued that

an in-person public hearing could be accomplished safely and in compliance with all pending State of Michigan Department of Health and Human Services directives, Administrative Orders, and CDC guidelines.

To alleviate any concerns, counsel for Judge Green offered to host the public hearing in the Plunkett Cooney Board Rooms in the Bloomfield Hills and/or Detroit office, which are very large, high-ceiling spaces in which appropriate social distancing could be effectively observed, and within a suite of offices that were sparsely staffed and observant of all State of Michigan directives and CDC guidelines. Plunkett Cooney offices maintained strict safety protocols at all times (offering disposable medical face masks to all staff and guests; requiring face masks be worn in all common areas, including restrooms; offering disposable plastic gloves to all staff and guests; hand sanitizer stations; six-foot social distancing requirements; disinfectant wipes in all conference rooms; plexi-glass dividers in all conference rooms; and, medical screening questionnaires). Additionally, all Plunkett Cooney offices had a sanitization protocol where heavily trafficked areas and surfaces (doorknobs, light switches, etc.) were sanitized multiple times per day. Further, each Board Room was a high-technology space with broadband internet connectivity, video conferencing capability, and the ability to host a livestream proceeding via YouTube. To further ensure the health, safety, and welfare of the participants,

Judge Green proposed that all present at the in-person public hearing could demonstrate proof of vaccination which, according to the CDC and vaccine manufacturers, provided close to 100% effectiveness in preventing COVID-19 or minimizing the risk of severe illness.

Disciplinary Counsel did not file a response in opposition to the Motion for In-Person Proceedings. On April 2, 2021, despite the fact that certain State of Michigan District and Circuit Courts, as well as United States District Courts, had resumed in-person hearings and jury trials, the Master issued her Decision on Respondent's Motion for In-Person Proceedings denying the request. Requiring the public hearing to be conducted by way of a virtual Zoom format was a denial of due process and resulted in prejudice to Judge Green.

Courts have found that the inherent limitations in remote litigation activities, such as taking depositions remotely, constitute undue prejudice against the party opposing the remote proceeding. *See, e.g., In re Fosamax Prods Liab Litig,* 2009 WL 539858, at *2 (SDNY Mar 4, 2009) (requiring in-person deposition where "testimony may be critical"); *Birkland v Courtyards Guest House,* 2011 WL 4738649, at *2 (ED La Oct, 7, 2011) ("The ability to observe a party as he or she answers deposition questions is an important aspect of discovery which the Court will not modify except in cases of extreme hardship."); *Kean v Board of Trustees of the Three Rivers Reg Library Sys,* 321

FRD 448, 453 (SD Ga 2017) (holding party is entitled to in-person deposition where witness is a party rather than a "less important witness"). One of the most important and critical reasons a virtual hearing should not have been ordered was the attendant Due Process considerations, including that assessing the credibility of witnesses and cross-examining witnesses is most effectively accomplished face-to-face. This right to a fair cross-examination is so fundamental to our justice system that it is guaranteed by the Sixth Amendment of our Bill of Rights. See *Pointer v Texas*, 380 US 400, 404 (1965) ("The fact that this right appears in the Sixth Amendment to our Bill of Rights reflects the belief that the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution."); see also, *People v Jemison*, 505 Mich 352, 366 (2020) (holding that allowing a witness to testify in a criminal proceeding via "two-way, interactive video" violated the defendant's rights under the Confrontation Clause.) The Attorney Discipline Board has also recognized the right to confront one's accuser as a fundamental right applicable to disciplinary proceedings. See *In the Matter of Reinstatement Petition of Robert C. Horvath* (Case No. 91-220-RP, Nov. 17, 1992) (stating that consideration of an anonymous letter "does not comport with the most fundamental precepts of fairness applied in judicial and quasi-judicial proceedings); *Grievance Administrator v Knight* (Case No. 02-100-RD, May 27,

2003) (stating that the respondent did not claim "that he was denied any fundamental right to notice of the charges against him, the right to confront his accuser, or the right to present evidence in his defense.")

Additionally, Judge Green was further unduly prejudiced given the voluminous number of documents that were introduced during the hearing. Some courts have refused to order remote proceedings, such as depositions, on that basis, alone. *See, e.g., Webb v Green Tree Servicing LLC,* 283 FRD 276, 280 (D Md 2012) ("Courts have held that the existence of voluminous documents which are central to a case, and which the party intends to discuss with the deponent, may preclude a telephonic deposition."); *In re Fosamax Prods Liab Litig,* 2009 WL 539858, at *2 ("He is likely to be presented with numerous documents . . . , making anything other than a face-to-face deposition unwieldy."); *Willis v Mullins,* 2006 WL 894922, at *3 (ED Cal April 4, 2006) (requiring in-person deposition in light of "unreasonable restraints" of video conferencing, "especially concerning the review and use of documents"); *Silva Run Worldwide, Lt. v Gaming Lottery Corp,* 2003 WL 23009989, at *2 (SDNY Dec 23, 2003) (rejecting telephonic or video deposition because of importance of testimony and volume of documents).

Under the plain language of MCR 9.231(B) and MCR 9.233, Judge Green was entitled to an in-person hearing in this matter. The Master denied Judge

Green's motion for in-person proceedings due to a concern with an increase in COVID-19 cases at the time; however, the Master reported to the parties that she was out-of-state, three time zones to the west, while presiding over at least one day of hearing in this case. In denying in-person proceedings, the Master deprived Judge Green of her due process rights to "adequately perform the critical credibility assessments that this matter" required. *Hassoun v Searls,* 453 F Supp 3d 612, at 11 (WDNY, 2020) Judge Green's counsel proposed a plan, based upon the waning number of cases in the community at the time, which would have provided sufficient and fully-compliant protections against COVID-19. There was no legal basis for the Master to decline to apply the Michigan Court Rules. Due to the criticality of the credibility determinations in this case, the Master's denial of Judge Green's motion for in-person proceedings was particularly egregious. Judge Green is entitled to an in-person rehearing. *Williams v Pennsylvania*, 136 S Ct 1899 (2016); *Grievance Administrator v Fieger*, 476 Mich 231, 254; 719 NW2d 123 (2006).

In his concurring opinion in *Morrow*, Justice Viviano agreed with the majority opinion but explained that, with regard to the lack of an in-person hearing, he "would have held that the Master violated MCR 9.231(B) by not conducting respondent's hearing in person at a physical location." Unlike *Morrow*, Judge Green's entire case was a contest of credibility, between two

minor boys and the Judge as their grandmother. There was no valid reason for denying Judge Green's reasonable request for in-person proceedings. The denial of those in-person proceedings resulted in a violation of due process and a miscarriage of justice.

**OBJECTION NO. 1**

***Recasting of Counts I & II of the Amended Complaint as "Covering Up Evidence of 'Corporal Punishment'" and "False Statements About Knowledge of 'Corporal Punishment'" by the Master…***

Before the close of proofs, the Commission filed an Amended Complaint against Judge Green. Count I is titled "COVERING UP EVIDENCE OF CHILD ABUSE." Count II is titled "FALSE STATEMENTS ABOUT KNOWLEDGE OF CHILD ABUSE." Nowhere in the Amended Complaint is Judge Green charged with covering up evidence of "corporal punishment" or making false statements about knowledge of "corporal punishment." In The Master's Findings of Fact and Conclusions of Law (the "Report"), following her statements on the Allegation of the case (Section I), Standard of Proof (Section II), and Procedural History (Section III), the Master details the Background (Section IV) of the case. Immediately, she refers to an order issued by Judge Cox out of the Wayne County Family Court that prohibited Judge Green's son and former daughter-in law, Gary Davis-Headd, Sr. and Choree Bressler, from using corporal

punishment on their sons, Gary, Jr. and Russell. (Section IV, p 4) In the sentence that follows, the Master then notes that "Respondent was aware of Judge Cox's order regarding corporal punishment." She goes on to point out as apparent fact that the boys lived with their father from April 2015 until June 24, 2018 and he used corporal punishment on the boys multiple times during that period.

The use of corporal punishment becomes the Master's focal point throughout the balance of her Report. Corporal punishment, however, is legal in Michigan. If Judge Green had known that her son was using corporal punishment in violation of the civil family court custody order, there would have been nothing she could have lawfully or ethically done to address it. If she had contacted Judge Cox, the author of the order, that would have been an improper *ex parte* communication from a lawyer to a judge. She would not have been able to engage the police to enforce a civil court order.

In Section IV, the Master also references Judge Green's interaction with attorney Brenda Richard who represented her son in his child protection trial in Third Circuit Court, Family Division – Juvenile Section. There seems to be no other reason for mentioning Attorney Richard except to imply that Judge Green did something wrong by discussing a child protection case that involved her son and grandchildren. Additionally, any advice or assistance that Judge Green

provided to Ms. Richard was given while Judge Green was still a lawyer, although the trial occurred after she because a judge. The Master also noted that Judge Green's son was convicted of two counts of felony child abuse in the second degree, in a separate case in the Third Circuit Court Criminal Division. These three points of reference, corporal punishment, Attorney Richard, and convictions in the criminal case are particularly notable because they are not relevant to this case. At the conclusion of Section IV, the Master summarizes the allegations of the Complaint as Judge Green having knowingly concealed evidence of her son's "abuse" of the boys and knowingly making false statements about her knowledge of the "abuse." (Section IV, pp 5-6) This point is also notable in that the Master jettisons the phrase "Child Abuse" as is used in Counts I & II of the Amended Complaint and, instead, generally refers to "abuse" throughout the balance of her Report. The claims against Judge Green are premised upon the crime of "child abuse" which is a phrase of art in Michigan jurisprudence and not the ambiguous concept of "abuse."

The Master then moves on to Section V which is her reiteration of Count I of the Amended Complaint which she titles "Knowingly Concealing Evidence of *Abuse*." (Section V, p 6, emphasis supplied) In the paragraph that follows, the Master refers only to "abuse" as opposed to the crime of "child abuse" and fails to cite to any standard or elements of child abuse. Here, the Master recasts

the actual charges against Judge Green. The Master again references the court order prohibiting corporal punishment and notes Disciplinary Counsels' allegation that Judge Green "knew" about the order, that her son was using corporal punishment during the April 2015 through June 2018 period, Judge Green "failed to protect the boys," and "attempted to conceal" her son's "abuse."

In her Findings of Fact that follow in Section V, the Master finds by a preponderance of the evidence the existence of ten facts labeled A – J. (Section V, p 7) These findings of fact do not contain a single cite to a statute, rule, or case law of any sort, let alone those related to "child abuse" which is the foundational element of the two charges against Judge Green. Instead, the Master, in sum, finds that Judge Green was aware that her son used "court-prohibited corporal punishment" on his sons.

As to Count I, in Section V, the Master did not make a single finding of fact that child abuse existed or that Judge Green covered up that child abuse. Critically, the Master notes in the paragraph that follows ("Discussion of Findings") that she disagrees with Judge Green's argument that a finding of child abuse is a "threshold issue;" however, the Master fails to cite to any authority to support that position. Surprisingly, she goes on to say that Disciplinary Counsel "describes" the corporal punishment as "abuse" and that Judge Green is correct that the single slap of which she was aware has not been

"determined by a court to be abuse." Here, the Master makes an incongruous pronouncement that "evidence of abuse is not the same as incontrovertible proof of abuse." Again, no citation to any authority is provided. Then, the Master dispenses with the responsibility to analyze each element of the charge and foundational premises for the charges by claiming that Judge Green "need not have been fully convinced that [her son] had abused the boys to be found liable under this charge." Absent, again, is any citation to supporting authority. Finally, the Master, respectfully, confirms her error by stating: "The Master will henceforth refer to specific *alleged* acts without making a *determination* about whether they *legally constitute abuse*, as such a determination is *beyond the scope* of the Master's authority." (Section V, p 8, emphasis supplied) Consistently, no authority supporting any aspect of the statement is recorded. Further analysis of the Master's "Discussion of Findings" as to Count I, found at pages 8 – 16, is of no import - - the Master has acknowledged that any referenced "acts" are simply "alleged" and she will not be determining whether any "alleged acts" "legally constitute abuse."

The Master abrogated and repudiated her duty to analyze the admitted evidence and the elements of each claim alleged against Judge Green. Two foundational elements had to be proved by a preponderance of evidence before the Commission can consider whether Judge Green covered up evidence of

child abuse. The first is the existence of *child abuse*. No one other than a trier of fact and court of law can adjudge something to be child abuse. Child abuse is a legal standard that requires elemental proofs and a finding or adjudication that it occurred. There is no evidence in the record that, prior to June 24, 2018, Gary, Jr. and Russell were victims of physical child abuse. Likewise, there is no legal finding or adjudication cited in the record that, prior to June 24, 2018, Gary, Jr. and Russell were victims of physical child abuse. There are no specific factual bases in the record of an incident of alleged physical child abuse before June 24, 2018. Regardless, the absence of proofs is of no moment - - the Master has already found that no determination of whether any specific alleged acts constituted legal abuse was conducted in this proceeding.

Gary, Jr. and Russell did not testify to specific factual details establishing beyond a reasonable doubt or by a preponderance of evidence that they were victims of physical child abuse before June 24, 2018. The Master made no such findings. A legal finding or adjudication of the existence of child abuse under a Michigan statute or case law is a foundational premise to a claim that Judge Green covered up evidence of child abuse. Disciplinary Counsel cited no statute, case law, or jury instruction related to the elements of child abuse. In their Proposed Findings of Fact and Conclusions of Law, Disciplinary Counsel did not cite to any evidence in the record that supports a legal finding of child abuse.

The required foundational premise has not been established in the record. No testimony has been introduced, or exhibit admitted, that establishes the first foundational premise. Conclusively, per her unequivocal statement in the Report, the Master has not found a single instance of child abuse in the record. A finding was not made, because required factual bases do not exist.

With regard to corporal punishment, whether or not Judge Green was aware that her son was using it as a form of discipline, is not relevant in this proceeding. The Amended Complaint, which was amended during the course of proofs, does not contain any charge regarding whether Judge Green had knowledge that corporal punishment was employed or when. Likewise, there is no charge related to whether the Judge was aware that her son was using corporal punishment in violation of a family court order.

While the Master referenced attorney Brenda Richard and her involvement in the defense of Judge Green's son in the Juvenile Court trial, the reference is irrelevant to this proceeding. The Amended Complaint contains no charge against Judge Green regarding Brenda Richard or the involvement of attorney Richard in the Gary Davis-Headd, Sr. criminal trial.

Judge Green admitted to applying make-up to a single, red handprint left on the cheek of Gary, Jr. The Master did acknowledge that the slap and handprint had not been determined by a court to have constituted "abuse." The

Report of the Master is clear that this act was not considered as to whether it legally amounted to child abuse. The only expert that testified in the formal hearing, Nancy Diehl, was a Michigan Child Protection Law and Forensic Protocol expert called by Judge Green. Ms. Diehl testified that she was unaware of any basis in fact or law that a slap to the cheek of a child leaving a red handprint constituted child abuse. Disciplinary Counsel did not call an expert or present any rebuttal testimony in response. Without the required foundational premise demonstrating the existence of child abuse, Counts I & II necessarily fail.

In her Report, the Master concluded as a matter of law that Disciplinary Counsel proved by a preponderance of the evidence that Judge Green violated three of the seven allegations of misconduct in Count I. (Section V, p 16) The Master did not cite to the record in support of the conclusions. There having been no finding that Judge Green was aware of actual child abuse, there can be no finding that she covered up child abuse. Moreover, MCR 9.104(1) and MRPC 8.4(c) contemplate "conduct clearly prejudicial to the proper administration of justice" related to a pending case. Judge Green was not involved in any pending case at any time related to the allegations. In that respect, it would have been impossible for the Judge to prejudice the proper administration of justice. The conclusions of law, by definition, are legally baseless.

## OBJECTION NO. 2

### *A Concise Answer to a Specific Question Without Elaboration Beyond the Scope of the Question Does Not Render the Answer Untruthful or Deceitful…*

In Count II of the Amended Complaint, the Commission alleges that Judge Green made false statements about knowledge of child abuse. In Section VI of her Report, the Master specifically references the allegations that Judge Green made false statements in her November 21, 2019 answers to some of the Commission's questions. In the Discussion of Findings portion of Section VI, the Master cites to purportedly inconsistent statements given by Judge Green in her testimony in the Juvenile Court proceeding, in this proceeding, and in written responses to questions from the Commission.

The first of the referenced inconsistent statements relates to Judge Green's response to Question No. 14 from the Commission. The response is accurate. The Judge admitted that she was aware of her son's use of corporal punishment prior to June 24, 2018. She explained that she was aware of a slap to the cheek of Gary, Jr., that left a red handprint, and her grandsons telling her that they had been spanked for misbehavior in the past. The Master then appears to reference Judge Green's response to Question No. 38 from the Commission as containing an inconsistent answer. The response to that question is not inconsistent. In Question No. 38, the Judge is asked to explain

"whether not inquiring into the details of abuse…was irresponsible or improper conduct." While the Master referenced only part of the response, the complete response is informative. The Judge responded:

> I was never, under any circumstances or in any respect, aware of, or told by anyone, the details of alleged **abuse** of my grandsons at the hand of their father. Specifically, I was never advised about alleged **abuse** by my grandsons.
>
> Once in the past, Gary, Jr. told me that he had been slapped in the face by his father. I saw what looked like a handprint on his cheek at that time. During that discussion, Russell confirmed that Gary, Jr. had been slapped by their father. My grandsons had also mentioned in the **past** that they had been spanked by their father for misbehaving.
>
> After being made aware of the slapping incident, seeing what looked like a handprint on the face of Gary, Jr., and considering it totally inappropriate and unacceptable, I immediately contacted my son and scolded him for doing so. I was satisfied that the issue had been resolved and appropriately remediated as improper and never to be repeated. I was never made aware of any **subsequent** corporal punishment. I did not consider that single incident as something that should be reported to law enforcement, CPS, or any other entity.
>
> As related to being spanked, I have no recall of any **specific occasion** that this was mentioned by my grandsons. I was not, however, aware of any **specific situation** or complaint from my grandchildren concerning being spanked for misbehavior. Further, I never saw any signs that my grandchildren had been spanked by their father.

(Answer to Question No. 38, emphasis supplied) The answer to Question No. 38 lines up precisely with the answer to Question No. 14. The only difference between the two is the scope of the questions. Question No. 38 was broader in scope. The answer, likewise, is broader in scope. In that answer, Judge Green is careful to specify exactly what she knew and when. The highlighted words clarify the answer. The responses are not inconsistent. Simply stated, Judge Green was never aware of any *abuse* of her grandsons at the hand of their father, was aware of *past* spankings, was unaware of any corporal punishment *following* the slap to the cheek of Gary, Jr., and had no recall of any *specific* occasion or situation concerning the boys being spanked. There is no citation to any evidence in the record that demonstrates that these answers are inconsistent or inaccurate. If there were any confusion on the part of Disciplinary Counsel, or perceived inconsistency, follow up questions could have been submitted. They were not.

With regard to Judge Green's testimony in the Juvenile Court, the exchange between the examining lawyer and Judge Green demonstrates that Judge Green answered the specific question asked per the directive of the lawyer. In the 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 was demonstrated through the cross-examination of M.L. Elrick, imprecision in wording within statements is scrutinized, which is why lawyers are careful to listen to questions and respond with precision. As a matter of course, lawyers counsel their clients to be succinct and exact with their responses to questions. Elrick testified that Judge Green had said during her interview with him that she did not "put any makeup on the boy's face." (Transcript, Volume I, p 200) Elrick was impeached and had to acknowledge on cross-examination that what Judge Green actually said was, "I didn't put makeup on any bruises *to conceal any abuse*." (Transcript Volume I, pp 203-204 & Exhibit 7, emphasis supplied). He also admitted that Judge Green, "went further to say that she did not put makeup on the boy's face to cover up any *bruises*." (Transcript, Volume I, p 204)

The Master acknowledged that she did not fault a witness, including Judge Green in the Juvenile Court hearing, for failing to volunteer information that was not specifically requested (Section VI, p 22); however, the Master then, without reference to any supporting evidence, concludes that the answers provided by Judge Green "paint a portrait of a legal professional using

sophisticated mastery of language to mislead or misinform…while still attempting to preserve plausible deniability concerning false statements." (Section VI, p 23) The two statements of the Master are inconsistent. On the one hand, she found no fault in succinctly answering the specific questions asked, and on the other she denigrates Judge Green for being a technician with her words without citation or explanation.

In addressing the red handprint left on the cheek of Gary, Jr. by a slap to the face, instead of relying upon the actual testimony of Gary, Jr. himself (i.e., a "pinkish" handprint from a slap, *Transcript*, Volume III, pp 652-653), or the expert testimony of Nancy Diehl, the only Child Protection Law legal expert in the case (i.e., she had never seen a case in which a slap to the face of a child that left a red mark was found to be child abuse, *Transcript*, Volume IX, p 1680), the Master consulted resources outside the record. WebMD (an Internet-based website), The Oxford Dictionary (a British resource), and Black's Online Law Dictionary (a legal resource), were referenced. With definitions from those sources, the Master attempted to categorize the "pinkish" handprint, that the actual recipient, Gary, Jr., confirmed as "pinkish," as a "bruise." The first "resource" defined a bruise as "a black and blue mark," the second as an "impact rupturing blood vessels," and the third as "injury…with a blunt or heavy instrument." The Master concluded that those descriptions were consistent

with the "pinkish" mark on the face of Gary, Jr. The extent undertaken to convert the acknowledged "pinkish" mark to a bruise in order to contend that Judge Green applied makeup to a bruise, thus rendering her testimony inconsistent, is simply astounding. The "bruise" contention lacks both factual and legal bases. It was Judge Green who reported the handprint to CPS in the first place.

In her Report, the Master concluded as a matter of law that Disciplinary Counsel proved by a preponderance of the evidence that Judge Green violated four of six allegations of misconduct in Count II. The Master did not cite to the record in support of the conclusions. There having been no finding that Judge Green had knowledge of actual child abuse, there can be no finding that she made false statements concerning knowledge of that child abuse. The conclusions of law, by definition, are legally baseless.

**OBJECTION NO. 3**

***Failure to Consider All of the Evidence and Weigh Credibility in Light of All of the Evidence by the Master…***

On page 1 of her Report, the Master confirmed the Standard of Proof with regard to her determinations in this matter. Specifically, she indicated: "Judicial discipline is a civil proceeding, the purpose of which is to maintain the

integrity of the judicial process. *Matter of Mikesell,* 396 Mich 517, 527 (1976); *In re Seitz*, 441 Mich 590, 624 (1993); *In re Haley*, 476 Mich 180, 195 (2006). The standard of proof is the preponderance of the evidence. *Id.* at 189, MCR 9.233(A)." The meaning of preponderance is "that evidence which outweighs that which is offered to oppose it, has more convincing power in the minds of the jury…. It is not a technical term at all, but means simply that evidence which outweighs that which offered to oppose it. It does not necessarily mean that a greater number of witnesses shall be produced on the one side or the other, but that, upon the whole evidence, the jury believe the greater probability of the truth to be upon the side of the party having the affirmative of the issue." *Strand v Chicago & WM Ry Co,* 67 Mich 380, 385, 34 NW 712 (1887). See also, Michigan Pleading and Practice §36:1097.

What necessarily follows this standard is that, as to each element of a count or charge, evidence in favor of liability must outweigh *all* evidence going against liability, and that applies also to administrative proceedings. "It is generally well-established that issues of fact in civil cases are to be determined in accordance with the preponderance of the evidence with the burden of persuasion upon the party asserting the claim. McCormick Evidence §339, p 793; 30 Am Jur 2d, Evidence, §1163, p. 337; *Stone v Earp*, 331 Mich 606, 611, 50 NW2d 172 (1951); *Martucci v Ballenger*, 322 Mich 270, 274, 33 NW2d 789

(1948). In *Aquilina v General Motors Corp*., 403 Mich 206, 210, 267 N.W.2d 923 (1978), this Court stated that the same burden of persuasion applies to proceedings before an administrative agency. Accord, Cooper, *State Administrative Law,* p 355.

Proof by a preponderance of the evidence requires that the factfinder believe that the evidence supporting the existence of the contested facts outweighs the evidence supporting its nonexistence. *Martucci v Detroit Police Comm'r*, *supra,* 322 Mich 274, 33 NW2d 789.

The Findings of Fact and Conclusions of Law sections of the Master's Report do not cite to the evidence in the record. The formal hearing transcript consists of 2,248 pages alone. 46 exhibits were admitted into evidence. The exhibits consisted of dozens of hours of testimony and interviews, hundreds of pages of trial and interview transcripts, and many hours of video. The Report is nearly devoid of any citations to the evidence.

The Master was charged with reviewing *all* of the evidence admitted in the case. There is no indication in the Report that the Master did so.

As for witnesses, the Master was to consider their credibility and do so in light of all of the evidence. M Civ JI 4.01, titled "Credibility of Witnesses," provides:

> You are the judges of the facts of this case, and you must determine which witnesses to believe and what weight to give to their testimony. In doing so you may consider each witness's ability and opportunity to observe, his or her memory, manner while testifying, any interest, bias or prejudice, and the reasonableness of the testimony *considered in light of all the evidence.*

(Emphasis supplied) So, too, the Master was charged with considering and giving weight to the evidence in the complete record. See, e.g., *New Covert Generating Company, LLC v Township of Covert*, 334 Mich App 24, 71-72, 964 NW2d 378 (2020) – "An agency commits an error of law or adopts wrong principles when the agency's findings are not supported by competent, material, and substantial evidence on the whole record… (citations and internal quotations omitted)

The Master found the testimony of Gary, Jr. and Russell credible, despite extensive impeachment and, as to Gary, Jr., an acknowledged pattern of deceit and untruthfulness during his involvement in this very case. Judge Green submitted evidence from multiple sources all of which undermined the veracity of the boys. After reading the Master's report, with no other information, one would assume that the only evidence admitted in the formal hearing was the testimony of Judge Green and her grandsons. Aside from Judge Green's testimony, the Master made no reference to any of Judge Green's evidence. Particularly glaring is the Master's ignoring the testimonies of Gary, Jr.'s

teachers, who are mandatory reporters of child abuse, and Ms. Diehl, the only expert witness in the case. The teachers' testimonies were critical because they contradicted Gary, Jr.'s testimony. Nancy Diehl's testimony was also critical because the Master not only certified her as an expert in Child Protection Law but also in the Forensic Protocol for interviewing children. Her expertise in this area should have helped the Master conclude that the boys' statements and testimonies were not reliable due, in large part, to the many deviations from proper implementation of the protocol. The Master also ignored the testimony of church ministry leaders who testified that they knew and observed the boys and never saw any indication that they were the subjects of physical child abuse. Family members also confirmed that they had spent extended periods of time with the boys during the three year period they lived with their father and signs of child abuse were never seen. There was testimony that the boys even had extensive contacts with their maternal relatives who never reported any concerns about the boys' treatment. Remarkably, however, there is no citation to any of this evidence in the report of the Master.

The Master did not find the testimony of Judge Green to be credible. Judge Green introduced character evidence from her family and church ministry leaders all of whom testified to her reputation for being truthful and honest. Each of these individuals was cross-examined by Disciplinary Counsel

and not one was impeached. The testimony of these witnesses was not cited in the Master's Report.

The lack of citation to the record and to the testimony of all of Judge Green's witnesses in the Report, creates a question as to whether all of the evidence admitted in the case was reviewed and the testimony of all of the witnesses considered in light of all of the evidence.

## CONCLUSION

The conclusions of the appointed Master related to Count I and Count II of the Amended Complaint lack factual and legal bases and the constitutional rights of Judge Green have been violated. Moreover, the totality of the Constitutional violations undermines the integrity of and confidence in these proceedings. For these reasons, those counts should be dismissed. In the event the Commission concludes otherwise, at a minimum, the denial of Judge Green's constitutional rights and the errors of the appointed Master entitles the Judge to a re-hearing.

Respectfully submitted,

PLUNKETT COONEY

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Dated: April 15, 2022

**PROOF OF SERVICE**

The undersigned certifies that on the 15th day of April 2022, a copy of the foregoing document and this Proof of Service were served upon the Judicial Tenure Commission c/o Cas Swastek, 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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