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 COUNSELS' BRIEF IN SUPPORT OF AND IN OPPOSITION TO MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND DISCIPLINARY ANALYSIS

Respondent, Judge Tracy Green ("Judge Green"), through her attorneys, Plunkett Cooney, respectfully provides the following response to the Brief in Support of and in Opposition to Master's Findings of Fact and Conclusions of Law, and Disciplinary Analysis ("Brief in Support and Opposition") submitted by Disciplinary Counsel.

INTRODUCTION

Despite a re-casting by the Master, and an attempt by Disciplinary Counsel to buttress that re-casting, this is *not* a case about whether Judge Tracy Green was aware that her son used corporal punishment on her grandsons at some point in the past in violation of a family court order. Judge Green was charged in this case with covering up evidence of *child abuse* (Count I), making false statements about her knowledge of *child abuse* (Count II), and knowingly making false statements to the Commission in her Answer to Complaint (Count III). Nowhere in the Complaint or Amended Complaint filed by Disciplinary Counsel was Judge Green charged with having knowledge that her son used corporal punishment, did so in violation of a family court order, and failed to report the violation. This *is* a case about whether Judge Green knew her grandsons were victims of *child abuse*, covered up evidence of *the* child abuse, and made false statements about her knowledge of *the* child abuse.

The Brief in Support and Opposition filed by Disciplinary Counsel illustrates and exemplifies the systemic lack of due process sustained by Judge Green and attempts to correct errors made by the Master. In her Findings of Fact and Conclusions of Law, the Master did not cite to supporting evidence of any *child abuse* in the record, even though *child abuse* is the foundational prerequisite and predicate for the actual charges against Judge Green. In fact,

by her own admission, she confirmed: "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." (Master's Report, Section V, p 8, emphasis supplied) Unequivocally, the Master failed to cite to any standard or elements of what constitutes "child abuse" in Michigan and failed to cite to any evidence of "child abuse" in the record. Disciplinary Counsel are clearly aware of the problem that the Master's pronouncement creates. Their effort to backfill the conclusions of the Master are glaringly apparent: "Disciplinary counsel endorse the Master's findings that respondent did the acts charged in Counts I and II that the Master found either explicitly or implicitly. With respect to those findings, *the primary purpose of this brief is to provide supporting citations to the record."* (Brief in Support and Opposition, Introduction, p 2, emphasis supplied) While MCR 9.240 does state that disciplinary counsel or a respondent may file "a brief in support of or in opposition to all or part of the master's report," the Rule does not afford the right to, in essence, ascribe to a master the evidence upon which her findings of fact and conclusions of law *were* based. Here, Disciplinary Counsel endeavor to do just that and, in so doing, further display the lack of due process and fundamental fairness - - United States and Michigan constitutional protections

that are to be inextricably intertwined within these proceedings - - denied to Judge Green.

TACIT ACKNOWLEDGMENTS OF DUE PROCESS & FUNDAMENTAL PROCEDURAL FAIRNESS VIOLATIONS BY DISCIPLINARY COUNSEL

<u>Indictment</u>: Defense of Recast and Undisclosed Charges & No Requisite Finding of "Child Abuse"

Without notice and an opportunity to defend, Judge Green was unknowingly involved in proceedings in which she was defending herself against charges that had been recast into ones that were completely new as well as additional charges that were undisclosed. In their summarization of the Master's Report concerning Count I, Disciplinary Counsel claim that "before she took the bench, she was aware her son had abused Katy and the boys and took actions to conceal that abuse." (Brief in Support and Opposition, Count I, p 4) They, like the Master, do not speak of the legal charge of child abuse or the elements of such a charge; instead, they simply posit that some type of "abuse" occurred and Judge Green was "aware." There are no citations to factual or legal support for the claim. The reference to "Katy" is notable in that Judge Green was never charged in these proceedings with anything related to Katy Davis-Headd, her former daughter-in-law. Anything related to Katy is irrelevant to these proceedings. Disciplinary Counsel argue that Judge Green's alleged knowledge of the "choking" incident shows that she was aware her son was a

violent person and, therefore, she should have known that her son was physically abusing her grandsons. While a fanciful claim, there is no evidence in the record that Katy was ever "abused." Most disturbing is the fact that Disciplinary Counsel interviewed Katy on at least two occasions and disclosed her as a witness that would be called in this case on their Witness List. Remarkably, Disciplinary Counsel never called Katy as a witness because Judge Green provided Disciplinary Counsel a text message from Katy to Judge Green's son in which she admitted, in her own words, that she had a problem with lying. Instead of calling the best witness who could testify about having allegedly been abused, Katy, Disciplinary Counsel asked Gary, Jr. and Russell about whether their father abused their step-mother. This was the "choking" incident that both Disciplinary Counsel and the Master referred to in these proceedings. Judge Green categorically denied ever being aware of any such abuse but, regardless, it is not relevant. Judge Green was never charged with misconduct for allegedly having knowledge of any incident involving Katy, yet her purported knowledge is cited as a finding of fact.

In this section of their Brief in Support and Opposition, Disciplinary Counsel itemize nine "facts" (A – I) that "[T]he Master found…" as to Count I - - but then, cleverly only by footnote, disclose the bases of these "facts:"

> This brief generally refers to pages in Disciplinary Counsel's Proposed Findings of Fact (Proposed Findings) to supply the citations to the record that support the Master's findings. *That is because the Proposed Findings have citations to the record that support the Master's findings, while the Master's report does not,* and the Proposed Findings also have the explanation for why those cites are significant to the issues in the case.

(Brief in Support and Opposition, footnote 3, p 5, emphasis supplied) Each and every one of the "facts" itemized by Disciplinary Counsel has no factual or legal bases:

A. Judge Green "knew" that her son slapped and choked Katy - - there is no charge related to this in the Complaint or Amended Complaint and, regardless, there are no supporting factual bases in the record during the referenced timeframe (no who, what, when, how, where, or why);

B. Judge Green was "aware" her son used corporal punishment - - there is no charge related to this in the Complaint or Amended Complaint and, regardless, there are no factual or legal findings of *child abuse* in the record during the referenced timeframe (no who, what, when, how, where, or why);

C. Judge Green "admitted" knowing that, prior to June 24, 2018, her son was a "very stern disciplinarian" and that demonstrated her "awareness" that her son used corporal punishment on Gary, Jr. and

Russell - - there is no charge related to this in the Complaint or Amended Complaint and, regardless, there are no factual or legal findings of *child abuse* in the record during any referenced timeframe (no who, what, when, how, where, or why);

D. Judge Green was aware that, on at least one occasion, her son smacked Gary, Jr. in the face and Judge Green concealed the handprint with makeup - - there is no charge related to this in the Complaint or Amended Complaint and, regardless, there are no factual or legal findings of *child abuse* in the record during the referenced timeframe (no who, what, when, how, where, or why);

E. Judge Green put makeup on the face of Gary, Jr. on multiple occasions to cover "marks" caused by a hit or slap - - there are no factual or legal findings of *child abuse* in the record during any referenced timeframe (no who, what, when, how, where, or why);

F. Judge Green was aware that her son spanked the boys and used a belt - - there is no charge related to this in the Complaint or Amended Complaint and, regardless, there are no factual or legal findings of *child abuse* in the record during the referenced timeframe (no who, what, when, how, where, or why);

G. Judge Green was told by Gary, Jr. and Russell their concern "about what their father would do to them physically when they returned home" and Judge Green did not ask them whether their father was using corporal punishment - - there is no charge related to this in the Complaint or Amended Complaint and, regardless, there are no factual or legal findings of *child abuse* in the record during the referenced timeframe (no who, what, when, how, where, or why);

H. Judge Green was told by Russell on at least one occasion, when he was eight, that he was about to be spanked, which meant Judge Green was aware that her son was using corporal punishment in violation of a court order - - there is no charge related to this in the Complaint or Amended Complaint and, regardless, there are no factual or legal findings of *child abuse* in the record during the referenced timeframe (no who, what, when, how, where, or why); and,

I. Judge Green did not attempt to independently verify whether her son was using corporal punishment in violation of a court order - - there is no charge related to this in the Complaint or Amended Complaint and, regardless, there are no factual or legal findings of *child abuse* in the record during the referenced timeframe (no who, what, when, how, where, or why).

This is not a case about Katy Davis-Headd, corporal punishment, or violations of a family court order prohibiting corporal punishment, rather, it is a case about *child abuse.* The questions that the Master refused to answer were whether Judge Green had knowledge of child abuse, concealed the abuse, and made false statements about her knowledge of child abuse. Because no evidence was introduced during the formal hearing establishing the existence of child abuse at any given time, let alone that Judge Green had knowledge of child abuse, Disciplinary Counsel had to pivot and attempt to work-around their failure of proofs by instead focusing attention on other alleged victims, corporal punishment, and violations of an order prohibiting corporal punishment. Judge Green was not charged with any misconduct related to such things. She was not on notice that she had to defend herself against charges related to such things. She was not given an opportunity to defend herself against these recast and undisclosed charges. Judge Green was entitled to notice and an opportunity to be heard even in an administrative proceeding. *Napuche v Liquor Control Comm,* 336 Mich 398, 404 (1953) As a result, her right to due process was violated.

In an almost passing comment, Disciplinary Counsel references the Master's failure to address Paragraph 10(h) of the Complaint. Despite not having been addressed by the Master, Disciplinary Counsel find that "the

evidence was clear" that Russell told Judge Green about his injuries and showed her bruises inflicted by his father. They then "urge" the Commission to find that the allegation has been established by the evidence.

The testimony of Gary, Jr. and Russell was not credible and both were impeached numerous times on cross-examination.

Russell had no consistent recollection of any story. He did not accuse Judge Green of using makeup to conceal marks on his face until the time of the investigation in this case. The first and only time he made this allegation was to Disciplinary Counsel, Lora Weingarden, on June 11, 2021; however, by that time, he had already had two KidsTalk interviews, in June and August 2018, closer in time to the actual alleged events. He had testified in three trials, and Ms. Weingarden had interviewed him three other times, in January 2020, February 2020, and May 2020. Russell *never* mentioned Judge Green using makeup to conceal marks on his face. By the time he first made the face makeup allegation during an interview with Ms. Weingarden on June 11, 2021, he had also been living with Choree Bressler for three years. Even then, only a few days after making that statement, he testified in the formal hearing but did not testify to Judge Green applying makeup on his face. He could not have forgotten about it; instead, he reverted back to an earlier allegation that Judge Green put makeup on his arms and legs. All of these interviews were introduced into the

record in this case. If the Master reviewed all of the evidence that was admitted, including the videos such as Russell's June 11, 2021, interview with Ms. Weingarden, she would have seen this glaring inconsistency. As detailed earlier, Russell ultimately testified instead that Judge Green put makeup on marks on his arms and legs.

Like Russell, Gary never mentioned Judge Green during his June 2018, KidsTalk interview. While a strong statement, it is the verified truth: Gary, Jr. is an admitted liar. He lied to Lora Weingarden repeatedly concerning the Uncle John Letter. In the first video of his interview with Ms. Weingarden about the letter, he seemed believable due to the extent of the details he was sharing, his countenance, and demeanor. The ease with which he lied, and the degree of calculation and forethought, showed that he is a very sophisticated 13 year-old. Even Ms. Weingarden believed him, yet it was established that he was, in fact, lying. Critically, his body language, disposition, and speech patterns in his video interview, where Ms. Weingarden was actually present, were exactly the same as his testimony on the stand during the formal hearing. This is so because he was lying in both instances. Had Gary, Jr. been made to testify in person, this would have been even more apparent.

The fact that Gary, Jr. chose to lie about Judge Green, as opposed to anyone else, demonstrates that he wanted to give Ms. Weingarden what he

knew she wanted - - a statement damaging to Judge Green. He only admitted the truth about the Uncle John letter when he believed he would go to "Juvie." He believed that the detective who Ms. Weingarden was calling in to look at his electronic devices would discover his lie. By the time of the formal hearing, Gary, Jr. had been abandoned again by Choree Bressler and desired to go home. He had not had contact with Russell in months, and he had not seen his mother but once (her birthday, on April 24, 2021) since she had kicked him out of her home at the end of 2020.

Based upon the totality of circumstances, Disciplinary Counsel created a coercive and/or suggestive environment for Gary Jr.'s testimony. They did not allow him to testify from his home, even though he had been interviewed multiple times at his home. Instead, he was picked up by Commission employees, brought to the Commission offices, and given an office from which to testify. He was also served lunch by the Commission. There was no reasonable explanation for this. Russell was not brought to the Commission offices; Russell testified from his mother, Choree Bressler's home. Disciplinary Counsel had to exercise control over Gary, Jr., both physically and mentally. At one point, Gary, Jr. testified about an exchange he had in the hallway of the Commission during one of the days he was testifying in the formal hearing. He testified that he and Lora Weingarden spoke and he told her that he did not

want to testify. Ms. Weingarden told him that he was under subpoena, he had to testify, and, if he did not, he "might" go to "juvie." (*Transcript*, Volume III, pp 617-618, 700-701) The exchange in the halls of the Commission, as well as the testimony, was both astonishing and outrageous! If he had not been there, she likely could not have coerced him with this threat. Disciplinary Counsel controlled and influenced the testimony of Gary, Jr. and had the literal benefit of an in-person proceeding as to Gary, Jr., a due process right that was denied Judge Green. The threat of "juvie" came *after* he stated he did not want to testify and after he had an expletive-laden tirade during cross-examination that resulted in a break and an opportunity for further, private interaction with Disciplinary Counsel. The tirade was because he believed he was being forced to testify as Disciplinary Counsel expected not because of an aggressive cross-examination. Disciplinary Counsel transported him and provided him lunch, suggesting that they cared about him, and ingratiated themselves in the process. He could have been told to bring a lunch. As a trained forensic examiner of children, Lora Weingarden knew this would be suggestive, at the very least. The Michigan Forensic Interview Protocol specifically states: "Do not use bathroom breaks or drinks as reinforcement for cooperating during the interview." (Exhibit 43, p 5) Disciplinary Counsel's offering and providing

lunch for Gary Jr. during his testimony served to undermine the reliability of his testimony. That was obviously improper.

In addition to these things which compromised the testimony of Gary, Jr., Disciplinary Counsel told Gary, Jr. that he did not have to see or view Judge Green during his testimony, specifically, that he could shut off his video. This lack of confrontation, made possible only because of the virtual nature of the formal hearing proceedings, made it easier for Gary, Jr. to lie about Judge Green just like he lied directly to the face of Disciplinary Counsel and that, by his own admission.

Disciplinary Counsel next move to asking the Commission to find that Judge Green violated certain statutes and court rules because the Master did not "explicitly" do so. Specifically, they request that the Commission find that Judge Green violated MCL §750.505 and MCL §750.483(a)(5)(a) as an accessory after the fact by concealing "abuse" and "tampering with evidence" of "abuse." Disciplinary Counsel errs in stating that Judge Green's son was convicted of Child Abuse in the Third Degree. They cite to MCL §750.136b(5)(a) which states: "A person is guilty of child abuse in the third degree if . . . The person knowingly or intentionally causes physical harm to a child." Judge Green's son was actually convicted of two counts of Child Abuse in the *Second* Degree, which has different elements. Child Abuse in the Third Degree requires

a showing of "physical harm" to a child. Child Abuse in the Second Degree requires a showing of "**serious** physical harm" to a child. [MCL §750.136b(3)(a)&(b), emphasis supplied] Disciplinary Counsel also cite to MCL §750.136(e) and argue that the "marks" Judge Green's son allegedly left on the boys establish that he caused them physical harm. Interestingly, both citations are factually incorrect in that they refer to the need for evidence of physical harm to substantiate the charge; but, the correct statute require the need for evidence of "serious" physical harm. Here, Disciplinary Counsel is intentionally vague. There is no citations to any "marks" left on the boys, the details of any "marks" that may have been left, or that the "marks" were evidence of "serious" physical harm as required. This is why the charges prosecuted by Disciplinary Counsel must fail as a matter of fact and law. There is no evidence in the record of *child abuse*. Not a single element of a charge of child abuse, or Judge Green's knowledge or concealment of child abuse, or of her misrepresenting her knowledge of child abuse, is found in the record. Disciplinary Counsel's vague references to "marks" and "physical harm," and "abuse" do not satisfy this foundational requirement to sustain the charges.

Likewise, Disciplinary Counsel have not made the foundational showing necessary to support violations of the criminal code related to being an accessory after the fact or for tampering with evidence. This was fully briefed

in Judge Green's proposed Findings of Fact and Conclusions of Law, and Objections to the Master's Report. Michigan law is clear: An "accessory after the fact" is "one who, with *knowledge* of the other's guilt, renders *assistance* to a *felon* in the effort to hinder his detection, arrest, trial or punishment." [*Perkins, Criminal Law* (2d ed), p 667, quoted in *People v Lucas*, 402 Mich 302, 304 (1978), emphasis supplied] On June 24, 2018, the only established date on which child abuse was alleged to have been identified and for which Gary Davis-Headd was convicted of Child Abuse in the Second Degree, Judge Green was a lawyer who focused her practice in abuse and neglect cases. She never deemed the handprint evidence of child abuse, nor did the only expert who testified in this case, Nancy Diehl, or CPS, or the Wayne County Prosecutor's Office. If Judge Green had "knowledge of the other's [her son's] guilt" she would not have reported the handprint to CPS caseworker, Leslie Apple.

The Michigan Model Criminal Jury Instruction on accessory after the fact is informative here. M Crim JI 8.6 states:

> Accessory After the Fact
>
> (1) The defendant is charged with being an accessory after the fact to [CHILD ABUSE]. An accessory after the fact is someone who knowingly helps a felon avoid discovery, arrest, trial, or punishment.

> (2) To prove that the defendant is guilty, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (3) First, that someone else committed [CHILD ABUSE]. [CHILD ABUSE] is defined as [summarize all the elements of the principal offense]. [The prosecutor does not have to prove that the other person has been charged with or convicted of (CHILD ABUSE); (he/she) just has to prove that (CHILD ABUSE) was committed.]
>
> (4) Second, that the defendant helped the other person in an effort to avoid discovery, arrest, trial, or punishment.
>
> (5) Third, that when the defendant gave help, [he/she] knew the other person had committed a felony.
>
> (6) Fourth, that the defendant intended to help the other person avoid discovery, arrest, trial, or punishment.

Disciplinary Counsel has not introduced any evidence to satisfy Element No. 3 as there are no proofs in the record that "child abuse" was committed on any specific date. No felony child abuse was proved. Disciplinary Counsel did not

prove that any child abuse occurred, other than on June 24, 2018, by finding of the criminal court, which was not linked in any way to Judge Green. Nancy Diehl testified, as an expert in child protection law (pertaining to civil child abuse in Juvenile Court/CPS cases) and based upon personal knowledge during her long experience and career as a former prosecutor and head of the Wayne County Prosecutor's Office Felony Child Abuse Unit, that she knew of no case where a parent who slapped a child leaving a handprint was prosecuted. Also, even after knowing about the handprint, CPS did not list the incident in its petition against Gary Davis-Headd, Sr. in Juvenile Court. Moreover, although he was charged with felony child abuse, Gary Davis-Headd, Sr. was not charged with the handprint incident, which was already known to the Wayne County Prosecutor's Office by way of CPS at the time they filed the other felony charges. They did not charge for the slap even though they could have attempted to base their case on the testimony of Judge Green. They did not make that charge because no *child abuse* had been committed. Element No. 5 is not proved because there was no evidence establishing an *underlying* felony related to the handprint. Judge Green advised CPS of the handprint, so Elements 4 and 6 are not satisfied. In sum Disciplinary Counsel did not and cannot satisfy any of the elements (3-6) required by the instruction. Footnote 2 also points out that this is a "specific intent crime."

Disciplinary Counsel also urge the Commission to find Judge Green guilty of tampering with evidence under MCL §750.483(a)(5)(a). The statute requires that a person tamper with "evidence to be offered in a present or future official proceeding." "[T]o be offered," by its plain language, means that the "official proceeding" was pending or expected to occur in the future. If the certainty of the future "official proceeding" was not required, the statute would state "which might or be offered," "which could be offered," or include similar language. Disciplinary Counsel cites an unpublished case to support that the "official proceeding" need not be pending. Even so, the future holding of the proceeding must be *certain*. Further, this is a specific intent crime. To be guilty of it, Judge Green must have "knowingly or intentionally" concealed, etc., evidence *and* she must have known it would be offered in a present or future proceeding. If Judge Green knew that, her disclosure to CPS was nonsensical.

Like the instruction for accessory after the fact, the instruction for tampering with evidence is informative. M Crim JI 37.11 states:

> Removing, Destroying or Tampering with Evidence
>
> (1) [The defendant is charged with / You may also consider the less serious offense of intentionally removing, altering, concealing, destroying, or tampering with evidence to be offered at an official

proceeding [not involving a criminal case where (identify crime where the punishment was more than 10 years) was charged]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: (2) First, that there was some evidence to be offered in a present or future official proceeding. An official proceeding is a hearing held before a legislative, judicial, administrative, or other governmental agency, or a hearing before an official authorized to hear evidence under oath, including a referee, a prosecuting attorney, a hearing examiner, a commissioner, a notary or another person taking testimony in a proceeding. (3) Second, that the defendant removed, altered, concealed, destroyed, or otherwise tampered with that evidence. (4) Third, that when the defendant removed, altered, concealed, destroyed, or otherwise tampered with that evidence, [he/she] did so on purpose and not by accident. [(5) Fourth, that the evidence that the defendant removed, altered, concealed, destroyed, or otherwise tampered

with was used or intended to be used in a criminal case where (identify crime where the punishment was more than 10 years) was charged.]

There is no interpretation or definition provided in the jury instruction for the "to be offered" language. It clearly means that someone has determined that it would be offered. Although element (5) would obviously not apply to Judge Green, it gives guidance as to what is meant by "to be offered" and illustrates that the concealed evidence "was used or intended to be used in a criminal case." Disciplinary Counsel have not and cannot cite to anything in the record to support such a finding.

Disciplinary Counsel returns to recast and undisclosed charges when vaguely claiming that Judge Green "knew" of the court order prohibiting corporal punishment and was informed of the "beatings" her grandsons were receiving, but then take a quantum leap in logic by stating that Judge Green's "concealment of the evidence of the abuse was knowing and intentional." (Brief in Support and Opposition, Count I, p 10) Here, they claim there is "evidence of the abuse" but cite to none. This is obviously because they know that the handprint was not evidence of "child abuse." They also claim that concealment of "the abuse" was "knowing and intentional" but, again, cite to no evidence in the record. There is no evidence of "child abuse" in the record of this case. No

such finding was made by the Master; no such evidence establishing "child abuse" was introduced by Disciplinary Counsel.

With regard to violations of the Michigan Court Rules, Disciplinary Counsel claim that MCR 9.104(5) was violated because a "criminal law of a state" was violated. The Master did not find such a violation of criminal law. Disciplinary Counsel then, again, take a quantum leap by claiming that MRPC 8.4(b) was violated because Judge Green's "violations of criminal law" were conduct involving dishonesty and misrepresentation. In order for their argument to stand, not only must the conduct involve dishonesty, but the dishonesty must be such that it reflects on her trustworthiness or fitness as a lawyer. Disciplinary Counsel have not cited to any such evidence in the record. Even if the Master had found that Judge Green had lied, this would not apply and there still would be no violation of MRPC 8.4(b).

Judge Green was denied due process and fundamental fairness when, without notice and an opportunity to defend, she was unknowingly involved in proceedings in which she was defending herself against charges that had been recast into ones that were completely new as well as additional charges that were undisclosed. The Commission should not allow the Master's findings as to Count I to stand. At a minimum, the violation of Judge Green's constitutional rights entitle her to a re-hearing.

<u>Indictment</u>: Defense of Recast and Undisclosed Charges, No Requisite Finding of "Child Abuse," No Requisite Finding of Knowledge of "Child Abuse," and No Evidence of False Statements

With regard to Count II, that alleges that Judge Green made false statements about her knowledge of *child abuse*, Disciplinary Counsel claim that the Master made 12 "determinations" that Judge Green was *not* believable and made no determinations that she *was* believable. Simply stated, the Master disregarded the evidence submitted by Judge Green. Not a single instance is found within the Master's Report in which weight and credibility was ascribed to any evidence that Judge Green introduced by witness or exhibit. Further, there is no indication in the Report that *all* of the introduced evidence was reviewed by the Master. While testimony was heard, and a few exhibits were shown via the Zoom screen sharing function, hundreds (if not thousands) of pages of interviews, court hearing, and trial transcripts were admitted along with hours of video interviews and hundreds of pages of exhibits. That evidence was critical to a proper consideration of this case.

Disciplinary Counsel again highlight recast and undisclosed charges regarding Katy Davis-Headd, corporal punishment, a family court order, and Judge Green's purported knowledge of "abuse" of her grandsons at the hand of her son. There are no citations to evidence of *child abuse* and Judge Green's *knowledge* of *child abuse* in Disciplinary Counsel's Brief in Support and

Opposition. There is no such evidence. Disciplinary Counsel deems *child abuse* and Judge Green's *knowledge* of *child abuse* as established and move to attempting to demonstrate that Judge Green made false statements about both.

Judge Green has consistently denied ever seeing bruises on the bodies of the boys. In an effort to show that she was not telling the truth, Disciplinary Counsel recount the testimony of Leslie Apple, the CPS worker who was present on June 28, 2018 when the boys were removed. She is quoted as having testified that, on June 28, 2018 when she examined the boys, she observed injuries that were an "11" on a scale of ten. Ms. Apple, who Judge Green has objectively shown to have been biased against her and was removed from the CPS case as a direct result, was not telling the truth. The proof is in the KidsTalk interview of Gary, Jr. conducted only four days later on June 28, 2018. In that interview, the interviewer actually acknowledged that the bruises on the legs of Gary, Jr. that he showed to CPS only four days earlier, and were considered an 11 on a scale of 10 by Ms. Apple, were "not there anymore." (Exhibit 31, pp 16-17) Ms. Apple also took other liberties in inaccurately or incompletely recording what she discussed with Judge Green. For example, Disciplinary Counsel claim that Ms. Apple was "inquiring into severe *physical* abuse" and Judge Green's explanation of her son's method of discipline was "very stern." Ms. Apple never "inquired" regarding this. Judge Green called Ms. Apple and

advised that she was "wracking her brain" because she could not understand how, if the boys were being abused, she could have missed it! In the CPS report, Ms. Apple recorded that Judge Green said she was "wracking my brain" - - but Ms. Apple provided no context at all for the statement. Judge Green also told Ms. Apple, as opposed to answering her, that Judge Green knew her son was a "stern disciplinarian," not "very stern", and was referring to how often, for how long, and for what reasons he would discipline the boys. Ms. Apple never asked what Judge Green meant, and she did not elaborate because she had no reason to suspect at that time that Ms. Apple was misconstruing what she was saying. Judge Green had no reason to suspect corporal punishment, and certainly not child abuse, because she only saw non-physical discipline after the divorce, and never heard or had any reason to believe otherwise.

Reference is made to another statement of Ms. Apple to the effect that Judge Green had told her that she did not think "it" was "this bad." Ms. Apple claimed to understand those words to mean that Judge Green did not know that the "physical abuse" was as bad as it turned out to be. Judge Green did not make such an implication. Judge Green told Ms. Apple that she did not know that "it," being generally the discipline being used by her son on her grandsons, was "this bad," meaning physically abusive. Judge Green precisely explained through her testimony what she meant and the context in which she made the statement.

Neither Ms. Apple, nor Disciplinary Counsel, is entitled to determine what Judge Green meant by her own statement.

Next, Disciplinary Counsel attempt to show Judge Green making a false statement during her testimony in the Juvenile Court hearing. While they claim that her testimony "appeared to mean" that she was aware of spankings during the period just before the boys were removed from the home in June 2018, Judge Green actually testified that she was aware of the boys being spanked "in the past." As Judge Green testified in this case concerning spankings that, by "in the past" she meant prior to the no corporal punishment order being issued by Judge Cox in 2015. Apparently because Judge Green answered the question truthfully and was not asked a follow-up question as to what her answer meant, she was not telling the truth. Such a position is preposterous. This is not an example of Judge Green not telling the truth. In fact, the Master did not find that it was such an example. Disciplinary Counsel, in a cryptic statement, alleged that the Master "a little elliptically" noted that the record supports a finding that Judge Green was aware her son was using corporal punishment after 2015. All of this is irrelevant; Judge Green has not been charged with having knowledge that her son used corporal punishment on her grandsons in violation of a family court order. The charges at issue are that Judge Green knew about child abuse, concealed it, and then made false statements about it. None of what was cited

by the Master, or that is now being cited by Disciplinary Counsel, supports those charges.

As emphasized by Disciplinary Counsel, the Master found that, when he was about 8 years of age, Russell told Judge Green that he was about to be spanked. Again, this is not relevant to the charges in this case; but, regardless, it was not "significant" to this case as Disciplinary Counsel claim. They remain fixated on the recast and undisclosed charges of Judge Green's alleged knowledge of corporal punishment in violation of a court order. Disciplinary Counsel appears to add yet another undisclosed charge here by alleging that she never took steps to determine if her son was using corporal punishment and violating an order. That was not a responsibility of Judge Green in any event - - but she did, nonetheless, address the issue with Russell. As she testified, she recalled a time when she stopped to visit with her son and grandsons unannounced. Russell was confined to his room on a "time-out." He told Judge Green he was "about to get a whooping" and she said "No you won't" because she knew that her son was prohibited by court order from using corporal punishment. Because Russell was so anxious about it, Judge Green went to talk to her son and told him that Russell thought he was about to get a "whooping." Her son admitted that he told Russell he would get a "whooping," but said that he was only trying to scare him. Judge Green had no reason not to

believe what she was told and, indeed, both boys admitted that Russell did not get a "whooping" even after she left.

Disciplinary Counsel take another quantum leap by claiming that "the credible evidence was that [Judge Green] was at her son's home when he hit Max in the face, she heard the slap, and she saw the resulting handprint. She then drove Max to her home to apply makeup to his face to conceal the handprint." Disturbingly, Disciplinary Counsel cite to their own Proposed Findings of Fact and Conclusions of Law in support of this claim. Not a scintilla of evidence exists in the record of this case supporting this outrageous and rank speculation.

Disciplinary Counsel then jump to a statement in Juvenile Court in which Judge Green denied using makeup. Judge Green testified and explained that she had applied makeup to the face of Gary, Jr. once to cover a faint red handprint. She has consistently denied ever applying makeup on more than that one occasion and ever applying makeup to a bruise. The Master's recasting of a "red handprint" on a cheek, precisely as confirmed by Gary, Jr., the one who received it (but described it as "pinkish"), as a "bruise" is factually and legally baseless and, in and of itself, a violation of Judge Green's entitlement to constitutional due process and fair dealing in these proceedings.

The Commission should not allow the Master's findings as to Count II to stand. At a minimum, the violation of Judge Green's constitutional rights entitle her to a re-hearing.

***Indictment*: Falsely Accusing Judge Green of Lying Based Solely On Her Acknowledgement That She Lacked Certainty Regarding The Full Extent Of A Prior Statement**

Judge Green admitted in her answer to the Complaint in this case that she was aware her son had, on a single occasion, slapped Gary, Jr. across the face hard enough to leave a handprint. She also stated that she had, at the same time, advised Child Protective Services of that fact, and explained that she applied some foundation to the cheek of Gary, Jr. as a result, during an interview with a CPS investigator. She stated that by doing so she was acknowledging that she was not attempting to cover up alleged evidence of child abuse or making a false statement about her knowledge. Judge Green was certain about her recollection at the time that she made the statements in her Answer to Complaint in December 2020. She believed at the time, to the best of her knowledge, information, and belief, that she *had* advised Child Protective Services that she applied some foundation to the cheek of Gary, Jr. on that single occasion. Over the passage of time, the handprint and makeup were a single topic in her mind. Upon further reflection, the passage of time, and the testimony and documents presented during the course of this case and the

formal hearing in this matter, she could no longer say with certainty at this late date whether that had occurred. During her testimony at the formal hearing, she explained that, while she could still recall with certainty that she had told CPS of the slapping incident and the handprint, she could not still recall with certainty whether she had also told CPS about applying makeup on that single occasion to the cheek of Gary, Jr. She acknowledged that, if she had done so, Leslie Apple would have been the person to whom she would have provided that information.

In her Master's Report, Retired Judge Widgeon found based upon the testimony of Ms. Apple that Judge Green had not told CPS about the use of makeup. The Master did not, however, find that Judge Green deliberately made a false statement to CPS about the makeup. Disciplinary Counsel contests that finding and, to the extent the position is understood, attempt to argue that, because of statements made by Judge Green to an investigative reporter and Ms. Apple, her lack of recollection and certainty was, in fact, a lie. There are no citations to evidence in support of this claim.

In her Report, the Master stated: "After the Master ruled to admit the reports, Respondent testified that she could not recall whether she had disclosed to CPS that she used [makeup] to cover a mark on Max' face." Here, she makes it seem as though Judge Green waited until she knew the CPS reports

would come in as evidence before admitting that no reference to her use of makeup on the handprint was in the report. Yet, Judge Green agreed to stipulate to this fact *before* the evidentiary ruling which admitted the reports was issued. In fact, Disciplinary Counsel refused to stipulate because they undoubtedly wanted the Master to read the complete CPS reports. Judge Green did not wait until "contradictory evidence" was about to be introduced," as the Master claimed. Judge Green had no reason to "reconsider [her] memory" until she realized that there was some controversy about whether she had told Ms. Apple about the makeup. That did not come to her attention until after the hearing was underway. Disciplinary Counsel cannot cite to any evidence to the contrary.

Investigative reporter Elrick was forced to admit on cross-examination that Judge Green did not say what he initially claimed that she had said regarding the makeup. Likewise, the lack of credibility in the formal hearing testimony of Ms. Apple was demonstrated through cross-examination of Ms. Apple and two individuals at the highest level of CPS management above her (Adam Baker, the District manager of CPS, and Bobbi Jo Ferguson, the State Administrative Manager of MDHHS). All of this is recounted in detail in Judge Green's Proposed Findings of Fact and Conclusions of Law. Judge Green demonstrated her credibility by admitting in the first place that she did not

have later certainty as to whether she had told Ms. Apple about the makeup at the time she told her about the slap and handprint. Judge Green may have done so, but she is uncertain. The Master and Disciplinary Counsel relying upon the impeached and incredible testimony of Ms. Apple to show that Judge Green absolutely did not make that statement is not supported by the evidence and is in error.

The testimony of Ms. Apple, Mr. Baker, and Ms. Ferguson also prove another violation of Judge Green's entitlement to due process and fundamental fairness. The Master originally ruled that case-specific testimony from these individuals would not be allowed. Disciplinary Counsel objected and demanded that the testimony be taken on a separate record. The Master granted the request; however, the Master did not record the testimony on video by way of the Commission's YouTube channel or the Zoom link. Later, when the Master changed position and ruled that the testimony would be admissible and admitted it into the case, there was no video recording available. Pursuant to MCR 9.233, Judge Green was entitled to a public hearing in which the public could observe and draw their own conclusions. Judge Green was deprived of that right as to three, critical witnesses in this case.

Disciplinary Counsel continue to argue that Judge Green's later uncertainty between December 2020 when she filed her Answer to Complaint,

and September 2021 when she testified that she was certain about telling CPS about the slap and handprint but not certain about whether she talked about the makeup, confirms that she "knowingly" made a false statement to the Commission in her Answer to Complaint. That is not so. The fact that Judge Green was so candid as to admit and clarify after the fact that her recollection had become uncertain after filing her Answer belies the argument that she had knowingly made a false statement. The Master was correct in so holding.

DISCIPLINARY COUNSELS' ANALYSIS OF PROPOSED SANCTIONS IS FLAWED

<u>Error</u>: The Factors For Consideration Under In Re Brown

The Master's Findings of Fact did 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. As to Count I, the Master did not make a single finding of fact that child abuse existed or that Judge Green covered up that child abuse. The Master noted that she disagreed with Judge Green's argument that a finding of child abuse was a "threshold issue;" however, the Master failed to cite to any authority to support that position. The Master dispensed with the responsibility to analyze each element of the charges and foundational premises for the charges, again, without any citation to supporting authority. The Master concluded by holding: "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." The Master abrogated and repudiated her duty to analyze the admitted evidence and the elements of each claim alleged against Judge Green. The two foundational elements that had to be proved by a preponderance of evidence before the Commission could consider whether Judge Green covered up evidence of child abuse, are the existence of *child abuse* and Judge Green's *knowledge* of actual *child abuse*. Without these findings in the record, it is impossible to find misconduct and an actual analysis of the *Brown* factors is impossible.

As to the factors under *In Re Brown*:

1) There has been no actual finding of misconduct based on record evidence. By definition, there can be no illustration of a pattern or practice of misconduct.

2) Disciplinary Counsel admit that the alleged misconduct at issue in this case did not take place on the bench.

3) There has been no actual finding of misconduct based on record evidence. Disciplinary Counsel cannot cite to any instance of misconduct prejudicial to the actual administration of justice.

4) There has been no actual finding of misconduct based on record evidence. Disciplinary Counsel cannot cite to misconduct that implicates the actual administration of justice.

5) There has been no actual finding of misconduct based on record evidence. Disciplinary Counsel cannot cite to premeditated or deliberated misconduct.

6) There has been no actual finding of misconduct based on record evidence. Disciplinary Counsel cannot cite to misconduct that undermines the justice system.

7) Disciplinary Counsel admit that the alleged misconduct at issue in this case did not involve the unequal application of justice.

Error: Uncharged Acts of Misconduct

In a bizarre attempt to create prejudice before the Commission, Disciplinary Counsel cast aspersions on Judge Green by referencing self-declared "uncharged acts of misconduct." Each allegation is both factually and legally baseless.

Error: Fees for "Misrepresentations"

Disciplinary Counsel seeks an award of costs, fees, and expenses incurred by the Commission in prosecuting this case pursuant to MCR 9.202(B). As to costs, the Rule provides, in pertinent part: "In addition to any other sanction

imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint **only if** the judge engaged in **conduct involving fraud, deceit, or intentional misrepresentation**, or if the judge made **misleading statements to the commission**, the commission's investigators, the master, or the Supreme Court." (Emphasis supplied) The Master did not find, nor has Disciplinary Counsel shown, that Judge Green engaged in conduct involving fraud, deceit, or intentional misrepresentation. As to misleading statements to the Commission, the Master specifically found that Count III had not been proved by Disciplinary Counsel based on a preponderance of evidence. Ironically, had Disciplinary Counsel Weingarten, who had a conflict of interest as investigator and Disciplinary Counsel in this case, recused herself from this case, it would never have been brought before the Commission seeking authorization for the filing of this complaint. The Commission is not entitled to an award of costs, fees, and expenses in this matter.

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 29, 2022

PROOF OF SERVICE

The undersigned certifies that on the 29th 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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