STATE OF MICHIGAN

IN THE SUPREME COURT

COMPLAINT AGAINST:

HON. TRACY E. GREEN
Third Circuit Court
Detroit, Michigan 48226

Docket No. 162260

Formal Complaint No. 103

RESPONDENT HON. TRACY E. GREEN'S PETITION FOR REVIEW

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

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STATEMENT OF JURISDICTION

On the Judicial Tenure Commission's recommendation, this Court may censure, suspend, retire, or remove a judge for misconduct in office and "conduct that is clearly prejudicial to the administration of justice." Const. 1963, art IV § 30; MCR 9.202(B). A respondent may ask this Court to review the Commission's decision and recommendation by filing a petition to reject or modify the Commission's recommendation within 28 days after being served. MCR 9.251(A)(1). Respondent Hon. Tracy E. Green filed this petition within the time allowed[1] following service of the Commission's July 18, 2022, Decision and Recommendation for Discipline.

[1] Respondent obtained extensions via stipulation through October 14, 2022. See Docket Entry Nos. 13 - 15.

QUESTIONS PRESENTED

I. WHETHER JUDGE GREEN HAS BEEN DENIED CONSTITUTIONAL GUARANTEES OF DUE PROCESS & FUNDAMENTAL PROCEDURAL FAIRNESS IN THIS PROCEEDING?

Respondent Answers: Yes

The Judicial Tenure Commission Answered: No

This Court should answer: Yes

II. WHETHER THE 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 VIOLATED JUDGE GREEN'S DUE PROCESS RIGHTS?

Respondent Answers: Yes

The Judicial Tenure Commission Answered: No

This Court should answer: Yes

III. WHETHER A CONCISE ANSWER TO A SPECIFIC QUESTION WITHOUT ELABORATION BEYOND THE SCOPE OF THE QUESTION RENDERS THE ANSWER UNTRUTHFUL, DECEITFUL, OR MISLEADING?

Respondent Answers: No

The Judicial Tenure Commission Answered: Yes

This Court should answer: No

IV. WHETHER THE PREPONDERANCE OF THE EVIDENCE STANDARD MEETS THE CONSTITUTIONAL THRESHOLD PROTECTIONS OF DUE PROCESS?

Respondent Answers: No

The Judicial Tenure Commission Answered: Yes

This Court should answer: No

INTRODUCTION

The denial of due process and fundamental fairness manifest in the procedural history of this case, including the findings of the appointed Master as well as the decision and recommendation of the Michigan Judicial Tenure Commission (in which the Commission accepted and adopted the Master's findings of fact and conclusions of law, *Decision and Recommendation for Discipline*, July 18, 2022, Section VI, p 7), render both the investigation and proceedings in this matter invalid due to a miscarriage of justice. MCR 9.211(D). This case involves the highly controversial and sensitive subject of corporal punishment. (See, e.g., *People v Green*, 155 Mich 524; 119 NW 1087 (1909)). The issues include the extent that a disciplinarian may go before legal physical punishment (See, e.g., *In re Rupert*, 2010 WL 1929904, at *1 (Mich Ct App May 13, 2010)) crosses the line and becomes illegal child abuse. (See, e.g., *Michigan Ass'n of Intermediate Special Ed Administrators v Department of Social Services*, 207 Mich App 491 (1994)). In addition to the sensitive nature of the subject, the highly contentious underlying custody dispute between Judge Green and Choree Bressler out of which this case arose received, and continues to receive, extensive media attention. The decision and recommendation of the Commission lack both factual and legal bases. For the reasons detailed in this petition, the Court should reject the recommendation of the Commission and dismiss the Amended Complaint pending against Judge Green.

FACTS AND PROCEDURAL HISTORY

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. Disciplinary Counsel "at all times [had] the burden of proving the allegations by a preponderance of the evidence." MCR 9.233(A). 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 essentially turned on the credibility of four witnesses, Judge Green, her two grandsons, and a CPS worker, 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. The Commission accepted and adopted a foundationally flawed premise - - proof of the existence of *child abuse* prior to June 24, 2018. There is no such proof in the record of this case.

Despite a re-casting of the actual claims in the Amended Complaint by the Master, and an attempt by both Disciplinary Counsel and the Commission 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)[2]. 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. (*Complaint* & *Amended Complaint*). 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.

Disciplinary Counsel's Brief in Support and Opposition to the Master's Report illustrated and exemplified the systemic lack of due process received by Judge Green and attempted to correct errors made by the Master. The Commission attempted to do the same. (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI, p 7). In her Findings of Fact and Conclusions of Law, the Master, unequivocally, failed to cite to any standard or elements of what constitutes "child abuse" in Michigan. Moreover, the Master did not cite to supporting evidence of any *child abuse* in the record, even though *child abuse*, a term of art, 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). Disciplinary Counsel were clearly aware of the problem that the Master's pronouncement created. Their effort to

[2] Count III is no longer at issue in this matter.

backfill the conclusions of the Master were 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 states 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 a party the right to become the fact-finder. Here, Disciplinary Counsel endeavored to do just that, and, in so doing, further displayed the lack of due process and fundamental fairness -- under the United States and Michigan constitutions -- in the proceedings against Judge Green. The Commission has done the same; indeed, the Commission did not risk entering the fray on the Master's pronouncement that she would not be making a "determination" as to whether child abuse legally existed, having concluded that such a determination was "beyond the scope" of her authority. The Decision and Recommendation for Discipline fails to cite to any standard or elements of what constitutes "child abuse" in Michigan and fails to cite to any evidence of "child abuse" in the record. In a footnote, the Commission simply "agrees with the Master" that an underlying or foundational finding of child abuse is unnecessary and, instead, rationalizes and "adopts" that "evidence" is not the same as "proof" of abuse. (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI. A., Footnote 5, p 12).

"Evidence" is not a standard. "Proof" is a standard and, if a crime is the foundational element to a charge of misconduct, as is the case here, a showing of "proof" must be made in order to sustain that charge. Neither Disciplinary Counsel, nor the Master, nor the Commission has made that showing. Simply stated, the record in this proceeding is devoid

of any standard or elements of what constitutes "child abuse" in Michigan and any actual evidence of "child abuse" of which Respondent was ever aware.

Most disturbing and prejudicial in this proceeding is the denial of Judge Green's constitutional rights. The Commission relegated the abrogation of those important rights to a tacit footnote. (*Decision and Recommendation for Discipline*, July 18, 2022, Section IV, Footnote 2, p 5). As detailed hereafter, the findings of fact and conclusions of law of the appointed Master related to Count I and Count II of the Amended Complaint, as unanimously accepted and adopted by the Commission (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI, p 7), lack factual and legal bases and the constitutional rights of Judge Green have been violated.

The circumstances of this case, as summarized here and detailed hereafter, call for a dismissal of the Amended Complaint against Judge Green.

STANDARD OF REVIEW

This Court reviews the Commission's recommendations and findings of fact *de novo*. *In re Chrzanowski*, 465 Mich 468, 478; 636 NW2d 758 (2001); *In re Hathaway,* 464 Mich 672, 684; 630 NW2d 850 (2001).

Disciplinary Counsel had the burden of proving the allegations of the Amended Complaint by a preponderance of the evidence. MCR 9.233(A); *In re Haley*, 476 Mich 180, 189 (2006).

ARGUMENT I

JUDGE GREEN HAS BEEN DENIED CONSTITUTIONAL GUARANTEES OF DUE PROCESS & FUNDAMENTAL PROCEDURAL FAIRNESS IN 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.

A. The Hybrid Investigative and Prosecutorial Role of Disciplinary Counsel Violates Due Process and Fundamental Procedural Fairness Guarantees

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). Michigan's judicial discipline system, therefore, is unconstitutional because it violates due process. 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 Commission staff, conducted the investigation of Judge Green and also served as prosecutors on behalf of the Commission. In violation of MCR 9.210(H)(2)(a)'s prohibition against it,[3] Lynn Helland, Lora Weingarten, or both participated in the Commission's decision to file the complaint against Judge Green, as they sought and obtained the Commission's authorization to do so. Then, pursuant to MCR 9.244(A), the Commission decided whether its own allegations and the findings of fact and conclusions of law issued by the appointed Master had merit. 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.

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. In Judge

[3] "The executive director, other disciplinary counsel, or any other person who is involved in the investigation or prosecution of a respondent … shall not be present *or participate in any manner* in the decision of the commission to file a complaint…." MCR 9.210(H)(2)(a), emphasis supplied.

Green's case, her right to due process has been violated because the investigator and co-disciplinary counsel were 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. (This was further facilitated by an unconstitutionally low standard of proof.) Although MCR 9.210(H)(2)(a) would provide checks-and-balances, the Rule was ignored. 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 created 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)

B. The Denial of an In-Person Public Hearing Where Credibility of Witnesses Was the Main Issue in the Proceeding Violates Due Process and Fundamental Procedural Fairness Guarantees

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 specifically argued, among other things, that she would be unduly prejudiced if the public hearing were to be conducted virtually because she, her counsel, and the Master would not be able to 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 (from whose home one of the boys testified) to make statements that would undermine Judge Green's ability to be awarded custody or placement of the boys, instead of their mother, who had abandoned them for the better part of three years prior to the accusations against Judge Green. 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. 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. Counsel for Judge Green even 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). 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. 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 denied Judge Green's Motion for In-Person Proceedings.

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); 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); *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). The Master denied Judge Green's motion for in-person proceedings ostensibly 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 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 reasonable safety plan for in-person proceedings which would have provided sufficient and fully compliant protections against COVID-19. Disciplinary Counsel did not oppose. There was no legal or reasonable basis for the Master to deny Judge Green's motion for in-person proceedings. 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. It was also a violation of MCR 2.407(E), which required a hearing under MCR 2.407(C).[4]

[4] Although this hearing has not been required since the rule's amendment effective
(cont'd next page)

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).

Judge Green was further denied her right to a full public hearing in this matter when the testimony of three CPS workers were taken on a separate record. The Master presided over that separate record but failed to record the testimony via video means. Later in the proceeding, the Master concluded that the proceedings on the separate record would be merged with the balance of the public record. At that point, the Master having not recorded the separate record testimony on the Zoom platform, only hard-copy transcripts were available for public consideration on the Michigan Judicial Tenure Commission website. *Transcript*, Volume XII, pp 2129 – 2131. The impact of the critical and explosive testimony of these CPS witnesses was lost when not *viewed* in public either in real time or by way of both an audio and video recording.

Unlike in *In re Morrow*, Judge Green's entire case was a contest of credibility, mainly 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. MCR 9.211(D).

(cont'd from previous page)

September 1, 2022, this was still good authority at the time of Judge Green's hearing.

C. Disciplinary Counsel's Failure to Disclose and Recuse Due to a Conflict of Interest Violates Due Process and Fundamental Procedural Fairness Guarantees

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, Gary Jr. and Russell's mother, 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. 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. Ms. Weingarten knowingly failed to even avoid the appearance of impropriety. 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 prompt 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 "28-day notice," 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. The due process and procedural fairness rights of Judge Green have been violated as a result.

D. Disciplinary Counsel's Failure to Disclose the Existence of Exculpatory Evidence Violates Due Process and Fundamental Procedural Fairness Guarantees

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 who had regular contact with the boys. After receiving the "28-day letter", Judge Green specifically requested that Disciplinary Counsel interview a number of witnesses. Lora Weingarden conducted those

interviews,[5] however, she failed to provide discovery on her interview with Rev. V. Lonnie Peek (Bressler's maternal grand-uncle). 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.

Gary, Jr. showed Ms. Perkins a photograph on his i-Pad of his half-sister, whom he had not yet met because she was born during the three-years in which Choree Bressler had abandoned Gary Jr. and Russell. She was born during that three-year period (June 2015 to June 2018). Linda Perkins gifted Gary Jr. and Russell i-Pads for Christmas in 2017, not Christmas 2018, as Ms. Weingarden reported in her discovery notes. Therefore, Gary Jr. must have received the photograph between December 25, 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 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 once during this critical period, on December 25, 2017, and then again merely days before the boys' removal from their father's custody on June 24, 2018. The photograph was probable 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

[5] Although it is clear from her written questions and statements that Weingarden interviewed Patricia Russell, Bressler's maternal grandmother, and Brenda Richard, she did not provide Judge Green discovery for these interviews.

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.[6] As a former prosecutor, she certainly knew the *Brady*[7] 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

[6] Although Ms. Weingarden mentioned this photograph in the discovery she provided, she falsely indicated that Perkins gave Gary Jr. the i-Pad for Christmas in *2018*, after the boys had been living with their mother for six months, rather than Christmas of 2017. Although she indicated in her notes that Perkins told her she had told no one about the photograph, Ms. Weingarden failed to state that *she asked* Mrs. Perkins if she told anyone, demonstrating that she knew the evidentiary significance of the photograph.

[7] *Brady v Maryland*, 373 US 83; SCt 1194, 10 LEd 2d 215 (1963).

the State, either willfully or inadvertently; and, 3) prejudice must have ensued. 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 had only court-ordered supervised visits with the boys. Her contacts with them, therefore, 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. Therefore, Ms. Weingarten was obligated not only to notify Judge Green of the photograph, but also to *obtain and provide* it to Judge Green. 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, this Court 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.[8]

E. Disciplinary Counsel's Unlawful/Unsanctioned Use of Wayne County Child Advocacy Center (a/k/a "Kids Talk") and Facilitation/Control of Key Witness Violates Due Process and Fundamental Procedural Fairness Guarantees

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 statements 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

[8] Judge Green did not learn of the existence of the photograph until February 28, 2022, well after the MJTC proceedings had concluded.

Services. Ms. Weingarden 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 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 interviewed both Gary, Jr. and Russell at Kids Talk as a staff member of the MJTC (*Transcript*, Vol XI, p 2102);
- She is the custodian of the interview disks (*Transcript*, Vol XI, p 2103);
- She was unaware of any rule or policy that allowed the MJTC to use Kids Talk to interview witnesses (*Transcript*, Vol XI, p 2102); 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.) Additionally, MCL 600.2163a(11) and (13) prohibit release of even copies of the videorecorded statement. 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.

Similarly, Ms. Weingarten sought again to gain an unfair advantage in these proceedings by exerting control over Gary Jr., whose testimony was critical, by employing clearly coercive or manipulative tactics:

- Arranged for him to testify from the offices of the MJTC. 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);
- Implicitly threatened, twice, to send him to "juvie," once during a June 2021 interview, and during a break in his testimony (*Transcript*, Vol III, p 617 – 619, 700 - 701); and,
- Provided Gary Jr. lunch, in direct violation of the Forensic Protocol (*Transcript*, Vol V, p 1064 - 1065)

ARGUMENT II

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 VIOLATED JUDGE GREEN'S DUE PROCESS RIGHTS

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."

The reference to "Katy" is notable in that Judge Green was never charged in these proceedings with anything related to Katy Davis-Headd. 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 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[9] 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.

The Commission also holds that Judge Green stated that she was aware her son was a "very stern disciplinarian," but does not cite to any evidence that proves, by a preponderance of the evidence, that meant she was aware that her son was committing child abuse on her grandsons. (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI, p 9).

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.
>
> *This is because the Proposed Findings have citations to the record that support the Master's findings, while the Master's report does not.*

[9] Russell admitted in his criminal court testimony that none of the children saw this alleged "choking" incident, and though charged, Gary Sr. was acquitted of this charge.

(*Brief in Support and Opposition*, footnote 3, p 5, emphasis supplied). None of the "facts" itemized by Disciplinary Counsel has legal or factual bases (i.e., no who, what, when, how, where, or why) is in the record.

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, and the Commission failed to answer, were whether Judge Green had knowledge of child abuse, concealed child 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. The Commission did the same in its analysis. Not having specific proofs for support, the Commission proposes an inference that abuse must have occurred by noting that CPS went to the home of Judge Green's son and grandsons on four occasions between 2015 and 2018. Here, again, the Commission does not cite to any evidence in the record and, notably, does not acknowledge that her grandsons were not removed from the home once during those visits, her son was never charged with child abuse once related to those visits, and child abuse was not charged, and ultimately proved to have occurred, until on or after June 24, 2018 when her grandsons were removed from the home. (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI, p 9).

Judge Green was not charged with any misconduct related to such things. She was not on notice that she had to defend herself against such charges. She was not given an

opportunity to defend herself against these recast and undisclosed charges. As a result, her right to due process was violated. 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) Had she received proper notice of the charges against her, she would have understood the significance of Judge Cox' no corporal punishment order in her case and defended herself differently.

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"), 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."

The use of corporal punishment then 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.[10]

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, however, 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 Commission quotes the maxim "the cover up is worse than the crime" when claiming that Judge Green lied under oath. While citing to the transcript when describing her testimony in the Juvenile Court, the Commission states that the Master did not believe Judge Green's testimony nor does the Commission. Once again, there is no citation to the record as to why the testimony was not credible. Curiously, and consistent with the recasting of the claims, the Commission cites to Judge Green having "betrayed her knowledge of her son's violation of Judge Cox's order prohibiting corporal punishment." (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI. A., pp 14 -15). Once again, the Commission, as did the Master, has made the claims ones related to Judge Green having alleged knowledge that her son violated a civil family court order prohibiting

[10] If reporting known or suspected violations of a civil parenting time order to the judge who issues the order is required of lawyers, no lawyer is safe from allegations of misconduct for failing to report violations of *any* civil order.

the use of corporal punishment and, apparently, failing to report it. There are no such claims in this case.

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 citation 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.

The Commission, in essence, accuses Judge Green of engaging in revisionist history by saying that she was only aware of her son's use of corporal punishment *before* the entry of the 2015 "no corporal punishment" order in the domestic relations case. The Commission does not, however, cite to any evidence that supports that finding. (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI, p 9).

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."[11] 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 this 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 Commission "adopted" the specific factually and legally baseless

[11] The Master ignored Nancy Deihl's expert child protection law testimony supporting a finding that a slap that left a handprint, alone, is not evidence of child abuse.

opinion of the Master (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI. A., Footnote 5, p 12) and made no attempt to support the conclusory opinion with citations to the record evidence in this case.

The Master abrogated and repudiated her duty to analyze the admitted evidence and the elements of each claim alleged against Judge Green. The Commission, by simply adopting the Master's findings and conclusions, failed in the same respect. "[I]t is inherently an abuse of discretion if a trial court fails to exercise discretion on the incorrect belief that no discretion exists to exercise." *People v. Merritt*, 396 Mich 67, 80, 238 NW2nd 31 (1976).

Two foundational elements had to be proved by a preponderance of evidence before the Commission could 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 already found, and the Commission accepted and adopted, that no determination of whether any specific alleged acts constituted legal abuse was conducted in this proceeding.

The Commission critically concedes that Respondent did not engage in a violation of a criminal law. Disciplinary Counsel asked the Commission to 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 did not make the foundational showing necessary to support violations of the criminal code related to being an accessory after the fact or for tampering with evidence. The Commission agreed with the Master that the proofs did not support such a finding. Although the Commission concedes that Respondent did not violate the criminal statutes of tampering with evidence and being an accessory after the fact to child abuse - - those are precisely the charges leveled against her in the Complaint and Amended Complaint. (*Complaint*, Count I, ¶¶ 9-15, Count II, ¶¶ 16-36, and *Amended Complaint*, Count I, ¶¶ 9-15, Count II, ¶¶ 16-34). Disciplinary Counsel objected to the Master's finding knowing that, under MCR 9.202(B), the commission of a felony is considered judicial misconduct. The Master and Commission also concede that Judge Green did not "cover up" evidence of child abuse or make "false statements" about child abuse - - despite those being the actual counts and charges alleged. *This is fatal to the Commission's decision and recommendation: Respondent is charged with covering up evidence of child abuse, and making false statements about child abuse, both of which are crimes in the State of Michigan, and the Commission admits that Respondent did not do so!*

In the exact same fashion as the Master, the Commission converted a "red handprint" to the legal status of a "bruise" in finding that Judge Green covered up a "bruise" on the body of one of her grandsons. There is no citation to any evidence in the record that the red handprint amounted to a bruise, or that a red handprint constituted child abuse. The only expert testimony in the record concerning the handprint and its status is from a stipulated expert witness, Nancy Diehl, who testified that she had never heard of such an

incident being charged as child abuse. (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI. B., pp 21 – 22).

The Commission claims that Judge Green "strategically limited her admission of knowledge to only a single instance of a 'slap' to her grandson Max's face, which she admits left a hand print across his face but incredibly asserts she never considered this to be an instance or evidence of abuse." (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI, p 10). From there, the Commission goes on to cite to numerous parts of the record in which denials by the boys, makeup, and teasing - - but never cites to any record evidence that proves by a preponderance of evidence that what Judge Green said was not completely truthful. In fact, Judge Green advised CPS of the handprint in the first place. (*Transcript*, Volume XI, p 1989). This begs the question as to why, if Judge Green was diabolical and bent on deceit and denial, she would have volunteered such a fact, to CPS no less, knowing that it would have been part of an investigation?

Despite no evidence of child abuse in the record, and an acknowledgement that Respondent did not cover up or make false statements about child abuse, the Master and the Commission 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. (*Master's Report*, Section V, p 16) Neither the Master nor the Commission cited to the record in support of the conclusions. There having been no finding of actual child abuse, however, Judge Green cannot be responsible for covering up or making false statements about child abuse. The Commission lists a number of purportedly false statements made by Judge Green. While there are citations to the record as to the actual statements, there is no citation to supporting evidence that demonstrates

those statements were anything but truthful. The Commission, as did the Master, has used the generic, non-descript, and non-defined word "abuse" and ascribed to it in every instance a legal finding of child abuse, a legal term of art and, in fact, crime that must be proved by establishing each individual element of the crime beyond a reasonable doubt. (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI. B., p 20). Judge Green respectfully requests that this Honorable Court confirm that Disciplinary Counsel did not meet their burden of proof that child abuse existed before June 24, 2018, that Judge Green was aware of the child abuse, covered it up, and then lied about it.

MCR 9.104(1), MCR 9.202(B), 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 decision and recommendation of the Commission are, therefore, legally baseless.

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. This Court should not allow the Commission's decision and recommendation to stand. At a minimum, the violation of Judge Green's constitutional rights entitles her to a re-hearing.

ARGUMENT III

A CONCISE ANSWER TO A SPECIFIC QUESTION WITHOUT ELABORATION BEYOND THE SCOPE OF THE QUESTION DOES NOT RENDER THE ANSWER UNTRUTHFUL, DECEITFUL, OR MISLEADING

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[12] 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 (before the court order prohibiting both parents from using corporal punishment), had no recall of any specific occasion or situation concerning the boys being spanked, and was unaware of any corporal punishment

[12] The Judge used the word "details" because that term was in the question posed by disciplinary Counsel.

following the slap to the cheek of Gary, Jr., 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 should have been submitted.

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 said that she did not fault a witness for failing to volunteer information that was not specifically requested (Section VI, p 22); however, she then, did just that,

concluding that Judge Green's answers "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)

In addressing the red handprint left on Gary, Jr.'s cheek by a slap, instead of relying upon the Gary, Jr.'s actual testimony (i.e., a "pinkish" handprint from a slap, *Transcript*, Volume III, pp 652-653), or the expert testimony of Nancy Diehl (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 curiously 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). 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." Based upon these resources, the Master somehow erroneously concluded that the "pinkish" mark on the face of Gary, Jr. was consistent with a "bruise!" 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. Judge Green had no reason to lie about a handprint. t was she who reported the handprint to CPS in the first place, clearly demonstrating that she had no consciousness of guilt.

Judge Green has consistently denied ever seeing "injuries" on the bodies of the boys. In an effort to show that she was not telling the truth, Disciplinary Counsel recounted the testimony of Leslie Apple, the CPS worker who was present on June 24, 2018, when the boys were removed. She is quoted as having testified that, on June 24, 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)

Additionally, despite Apple's claimed "11" injuries, there was no evidence that either boy was hospitalized or even treated on June 24, 2018. Disciplinary Counsel presented no medical records or photographs of the boys' "injuries," , which would obviously have been the best evidence, both of which were available from the Juvenile Court and Criminal Court proceedings for Gary Sr. Recognizing the lack of evidence of child abuse, and in a desperate attempt to increase severity, Disciplinary Counsel tried to somehow associate Judge Green with the boys' bruises from June 24, 2018, about which Judge Green could not possibly have been aware because she and her husband arrived on the scene after the incident.

Similarly Disciplinary Counsel and the Commission associated Judge Green with Gary Sr.'s criminal case convictions, despite *zero evidence* that she had anything whatsoever to do with that criminal case. Nevertheless, the Commission wrote the following astonishing statement:

> "*Despite Respondent's knowing concealment of evidence of Davis-Headd's abuse of the boys and active direction and assistance for his defense*, on September 27, 2019, Davis-Headd was convicted of two counts of felony child abuse second degree. He was subsequently sentenced to concurrent prison terms of 4 to 10 years for each conviction. Thus, while the JTC might not otherwise get involved in purely personal family matters, *this case presented extreme facts of a family law attorney turned judge who withheld evidence of severe abuse to minors.*

Decision and Recommendation for Discipline, July 18, 2022, Section VI, A., p 19, emphasis supplied.

Ms. Apple also took other liberties by 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 description of her son's method of discipline was "very stern." Ms. Apple never "inquired" regarding this. Judge Green phoned 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 [her] brain" - - but Ms. Apple curiously provided *no context* for the statement. Judge Green also *told* Ms. Apple, as opposed to answering her, that she knew her son was a "stern disciplinarian" (not "very stern"), referring to how often, for how long, and for what reasons he would discipline the boys. Ms. Apple never asked what Judge Green meant by "stern disciplinarian" and Judge Green did not elaborate because she had no reason to suspect at that time that Ms. Apple was misconstruing what she was saying. Judge Green also had no reason to suspect corporal punishment, and certainly not child abuse, because she only saw non-physical discipline after the 2015 divorce between her son and Bressler, 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." Again, Judge Green did not say this in response to any questions by Ms. Apple. 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 the discipline generally used by her son on her grandsons, was "this bad," meaning physically abusive. The only discipline about which Judge Green was aware was what she described as very stern, sometimes , in her opinion, unreasonable discipline, but she never knew about any physical discipline, and certainly not physical abuse. Judge Green precisely explained through her testimony what she meant and the context in which she made the 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 that occurred 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 that, concerning spankings, by "in the past" she meant prior to the no corporal punishment order 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.*

The Commission, however, stated, "When Respondent told Ms. Apple that she knew about spankings, she had just met with Ms. Apple for the team meeting that was concerned only with her son's very recent abuse of the boys as of June 24, 2018, not events from more than three years earlier." This is pure speculation! There is no evidence of the scope of the FTM discussion. Had she received proper notice of the charges against her, Judge Green

would have understood the significance of Judge Cox' no corporal punishment order, and therefore, would have attempted to provide specific dates or time frames.

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. Disciplinary Counsel added yet another undisclosed charge here by alleging that Judge Green never took steps to determine if her son was using corporal punishment and violating an order. That was not Judge Green's responsibility 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 Judge Green 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. It is illogical that Judge Green would lie about *how* she came to learn of the handprint; the material fact is that she knew about the handprint. Note that it was Judge Green who advised CPS of the handprint in the first place; she clearly was neither hiding nor concealing anything.

Disciplinary Counsel then jump to a statement in Juvenile Court in which Judge Green denied using makeup to cover a bruise. Judge Green's testimony in these proceedings was not inconsistent to her testimony in the Juvenile Court. In these proceedings, she explained that *once* she had applied makeup on a faint red handprint on Gary, Jr.'s cheek.

The Master's recasting of a "red handprint" on Gary, Jr.'s cheek, 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 have allowed 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.

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 these conclusions, either. 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.

ARGUMENT IV

THE PREPONDERANCE OF THE EVIDENCE STANDARD DOES NOT MEET THE CONSTITUTIONAL THRESHOLD PROTECTIONS OF DUE PROCESS

A. Preponderance of Evidence Standard Is Constitutionally Inadequate

The Commission states that, "If only the misconduct in Count I (covering up child abuse as an attorney) was at issue, the Commission would not be recommending removal." (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI, p 11). Stating that was "pre-bench conduct" and, since it did not involve lying under oath, there appeared to be "little precedent for removal on [that] basis." The Commission goes on to conclude that Judge Green's "coverup…triggers the harshest discipline of removal under the Supreme Court's significant line of precedent…" Numerous cases are then cited by the Commission in support of the argument. A close reading of the cases, however, reflect that they involved objective instances of lying under oath. In other words, instances of removal were not based on subjective assessments of weight and credibility. (*Decision and Recommendation for Discipline*, July 18, 2022, Section VI, pp 11 – 12). In this case, there is no objective evidence in the record that Judge Green did not tell the truth under oath. The Master and the Commission have made subjective assessments. The elimination of a judge's

livelihood through removal should not be allowed to occur based on a subjective as opposed to an objective proof.

In *Santosky v Kramer*, 455 US 745 (1982), the US Supreme Court held that, "in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the public and private interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Id.* at 746. In *Santosky,* a case involving termination of parental rights, the Court held that fundamental fairness is not preserved where a class of proceedings is governed by a constitutionally defective evidentiary standard. *Id.* at 754-757. It also held, relying on *Mathews v Eldridge,* 424 US 319, 96 S Ct 893 (1976), an administrative law case, that the nature of the process due … turns on a balancing of three factors: the private interests affected by the proceedings; the risk of error created by the State's chosen procedure; and, the countervailing governmental interest supporting use of the challenged procedure. Further, the High Court held that in a termination of parental rights case, a "fair preponderance of the evidence" standard … violates the Due Process Clause of the Fourteenth Amendment. *Santosky***,** at 758-768.

Like in a termination of parental rights case, a preponderance of evidence standard violates due process where the Commission seeks to remove an elected judge from the bench. As in *Santosky*, the balance of private interests affected weighs heavily against use of such a standard in Commission removal proceedings, because the private interest affected is commanding, and the threatened loss is permanent. Once affirmed by the Michigan Supreme Court, a decision removing an elected judge from the bench is final and irrevocable. *Id.*, 758-761. Using the same *Matthews* analysis as employed in *Santosky*, a

standard of proof that allocates the risk of error nearly equally between an erroneous failure to remove an elected judge from the bench, which leaves the public and the Court in an uneasy status quo, and an erroneous decision to remove, which destroys the judge's professional career, reputation, and future, does not reflect properly the relative severity of these two outcomes. *Id*., 761-766. Before a State may completely and irrevocably remove a judge from the bench, due process requires that the State support its allegations by at least clear and convincing evidence. This is especially so in judicial removal of an elected judge, where greater than 200,000 Wayne County voters would be disenfranchised. "A 'clear and convincing evidence' standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process. Determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts." *Id.*, 768-770.

B. At a Minimum, Removal of an Elected Judge from her Position and Livelihood Requires a Higher Burden of Proof

In support of the request for the most severe sanction of removal, the Commission provides a list of "false statements" and "lies" attributable to Judge Green; however, on close examination, the purported lies relate to matters on which Judge Green was never charged. (*Decision and Recommendation for Discipline*, July 18, 2022, Section VIII, A., pp 28 – 29). The only claims that remain in this case are those charging Judge Green with covering up evidence of child abuse (Count I) and making false statements about her knowledge of child abuse (Count II). These claims distill down to crimes, each having required elements, not one of which has been proved in this case. Critically, in criminal law, the burden of proof is beyond a reasonable doubt. While preponderance of the

evidence is the standard of review in this administrative proceeding, due process requires that removal of the livelihood of an individual be subject to the highest standard that is arguably applicable to the proceeding. Here, the underpinnings of the charges, as set out by the Commission in the Complaint and Amended Complaint, are elements of crimes. (See, e.g., *Complaint*, ¶15 e. – f. & *Amended Complaint*, ¶15 e. – f). At a minimum, the burden of proof applicable to criminal matters should apply in this proceeding.

C. Preponderance of Evidence Standard Is Not Met Where Master Fails To Consider And Weigh Credibility In Light of All of The Evidence

If this Honorable Court disagrees that a preponderance of evidence standard is legally insufficient for removal of a sitting elected judge, Disciplinary Counsel has, nonetheless, failed to meet even that standard.

The standard of proof is the preponderance of the evidence. *In re Haley*, 476 Mich 180, 189 (2006); MCR 9.233(A). 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*, 322 Mich 274; 33 NW2d 789.

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 (citations and internal quotations omitted)." 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.

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. The Master's Findings of Fact and Conclusions of Law sections rarely cite to evidence in the record. The formal hearing was conducted over 12 days. The transcript consists of 2,248 pages, alone. Forty-six exhibits were admitted into evidence. The exhibits consisted of dozens of hours of testimony and interviews, including many hours of video; and hundreds of pages of trial and interview transcripts , yet the Report is nearly devoid of any citations to the evidence.

As for witnesses, the Master was to consider their credibility, and do so in light of *all* of the evidence. The Master was required to consider and give 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… (emphasis supplied) (citations and internal quotations omitted).

After reading the Master's report, and the decision and recommendation of the Commission, 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 (and possibly Ms. Apple). Aside from Judge Green's testimony, neither the Master nor the Commission referred 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 and statements that at least one teacher not only saw evidence of abuse but had a discussion with him about it. 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 would 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, especially the interviewers' failure to rule out coaching, retaliation, and desire for another custody arrangement as alternative hypotheses for the boys allegations* (*Forensic Protocol*, Exhibit 43).

The Master also ignored the testimony of experienced church children's ministry leaders who testified that they knew and observed the boys regularly and never saw any indication or even suspected 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 boys' credibility was significantly undermined by their cross-examination testimony and outlandish allegations that even CPS and police did not believe (because they never took any action on them) such as receiving 500 lashes with a belt from his father, that he counted (Gary Jr.), and witnessing a murder, and sex orgies in his father's home (Russell).

Despite all of the above, the Master found the boys more credible than Judge Green, *even though* both the boys admitted myriad lies during their testimonies, and there was no objective proof of Judge Green lying at all, only subjective speculation. Speculation occurs when an inference "while factually supported, is, at best, just as possible as another theory." *Skinner v Square D Co*, 445 Mich 153, 164-65; 516 NW2d 475 (1994). Mere speculation or conjecture is not enough to satisfy the preponderance standard. Moreover, circumstantial evidence requires "sufficient evidence to take the inferences out of the realm of conjecture." *Yoost v Caspari*, 295 Mich App 209, 226; 813 NW2d 783 (2012). The Master's finding that the boys were credible clearly displays that she did not consider or carefully weigh all of the evidence, especially the expert testimony on the protocol, that she did not understand the significance of some evidence, or both.

Similarly, the Master unjustifiably relied heavily on CPS worker Leslie Apple's testimony in this case, *believing her accounts over Judge Green's,* although there is overwhelming evidence that she lied multiple times about very important matters. The Master relied on CPS Apple's testimony, despite her own ruling of unreliability of Apple's reports.

By contrast, the Master did not find the testimony of Judge Green to be credible. The Master made 12 "determinations" that Judge Green was *not* believable and made no determinations that she *was* believable. 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. Not a single instance is found within the Master's Report or the

Commission's Decision and Recommendation in which weight and credibility was ascribed to any evidence that Judge Green introduced by witness or exhibit. Simply stated, the Master and the Commission, without explanation, disregarded *all* of Judge Green's evidence, as if it did not exist.

Based upon the above, finding that Disciplinary Counsel established its case by a preponderance of evidence cannot stand.

ARGUMENT V

CONSIDERATION OF FACTORS UNDER *IN RE BROWN*

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.

CONCLUSION

The decision and recommendation of the Commission, in adopting the findings of fact and 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. At a minimum, the denial of Judge Green's constitutional rights and the errors of the Commission and appointed Master entitles the Judge to an in-person re-hearing.

Respectfully submitted,

PLUNKETT COONEY

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Dated: October 14, 2022

VERIFICATION

I, Hon. Tracy E. Green, certify that the information contained in this Petition is correct to the best of my information, knowledge and belief.

Tracy E. Green

HON. TRACY E. GREEN

CERTIFICATE OF COMPLIANCE

MICHAEL P. ASHCRAFT, JR., certifies and states the following:

1. He is a shareholder with the firm Plunkett Cooney, and is in principal charge of the above-captioned cause for the purpose of preparing the Respondent's Petition for Review;

2. The brief prepared by his office complies with the print type requirements;

3. Plunkett Cooney relies on the word count of their word processing system used to prepare the brief, using Cambria size 12 font; and,

4. The word processing system counts the number of words in the Petition as 14,844.

s/Michael P. Ashcraft, Jr.
MICHAEL P. ASHCRAFT, JR.

STATE OF MICHIGAN

IN THE SUPREME COURT

COMPLAINT AGAINST:

HON. TRACY E. GREEN
Third Circuit Court
Detroit, Michigan 48226

Docket No. 162260

Formal Complaint No. 103

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

MONIQUE M. VANDERHOFF, being duly sworn, deposes and says that she is an employee of the law firm of Plunkett Cooney, and that on October 14, 2022, she caused to be served a copy of a Respondent's Petition for Review, Certificate of Compliance, and Proof of Service/Statement Regarding E-Service as follows:

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STATE OF MICHIGAN
MI Supreme Court

Proof of Service

Case Title:	Case Number:
IN RE TRACY E. GREEN, JUDGE	162260

1. Title(s) of the document(s) served:

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