To be Argued by:
ROBERT F. JULIAN
(Time Requested: 30 Minutes)

JCR 2024-00007

Court of Appeals

of the

State of New York

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

ERIN P. GALL,

A Justice of the Supreme Court,
Fifth Judicial District, Oneida County,

HONORABLE ERIN P. GALL,

Petitioner,

– against –

STATE OF NEW YORK COMMISSION ON JUDICIAL CONDUCT,

Respondent.

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Did the Respondent offer competent proof of mitigation that made the conclusion by the Commission of removal unfair based on the law and facts? Yes.

II. Did the Commission wrongly reject the psychological evidence presented by Respondent? Yes.

III. Did the Concurring Opinion as expressed assume charges not in evidence and offer expert opinions from a Commission member to the prejudice of the Respondent? Yes.

IV. Should the disposition in the Determination of removal be reduced to censure? Yes.

STATEMENT OF FACTS

Respondent's son William Gall's best friend Jackson Pearce was having a party on July 1, 2022, celebrating his graduation from New Hartford High School. Respondent's husband and Jackson's father Steve Pearce grew up together and Respondent herself had a 22-year friendship with Steve Pearce and his wife, Gina. Jackson Pearce and William Gall, IV have a lifelong friendship stemming back to pre-school (Exhibit 9, pp. 11). Approximately 50 invitations were mailed out by formal invitation to this private party. Jackson Pearce invited another 50-60 by other means, all people known to him. It has been clearly established that Havo, Dooley, Mr. Carter and Mr. Valladares did not receive a formal invitation nor did they receive an invitation from Jackson Pearce (see Agreed Statement of Facts, pg. 10). Havo, Dooley, Mr. Carter and Mr. Valladares learned of the party from Snapchat from a source they declined to identify. (Agreed Statement of Facts, pg. 10). Without invitation and with wrong address they traveled across

Utica to New Hartford to find the party. They were among the approximately 15 individuals who were unknown and uninvited who arrived at the party after 11:30 p.m. (Exhibit 9, pp. 42-43).

The party was held at the Pearce's private residence, located on a main road off of Route 12 in the Town of New Hartford, New York (Exhibit 9, pp. 13). There had been "so many graduation parties up to this point" Respondent testified that she was familiar with the parents and children who attended the party as a part of the New Hartford High School graduating class. Her son, William, and Jackson have a large group of friends and it was nearly the same group of attendees (friends and their families) who attended the majority of the graduation parties. At around 10:30 p.m., the party seemed quiet; a lot of parents had left. (Exhibit 9, pp. 16). Respondent took her younger children home at approximately 11:00 p.m. and returned to the party to retrieve her son, William, and husband, Bill. When she returned, Matt Hart, who was one of the graduating students, approached her and told her that several carloads of unknown uninvited individuals had arrived at the party (Exhibit 9, pg. 18). He appeared nervous and concerned. Other students reacted in the same manner.

Sometime around 11:30-11:45 p.m., Respondent saw an unknown individual overturn a tray of food under the tent (Exhibit 9, pp. 19). At or around this time, Respondent heard banter and swearing while under the tent. (Exhibit 9, pp. 19) Sometime after midnight there was an attempt to clear the area because there was hostile communication between the uninvited individuals and the New Hartford High School young people. A fight broke out. The Respondent without difficulty identified Havo and Dooley as instigating the assault upon her son within ten feet of her presence. (Exhibit 9, pp. 46-49; Paragraph 23 of the ASF) The Respondent described observing her son being slapped by Dooley, being knocked to the ground and kicked

and punched by four interlopers including Havo, Dooley and Carter. (Exhibit 9, pp. 39). She identified Havo, Dooley and Carter as engaging in a fight further with her husband as he was attempting to clear the area. When deposed on November 15, 2022 at the Commission office in Albany without any prompting the Respondent identified Havo and Dooley as well as Mr. Carter as individuals who brutally attacked her son. Mr. Carter and Mr. Valladares declined to give the Commission investigators the full and formal names and addresses of Havo and Dooley. Judge Gall was shown photographs in a photo array which is attached as Exhibit 2 to Exhibit 9 and unequivocally picked out Havo and Dooley. (pp. 46-49, see paragraph 23 of the ASF). Mr. Carter's and Mr. Valladares' photographs were not in the photo array. The Respondent identified Mr. Carter, however, from the body camera footage that was shown to her during the deposition. Respondent in the ASF not having seen Valladares, Carter, Havo or Dooley at a deposition and not having the advantage of Havo and Dooley's depositions, in the interest of fairness, acknowledged that evidence as accumulated by the Commission Counsel to support, they started the fight or fought. (ASF p. 9)

Attached as Exhibit 20 is an aerial photo of the Pearce front lawn. The photo shows the location of the tent where food was served, parking and the location of the lawn where Respondent's son was initially slapped and ditch where the fight ensued.

There is no dispute that Havo, Dooley, Mr. Carter and Mr. Valladares were not invited to this party and were present as interlopers as acknowledged in the ASF at paragraph 17.

What ensued therefore could only be described as mayhem incited by the several cars of unknown, uninvited persons to Respondent's observation. Respondent's friend Steven Pearce was inebriated. It was his house, it was a party for his son, and we suppose if someone is going to be inebriated, that is the place to do it. However, he was responding inappropriately to the

violent situation that unfolded. Respondent who did not consume alcohol observed her son being punched and kicked in the head as he lay on the ground and her husband engaged in a brawl to attempt to extricate his son and clear the area of combatants.

She observed fighting among numerous individuals on the lawn and in the ditch. The male adults present attempted to break the fighting up. (Exhibits 18, 19, 21, 23). They were clearly outnumbered and attempted to separate the individuals and hold off the fighting until the police arrived. The Respondent witnessed a few feet away her son at the bottom of several individuals who were striking him and kicking him about the head and body. (Exhibit 9, pp. 25-39; 46-48). She testified it was traumatizing and scary to see her son being beaten and on the ground receiving blows to the head. (Exhibit 9, pp. 19-20). She witnessed her husband, who was attempting to extricate her son from the pile, being struck, punched and kicked (shirt torn off) and attempting to protect himself as he tried to intervene and break up the fighting. Respondent did not intervene in any way in the fighting but stood frozen as she observed the dangerous and violent attack. In the aftermath, the Respondent's son and husband were battered and bruised and their clothing had been ripped. (Exhibits 10 and 17). The Respondent saw the individuals who attacked her son standing around afterwards and they weren't leaving the property (Exhibit 9, pp.25), and were present at the property looking for keys that had been lost during the fight. (Exhibit 9, pp. 25-26). The Respondent self-described her reaction as silent and in shock during the fight as her son was on the ground receiving a "stomping on his head" and being kicked in the head. She did not know if the aggressors had weapons. (Exhibit 9, pp. 39). She testified that Mr. Carter's group including Havo and Dooley remained on the Pearce premises for an hour and a half looking for Keys. (Exhibit 9, pp. 57). The Respondent testified that she was very upset and very scared during the hour and a half with the presence of the

aggressors on the property. (Exhibit 9, pp. 57). She testified that she referenced her judicial position and made very inappropriate comments in this state. (Exhibit 9, pp. 58-62).

Once the police arrived, they did not cause the combatants to be separated or leave the premises. That precipitated the clearly hysterical and out of proportion reaction of Respondent and Mr. Pearce. Respondent engaged in what we know to be a hyperbolic and hysterical reaction to the event and the police response to the event launched by a trauma reaction diagnosed by the psychologists secondary to her [redacted]. What would cause this otherwise dignified and successful jurist who was placed with the responsibility of some of the most difficult and high-profile cases to react in such a vulgar and inappropriate manner? The Respondent testified she was in fear that there would be further fighting and felt a feeling of powerlessness and the need to bring the situation under control. She was experiencing a revisiting of her own assault and a feeling of inability to respond and lack of control in terms of her witnessing her son's and husband's attack which ensued in her proximity but for which she did nothing, just like her reaction as she was assaulted 34 years before when she "froze." (Exhibit B). She compensated with an extreme over-reaction that was irrational and trauma-based. The Respondent testified, "...I really was acting as a mom who had just witnessed something awful and I wasn't acting appropriately and I wasn't thinking the right way" even though she realized she was likely being recorded. (Exhibit 9, pp. 56). She admits she invoked her office multiple times, that she was disrespectful to the police and Mr. Carter's group, that she made the utterly inappropriate comment about anyone coming back onto the property would be shot, had an inappropriate conversation about ERPOS and was profane.

The Respondent was the victim of a brutal assault in college on April 29, 1990. During that assault she recollects she did not fight back, yell or resist. Because of the assault she

obtained immediate psychological counseling and treatment from Dr. Joanne Joseph when she returned home in May of 1990. After seeing Dr. Joseph following the assault she was ultimately released from care. (Exhibit B). She returned to college in the Fall of 1990 for her sophomore year and graduated timely in May of 1993. In August of 1993, Judge Gall attended law school, graduated in 1996 and successfully commenced the practice of law. (Exhibit 9, pg. 6). It was during her early years of practicing that she thought it was important that she speak in a public manner about her personal experience with [redacted] for the purpose of reaching out and empowering other victims and educating police and the public with regard to this brutal crime. She proceeded to marry, have children, pursue a career in the court system honorably and with distinction as a law clerk. As previously detailed, Judge Gall engaged in 12 years of distinguished service dealing with all forms of cases in several counties including matrimonial with the attendant domestic disputes, personal injury and various types and forms of psychiatric cases. She was ultimately given the distinction of serving as the dedicated regional asbestos judge for 42 counties known to be complex cases.

After the brutal and highly emotional events of July 2, 2022, the Respondent re-engaged with her original therapist Dr. Joseph and sought treatment and counseling. (Exhibit B). She was also evaluated by Dr. Norman Lesswing, a psychologist with experience in [redacted] who has historically in his practice cleared potential police officers for service and incumbent police officers for fitness for duty after stressful events, and engaged in a large number of trauma-based evaluations. (Exhibit F, B-1 and B-5). Reviewing the body camera footage of the event further incited her [redacted] and helped her to recognize her ongoing trauma reaction causing her to seek out Dr. Joseph and be evaluated by Dr.

Lesswing. (Exhibit B-1, Lesswing, pg. 5). Judge Gall continues treatment to date with Dr. Joseph.

Both Dr. Lesswing and Dr. Joseph, upon evaluation of the Respondent, have concluded that Judge Gall had a reactivation on July 2, 2022, of [redacted] stemming from her prior assault. The trauma was a significant contributing factor to her disproportionate and inappropriate reaction to this traumatic event. It was, in their opinions, clearly a trauma reaction. (Exhibit B-1, B-4). Specifically, and crucially, Respondent's feeling of powerlessness and her failure to intervene physically to protect her son as she saw him being pummeled and beaten beneath several unknown violent individuals and watching her husband attempt to save her son and stop the fighting prompted and precipitated her excessive reaction once the police arrived. (Exhibit 9, pp. 19-20; B-1, B-4). It was further exacerbated by her belief that law enforcement was not attempting to clear the property of the assailants. It is in that context that she invoked her office multiple times, that she engaged in extensive profanity, that she was argumentative and critical with the police. Consequently, she was aggressive and disrespectful to the individuals she believed assaulted her family and an uninvolved relative. None of these facts or observations are offered to excuse her conduct. It is a fact that in the Statement of Agreed Facts the Respondent acknowledged that her conduct was inappropriate. We believe there are three factual conclusions that the Commission should draw from the affirmative defenses in this case that mitigate:

1. That her conduct on July 2, 2022, was an aberration and not an indication of Respondent's conduct on the bench or in her personal life, and
2. That Respondent has sought the appropriate therapy and is deemed by both psychologists consulted to be fully able to continue her duties without any

compromise to her abilities. In the context of her diagnosis and trauma reaction on July 2, 2022, this one event does not disqualify her from continuing on the bench. (B-1, B-4)

3. Whatever the appearance, the facts bear out that Respondent was not expressive of or motivated by racial bias. She was motivated by her stress, fear, and desire to protect her family resulting in an inappropriate trauma reaction. (B-11, pp. 7; B-4). She was screened for [redacted] by the PCL-5 and found by Dr. Lesswing to be suffering from [redacted]. (B-1, pp. 5).

Indeed, she has continued as the asbestos judge.

ARGUMENT

POINT I: NEITHER THE CASE LAW OR FACTS SUPPORT REMOVAL

Matter of Putorti, 40 NY3d 359 (2023), which is cited with prominence by the Commission in its Determination is unlike the fact situation in the case at bar. Judge Putorti over a period of several years engaged in conduct that described a litigant by race, touted incorrectly an incident that occurred in his courtroom ad engaged in ongoing conduct directed toward the racial identity of the litigant. In the case at bar the Respondent:

- Was not addressing litigants in the courtroom, she was speaking to individuals she believed assaulted her son and husband.
- Never mentioned the race of the individuals.
- Is wrongly found to have used "blackspeak".

In fact, while the Respondent candidly acknowledged that while her comments may have the appearance of racial overtones because she was addressing four black men, in the ASF she

demonstrated that was not the case, that her comments were trauma induced anger directed toward these individuals who she believed attacked her son and husband and not reflective of their race.

The use of a racial slur in a single instance has been found to rise only to censure, even when harshly directed at an individual. In *Mtr. of Agresta*, 64 N.Y.2d 327 (1985), the sanction was censure when a judge undisputedly addressed an African-American defendant in open court by saying, "I know there is another n[redacted] in the woodpile." *Id.*, at 329. In other instances, the Court has found that inappropriate comments alone are not a sufficient basis for removal. For instance, when a judge passed a note to a court attorney commenting on the physical attributes of a female law intern and suggested to the intern that she remove some of her apparel in his presence, the Court found that this conduct was "demeaning, [and] entirely inappropriate," but not itself sufficient for removal. *Mtr. of Collazo*, 691 NE 2d 1021, 253 (N.Y. 1998).

The Commission did not charge the Respondent with racial bias. The Commission counsel introduced that allegation in a category entitled Additional Factors in paragraph 75.D. of the ASF. Respondent stipulated that her statements that Mr. Carter and his friends did not look "that smart" and were "not going to business school That's for sure" and her statement that she would shoot the young men if they returned to search for the missing car key, created at least the appearance of racial bias. In so acknowledging, the Respondent did not concede that there was in fact actual or implicit racial bias and believed that she could reasonably refute that the appearance was based on trauma reaction and her affirmative defenses which are based on her belief these men attacked her family, and not due to racial bias. Respondent agrees that wherever possible a Judge should engage in conduct that does not create the appearance of racial bias. In this case, supportive that there was no bias being exercised, is the fact that indeed no

racial descriptors were utilized during the confrontation unlike Judge Putorti. Moreover, the facts support that there was indeed no such bias directly or implicitly to wit:

1. The young men in question were uninvited to the party arrived at midnight and were unknown to the individuals present including the Respondent. This was a home invasion composed of several cars full of uninvited people that occurred very late in the evening, an event that would prompt concern regardless of the race of the unknown and uninvited individuals.
2. That there was a confrontation and language that was threatening and incendiary was utilized. Respondent believed Mr. Carter's and Mr. Valladares' group to be the provocateurs. It is conceded in the ASF that they were not invited to the party and had the wrong address obtained from an undisclosed source. The source is undisclosed because Carter and Valladares refused to give the name of the person who invited them.
3. That the Respondent observed an individual she identified as a member of Mr. Carter's group and who is acknowledged to be a member of Mr. Carter's group, Dooley, slapped her son and then engaged in a fight with him kicking him while he was on the ground about the head and body. The Respondent observed Mr. Carter and Havo engaging in the same conduct assaulting and fighting with the Respondent's son. In her deposition she identified both individuals from the photo array.
4. The four members of the Carter/Valladares group engaged in fighting with her husband. That Carter and Valladares were involved in the fighting is conceded in the ASF ¶26.

5. There was an extended delay in the departure of the Carter group from the Pearce premises caused by the loss of keys during the fighting which further accentuated and exacerbated the Respondent's fear and frustration. However, at no time were any racial epithets used. Respondent's insulting language could have been directed toward any violent interloper regardless of race.

As noted above, unlike the *Matter of Putorti v. New York State Commission on Judicial Conduct*, (40 NY3d 359 [2023]) the Respondent at no time utilized descriptive terms such as black or any other racially delineating language. Candor requires that in the context of the event, i.e., her statements to the black young men could not be denied on their face as creating an appearance of bias if one ignores the overall factual context. (Exhibit 9, pp. 19-20). Respondent was addressing uninvited interlopers who she believed assaulted her son and husband. However, that appearance is not the basis of a demonstrated implicit or actual bias by virtue of her history and by virtue of the circumstances in that she was a mother responding to an assault upon her child and husband. The Respondent recognized that in this proceeding she would be required to refute the presence of implicit bias and so consequently acknowledged that an appearance, albeit refutable, was created. The Respondent cites and respectfully directs the Court to the article by Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, (2018 Mich. St. L. Rev. 1243, 1249-1250) cited by the Court of Appeals in *Putorti*. It is noteworthy that in the *Matter of Putorti*, the Court of Appeals found as follows:

> "Although petitioner claims that he 'subjectively feared for his safety', he admits that he had 'no reasonable basis' to believe that the litigant 'was about to use imminent deadly force', and that he was 'not justified' in brandishing the firearm." (*Id.*, pp. 1249-1250).

This is not the circumstance in the case at bar - the Respondent's family was in a unprovoked fight with strangers. The Respondent feared for her safety and that of her family.

She had a personal life history of having endured the most-ghastly form of prior trauma and the assault on her family provoked a trauma reaction.

As best determined the Putorti incident occurred in 2015 and Putorti recounted the incident for an article published in a Long Island news source in 2016. He showed the article to another Judge describing his actions as pulling his firearm "on an agitated" "big black man" when the man approached the bench too quickly. He told a 2016 Washington County Magistrate's Association meeting of this article and event and another association in 2018 that the incident had occurred describing again the gentleman as a large black man. All of these statements were exaggerated.

In the case at bar, it is stipulated in the ASF that there was violence, fighting and that the Respondent's son and husband were significantly involved (ASF 26). The conflict that broke out was provoked and was primarily engaged in with a number of uninvited individuals. It is significant that the Respondent identified two individuals, Dooley and Havo, as involved in the fighting out of a photo array of over 20 photographs. (Exhibit 2 of Exhibit of Ex. 9) In this context, the Respondent's comments did not demonstrate implicit bias because she was addressing the individuals who engaged in assaultive behavior who happened to be black

In citing the Mikah K. Thompson law review article, *supra*, this Court offers in footnote 30 of that article a law review article authored by Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DePaul L. Rev. 1013, 1071-72 (2004). In the Wang article a clear explanation is offered for conduct such as confronted Respondent:

> "Sometimes the parties lack the cognitive or behavioral resources to do more than resort to stereotype - confirming patterns of behavior and interpretation by default. The perceiver may be under too much stress or too busy to do much more than rely on cognitive and behavioral shortcuts. People who are aroused or under greater cognitive load may rely more heavily on expectations or stereotypes. Time pressures

also limit the ability and the motivation of both parties to avoid stereotypes confirmation."

The Wang article references an article by Steven L. Neuberg, *Expectancy - Confirmation Processes in Stereotyped-Tinged Social Encounters: The Moderating Role of Social Goals*; Mark P. Zanna and James M. Olson, The Ontario Symposium, pg. 103, 105-106.

The social research cited above demonstrates that individuals under stress or with little time will resort to cognitive and behavioral shortcuts and old, socially conditioned and implicit stereotypes that they might avoid in other situations. If there is the appearance of implicit bias in the statements by the Respondent, the same must be viewed in the context of the stressful event she confronted on July 2, 2022. In the case at bar, the Respondent was confronted with a violent episode that rekindled her [redacted] and which caused her to respond by trauma reaction in a way that is contrary to her otherwise exemplary in Court and out of Court conduct. Her confrontational and taunting response, although directed toward young black men, would likely have been the same if they were any other race. It utilized common vernacular and not "blackspeak". There is no reason to believe otherwise. In her mind they were the aggressors, she had failed to protect her son and husband, and, in her trauma reaction, was asserting her ability to control and protect. If there was implicit bias which she denies, she was resorting to stereotypes out of fear and stress although this in no way can be definitively concluded because of the specific facts which do not evidence bias. In any event, such a supposed implicit bias is contrary to her life's work of according equal treatment and respect to all. To proclaim her as biased ignores the facts in the case and the conduct of Carter, Valladares, Havo and Dooley. Her conduct was not anywhere proximate to overt expressions of racism in *Matter of Agresta, 64 NY 2d 327,329, 1985 at Page 329,* or in the *Matter of Putorti, supra,* where there was removal.

POINT II

THE COMMISSION DID NOT HAVE A SOUND BASIS TO REJECT THE REPORTS AND OPINIONS OF TWO PSYCHOLOGISTS

Both Dr. Lesswing and Dr. Joseph agreed that Respondent had reaction secondary to her underlying diagnosis. The Commission without any expert opinion supporting their finding rejected the findings of both because the Respondent sought evaluation nine months after the event, ignoring the fact that she was deemed to have this condition on a ongoing basis when examined by Dr. Lesswing and seen again by Dr. Joseph. That condition remained in effect two weeks after when she spoke with the Sheriffs at the Courthouse about that event. Trauma Experts recite that individuals with Respondent's history frequently do exhibit "expected action for which they are later judged or blamed". Haskell and Randall at page 15. That is precisely what occurred here in talking to the Sheriffs two weeks later.

It is undisputed the respondent had a ongoing trauma reaction which was a sequalae of her diagnosis of [redacted].

It is undisputed based on the stipulated record that the Respondent had a trauma reaction on 7/02/22, secondary to the [redacted] that was a result of her having been [redacted] in college. (Ex. B1, B4) That is the diagnosis of Dr. Lesswing and Dr. Joseph. Dr. Lesswing administered the PCL-5 test, a widely used 20 item measure of symptoms from the DSM-5-TR. Respondent's test result was diagnostic for [redacted] on 6/20/23 and was a basis for Dr. Lesswing diagnosing that Respondent was experiencing [redacted]. He opined she had a trauma reaction on 7/2/22, which was initiated by watching her son being struck numerous times, knocked to the ground kicked in the head and body and fighting in the ditch outside of the Pearce residence. Dr. Lesswing cites the Respondents DSM-5-TR symptoms in his

report (Ex. B 4, pg. 6):

> ... her behavior on 7/2/22 during the events in question was motivated by a trauma reaction. She expressed that her [redacted] in 1989 and her witnessing the assaults to her son and husband represent the only two traumatic events in her life. While separated in kind and time, her reactions within those events nonetheless are psychologically related.
>
> She discussed having been disgusted with herself for having "froze" when [redacted], and her holding the expectation for herself that she should have fought back at that time." (Ex. B. pg. 7)

In relating the trauma of her [redacted] to the events of 7/2/22, Dr. Lesswing stated:

> "On 7/2/22, Erin Gall witnessed another traumatic event, and again "froze" in her immediate response to seeing physical assault and injury to her son and husband. She then automatically and aggressively reacted out of her sense of failure to live up to her own standards for protecting her family and her conviction of "what kind of mother wouldn't have jumped into that ditch?" This represents a parallel form of trauma response across these two isolated events in her life. Judge Gall, in her testimony, recounted that she "acted as a mom under exigent circumstances" and engaged in frantic, unreflected, and emotionally dysregulated efforts to take charge of the situation at the party. Her emotional state reflected fear and anxiety about threats posed within that situation, and frustration and anger about her perception that the police were not doing enough to address it." (Ex. B 4, pg. 7, Ex. 9, pg. 27)

The DSM-5-TR gives a clear description of the relationship between the Respondent's assault and the July 2, 2022, fight clarifying that years can elapse between traumatic events:

> "Duration of the symptoms also varies, with complete recovery within three months occurring in approximately one-half of adults, while some individuals remain asymptomatic for longer than 12 months and sometimes for more than 50 years. Symptom recurrence and intensification may occur in response to reminders of the original trauma, ongoing life stressors, or newly experienced traumatic events." (DSM-5-TR at p. 309)

[redacted] recurrences such as Respondent experienced can be delayed and intensified in response to reminders of the original trauma. As Dr. Lesswing noted at pages 6 and 7 of his report, the Respondent's witnessing of the assaults on her son and husband triggered the recurrence of her original trauma response. (Ex B-4) She sustained a reactivation of diagnostic reactions as defined

in Part E of DSM-5 criteria for [redacted], in that she experienced by virtue of the events of July 2, 2022, "Marked alterations in arousal and reactivity associated with the traumatic event(s)," causing her trauma (P. 302). DSM-5-TR *supra.*

Respondent's behavior on the night in question was completely out of character. It reflected an acute emotional dysregulation and anger in the form of her "fight" or "flight" responses to the intruders after "freezing" while witnessing physical violence to her family members. This was automatic and reflexive on her part. She testified at her deposition that her initial response to the violence was:

- That she froze, was silent and in shock as she saw her son slapped and knocked to the ground near the ditch, being hit and kicked. (Ex. 9 p. 38-39, ASF 20-22)
- "I literally stood there in shock. It felt like time had stopped. I can't describe it any other way. I did not even - I did not even try to help or stop anything. I literally was frozen. I can't describe it any other way." (Ex. 9, pg. 38)
- She was in shock and silent as she observed her son on the ground receiving a "stomping on his head" and being kicked in the head. (Ex. 9, pg. 39)

Her freezing and not fighting back is precisely the same internal personal criticism she harbored regarding her self-perceived lack of resistance to being [redacted]. (Ex. B1; B4, pg. 4-5) With that long term festering self-criticism provoked by her lack of response to her prior [redacted], on 7/2/22 she "engaged in frantic, unreflected and emotionally dysregulated efforts to take charge of the situation at the party" according to Dr. Lesswing (Ex. B-4, pg. 7) The facts support this opinion.

After the fight when the police arrived:

- The individuals (Carter, Valladares, Havo and Dooley) she believed were the aggressors who attacked her son remained on the property for nearly 1-1/2 hours after the police arrived. (ASF, ¶ 32, 65, 72).
- Respondent identified Havo, Dooley as attacking and fighting with her son, Carter and Valladares were in a physical altercation with her husband, yet they remained present and milling on the premises during that time. (ASF ¶ 23, 32, 65, 72)

Respondent identified Dooley and Havo by photographs at her deposition as the two persons who initially attacked her son (ASF ¶ 22,23,24). (The Respondent stipulated that her identification of these two individuals in and of itself was not sufficient to support a finding that Havo and Dooley did start the fight or fought with her family but that is what she believed. (ASF ¶ 24 A and B) Neither Havo nor Dooley was deposed by commission counsel because Mr. Carter and Mr. Valladares when deposed declined to provide proper identification of those individuals. The Court may draw the inference that they initiated the assault on Respondent's son and/or fought with her family based on the failure to identify and produce Havo and Dooley. Moreover if the Respondent had the right to participate in discovery she could have compelled the production of the identity of Havo and Dooley and seen them in person in the discovery phase to make a further identification. She was not accorded that opportunity.

- Respondent was afraid and frustrated by the police not clearing the property and in a trauma reaction which was manifested by Respondent launching invective and profanity, threats, bragging, invoking her office nine times all while knowing she was being recorded on the police officer's bodycams. (Ex. B1, B4).

- Explaining her conduct, she stated:

> I know, I know. And the only way I can express to you is, if you have children, and if you've ever witnessed something like this – you could possibly hear that your son was in a fight. It doesn't come close to the magnitude of seeing it, seeing your child assaulted. And I stood there and did nothing and couldn't – I was helpless.
>
> So the frustration level had built. And imagine what it felt like an hour and a half in and they're still on the property and they're in the house. You're thinking, there's little to no protection here. That's how I felt. (Ex. 9, pgs. 62-63).

- Respondent when asked what caused the attack on her son and the fighting in the ditch, testified:

> Honestly, I believe these kids arrived at the party uninvited, they trespassed, and they were looking for trouble. I really believe that they were out and about, they found a party, and they stirred up trouble and they literally attacked out of no where. (Ex. 9, pg. 41).

The undisputed opinions of Dr. Lesswing, a psychologist who performs fitness for duty

evaluations for police departments and has extensive trauma diagnostic experience, and her therapist Dr. Joseph who is a college professor and practicing clinician who also is experienced in the diagnosis and treatment of trauma, are that she had pre-existing [redacted] causing a trauma reaction to the violent events of July 2, 2022.

To be clear, this analysis is offered in mitigation and in opposition to Commission counsel's urging Respondent's removal. The facts in mitigation support a lesser sanction. She was responding as a mother who was adversely impacted in her behavior by her prior history of trauma. As she told Dr. Lesswing, "What mother wouldn't have jumped in the ditch" to protect her son. She didn't. "I stood there locked up." In response to her perceived failure to act, she then attempted to "take charge" of the situation (Exh B 4 pg. 7). Ultimately, she was beside herself and responding utterly inappropriately before the cameras as a part of the trauma reaction. (Ex. B, pg. 4-6).

Over and above the treatment records of Dr. Joseph and the diagnostic testing and report of Dr. Lesswing in which both concluded that the Respondent had a [redacted] based on her assault of 30 years ago which was reactivated causing a trauma reaction and acutely present during the events of July 2, 2022, we reference a well-recognized report submitted to the government of Canada in 2019 and updated January 20, 2023 which is reproduced on the Justice Canada website entitled "*The Impact of Trauma on Adult* [redacted]" by Dr. L[redacted] H[redacted], C. Psych. and Dr. M[redacted] R[redacted], www.justice.gc[redacted] Dr. Haskell is a private practicing clinical psychologist in Toronto, as well as an assistant professor in psychiatry at the University of Toronto and an academic research associate at the Centre for Research on Violence Against Women and Children. She is a leading Canadian authority on these issues who recently received the Order of Canada for her transformational research into the

treatment of trauma victims. Dr. Melanie Randall is a Professor of Law at Western University, Canada, who has written and lectured widely on assault, domestic violence and violence toward women. For completeness, this report is published on the Department of Justice Canada website with a disclaimer that the views expressed do not necessarily reflect the views of the Department of Justice Canada. In explaining the effects of assault and Trauma the report cites "*Trauma and Recovery: The Aftermath of Violence - From Domestic Abuse to Political Terror*" by Judith Herman (1992) (Herman, J. L. (1992). *Trauma and Recovery: The Aftermath of Violence: From Domestic Abuse to Political Terror*. New York: Basic Books) at page 12. Ms. Herman explains trauma as follows:

> "Traumatic events overwhelm the ordinary systems of care that give people a sense of control, connection and meaning. Traumatic events are extraordinary, not because they occur rarely, but because they overwhelm the ordinary human adaptations to life ... they confront human beings with the extremities of helplessness and terror and evoke the responses of catastrophe." (Page 65)

The report states further at page 12 "Traumatic events are not necessarily violent, although they violate a person's sense of self and security." (Kammerer, N., & Mazelis, R. (2006). *After the Crisis Initiative: Healing from Trauma after Disasters*. Resource Paper: Trauma and Re-traumatization. Substance Abuse and Mental Health Services Administration (SAMHSA). The report asserts that trauma is subjective; what is traumatic to one person might not be to another. Haskell and Randall report that it is important to understand the defense circuitry and the neuro biology of the brain in a trauma circumstance in order to understand the range of reactions victims might exhibit in said threatening circumstances. It notes that victims frequently say, "I just froze" or "I was just laying there until it ended" or "I didn't know what to do, I couldn't feel I could do anything". The Haskell and Randall report explains that the brain's defense circuitry takes control when under threat. The authors point out that we react automatically with reflexive reactions

which include the well-known fight, flight or freeze responses. The report states that with regard to these reactions "they register at two levels: conscious cognitive levels and conscious physiological levels." The report explains that when one of our five senses detects a serious threat, the brain's defense circuitry is activated, and a cascade of stress chemicals are released. Haskell and Randall opine at page 13:

> "When a threat to physical survival is imminent, the human brain, unless specifically trained to do otherwise, will switch to subcortical dominance and the defense responses of fight, flight or freeze. The defense circuitry dominates brain functioning once activated." (Mobbs, D., Marchant, J. L., Hassabis, D., Seymour, B., Tan, G., Gray, M., Petrovic, P., Dolan, R. J., & Frith, C. D. (2009). From Threat to Fear: The Neural Organization of Defensive Fear Systems in Humans. *The Journal of Neuroscience: The Official Journal of the Society for Neuroscience*, 29(39): 12236-43) (Pg. 40)

The report further opines:

> "The prefrontal cortex is the center of executive functions in the brain. It is involved in managing complex processes like reason, logic, problem solving, planning and memory. Stress hormones flooding the brain can cause a rapid and dramatic loss of prefrontal cognitive abilities, limiting our ability to think, plan and reason in the face of threat." (Arnsten, A. (2009). Stress Signaling Pathways That Impair Prefrontal Cortex Structure and Function. Nat Rev Neurosci. 2009 June; 10(6): 410–422) (Pg. 36)

Haskell and Randall explain at page 14:

> "When an individual is under threat and their stress response is activated and people temporarily lose executive functioning. This impairs not only planning and decision making but also affects the brain's capacity to organize experience into logical sequences. What this means is that when people are in the midst of a serious threat or assault, brain regions are activated to help them survive the experience, increasing intense response such as hyperarousal and altered attentional focus, while decreasing activity of brain structures involved in planning and strategizing. These neurological changes are why pilots, mountain climbers, paramedics and hospital emergency personnel practice emergency procedures over and over again, and they also carefully review checklists of what to do in a crisis. It needs to become automatic for them how to handle a crisis situation."

The report references victim reactions such as those of Respondent at page 14:

> "Most people who have experienced a traumatic, overwhelming event are not knowledgeable about the complex brain and body alterations that they experienced. They may not be able to explain even to themselves their own often confusing and counterintuitive behaviors at the time of the event or immediately afterwards."

At her deposition Respondent offered an apology after a break prior to further questioning and tried to explain her behavior. The Respondent was and is clearly remorseful but unable to explain her behavior on July 2, 2022, except to say that she was acting as a mom under exigent circumstances:

> Ok. I want to apologize for my emotions today. Clearly although I have prepared for today and I'm taking this extremely seriously, what we're here for, I haven't put myself back at the scene of the incident. And so, it brought back a lot of emotions from what I witnessed. I had a lot of anxiety, as did my husband and my son, after the event. But I pretty much tried to bury that. So I apologize for my emotions.
>
> "I also, before we continue, would like to apologize for my conduct at the scene. Clearly, as you can see, the emotions I have now -- I was acting as a mom. I was acting under exigent circumstances. I do not condone my behavior or the fact that I ever stated my position to the police officers. I should've never, ever done that. I'm embarrassed by it. I've never done something like that in the past. If I could go back, wow, I would do so much differently. But I literally had never expected or experienced anything quite like what I experienced.
>
> "When we received the tapes, I was sick to my stomach. I didn't want to watch them. I wanted Mr. Julian to watch them by himself. I was embarrassed by my conduct. I very, very much respect the bench, respect my position. I made an awful mistake. But if you talk to my colleagues, if you talk to attorneys that appear in front of me, I believe I am very fair and very honest and very respectful of my opportunity to be a judge." (Ex. 9, pg. 7)

Respondent's description of her response on July 2, 2022, is entirely consistent with Haskell and Randall's analysis of persons experiencing a traumatic event. (*supra*) The report goes on to state at page 15:

> "Understanding these complex yet common psychological and neurologically based

> responses to traumatic experiences such as [redacted] helps to explain why some [redacted] victims don't exhibit "fighting back", "yelling", "escaping" or taking some other kind of expected action for which they are later judged or blamed."

It is not surprising that two weeks after the assault on her family she would ruminate with a police officer at the courthouse who is a friend that she thought the police could have done more. Likewise, judging Respondent's delay in getting therapeutic treatment is consistent behavior for a person with [redacted]. That she tested positive for this condition nearly a year after the assault which supports that she had a ongoing condition.

Haskell and Randall further discuss dissociation which is the process of the brain protecting itself from overwhelming stimulus by splitting some aspect of the experience away from consciousness. The report states:

> "Dissociation can be automatic for people who were traumatized earlier in life. Victims describe their experience as feeling like being on autopilot. Others report trance states, feeling in a fog or in a dream, and they don't feel their bodies."

In the case at bar, the Respondent was in a state of shock, her counterintuitive and inappropriate reactions and comments occurred even while knowing she was being recorded on body cam, and that she was in a state of fear. She had, as Dr. Lesswing opined, a dissociative reaction resulting in her inappropriate conduct on July 2, 2022. Her conduct should not be condoned. Removal is a harsh and disproportionate response to a one-time inappropriate course of conduct over several hours in the wake of a violent and unexpected event which rekindled her [redacted]. A significant mitigating factor that must be weighed in the case at bar is her history of trauma, her diagnosis of [redacted] and her trauma reaction secondary to that history. A lesser sanction we respectfully argue is the proportionate response.

POINT III

THE CONCURRING OPINION ALLEGES UNCHARGED, UNPROVEN SENSATIONAL CONDUCT THAT PREJUDICED THE PANEL

The Concurring Opinion found Respondent culpable on charges that were not alleged, to wit, that the Respondent used mocking black language in addressing the individuals she believed attacked her son and husband. The scathing Concurring Opinion reciting this uncharged conduct surely had a prejudicial effect on the deliberations in this case. In that opinion the author argues in the subsection entitled "Black Litigant Trust in the Judiciary":

> "Her derisive deployment of Black English (aka "African American vernacular," "Ebonics," and "blaccent") is jolting. She averred: "You know what you're not going to find your mom's keys. You gotta ask her for a second set, bro! ... That's what I'm telling you right now. That's how I roll. That's how I roll. That's how Mrs. G rolls. That's how Judge Gall rolls. We're clearing this place out." (ASF at 13-14, ¶¶38-39).
>
> Judge Gall's mocking blaccent is in addition to the other racialized behaviors noted in the majority opinion ...". (Emphasis added)

This highly inflammatory accusation directed toward the Respondent was never charged, and even though the Respondent appeared in front of the Commission to explain her conduct she was never confronted by the Commission members about this issue. Even more unfair, references made to literature in the Concurring Opinion, i.e., John McWhorter, *Talking Back, Talking Black; Truths about America's Lingua Franca* (New York, NY: Bellevue Literary Press, 2017) and Geneva Smitherman, *Black Talk: Words and Phrases from the Hood to the Amen Corner* (San Francisco, CA: HarperOne, 2000), entire works by authors with no specific page or quotation. The allegation for example that the word 'bro' is somehow a manifestation of sarcastic and racialized behavior is utterly refuted by the cultural use of that word for a longstanding period of time. For example, if one turns to Adweek in 2017, one finds that Geico

ran an entire 33 second ad in which two white males utilized the word bro multiple times while working out in a gymnasium extolling Geico products while Hollywood stars are reported by People Magazine as having a bro-mance. There are several examples of a litany of circumstances in which the word 'bro' and other language such as 'That's how I roll' are utilized by people from all races and walks of life.

'That's how I roll' also does not appear to have anything remotely like exclusive province of "blackspeak". For example, the white country and western group Florida Georgia Line in 2014 marketed a song "This Is How We Roll". White country singer Jeannie Seely in 2020 marketed a song entitled "That's How I Roll" While Respondent acknowledges that other artists for example who are African American have also utilized those words such as Wyclef Jean in his adaptation of a Bee Gees song "Staying Alive" he used the words That's How I Roll in the 1990s and Ciara/Chris Brown in 2023 have utilized the title "How We Roll". A simple Google review demonstrates the manifest unfairness of the allegation made and the toxicity which it must have had upon other members of the panel. "How I Roll" has been referenced in the common usage to include describing rolling a marijuana joint and a variation of billiard pool shots that involve hitting multiple pockets in the same shot. In the complete defense of the Respondent, it should be noted that she has three children under the age of 21 and interacts with their friends, using these words and phrases.

To stigmatize the Respondent as having engaged in inappropriate behavior in the use of these words in such a way as to demean the race of the individuals being addressed is unfair, outside of the record. Adding to the unfairness, the author of the Concurring Opinion, a Ph.D. college professor has made herself an expert in a situation where the claimed transgression has not been charged and in which the Respondent has not had the opportunity to answer. The Court

is respectfully directed to cases where this Court has previously dealt with the unfairness posed by a expert trier of fact as it would pertain to jury trials. Specifically, in *People v. Maragh*, 94 N.Y.2d 569 and *People v. Arnold*, 96 N.Y.2d 358. In *People v. Maragh, supra*, two nurses who sat on the jury did a calculation based on their knowledge which influenced the other jurors with regard to the outcome of the case. Specifically, the allocation had to do with a computation of the rate of blood loss. In *People v. Arnold, supra*, the juror involved was challenged for having a bias and prejudice as to domestic violence but that challenge by the defense was overruled by the Court resulting in this Court overturning the conviction.

Recognizing that the Commission on Judicial Conduct is not per se a jury, it is essential that basic rudiments of our juris prudence nevertheless be preserved including but not limited to a Judge should be adjudicated based upon those issues that are properly placed before the Commission at a hearing and given the opportunity to defend. In a record that already has sufficient information and detail that would warrant a disciplinary action, the further invoking of this highly inflammatory uncharged piece of information utilizing references without even providing appropriate pages or quotations all inure to Respondent's extreme prejudice, stigmatizing her conduct as racist when it was not.

The extreme prejudice to Respondent associated with being labeled a racist unfairly cannot be calculated. There is no credible evidence that her anger was directed to the perceived violent attackers because they were black – they were simply in her view the uninvited perpetrators who caused violence. To categorize her as racist based on unfair interpretation of the language in an uncharged way having failed to confront her is just simply beyond fundamental fairness and an absolute abuse of power. It cannot be plausibly argued that this insertion of uncharged, inaccurate prejudice is harmless and had no impact on the ultimate

determination of removal. Indeed, even the subhead in which this is placed, "Black Litigant Trust in the Judiciary", commences an inflammatory interpretation of language that was uncharged. Respondent was candid in allowing that her choice of language in addressing the individuals she believed attacked her family was intemperate and inappropriate and could be interpreted as racist. However, when examined and explained in context it was not. In no way, however, did she attempt to invoke blaccent or ebonics or African American vernacular. She used words that are commonly used by people of all races and to make that specific accusation without giving her the right to defend herself clearly adversely impacted the Commission in terms of its ultimate determination.

The Commission's speculating as to Respondent's intent is contrary to the holding in *Matter of Kiley*, 74 NY2d 364 (1989) wherein this Court found that conduct that "amounts to poor judgment even extremely poor judgment" is not a basis for removal. In *Matter of Kiley* the Court declined to form conclusions about the Judge's subjective intention:

> "If a Judge has acted with extremely poor judgment but not necessarily with a particular subjective intention which the Commission would like to attribute to him or her, the Judge can either admit an intention that he or she did not possess, or truthfully deny the intention and yet face an additional charge of lack of candor."

Equally inflammatory is the statement by the Concurring Opinion author which assumes without basis innocence on the part of Carter, Valladares, Havo and Dooley:

> "The totality of circumstances in this case point up the strong probability that we would have before us a very different case: one with four Black teens unlawfully victimized by the criminal justice system, due to mistaken identity by a White female judge, based on the argument that it was because she was assaulted when she was a college freshman."

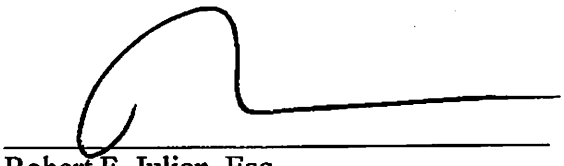
This staggering and unfair interpretation of the facts overlooks that the two individuals who the Respondent identified, Havo and Dooley, as the individuals who struck her son and

started the fight from photographs. The testifying participants Valladares and Carter did not cooperate with the Commission and declined to give the names of Havo and Dooley and consequently we do not have the complete story as to what Havo and Dooley did or didn't do. In real time the Judge was yelling at Havo and Dooley. Respondent requested the inference accorded a missing witness. Once again, simply ignoring Respondent's request for a missing witness inference on this issue, both the majority opinion and the Concurring Opinion therefore fail to factor an important flaw in the investigation as it would pertain to the assault on Respondent's family which she witnessed. Havo and Dooley are unknown because that was the choice of both Carter and Valladares and the Commission Counsel in failing to obtain a Court order to compel their testimony. The hyperbolic assumption of their innocence when it is acknowledged that the Carter group appeared at midnight uninvited and violence erupted is unfair and without basis. The actions of Havo and Dooley are unknown, they are mystical figures who were never interviewed by the Commission Counsel, no effort was made by Commission Counsel to obtain a Court order to bring them into the proceeding so that the true facts could be known. Consequently, we are left with the prejudicial inferential conclusions of the Concurring Opinion which clearly polluted and adversely effected the deliberations of the entire panel causing a adverse prejudicial impact upon outcome. A traditional civil discovery process would have allowed the Respondent to question Carter and Valladares at deposition and compel them to identify the name and address of Havo and Dooley, followed by subpoenaing them to a deposition to be questioned and to be definitively identified by the Respondent. Commission procedures are one sided and unfair to Respondent in this regard and therefore, do not offer Respondent a fair chance to prepare her case. The Commission procedures are unlike any procedure offered under the CPLR.

CONCLUSION

The Respondent prays that this Court reduce the sanction to censure based on the Respondent's conduct which was wrong and inappropriate but not due to racial bias.

Dated: September 11, 2024



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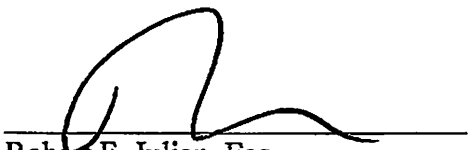
WORD COUNT CERTIFICATION

Pursuant to Rule 32(7)(B)(i)

I hereby certify that the total number of words in the Respondent's Brief including point headings and footnotes, and exclusive of the caption, the Table of Contents, Table of Authorities, and signature block, is 9,166 words, which complies with the word count limit.



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