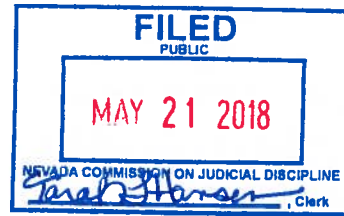


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6 **BEFORE THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE**

7  
8 IN THE MATTER OF THE HONORABLE  
RENA G. HUGHES, Eighth Judicial District Court,  
9 Department J - Family Court,  
County of Clark, State of Nevada,

CASE NO. 2016-113-P

10 Respondent.

11  
12 **OPPOSITION TO RESPONDENT'S MOTION TO DISMISS COMPLAINT**

13 Prosecuting Officer, Thomas C. Bradley, hereby submits his Opposition to Respondent's  
14 *Motion to Dismiss Complaint* ("Hughes Motion"). This *Opposition* is based upon all documents on  
15 file with the Commission in this matter, and the points and authorities that follow.

16 **POINTS AND AUTHORITIES**

17 **I. Factual Summary**

18 Welthy Silva ("Mother") and Rogerio Silva ("Father") were divorced in 2013 in Clark  
19 County, Nevada. The parties had one minor child. In the original Decree of Divorce, the Court  
20 granted the Mother primary physical custody and the Father weekend visitation of the child.

21 Beginning in May 2015, the parties began litigating a number of issues concerning the well-  
22 being of their child and whether the Mother was interfering with the Father's visitation rights.  
23 During the next twelve months, Respondent held a number of hearings on these issues.

24 On May 12, 2016, an in-person hearing was held. During the hearing, the parties argued  
25 whether the Mother was interfering with the Father's rights of visitation. Respondent then advised  
26 the Mother that she was close to being held in contempt and being incarcerated. At the conclusion  
27 of the hearing, the Respondent ordered that the Father shall have visitation with the child on the  
28

1 upcoming weekend and that the parties shall exchange the child under the supervision of Donna's  
2 House Central.

3 Subsequently, the Father alleged that the Mother allegedly failed to comply with the  
4 recently ordered visitation. On May 17, 2016, the Father's counsel filed a motion to place the matter  
5 back on calendar regarding the visitation. On June 8, 2016, Respondent issued a Minute Order  
6 detailing the visitation issues. The Respondent concluded that, "[t]his Court finds that Plaintiff  
7 [Mother] is in contempt of the Court's order to facilitate visitation on weekends with the Father,  
8 AN ORDER TO SHOW CAUSE SHALL ISSUE."

9 The Minute Order further stated, "[m]other shall bring the minor child to Dept. J, Court  
10 room [*sic*] #4, on June 15, 2016 at 1:30 p.m. If the Mother fails to deliver the minor child to the  
11 courtroom on June 15, 2016, she shall be deemed in further contempt of Court, and sentenced to  
12 twenty-five (25) days incarceration. If the Mother fails to appear, a bench warrant shall issue."  
13 The Minute Order also addressed other Order to Show Cause issues that were not related to  
14 visitation, and stated in closing, "[t]he Order to Show Cause Hearing shall be scheduled for July  
15 28, 2016 at 1:30 p.m."

16 Mother arrived with her minor child at the scheduled hearing on June 15, 2016. Respondent  
17 ordered all parties and counsel, except the minor child, to leave the courtroom, and Respondent  
18 addressed the child for nine (9) minutes off the record. The Mother was not allowed to return to  
19 the courtroom and was escorted off the Courthouse property. In the Mother's absence, Respondent  
20 awarded the Father temporary sole legal and physical custody, terminated the Father's child support  
21 obligation, ordered the Mother to pay the statutory minimum child support to the Father, and  
22 ordered the Mother to have no contact with the minor child.

23 The minor child was clearly distressed and cried during the entire process while the Father  
24 remained impassive at his counsel table. Respondent addressed the crying minor child by stating  
25 that the change in custody occurred because the Mother and minor child were not cooperative with  
26 the Court ordered visitations. Respondent further stated that if the minor child refused to go with  
27 the Father she would end up in Child Haven, which Respondent referred to as a jail for kids.  
28

1 At the court proceeding on June 15, 2016, no evidence or testimony was entered into the  
2 record regarding the change of custody, change in child support or the finding of contempt. No  
3 Order to Show Cause issued regarding the failure to facilitate visitation or notice regarding the  
4 change of custody and/or child support, and no hearing was held.

5 **II. Relevant Issues**

6 Accordingly, the issues in this case are narrow:

7 Did Respondent violate Nevada law and the Nevada Judicial Code:

- 8 1) By holding Ms. Silva in contempt without due process and an opportunity to be heard;
- 9 2) By imposing a penalty for contempt that changed custody of the minor child by  
10 awarding sole physical and legal custody to the Father; and
- 11 3) By changing physical and legal custody of the minor child without a hearing.

12 **ARGUMENT**

13 In the *Hughes Motion* filed with the Commission on May 14, 2018, the Respondent seeks  
14 the dismissal of her case on the grounds the Commission's procedures violate her right to due  
15 process. For the reasons discussed below, the *Hughes Motion* is without merit.

16 **I. Respondent Inappropriately Integrates An Out Of Court Pleading In Her Motion**

17 In support of her argument, the Respondent includes 29 pages of pleadings from *In re Weller*  
18 (NCJD Case No. 2017-025-P). Respondent integrates the 29 pages as her own because she claims  
19 that the cases are indistinguishable. "Because the issues in Judge Hughes's case are almost identical  
20 to that of Judge Weller with one exception which will be set forth herein, the Respondent Hughes  
21 attaches and incorporates by reference herein as Exhibit 'A' a copy of the Weller points and  
22 authorities[.]" *Hughes Motion*, 3:4-9. Respondent's integration of a pleading from another case is  
23 inappropriate.

24 **A. The Respondent Did Not Seek Leave From The Commission.**

25 Rather than using Respondent Weller's pleading as an actual exhibit, the Respondent  
26 integrates the entirety of the Weller pleading in her own argument. "In addition to attaching a copy  
27 of these points and authorities, Respondent Hughes would incorporate by reference each of the  
28 arguments made by Judge Weller[.]" *Hughes Motion*, 3:7-9. Respondent Hughes believes that

1 crafting her own argument is not necessary because Respondent Weller’s “are equally applicable  
2 to Judge Hughes.” *Id.* at 9.

3       However, even if the arguments made by Respondent Weller were applicable to Respondent  
4 Hughes, such an integration is inappropriate because Respondent Hughes did not seek leave from  
5 the Commission to exceed the page limit on her *Motion to Dismiss Complaint*. The Prehearing  
6 Order filed in this case on January 5, 2018 states, “[A]ll pleadings, including accompanying legal  
7 memoranda, submitted in support of any motion shall be limited to: fifteen (15) pages in length for  
8 the opening motion[.]” *2016-142-P Prehearing Order*, 1:25-26. While the Prehearing Order’s  
9 limitation does not apply to exhibits, the Respondent is utilizing Respondent Weller’s pleading as  
10 legal memoranda. As such, the pleading is improper because the Respondent did not seek leave to  
11 file her 35-page *Motion to Dismiss Complaint*.

#### 12       **B. The Arguments Are Not Applicable**

13       Respondent Hughes argues that Respondent Weller’s arguments are applicable to her case  
14 because both Respondent Weller and herself have been denied due process. “[Weller] argues that  
15 ‘By Failing to Follow Applicable Procedural Rules, the Commission Commenced Formal  
16 Proceedings in Excess of Jurisdiction and Denied Judge Weller His Fourteenth Amendment Due  
17 Process Rights’. This argument is equally applicable to Judge Hughes.” *Hughes Motion*, 3:16-19.

18       However, in contrast to what is insinuated in the *Hughes Motion*, Respondent Weller does  
19 not argue that the Commission’s procedures *per se* violate due process. Recognizing significant  
20 case law to the contrary, Respondent Weller rather argues in his *Motion* that the allegations against  
21 him “lacked merit” and, therefore, “the Commission’s determination was clearly arbitrary and  
22 capricious in violation of Judge Weller’s Fourteenth Amendment right[.]” *Weller Motion to*  
23 *Dismiss*, attached as Exhibit A to the *Hughes Motion*.

24       Without addressing the questionable merits of Respondent Weller’s claim, the Prosecuting  
25 Officer notes that no such argument has been made by the Respondent. In this case, “[t]he Formal  
26 Statement of Charges centers upon one hearing which was recorded on the Court’s JAVS system,  
27 with the exception of nine (9) minutes with the minor child, and related court filings.” *Order*  
28 *Denying Respondent’s Motion for Expansion of Time to Present Defense*, 6:19-22. Moreover, the

1 Respondent has never denied the authenticity of the JAVS video and related court filings.  
2 Therefore, Respondent Weller's argument is not applicable because Respondent Hughes does not  
3 claim the determination made against her was arbitrary and capricious.

## 4 **II. The Commission's Procedures Do Not Violate Respondent's Due Process Rights**

### 5 **A. The Commission's Combination of Functions is Proper**

6 In the *Hughes Motion*, the Respondent argues that the Commission's procedures violate her  
7 right to due process "because the Commission does the investigation, prosecution, the hearing, and  
8 the decision making in basically a single process." *Hughes Motion*, 3:24-26. In *Mosley v. Nevada*  
9 *Commission on Judicial Discipline*, Judge Mosley raised the same argument to the Nevada  
10 Supreme Court, contending "that the Commission's investigative, prosecutorial, and adjudicative  
11 functions have combined to deprive him of his right to due process." 117 Nev. 371, 378, 22 P.3d  
12 655, 659 (2001).

13 Rejecting this argument, the Court first recognized that the 1998 Amendment to the Nevada  
14 Constitution authorized the Commission to play multiple roles. "It seems clear then that the  
15 legislative intent manifested in the amendment process is that, although a 'court of judicial  
16 performance,' the Commission may exercise, to a degree, a combination of investigative,  
17 prosecutorial and adjudicative functions." *Id.*, at 379, 660. The Court then analyzed whether these  
18 multiple roles authorized by the Nevada Constitution were violative of Judge Mosley's due process  
19 rights. "Thus, having determined that the Nevada State Constitution contemplates a judicial  
20 discipline commission with combined functions, we turn to the issue of whether that combination  
21 violates Judge Mosley's rights of due process." *Id.*

22 In ruling the combination of functions was proper, the Court analyzed the U.S. Supreme  
23 Court ruling in *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). Although  
24 *Withrow* involved a physician disciplined by a state medical board, the *Mosley* court found it  
25 "otherwise indistinguishable and therefore dispositive." *Mosley*, 117 Nev. at 379, 22 P.3d at 660.  
26 In *Withrow*, the issue was whether the doctor's discipline at the board's "own contested hearing on  
27 charges evolving from its own investigation would constitute a denial to him of his rights to  
28 procedural due process." *Withrow*, 421 U.S. at 46, 95 S. Ct. at 1464. In a unanimous decision, the

1 United States Supreme Court found that the combination of functions was not improper. “The initial  
2 charge or determination of probable cause and the ultimate adjudication have different bases and  
3 purposes. The fact that the same agency makes them in tandem and that they relate to the same  
4 issues does not result in a procedural due process violation.” *Id.* at 58, 1470.

5 As an example, the *Withrow* Court explained that if a judge finds that contempt has been  
6 committed, that same judge may bring and preside over the contempt hearing. *See Id.* at 53, 1468;  
7 *see also Id.* at 48-49, 1465 (“No decision of this Court would require us to hold that it would be a  
8 violation of procedural due process for a judge to sit in a case after he had expressed an opinion as  
9 to whether certain types of conduct were prohibited by law.”). The Nevada Supreme Court therefore  
10 held that *Withrow* stood for the fact that “even with regard to judicial proceedings, a combination  
11 of adjudicative and prosecutorial functions is not biased *per se* and does not, without more, violate  
12 due process.” *Mosley*, 117 Nev. at 380, 22 P.3d at 660.

### 13 **B. Judge Hughes Has Not Demonstrated Actual Bias**

14 Ruling that the combination of functions by the Commission did not *per se* violate Mosley’s  
15 due process rights, the Nevada Supreme Court held in order to make such a finding, the petitioner  
16 has the burden of showing actual bias. The Respondent attempts to meet this burden by arguing  
17 that any hearing by the Commission is inherently biased because the Commission had previously  
18 made a determination as to probable cause. The Nevada Supreme Court has previously rejected  
19 Respondent’s argument. “Probable cause determinations are by no means a determination of guilt.  
20 Proof by clear and convincing evidence [...] would still be required at the formal adjudicatory level.  
21 Thus, the fact that some of the Commissioners previously had found there was probable cause to  
22 believe appellant had committed perjury does not require that they be disqualified from  
23 participating in the formal hearing.” *Matter of Davis*, 113 Nev. 1204, 1218, 946 P.2d 1033, 1043  
24 (1997).

25 Without a showing to the contrary, the Commission is “assumed to be [people] of  
26 conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis  
27 of its own circumstances.” *Mosley*, 117 Nev. at 381, 22 P.3d at 661 (citing *Withrow*, 421 U.S. at  
28 54, 95 S. Ct. at 1468). Therefore, the burden rests solely with the Respondent to overcome the

1 presumption that the Commission lacks bias:

2 *Withrow* provided that, to demonstrate such as risk, aggrieved parties must first  
3 overcome a presumption that the adjudicators are honest. Second, complainants  
4 must demonstrate that “under a realistic appraisal of psychological tendencies and  
5 human weakness, conferring investigative and adjudicative powers on the same  
6 individuals poses such a risk of actual bias or prejudgment that the practice must be  
7 forbidden if the guarantee of due process is to be adequately implemented.”

8 *Mosley*, 117 Nev. at 381, 22 P.3d at 661 (quoting *Withrow*, 421 U.S. at 47, 95 S. Ct. at 1464).

9 Similar to Judge *Mosley*, Respondent “has failed to overcome the presumption that the  
10 commissioners are unbiased” because she “offers no evidence suggesting that the Commission  
11 members are dishonest, biased, or prejudiced in any manner.” *Mosley*, 117 Nev. at 381, 22 P.3d at  
12 661. Since Respondent “has failed to overcome this assumption and because there is no reason to  
13 believe that the Commission's structure poses any risk of bias” the Respondent’s “rights to due  
14 process have not been infringed.” *Id.*

### 15 **C. The ABA Model Rules Were Rejected In Nevada**

16 The Respondent argues that Nevada should adhere to the ABA Model Rules for Judicial  
17 Disciplinary Enforcement (“Model Rules”). However, the current iteration of the Model Rules was  
18 approved by the ABA in 1994. [https://www.americanbar.org/groups/professional\\_responsibility/  
19 model\\_rules\\_judicial\\_disciplinary\\_enforcement/preface.html](https://www.americanbar.org/groups/professional_responsibility/model_rules_judicial_disciplinary_enforcement/preface.html). By amending the Nevada  
20 Constitution in 1997 to create the modern Commission, the Nevada legislature and Nevada voters  
21 implicitly rejected those procedures *suggested* by the ABA. In fact, Nevada is not alone. “The use  
22 of two panels is based on the *ABA Model Rules for Judicial Disciplinary Enforcement* (1994),  
23 although no state has adopted the precise structure suggested by the Model Rules.” C. Gray, *How  
24 Judicial Conduct Commissions Work*, *The Justice System Journal*, Vol. 28, No. 3, p. 415 (2007).

### 25 **D. The Nevada Supreme Court Reviews The Decisions Of The Commission**

26 In the *Hughes Motion*, the Respondent admits that the Nevada Supreme Court ultimately  
27 reviews the findings of the Commission. “Judge Hughes is also mindful of the fact that the Nevada  
28 Supreme Court has the ultimate authority to review De Novo the findings of the Commission and  
to alter the sanctions if the court feels it appropriate.” *Hughes Motion*, 3:26-28. The Supreme

1 Court's *de novo* review is why any risk of harm to the Respondent is minimized and why every  
2 state court that has examined the issue has rejected Respondent's argument.


3 Judges frequently argue that the judicial discipline systems violate their  
4 constitutional due-process rights if the commission not only investigates and  
5 prosecutes complaints but also makes the decisions. They are also concerned that  
6 evidence gathered during the investigative phase that is not admitted at the hearing  
7 phase (for example, because it violates one of the rules of evidence) will nonetheless  
8 taint the members' view of the judge. These arguments have been rejected by all of  
9 the more than twenty state high courts that have considered it because the decisions  
10 of the commission are reviewed by the supreme court.

11 C. Gray, *How Judicial Conduct Commissions Work*, The Justice System Journal, Vol. 28, No. 3, p.  
12 414 (2007).

### 13 CONCLUSION

14 For reasons above, the Commission should deny the Respondent's *Motion to Dismiss*  
15 *Complaint*.

16 DATED this 21<sup>st</sup> day of May 2018.

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19 Prosecuting Officer Thomas C. Bradley, Esq.




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**CERTIFICATE OF SERVICE**

I certify that on the 21<sup>st</sup> day of May, 2018, I emailed a true and correct copy of this *Opposition to Motion to Dismiss* to the following:

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By:   
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