No. _____

In The
Supreme Court of the United States

JOSEPH Q. MIRARCHI, ESQUIRE,

Petitioner,

v.

OFFICE OF DISCIPLINARY COUNSEL,

Respondent.

On Petition For A Writ Of Certiorari
To The Pennsylvania State Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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Member of
The United States Supreme Court Bar;
The U.S. Court of Appeals, 3rd Cir. Bar;
and The U.S. District Court, E.D., PA Bar.

QUESTION PRESENTED

Whether the state supreme court order for attorney disbarment is inconsistent with the standards set forth in *Selling v. Radford*, 243 U.S. 46, 50-51 (1917), and *In re Ruffalo*, 390 U.S. 544, 550 (1968), and is violative of U.S. CONST. AMENDS. V, VI & XIV; and PA. CONST., art. I, § 9, cl. 1, as the court allowed the ineffective assistance of Petitioner's trial counsel to preclude the admission of relevant, material mitigation evidence of his Medical and Neuropsychological Expert Witness Reports—despite the state declaring that it would not be prejudiced by its admission—thereby depriving Petitioner of his constitutional rights to Due Process and effective assistance of counsel.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioner is: Joseph Q. Mirarchi, Esquire. He is a citizen of the United States of America and resident of the Commonwealth of Pennsylvania who is an attorney by the Commonwealth of Pennsylvania; by the Third Circuit Court of Appeals; and by the United States District Court of Pennsylvania, in its Eastern District. In practicing law, Petitioner is a solo practitioner employed by Joseph Q. Mirarchi Legal Services, P.C., being organized as a closed corporation under the laws of Pennsylvania. As such, a corporate disclosure statement is not required pursuant to Supreme Court Rule 29.6. However, in light of the Rule's spirit, Petitioner acknowledges he is a natural person and not a nongovernmental corporate entity. Neither he, nor his corporation, has any publicly issued shares existing that pertain to corporation. Petitioner also acknowledges there is no parent or publicly held company that owns any stock in his business interests.

Respondent is the Office of Disciplinary Counsel of the Pennsylvania State Supreme Court and, at all times material, prosecuted all claims against Petitioner on behalf of the Pennsylvania Supreme Court. Petitioner also acknowledges that Respondent is not a corporate nongovernmental entity that issues shares of ownership interests publicly. Further, Respondent does not have a parent company, subsidiary, or other publicly held company (or shareholders of those

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6—Continued

companies) that own 10% or more of any stock in Respondent. However, Respondent is a subordinate agency of the Commonwealth of Pennsylvania's Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, being an attorney sanctioned by the Commonwealth of Pennsylvania; and a member of the Third Circuit Court of Appeals bar, and of the United States District Court of Pennsylvania's bar, in its Eastern District, and this most honorable Supreme Court, requests it to issue a Writ of Certiorari to review the judgment related orders which the Pennsylvania Supreme Court issued without an opinion on December 14th, 2018, and March 18th, 2019. Although the court adopted the recommendations of its subordinate Office of Disciplinary Counsel and Disciplinary Board, it did not express an opinion on the issues which petitioner raised on appeal—not even to express that they were denied. In doing so, the court allowed the ineffective assistance of Petitioner's counsel to preclude the admission of his relevant, material mitigation evidence being: Medical and Neuropsychological Expert Witnesses: Dr. Paul J. Sedacca, M.D., M.A.C.P., F.A.A.D.E.P.; Dr. Stephen Samuels, Ph.D., and Dr. Kirk Heilbrun, Ph.D.—despite the Commonwealth declaring that it would not be prejudiced by their testimony and Reports being admitted into the record—thereby depriving Petitioner of his constitutional rights to Due Process and effective assistance of counsel.

Jurisdiction of this matter also raises important and recurring issues with reciprocity and comity because the Third Circuit Court of Appeals and the District Court of Eastern Pennsylvania also seek to adopt the state court's decision presuming it to be valid. However, 28 U.S.C. § 1257(a) expressly limits review of

these state proceedings to a direct review by this Supreme Court in accordance with *Selling v. Radford*, 243 U.S. 46, 50-51 (1917), and *In re Ruffalo*, 390 U.S. 544, 550 (1968). In Petitioners' case, Respondent, the Disciplinary Board, and the Pennsylvania Supreme Court disregarded its procedural and substantive precedence, and this Court's Law, and entered judgment in Respondent's favor when Petitioner, himself, had to object to the Committee's exclusion of his Expert Witness evidence (based on 42 U.S.C. § 1983 for unconstitutional violations, and Title VII of the American Disabilities Act of 1990 for equal protection) during the Committee Hearing due to his trial attorney effectively arguing a case adverse to his interests. Hence, such action, if this Court agrees, would be void and cannot be invoked for reciprocal disciplinary purposes in the federal courts.[1]

Further, being that Respondent admitted on the Hearing Committee record that it would not be prejudiced by any further delay in receiving all of the Expert Witness Reports, the Committee's exclusion of the evidence is fundamentally unfair and does not promote the protection of the public, the proper administration of justice, or the rehabilitation and fitness of Attorneys who need assistance. Indeed, although Attorneys are part of the judicial system, most are unaware that they have fewer rights than non-attorney citizens. But, "the inherent authority of the courts to discipline lawyers

[1] Willburn Brewer, Jr., *Due Process in Lawyer Disciplinary Cases: From the Cradle to the Grave*, 42 S.C. L. Rev. 925, 940 (1991).

carries with it the necessity that this authority is administered according to due process[]"[2] which protects their core constitutional rights as discussed herein.

OPINIONS AND ORDERS BELOW

As to the specific questions raised in this Petition for Issuance of Writ of Certiorari, the Pennsylvania Supreme Court did not issue an opinion. It did, however, issue two Orders. The first is located at 2019 WL 1234388 (March 18th, 2018). *See* App., *infra*, 1. Relevant to this decision is a motion related order denying Petitioner's Application Seeking Leave to File an Affidavit in Support of his Appeal, dated December 14th, 2018. *See* App., *infra*, 2. As to the March 18th Order, a certified copy of the Hearing Transcript is attached. *See* App., *infra*, 3-20. The Disciplinary Board's Report and Recommendations, dated May 21st, 2018, is at App., *infra*, 21-106, and followed by the Report and Recommendations of its Hearing Committee, dated December 20th, 2017. *See* App., *infra*, 107-191. As subsequent, collateral matters presently pending, on May 29th, 2019, The United States Court of Appeals for the Third Circuit issued an Order staying its April 11th, 2019, Order to Show Cause Why the Pennsylvania court's Order should not receive reciprocity. *See* App., *infra*, 192-196. The reason for the stay is so the United States District Court, in the Eastern District of Pennsylvania, can conduct a Hearing on its own Show

[2] *See id.*, at 928.

Cause Order, which is scheduled for August 6th, 2019. *See* App., *infra*, 197-199.

JURISDICTION

On June 13th, 2019, Petitioner filed this Petition within the required 90 days. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND AMENDMENTS, AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

Article 6, Clause 2 of the United States Constitution:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The Fifth Amendment to the United States Constitution:

"No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"

The Sixth Amendment to the United States Constitution:

"[T]he accused shall enjoy the right to . . . have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution:

1. All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PA. CONST., art. I, § 9, cl. 1:

[T]he accused hath a right to be heard by himself and his counsel, . . . to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, . . . he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. . . .

STATEMENT OF THE CASE

A. Introduction

1. This Attorney Disciplinary Appeal is Important and Significantly Effects Every Attorney Nationwide Because it Raises a Question of First Impression for the Court.

Petitioner's case is a state Attorney Disciplinary Matter. To truly appreciate the constitutional violations that occurred, a recount of the circumstances is essential. As Petitioner realizes that this Court may still seek to discipline him, he also believes this Court's review is necessary because it will truly protect the public, promote the administration of justice and will help in attorneys rehabilitating themselves to become fit enough again to practice law. Indeed, this matter is complex for those reasons.

It is an excellent example because Petitioner's ability to practice law in Pennsylvania as well as in all levels of federal court up to this Honorable Supreme Court makes him a representative of all attorneys who are subject to any state and federal disciplinary sanctions. Respondent presently licenses 50,039 attorneys.[3] Nationwide, there are 1,352,027 attorneys licensed to practice law in their respective states and all are subject to this Court's ultimate authority[4] without even

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[3] *ABA National Lawyer Population Survey*, at http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2009-2019.pdf (June 7, 2019).

[4] *See id*.

considering the individual and overlapping membership of each federal District Court bar, the Circuit Court bars, or this Court's own Bar. The Class effected by this Court hearing this matter is that big.

Also effecting this class and Petitioner is a nationwide mental health crisis which is striking the entire legal profession hard. The problems cannot be fixed until physical and mental health issues are addressed by the Court. Mental health experts and legal industry representatives, including: psychiatrists, judges and lawyers, agree and support recent recommendations made by the American Bar Association ("ABA") in a 2017 groundbreaking study.[5] The study seeks to overcome the circumstances of depression, alcoholism, drug addiction, and suicide.[6]

This case is even important because it presents a question of first impression for the Court and it is the only place where an aggrieved lawyer can go after a state court rules on his or her matter—especially when it involves core constitutional issues, *i.e.*, Due Process and ineffective assistance of counsel. That is the question. As such rights are guaranteed to all other

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[5] *See* ABA, *Study on Lawyer Impairment* at https://www.americanbar.org/groups/lawyer_assistance/research/colap_hazelden_lawyer_study/ (Jan. 18, 2019); Dylan Jackson, *Lawyers, Judges at High Risk for Mental Health Issues* at https://www.law.com/dailybusinessreview/2019/03/01/lawyers-judges-at-high-risk-for-mental-health-issues/?slreturn=20190514060101 (Mar. 1, 2019); ABA, *National Task Force on Lawyer Well-Being Report* at https://judicialstudies.duke.edu/wp-content/uploads/2019/02/Panel-8-National-Task-Force-on-Lawyer-Well-Being-Report.pdf (Aug. 14, 2017).

[6] *See id*.

American citizens, in all other cases personal to them, can these inherent protections not be required of attorneys that represent them?

Petitioner has been deprived of his core Fifth, Sixth, and Fourteenth Amendment Rights to Due Process and effective assistance of counsel, and those same rights guaranteed to him by the Commonwealth of Pennsylvania under PA. CONST., art. I, § 9, cl. 1. In this regard, the Pennsylvania Supreme Court does not follow the ABA's Recommendations to respect those rights despite having adopted the ABA Model Rules of Professional Conduct almost 32 years ago on October 16th, 1987. The ABA's Model Rule for lawyer disciplinary enforcement, No. 18, provides the right to counsel, but the proceedings are governed by the state's rules of civil procedure and evidence in civil, non-jury matters, and that the standard of proof is by "clear and convincing evidence."

These Rules provide attorneys with the right to counsel as a part of due process, and which the state court promulgated in its Rule of Disciplinary Enforcement 89.4.[7] Rule 89.141 extends the state court's rules of civil procedure, non-jury and evidence to disciplinary matters. As a direct result, Petitioner is now prejudiced in defending himself in disciplinary proceedings before the federal courts.

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[7] ABA, Jurisdictions that have Adopted the ABA Model Rules of Professional Conduct at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (March 28, 2018).

Petitioner's case also brings the Court's attention to the most important case effecting Attorney Discipline in the United States, since its seminal case of *Selling v. Radford*, 243 U.S. 46, 50-51 (1917), 102 years ago, and since its ruling 51 years ago in *In re Ruffalo*, 390 U.S. 544, 550 (1968). Yes, this Court addressed other similar appeals since *Ruffalo*; however, none of those matters raised the question to halt a constitutionally violative state court decision which is presently being used to apply reciprocal sanctions in the federal courts. The Pennsylvania Supreme Court misapplied this Court's Law in *Ruffalo* and *Selling*, both procedurally and substantively. The decision also violates this Court's Laws as declared in *Gideon v. Wainwright*, 372 U.S. 335, 343 (1968) and *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In committing these violations, the court also refused to apply its own precedence including: *Braun* mitigation evidence in the form of psychiatric testimony ("*Braun* mitigation") and *Feingold v. Southeastern Pa. Transp. Auth.*, 512 Pa. 567, 517 A.2d 1270 (1986). The refusal to apply these cases intertwines with the constitutional violation at issue. The state court's decision also deviates from the ABA's Annotated Standards for Imposing Lawyer Sanctions (2015), hereafter, "ABA Standards."

2. Relevant Public Interest Concerns Being Monitored by the ABA.

Indeed, the foregoing concerns in Petitioner's case are of great public interest and are being monitored by the ABA and ABA Standards as discussed. For

example, these Standards serve as the Third Circuit's "model for determining the appropriate sanctions for Lawyer misconduct." *In re Mitchell*, 901 F.2d 1179, 1184 (3d Cir. 1990) (applying the 1986 publication) (citing *In re Snyder*, 472 U.S. 634, 643 n.2 (1985), and applying Fed. R. App. P. 46(c) in which the Supreme Court extended the Rule to matters of "suspension or disbarment"). *In re Mitchell*, 901 F.2d at 1184 n. 6 (quoting *In re Snyder*, *supra*).

Given the great importance of the issues at stake, Petitioner's case is worthy of review. In particular, both the Third Circuit Court of Appeals and its District Court of Eastern Pennsylvania presently have Show Cause Orders issued to explain why the state court order should not be adopted. *See* App. *infra*, 192-199.

B. Factual Background.

1. How This Matter Arose.

This matter arises from an anonymous letter followed by the complaints of three (3) clients which occurred in the latter part of Petitioner's then fifteen year legal career. Petitioner was an accomplished and respected solo practice trial attorney, handling state and federal civil matters, and Domestic Relations and Dependency Matters. He also served the Philadelphia County Court in Pennsylvania by sitting as a Court-Appointed Arbitrator hearing civil matters. During that same time, he dealt with business related dilemmas such as staffing turnovers; inconsistent pay patterns earned from his court-appointed duties in the

court's Dependency Division that will go well beyond 90 days and seen as if it was volunteer work; three forced office moves; the firing of one newly hired employee for soliciting thirteen fraudulent cases; the theft of his Office Network Server, Backup Server, and Secretary's Desktop Computer, believed to be done by the tipster; as well as personal family related problems. All took its toll on Petitioner and his law practice. Petitioner also began to suffer from a developing aggravation of physical impairments unbeknownst to him which included: Head Trauma related injuries causing a neuropsychological dysfunction (more commonly referred to as "Executive Dysfunction"), depression, alcohol abuse, and anxiety.

2. During the Investigatory Stages.

As Petitioner struggled with these impairments, he also continued in reorganizing his law practice in accordance with all ethical rules and laws. Around May of 2015, Petitioner entered into a Proctorship relationship with a colleague, Gary Scott Silver, Esquire, who through the filing of this Petition has overseen Petitioner's law practice upon the primary condition that Petitioner works out of his Office. Petitioner also retained counsel, Stuart L. Haimowitz, to address Respondent's complaints. In doing so, Petitioner paid and worked with his trial attorney.

Petitioner retained Mr. Haimowitz because he represented that he worked for Respondent for approximately five years, that he was familiar with Attorney

Disciplinary Practice and litigation in Pennsylvania. During the investigation, Petitioner provided thousands of pages of documentation, answered and exchanged hundreds of emails with his attorney, diligently sought Medical and Neuropsychological Expert Evaluations and Examinations, objective testing, and resulting Reports. At no time during the investigation did Mr. Haimowitz advise Petitioner as to how his Fifth Amendment Rights against possible self incrimination could be applicable in the matter and insisted that Petitioner submit stipulations as to facts, laws, and legal conclusions and testify in the matter.

As Respondent offered to accept stipulations, Petitioner, through his attorney's assurances and advice, agreed to do so upon Respondent's agreement to accept mitigation evidence, *i.e.*, Neuropsychological Evidence, so that Respondent would consider it to possibly mitigate the sanctions. Petitioner also engaged in this testing for rehabilitation purposes to address his health now that he understood the nature of the impairments. During the process of scheduling, interviewing, and testing with the physicians, Mr. Haimowitz became elusive to Petitioner who confirmed with both Petitioner and Mr. Haimowitz that comprehensive testing was required to reach verifiable diagnoses and conclusions. The physicians included: Dr. Steven E. Samuel, Ph.D.; Dr. Paul J. Sedacca, M.D., M.A.C.P., F.A.A.D.E.P.; and Dr. Kirk Heilbrun, Ph.D.

As a result, Petitioner's physicians issued the following Narrative Reports: Initial Narrative Report of Dr. Sedacca, dated March 28th, 2017; and his Followup

Narrative Report dated June 30th, 2017; a Neuropsychological Evaluation Narrative Report of Dr. Samuels, dated April 24th, 2017; and the Neuropsychological Evaluation Narrative Reports of Dr. Heilbrun, dated June 15th and July 6th, 2017. All Reports were near immediately forwarded to Mr. Haimowitz either by the physician or by Petitioner.

C. Procedural Background.

1. Before and During the Committee.

Since Respondent's investigation began in late 2014, Petitioner has been respectful, professional, and cooperative with Respondent, while simultaneously being allowed to continue with his law practice. During that same time, Respondent allowed him to assist the state court by sitting as a Court-Appointed Arbitrator (most often as Chairperson) to hear matters. He did so at least 10 to 12 times, and received phone calls to assist on short notice at least a dozen other times. Before 2014, Petitioner was more active in accepting appointments as an Arbitrator.

As to the investigation, Petitioner produced the noted voluminous documents, sat for a lengthy deposition, and provided extensive stipulations for hearing purposes understanding he would be allowed to submit "*Braun* evidence" for the Committee to consider. In fact, Petitioner, at all times material understood that the submission of the *Braun* evidence was a condition precedent to submitting the parties' Joint Stipulation of Facts in the matter.

Around April 15th, 2016, Respondent issued Rule Petition seeking to temporarily suspend Petitioner's law license for his delay in producing requested information pursuant to its Rules. However, Petitioner produced the information. On May 10th 2016, Respondent's Disciplinary Board scheduled a Hearing for May 18th. On May 12th, Respondent withdrew the Petition thereby allowing Petitioner to continue practicing law. On that same day, Petitioner—being appreciative—issued and filed a letter of appreciation and gratitude to Respondent.

As to possible neuropsychological assessment, Petitioner and Mr. Haimowitz first discussed it around late November 2017. Mr. Haimowitz recommended Dr. Stephen Samuels, Ph.D., for the assessment. In fact, Petitioner exchanged many emails with Mr. Haimowitz on Petitioner's difficulties in connecting with Dr. Samuels. However, Mr. Haimowitz never advised Petitioner to seek another person to do the testing.

On January 18th, 2017, at the pre-hearing conference, the attorneys for the parties established February 9th as the deadline to: exchange exhibits; for Petitioner to advise Respondent if he was going to submit joint stipulations of facts, law, and exhibits; if Petitioner would be presenting *Braun* mitigation; and Petitioner's Witness List. They also agreed if Petitioner decided to present the *Braun* mitigation, an additional hearing would be scheduled. Expert Witness Reports were to be exchanged three weeks before that hearing. Because of Petitioner's inability to meet with Dr.

Samuels, on February 13th, Mr. Haimowitz advised the Committee by letter of the foreseeable delay because of the required comprehensive testing, and his professional opinion, that Petitioner could sign the stipulations until he completed the tests. However, before Dr. Samuels completed his testing, Mr. Haimowitz instructed Petitioner to complete the joint stipulations.

On February 23rd, 2017, the Committee scheduled the Hearing for two days: March 27th, and April 10th. Right around March 7th, Petitioner advised Mr. Haimowitz that he was seeing Dr. Sedacca to provide a medical assessment to be a coordinating physician to organize and schedule all required testing. On March 22nd, Petitioner also advised Dr. Samuels to promote transparency in the testing. Mr. Haimowitz acknowledged and began to communicate to Dr. Sedacca on March 23rd.

On that day, Mr. Haimowitz requested Petitioner meet him in Respondent's Office. They brought Petitioner to Conference room, presented him with the extensive Joint Stipulations, and Mr. Haimowitz recommended that Petitioner sign them. Trusting Mr. Haimowitz, Petitioner did so—again believing that he would be allowed to submit *Braun* evidence, and that Mr. Haimowitz was communicating all delays in obtaining the final Expert Witness Reports. On March 26th, 2017, Petitioner provided Mr. Haimowitz with a Witness List which identified many witnesses Factual, Character, and Expert. Dr. Sedacca, Dr. Samuels, and also a treating Therapist who the Pennsylvania Bar

Association's Group called "Lawyers Concerned for Lawyers" provided a referral.

The Hearing commenced on March 27th. At the outset, one member of the Committee advised that he has a conflict of interest in that he was the attorney for the Estate of Petitioner's Father in a Nursing Home Negligence Action. Mr. Haimowitz advised Petitioner that he should waive the conflict being that Petitioner initially renunciated interest in the litigation but months later accepted a percentage of an eventual settlement in that matter. Respondent presented four witnesses and introduced many exhibits. Before adjourning, the Committee set April 3rd, 2017 as the deadline for Petitioner to provide a witness list and to identify if they were character or fact witnesses, and to exchange any additional exhibits.

On March 28th, Dr. Sedacca issued his initial Narrative Report to Mr. Haimowitz, which provided a "Concussion Syndrome" diagnosis expressed to a reasonable degree of medical certainty, and recommended that additional testing be completed just as Dr. Samuels forewarned. Thereafter, Petitioner continued to undergo testing including an MRI, which he completed around April 13th.

The Committee and the parties reconvened on April 10th. Without notice to Petitioner, Respondent introduced a revised version of Exhibit ODC-I being an extensive spreadsheet. Also, Respondent objected to Petitioner's *Braun* mitigation evidence which was being developed, and which Petitioner reasonably

believed Mr. Haimowitz was giving Respondent regular updates on Petitioner's progress, as well as producing Dr. Sedacca's Narrative Report for the same reasons Mr. Haimowitz issued his February 13th letter to the Committee—simply because testing takes time. The only concern raised by the Committee was that Respondent cannot be prejudiced by presentation of the witness. In fact, Respondent advised the Committee that he received Petitioner's Witness List and was surprised to see that Dr. Samuels was still going to testify thinking: "that was already disposed of, that he wasn't going to be testifying." This understanding could only have come from representations made by Mr. Haimowitz. The Committee's Chairperson then adjourned the matter. Before leaving, Respondent demanded that it wanted "an expert report" two weeks from the next hearing date (not yet selected). However, the Committee never granted the demand on the record.

On April 12th, Mr. Haimowitz requested a status on the MRI test which Dr. Sedacca scheduled. On April 13th, Petitioner requested his test results from Dr. Samuels who responded that he will send them out in about four days. In response, on April 24th, Dr. Samuels advised Petitioner that Mr. Haimowitz instructed him to not prepare a Report. The next day, Petitioner only received a summary of the results in a Report dated April 24, 2017.

On April 18th, Mr. Haimowitz advised Petitioner that "We have two months to get everything together." Petitioner responded that Dr. Sedacca was awaiting

the MRI test results and that Petitioner was trying to schedule testing as quick as possible.

Around this time, the latest Hearing was then scheduled for three days: June 27th, 28th, and 29th, 2017. The unconfirmed Expert Witness Report Due Date was June 13th, 2017.

On May 30th, Petitioner sent Mr. Haimowitz a detailed update on everything he had been doing (with Mr. Haimowitz's consent and recommendation) to submit his *Braun* mitigation evidence, *i.e.*, that the MRI test is complete, Dr. Sedacca's conclusions are as he represented in his March 28th Report, that Petitioner completed the Neuropsychological testing on May 23rd and 26th, and expect results around June 13th, and that Petitioner was continuing counseling with Dr. Daniels.

On June 5th, Mr. Haimowitz missed a scheduled meeting with Petitioner so Petitioner sent him an update. Petitioner advised that he was still awaiting Dr. Heilbrun's Narrative Report. The meeting was rescheduled for June 7th.

Overall, Petitioner's Medical Evidence included the Initial Narrative Report of Dr. Paul J. Sedacca, dated March 28th, 2017, and his Followup Narrative Report dated June 30th, 2017; a Neuropsychological Evaluation Narrative Report of Dr. Steven E. Samuel, Ph.D., dated April 24th, 2017; and the more extensive Neuropsychological Evaluation Narrative Reports of Dr. Kirk Heilbrun, dated June 15th and July 6th, 2017.

On June 12th, Mr. Haimowitz advised Petitioner that he advised Respondent that he was unavailable to discuss Petitioner's matter with him until June 15th, which was 2 days after the projected Expert witness Report Due Date.

On June 15th, Petitioner received Dr. Heilbrun's Report and emailed it to Mr. Haimowitz, Dr. Samuels, Dr. Daniels, and Dr. Sedacca, for Hearing and therapeutic purposes. Petitioner also asked Dr. Samuels if he could make any additional recommendations based on the Report. He never responded. In providing the Report to Mr. Haimowitz, Petitioner understood who would forward it immediately to Respondent on that same day. On June 16th, Petitioner also emailed Dr. Heilbrun's *curriculum vitae* to Mr. Haimowitz and an additional copy of his Report. Mr. Haimowitz then began to scrutinize Dr. Heilbrun's trial experience suspecting it was lacking.

On June 22nd, Mr. Haimowitz again requested that Petitioner resend Dr. Heilbrun's information and also to resend him Dr. Sedacca's March 28th Report and *curriculum vitae*. Petitioner did so.

In final preparation for the coming Hearings, Mr. Haimowitz advised Petitioner that he would rely on the Joint Stipulations as an outline for questioning Petitioner during his case-in-chief. Mr. Haimowitz provided no other instructions. Petitioner confirmed and indicated that he was finishing the Question Outline, and Exhibit Lists and Books that he requested.

At the outset, on June 27th, Mr. Haimowitz intentionally misrepresented Petitioner's foregoing efforts and progress in completing and submitting his *Braun* mitigation evidence. He even went on to mislead the Committee as to when he received Dr. Sedacca's Report, and then proceeded amongst other things argued and challenged Dr. Sedacca's medical conclusions which the Doctor expressed to a reasonable degree of medical certainty to the point of expressing a contradicting expert medical opinion. Mr. Haimowitz then declared that "We" decided to take no action based on the Report which is untrue as such a conversation never occurred.

Mr. Haimowitz then proceeded to advise the Committee as to how he determined that Dr. Samuels' position was inconclusive implying that Dr. Samuels reached a final conclusion when he actually requested additional testing and information as he foresaw and advised Mr. Haimowitz at the outset of his assessment which was before Mr. Haimowitz instructed him to stop and that he is not to prepare a Narrative Report.

Moving along in his misrepresentations, Mr. Haimowitz discounted Petitioner's treatment with Dr. Daniels, and the fact that Petitioner sought the assistance of Dr. Kirk Heilbrun, because Dr. Samuels advised him of Mr. Haimowitz's instructions. In doing so, Mr. Haimowitz again misrepresented his timing and discussions with Dr. Heilbrun (claiming the Doctor was "unaware" of *Braun* mitigation); and when he actually received Dr. Heilbrun's Report; and that he delayed forwarding it to Respondent until a decision was made to

proceed with the *Braun* mitigation. As to witness availability, both Dr. Sedacca and Dr. Heilbrun were available to testify in the matter although Mr. Haimowitz represented that he would only call Dr. Heilbrun. Their supplemental Reports intended to be submitted served to summarize their initial diagnoses and conclusions to assist the committee in its possible deliberations.

Respondent objected, arguing that Petitioner failed to timely provide the evidence and admitted that it would not be prejudiced if the committee accepted the *Braun* mitigation. To cure any possible prejudice, Respondent reassured the Committee that it would speak with and rely on Dr. Samuels' Report and possible testimony. The Hearing Committee denied Petitioner's requests, despite the fact that his Experts required time to sufficiently test Petitioner so the results would be most reliable.

Realizing that Mr. Haimowitz effectively argued against his interests, Petitioner became compelled to object on the basis of Title VII and 42 U.S.C. § 1983 as the Committee's refusal to consider the *Braun* mitigation evidence and Petitioner's physical and mental impairments are violative of due process and equal protection.

Petitioner then called eleven witnesses. All offered character testimony and several also offered non-character testimony. These witnesses also sought to lay a foundation for the *Braun* mitigation evidence to show good cause existed to support it. The witnesses included five (5) Attorneys: one being a client (Mary Lou

Doherty); another being a Family Court Hearing Master (Vincent Giusini); one serving as a present, voluntary Proctor and Business Associate (Gary Silver); and two of whom were former Officers of ODC (Michael Anthony DeFino, and Glenn Bozzocco) of which one was also a former employer (Mr. DeFino) and the other a former Client and former Deputy Court Administrator (Mr. Bozzocco). The six other witnesses were: two (2) siblings (Maria Mirarchi and Eric Mirarchi), Petitioner's Landlord (Joseph Foglia, Sr.), three former clients (Cindy Holstein, Renata Giansante, and Salvatore Rota). ODC also refused to accept valid Medical evidence of Petitioner's Physical Neuropsychological Disabilities arising from a history of serious head trauma.

As the matter proceeded, Petitioner also began to testify. While on direct, he developed a severe dysfunctional and anxiety related attack which was the basis for the *Braun* mitigation evidence in the first place. Respondent, the Committee, and Petitioner's attorney, Mr. Haimowitz, as well as Respondent's other staff, witnessed the extreme severity of the impairment. The Committee called a thirty (30) to sixty (60) minute recess. Mr. Haimowitz then informed the Committee that Petitioner was unable to continue. The Committee Record merely records that the Committee continued the matter because Petitioner became "ill." However, the circumstances were more complicated. In fact, Mr. Haimowitz also advised Petitioner to immediately seek medical and/or psychological attention. Neither Mr. Haimowitz, Respondent, nor the Committee elected to

reopen the record pursuant to applicable Board Rule 89.95.

The Hearing resumed on the following day. Upon taking the stand, Petitioner embarrassingly apologized to the Committee, Petitioner, and Mr. Haimowitz for his unavoidable breakdown. While explaining that he and Mr. Haimowitz may disagree, Petitioner did not withdraw his objections. On June 29th, the hearing reconvened for its final day. Petitioner finished testifying and Mr. Haimowitz chose to introduce only one Exhibit (R-1) which was unrelated to *Braun* mitigation or any of Respondent's charges. The Committee adjourned the matter and left the record open so the parties could submit Post Trial Briefs, which they did.

On July 12th, Petitioner received and forwarded the supplemental Reports of Dr. Sedacca to Mr. Haimowitz. At no time thereafter did Mr. Haimowitz elect to reopen the record pursuant to applicable Board Rules 89.95 and 89.251 to add evidence. Additionally, Mr. Haimowitz never advised Petitioner that he had the option to do so. He did proceed to write Petitioner's Post Trial Brief and submit it timely. But, he did not allow Petitioner to include a section to express remorse to his former clients and witnesses. On December 20th, 2017, the Committee issued its Report and Recommendation. Petitioner discharged Mr. Haimowitz shortly thereafter.

2. Before the Disciplinary Board.

On January 11th, 2018, Petitioner, *pro se*, filed timely Exceptions which included the Medical Reports at issue attached as Exhibits in case the Board of Discipline wished to entertain them and accept them for filing purposes, and requested Oral Argument. On January 16th, Mr. Haimowitz withdrew his Appearance. On January 30th, Respondent filed an Opposing Brief and a separate Motion to Strike the Exhibits. Then, on February 14th, Petitioner filed a Reply, and a Response to the Motion to Strike. On May 2nd, the Board convened for Argument. Pursuant to Board Rules, Petitioner appeared and requested a continuance so he could continue to look for a new attorney to represent him. Respondent objected and the Board. Having no choice, Petitioner argued his Exceptions which included his claim that Mr. Haimowitz was ineffective. On May 22nd, 2018, the Board granted the Motion to Strike, denied the Exceptions, and issued its Report and Recommendation.

3. Before Pennsylvania's Supreme Court.

On July 11th, Petitioner, *pro se*, pursuant to the Board's Rules under Pa.R.D.E. 208(c)(2), filed a Request for Oral Argument with the State Supreme Court which it granted on July 18th. On June 22nd, although doing so *pro se*, Petitioner, with the assistance of a professional court filing service company, Counsel Press, Inc., filed a Petition for Review raising all issues as raised herein. On June 27th, upon Petitioner's query, the Clerk of Court's Office advised

Petitioner that it rejected the Petition because it was filed several hours late and was due on the day before. On June 29th, Petitioner filed a Petition for Leave to File Petition for Review *Nunc Pro Tunc*, which was denied on July 18th.

On August 15th, Petitioner was able to retain appellate counsel, Joel Frank, Esquire, and Scot Withers, Esquire, of Lamb McErlane, P.C., who entered their appearances, met with Petitioner, reviewed Petitioner's personal file including but not limited to all foregoing efforts, communications, and documents referenced by Petitioner above, continued and briefed the matter, and thereafter argued it on March 5th. In doing so, they presented and argued the focused issue: "Whether, in the interests of justice, the proceeding should be reopened and remanded to the Hearing Committee to allow Respondent to present *Braun* mitigation evidence."

In conjunction with Petitioner's Brief, they filed a Motion seeking to submit Petitioner's Affidavit in support of his claims that Mr. Haimowitz was constitutionally ineffective. On March 8th, the Pennsylvania Supreme Court heard Oral Argument. On March 18th, 2019, the court denied the Appeal, issuing an opinion on the constitutional issues raised, which Petitioner now appeals.

REASONS FOR GRANTING THIS PETITION

A. Standard for Granting.

The Court frequently grants certiorari to review state court decisions when core constitutional rights are ruled upon by a state supreme court in Attorney Disciplinary matters. This power is in effect today pursuant to 28 U.S.C. § 1257(a). *See In re Ruffalo*, 390 U.S. 544, 550 (1968); *Selling v. Radford*, 243 U.S. 46, 50-51 (1917). The appellate jurisdiction to review these decisions was enacted by the very first Congress in the Judiciary Act of 1789 and first elaborated upon by the Court in 1816. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Justice Story opined that Section 25 of the Act is fully supported "by the letter and spirit of the [C]onstitution[.]" *Id.* at 338-339. Thereafter, in 1821, Chief Justice John Marshall reiterated this Law in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 415 (1821) and established bedrock principle in federal law: the Supreme Court is the final arbiter on the meaning and interpretation of federal laws, and its decisions are binding not only on federal courts, but also on state courts. *See*, *e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (finding that "[w]hen this Court has fulfilled its duty to interpret a federal law, a state court may not contradict or fail to implement the rule so established[.]").

Furthermore, a sanctioned Attorney is not allowed to perform a collateral attack on state disciplinary proceedings in the lower federal courts. *See Younger v.*

Harris, 401 U.S. 37, 43 (1971) (enforcing the "abstention doctrine" under the principles of "Comity" and espousing federal policy that a federal court should abstain from interfering with a pending state disciplinary proceeding "absent extraordinary circumstances"); *Rooker v. Fidelity Trust*, 263 U.S. 413, 479 (1923) (interpreting federal subject matter jurisdiction under statute); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 479 (1983) (interpreting and finding the same).

B. Argument.

1. Elaboration of State Court Arguments.

In the underlying matter, Petitioner put forth a compelling argument, which the court denied, refusing to extend the Sixth Amendment Right to effective assistance of counsel to his prior disciplinary trial counsel pursuant to an agreement with Respondent's counsel in accordance with *Braun*, 520 Pa. at 161-162 (finding that expert psychiatric testimony establishing that an attorney's psychological condition was a causal factor in his misconduct is properly considered as mitigating evidence and warranting "a sanction less severe than disbarment." *Id.* at 161 (persuading the Pennsylvania Supreme Court to impose "a sanction less severe than disbarment." *Id.* at 162.)).

In his Brief on appeal, Petitioner prayed under the unique circumstances of his case, and in the best interests of justice, the court reopen and remand the matter to the Committee so he could present *Braun* evidence,

because only after such evidence is considered can a final determination of a reasonable penalty be imposed on him under the state's Rules of Professional Conduct. In determining the appropriate discipline to be imposed, Respondent and the state court (as well as all foreseeable federal disciplinary courts) should have had access to all aggravating and mitigating evidence. *ODC v. Preski*, 134 A.3d 1027, 1031 (Pa. 2016) (requiring discipline to be "imposed on a case-by-case basis," after considering "the totality of facts presented, including any aggravating or mitigating factors."); *ODC v. Pozonsky*, 177 A.3d 830, 838 (Pa. 2018) (finding each matter "must be resolved according to its unique facts and circumstances").

In response, Respondent argued that in exercising *de novo* review, the state court should ignore Petitioner's substantive and procedural Due Process claims, because he waived his rights to present *Braun* evidence notwithstanding that Respondent was unable to cite to any case law. Respondent also argued that the Right to Counsel for Attorney Disciplinary matters does not exist in Pennsylvania or that this Right embodies the obligation to provide effective assistance to a client such as Petitioner. U.S. CONST. AMENDS. V, VI & XIV; PA. CONST., art. I, § 9, cl. 1. However, Pennsylvania law is clear. The state court is required to conduct a review *de novo* pursuant to Pa.R.D.E. 208(d)(iii). In issuing its March 18th, 2019, Order, the state court adopted Respondent's constitutional position which clearly violates this Supreme Court's Law. Namely, that the substantive and procedural due process

claims of all persons in the same or similar position of Petitioner should be ignored.

Even more concerning is the fact that Respondent consciously misrepresented certain key facts in the matter, it's own Rules of Enforcement and Procedure, *i.e.*, how to proceed with obtaining a temporary suspension of an attorney, and Disciplinary Board Rules, *i.e.*, Disciplinary Board Rule 89.141 (applicability of state civil Rules of Procedure and Evidence), as well as the state court's precedence on *Braun*, *supra*, and *Feingold*, *supra*, which will be discussed further herein. *See* App., *infra*, 10-20. It is primarily for these reasons that this state court decision requires this Court's review.

In support of his claims of ineffective assistance, Petitioner also sought leave to submit an Affidavit to clarify the circumstances. U.S. CONST. AMENDS. V, VI & XIV; PA. CONST., art. I, § 9, cl. 1. Petitioner explained his efforts to obtain the *Braun* evidence as quick as possible, how he possessed it as of the June 15th, 2017, Hearing; how he reasonably believed that Mr. Haimowitz was diligently communicating with Respondent and immediately providing the evidence; and how from hindsight, it had become obvious that he was doing the opposite. After a Response was filed, the court denied them application without entertaining any argument.

2. This Court's Law Clearly Requires the States to Provide Fair Procedural and Substantive Due Process Rights to Attorneys.

This Court characterized state disbarment proceedings as adversarial and *quasi-criminal* in nature. *See In re Ruffalo*, 390 U.S. 544, 550 (1968). In 1975, Pennsylvania adopted and applied this Court's Law. *See Office of Disciplinary Counsel v. Campbell, Jr.*, 463 Pa. 472, 479, 345 A.2d 616 (1975) (finding also that the court's review is *de novo* and it is the Board's function "to determine continued fitness of an attorney to practice law." *Id.* at 484).

The dominant federal position has been that due process requires "fundamental fairness" in all state proceedings.[8] As declared by the Court, the Fourteenth Amendment embodies the concept of fundamental fairness "as part of our scheme of constitutionally ordered liberty." *In re Winship*, 397 U.S. 358, 372-73 n.5 (1970) (Harlan, J., concurring). The criterion for determining whether an interest deserves due process protection involves a simple assessment of its importance to the individual. *Bell v. Burson*, 402 U.S. 535, 539-40 (1971) (holding that a driver's license may not be suspended without procedural due process).

Since 1824, the U.S. Supreme Court recognized that lawyers facing suspension from the bar have due process rights. *Ex parte Bradley*, 74 U.S. 364, 372 (1868) (reiterating emphatically the Court's

[8] Gerald Gunther, Constitutional Law 413 (12th ed. 1991).

declarations in *Ex parte Burr*, 22 U.S. 529, 530 (1824) (stating: "the profession of any attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him."); *Ex Parte Garland* (1866) (doing the same).

In *Campbell, Jr.*, the court clearly recognized this Supreme Court's Law in *In re Ruffalo*, and its obligation to protect the procedural and substantive rights of an individual. *Id.* at 479. The case is similar to Petitioner's in that Respondent alleged many serious charges against Mr. Campbell, and the Board recommended that he be disbarred. *Id.* at 477-478, 482. However, the case is distinguishable because the exceptions raised do not relate to *Braun* evidence, lack of procedural and substantive due process, or claims of ineffective assistance of counsel as constitutional violations. *See id.* at 480-482. Even the relief being sought was different. *See*, *gen.*, *id.* In the underlying matter, Petitioner was seeking to reopen the record for evidentiary purposes, whereas in *Campbell*, Mr. Campbell was seeking to reverse the Board's decision in its entirety. *See*, *gen.*, *id.*

Where Mr. Campbell's case is most similar to Petitioner's matter is in the final concerns of the *Campbell* court. *See id.* at 484-485. The court queried how different punishments could be imposed for the different charges being that the Board was considering the totality of Mr. Campbell's conduct. *See id.*

In Petitioner's matter, the court queried why a temporary suspension was not pursued within a reasonable time after Respondent commenced its investigation in 2014 regarding complainant, Elizabeth Majors. *See* App., *infra*, 11-12. Respondent admitted that Petitioner was not an immediate danger to the public warranting instant suspension despite whichever evidentiary standard was applicable (preponderance of the evidence or clear and convincing). *See* App., *infra*, 14. However, now that more than five (5) years have passed, and based on the same claims and evidence of Ms. Majors, Petitioner is suddenly a danger to the public in continuing to practice law and should be disbarred. *See* App., *infra*, 14.

The facts of the record are clear. In misrepresenting that Petitioner's response position with regards to Ms. Majors was that she gave him $80,000.00 as a "gift," that was untrue. Just as it makes that misrepresentation, Respondent also refused to consider all of the truly compelling circumstances which Petitioner produced during its investigation. In that same regard, Petitioner's trial attorney (although he produced everything but the *Braun* evidence), failed to advocate for Petitioner with that evidence to the point of also prejudicing Petitioner's Sixth and Fourteenth Amendment Rights to confront his opposing witnesses. If this Court would allow, Petitioner welcomes the opportunity to elaborate on this constitutional violation also. Even the most cursory reading of the Committee Hearing Transcripts confirms these core violations of Petitioner's rights.

ABA Standards addresses the nature of overwhelming in allowing for truly compelling circumstances to warrant mitigation when the misappropriation of clients funds was not "knowing" or "intentional." *See In re Discipline of Corey*, 274 P.3d 972, 977, 978 (Utah 2012) (finding: "that 'intentional misappropriation of clients funds will result in disbarment unless the lawyer can demonstrate truly compelling mitigating circumstances.' ") (citation omitted) (being referred to as part of the Standard for Review in *Matter of Lundgren*, 394 P.3d 842, 847 (Kan. 2017), and *In re Disciplinary Action Against Matson*, 2015 ND 222, 869 N.W.2d 128, 132 (N.D. 2015) (Kapsner, concur.).

If so, in all fairness, Petitioner's *Braun* evidence goes to the very heart of defending and mitigating his claim—and assessing the most appropriate sanction for any purpose, *i.e.*, disbarment, suspension, punishment, deterrence, or rehabilitation. The doctors did a comprehensive evaluation of Respondent's complaint and of Petitioner's entire life to test and confirm their conclusions. Due Process should have been provided to Petitioner in accordance with *Campbell* and *In re Ruffalo.* Because the court failed to do so, Petitioner prays this Court will agree and grant his Petition for Writ.

3. Petitioner's Sixth Amendment Right to Counsel and Effective Assistance of Counsel via the Fourteenth Amendment Clearly Exists and the State Court's Refusal to Recognize it Is Clearly Unconstitutional.

The refusal to acknowledge Petitioner's constitutional right to counsel violates this Court's Laws and the Sixth and Fourteenth Amendments. The fact that the state court even asked how to assess it is more troubling. *See* App. *infra*, 5-6. The right exists pursuant to *Gideon v. Wainwright*, 372 U.S. at 343. In *Strickland v. Washington*, 466 U.S. at 686, this Court extended that right and now requires that counsel be effective at trial. Such rights are intertwined with the procedural and substantive due process as made law in *In Re Ruffalo* as discussed.

In *Strickland*, the Court established a two-prong test for assessing attorney ineffective: First, assess if the attorney's performance was deficient under the circumstances and prevailing professional norms. Second, assess whether that subpar conduct reasonably prejudiced the trial outcome. Upon the facts alleged throughout this Petition, Petitioner avers that Mr. Haimowitz's performance was subpar and below prevailing norms of an attorney practicing civil litigation and disciplinary law, and but for his errors Petitioner's matters was severely prejudiced to his detriment at the moment the Committee precluded the *Braun* evidence. *Strickland*, 466 U.S. 689-693.

4. Petitioner also Has a Cognizable Property Right in his Attorney's License, which the Pennsylvania Supreme Court Clearly Disregarded in Rendering its Decision.

The state court incorrectly declared an attorney does not have any constitutional rights in his or her Law License. *See* App., *infra*, 6-7. As an attorney's license constitutes a property interest, procedural due process is required before that right can be taken away. *See In re Ruffalo*, 390 U.S. at 550; *see also In re Shigon*, 462 Pa. 1, 10, 329 A.2d 235 (1974) (emphasizing: "as this [Pennsylvania Supreme] Court has long recognized, '[t]he right to practice law is constitutionally protected as a property right and no attorney can lawfully be deprived of such right except by due process of law and upon competent and relevant proofs sufficiently credible to support a just order of disbarment.'" *Schlesinger Appeal*, 404 Pa. 584, 596, 172 A.2d 835 (1961) (being disapproved on other grounds in *Commonwealth v. Smith*, 412 Pa. 1, 192 A.2d 671 (1964)).

Petitioner always contended throughout the underlying proceedings that he has a vested property right in his law license. *In re Shigon*, 462 Pa. at 10. Petitioner invested considerable amounts of time and capital in his law license, which is in fact a business license. Tens of thousands of dollars and more than three years of his life in law school, the bar examination, bar fees, continuing legal education, and much more; he has a cognizable property interest in his license to practice law and as such he should be afforded

all of the protections under the Fifth Amendment's Takings Clause. *See Schlesinger Appeal*, 404 Pa. at 596 (citing *Ex parte Garland*, 4 Wall, 333, 379, 71 U.S. 333, 379 (1886) and In *Schlesinger Petition*, 367 Pa. 476, 481 A.2d 216, 319 (1957) (declaring: "the right to practice law is a right so valuable that it 'may neither be extinguished, abated nor dismissed by any proceeding short of one which fully comports with the historical and constitutional requisites of due process.' ")). *Id.*

Because this property right is not alienable, it must be subjected to even greater scrutiny. *See also generally Lynch v. United States*, 292 U.S. 571, 579 (1934) (contracts); *Boyle v. United States*, 200 F.3d 1369, 1374 (Fed. Cir. 2000) (copyrights); *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983) (copyrights); *Leesona Corp. v. United States*, 599 F.2d 958, 964 (Ct. Cl. 1979) (patents); *Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003) (contracts); *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 839-40 (Cal. 1982) (patents, franchises and contracts).

At the very least, the state court's decision is erroneous. *See* App., *infra*, 6-7.

5. Prejudice Is a Non-jury Civil Matter which Respondent Fails to Apply in Attorney Disciplinary Matters.

Also, warranting this Court's review is the fact that Respondent denies its precedence in *Feingold* is not applicable. However, its own Board Rules (89.141(a)) requires that Respondent's Disciplinary

matters "shall be governed by the rules of evidence observed by the courts . . . in non-jury civil matters at the time of hearing." *Id*. Pursuant to Pennsylvania Rule of Civil Procedure 126: "[t]he rule shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court of every stage of any such proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties. *See Womer v. Hilliker, M.D*., 589 Pa. 256, 267, 908 A.2d 269 (2006) (applying the Rule of Professional Liability action).

The state court in *Feingold*, 512 Pa. at 573-574, 517 A.2d 1270 (1986), held that a multi-factor approach must be applied to determine if the testimony of an untimely identified expert witness can be excluded. Therein, that court held where an expert witness has not been identified pursuant to local or state discovery rule, "the presiding court must balance the facts and circumstances of each case to determine the prejudice to each party." *Feingold*, 512 Pa. at 573. Here, as Respondent admitted to its Hearing Committee, no prejudice existed to it in allowing Petitioner to submit his Expert Reports, to prepare its cross-examination of any Expert Witnesses.

Indeed, at all times material, Petitioner set forth his belief that the Hearing Committee's and the Disciplinary Board's decisions violated Petitioner's rights, as a person diagnosed with physical and neuropsychological impairments, under Title VII and 42 U.S.C. § 1983. Moreover, Petitioner argued that as a result of

the ineffectiveness of his trial counsel, the Hearing Committee's and Disciplinary Board's decisions deprived him of substantive and procedural due process in that he was not provided with a fair hearing at which time relevant *Braun* evidence would be objectively assessed in mitigation. *See In re Surrick*, 338 F.3d 224, 231 (3rd Cir. 2003). Without this evidence, the evidence of record in the underlying matter is infirm and directly prejudiced Petitioner's matter throughout all stages of Respondent's prosecution and Petitioner's appeal. The absence of this fairness during the state grievance procedure deprived Petitioner of procedural Due Process and the interests of justice and fundamental fairness were lost. *See In re Ruffalo*, 390 U.S. at 552; *Selling*, 243 U.S. at 50-51. Hence, the lack of Due Process becomes an unlawful taking of an attorney's law license as discussed.

The ineffective assistance of Petitioner's trial counsel also resulted in a deprivation of Due Process and has not ensured that he was provided a fair opportunity to defend against the charges and to show mitigating circumstances. The Rights to Due Process and Effective Assistance of Counsel during Disciplinary Proceedings are intertwined and necessary to protect Petitioner from being deprived of his livelihood.

6. Petitioner's *Pro se* Professional Opinion.

Indeed, this Petition is cert worthy. As Honorable Justice William O. Douglas cautioned, "[t]he liberties of none are safe unless the liberties of all are protected."[9] Petitioner's matter effects the practical and inherent constitutional rights of every attorney licensed to practice law in our United States—on state and federal levels.

In Petitioner's *pro se* professional opinion, all conflicts and constitutional violations identified herein are direct, significant, and of great national importance to protect the public, for the administration of justice, and to help attorneys in need. Any of the noted jurisdictions hearing Petitioner's matter would rule in his favor. Petitioner explained why the state court's decisions violate the Constitution. Respondent will undoubtedly respond at it did before the state court and fail to establish how the Petition fails to satisfy the factors for cert worthiness—calling for this Court to exercise its ultimate power.

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[9] Honorable William O. Douglas, A LIVING BILL OF RIGHTS 64 (1961).

VII. CONCLUSION

For the foregoing reasons, Petitioner, Joseph Q. Mirarchi, respectfully prays this Supreme Court will grant his Petition and order any other relief deemed equitable, just, and lawful.

Dated: June 17, 2019

Beholden and Respectfully submitted,

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