No. 18-1551

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

SUPPLEMENTAL BRIEF

Respectfully submitted,

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OTHER AUTHORITIES

RELEVANT STATE STATUTES, COURT RULES, AND DISCIPLINARY BOARD RULES

1 Pa.C.S.A. § 1928(b)(1) of the Statutory Construction Act

> All provisions of a statute . . . hereafter enumerated shall be strictly construed:
>
> (1) Penal provisions.

Pennsylvania Rule of Civil Procedure 126

> The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

Pennsylvania Disciplinary Board Rules:

42 Pa.C.S.A. § 89.2. Equity Procedure to Apply

> Except where inconsistent with these rules, formal proceedings before hearing committees . . . and the Board shall conform generally to the practice in action in equity under the Pennsylvania Rules of Civil Procedure.

42 Pa.C.S.A. § 89.72. Subjects Which May Be Considered at Conferences to Expedite Hearings

> At the pre-hearing conference . . . which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, . . . the possibility of . . . (1) The

> simplification of the issues. (2) The exchange and acceptance of service of exhibits proposed to be offered in evidence. (3) The obtaining of admissions as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing. (4) The limitation of the number of witnesses and the identification of expert witnesses. The . . . hearing committee . . . may order the parties to exchange the names and addresses of all expert witnesses and to provide the opposing party with copies of all expert reports. The order may provide that failure to comply with it shall have the consequences described in § 89.93(c) (relating to exclusion/of evidence). . . .

42 Pa.C.S.A. § 89.74(a). Authority of Hearing Committee Member . . . at Conferences

> General rule. The . . . committee member presiding . . . may dispose of by ruling [on] any procedural matters which . . . it appears may appropriately and usefully be disposed of at that stage. Where it appears that the proceeding would be substantially expedited by distribution of proposed exhibits and written prepared testimony reasonably in advance of the hearing session, such advance distribution by a prescribed date may be directed at the discretion of the . . . member [who] may also order the exchange of the names and addresses of expert witnesses and copies of all expert reports. An order for the distribution of exhibits and written testimony or the identification of expert witnesses and exchange of

> expert reports shall be made with due regard for the convenience and necessity of the respondent attorney and staff counsel, and may provide that failure to comply with it shall have the consequences described in § 89.93(c) (relating to exclusion of evidence). The rulings . . . made at a conference shall control . . . unless modified for good cause shown.

42 Pa.C.S.A. § 89.93(c) Exclusion of Expert Evidence

> The hearing committee. . . may exclude the introduction of expert testimony or reports as to which a party has failed to comply with an order under §§ 89.72(4) (relating to subjects which may be considered at conferences to expedite hearings) or 89.74(a) (relating to authority of hearing committee [.]).

42 Pa.C.S.A. § 89.141(a) Admissibility of Evidence

> General rule. In any proceeding admissibility of evidence shall be governed by the rules of evidence observed by the court of common pleas in this Commonwealth in nonjury civil matters the time of the hearing.

SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, Petitioner, Joseph Q. Mirarchi, submits this supplemental brief with this Court's latest Law that clarifies the need for its review of his matter in light of Respondent remaining silent on the core constitutional claims raised in the Petition.

ARGUMENT

I. The Court Should at a Minimum Grant, Vacate, and Remand this Case in Light of *United States v. Davis*.

Given the Court's recent ruling in *United States v. Davis*, No. 18-431 (June 24, 2019), the Court should at a minimum grant, vacate, and remand Petitioner's case. In addition to presenting a question under the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution, the *Davis* case raises claim under the doctrine of Constitutional Avoidance and the framework of the Rule of Lenity doctrine. *See* Cert. Pet. I (raising Petitioner's core constitutional claims), 8 (citing Respondent's Rule § 89.4 (adopting the ABA Model Rules of Professional Conduct), 36-37 (citing the Respondent's Rule § 89.141(a) and State Court Rule of Civil Procedure 126 requiring Respondent to apply its rules of court liberally at every stage of any proceeding so Respondent can disregard any error or defect of procedure "which does not effect the substantial rights of the parties"). The Court's Constitutional Avoidance

analysis and its Rule of Lenity analysis in *Davis* directly supports Petitioner's Due Process claims here.

In *United States v. Davis*, the Court held that a federal statute can be unconstitutionally vague under due process principles and the presumption of its constitutionality could not be applied to save its residual sentencing clause by deeming a case-specific approach rather than a categorical approach. The Court reviewed the convictions under a federal statute which the district court enhanced based on a broad reading of the statute. As to the district court's consideration of the case the Court said it has never invoked the canon to expand the reach of the statute in case specific instances in order to save it in application. *Davis*, 139 S.Ct. at 2333. Two key factors led to that conclusion. First, employing the avoidance canon to expand a statute's ability to punish a defendant risks offending due process principles on which the vagueness doctrines rests. *Id.* Second, employing the canon like this also conflicts with the Rule of Lenity's guidance that ambiguities about the breadth of a statute should be resolved in a defendant's favor. *Id.* (citing the first case to apply the Rule almost 200 years ago: *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.)).

It is also founded on "the tenderness of the law for the rights of individuals" to fair notice of the law. *Id.*; *United States v. Lanier*, 520 U.S. 259, 265-266, and n. 5 (1997); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982) (finding that while the Rules of Professional Conduct are only

"quasi-criminal," the Rule of Lenity applies to both criminal and quasi-criminal statutes); *United States v. Enmons*, 410 U.S. 396, 411 (1973) (explaining: "this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity."); *United States v. Cook*, 384 U.S. 257, 262 (1966) (noting: "We are mindful of the maxim that penal statutes should be strictly construed."); *Bell v. United States*, 349 U.S. 81, 83 (1955) (holding "ambiguity should be resolved in favor of lenity"). The deciding factor is the nature of the sanction to be imposed.

The Supreme Court of Washington in *In re the Disciplinary Proceedings Against Jeffrey T. Haley*, 156 Wash.2d 324, 347-348, 126 P.3d 1262 (2006) (Sanders, J., concurring), confirmed that at least three (3) state courts (including itself), Washington, D.C., and two (2) Circuit Courts of Appeals follow this Court's precedence. *See, e.g.*, *Kentucky v. Lundergan*, 847 S.W.2d 729, 731 (Ky. 1993) (finding Kentucky's Legislative Ethics Act a "penal statute" to which "the 'rule of lenity' is applicable"); *Moutray v. People*, 162 Ill. 194, 198, 44 N.E. 496 (1896) (holding statutes authorizing disbarment must be "strictly construed, and not extended by implication to things not expressly within their terms"); *Charlton v. Fed. Trade Comm'n*, 177 U.S.App. D.C. 418, 543 F.2d 903, 906 (1976); *In re McBride*, 602 A.2d 626, 640-641 (D.C. 1992) (applying Rule of Lenity to statute governing disbarment); *United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995); *In re Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988) (finding that: "Because attorney suspension is a quasi criminal

punishment in character, any disciplinary rules used to impose this sanction on attorneys must be strictly construed resolving ambiguities in favor of the person charged."); *see also* Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 Geo. J. Legal Ethics 1, 14 (2002) (noting that "disciplinary proceedings seek many of the aims of criminal law and employ similarly punitive and stigmatizing penalties").

In direct contrast, Pennsylvania's Supreme Court fails to do so (just as it fails to apply the Sixth Amendment Right to Effective Assistance of Counsel *via* the Fourteenth Amendment), despite adopting the Rule of Lenity in other matters. *See Pennsylvania State Real Estate Comm'n v. Keller*, 401 Pa. 454, 165 A.2d 79, 80 (1980) (holding that a statute that imposes punishment in the form of a professional license suspension or revocation, for specified acts, is penal in nature and must be strictly construed; applying Section 1928(b)(1) of the Statutory Construction Act which originated from common law that: "The rule of lenity requires a clear and unequivocal warning in language that people would generally understand, as to what actions would expose them to liability for penalties and what the penalties. Application of the rule of lenity extends beyond criminal statutes.") (citing *Richards v. Pennsylvania Board of Probation and Parole*, 20 A.3d 596, 600 (Pa. Cmwlth. 2011) (en banc)); *McGrath v. Bureau of Professional and Occupational Affairs*, 146 A.3d 310, 316 (Pa. Cmwlth. 2016) (adopting the Rule in a Nurse Licensing matter before the State Board of Nursing).

The state's own precedence beckons the question: How fair is it for a court sitting in equity to apply the Rule of Lenity to all professional disciplinary matters but for those of attorneys?

At a minimum, the Court should grant, vacate, and remand the matter. That would allow the state court to consider the evidence of conflict and ambiguity existing within its Rules in serving to exclude relevant, mitigation evidence. In applying the Constitutional Avoidance doctrine pursuant to *Davis*, the circumstances of Petitioner's matter reveals that Respondent violated Petitioner's Due Process Rights and right to effective assistance of counsel by refusing to extend the inherent effectiveness requirement intertwined within the protections and intended safeguards of each right. Simply, the state cannot grant a partial constitutional right which the founders mandated, and this Court confirmed to be applied via the Fifth and Fourteenth Amendments. Respondent should be made to come forward to explain doing so specifically in Petitioner's matter. *Davis*, 139 S.Ct. at 2333.

The circumstances also reveal that Respondent intentionally chose to read and apply its Rules selectively. Respondent ignores the Warning Provisions within its own statutes and Rules to reject Petitioner's evidence, and aggravates such recklessness by admitting that it was not prejudiced by the possible delay. *See* App. *infra*, 18-19. As a result, the state court's decision results from its ambiguous application of its own precedence, statutes (1 Pa.C.S.A. § 1928(b)(1)), Rule of Court (126), and Disciplinary Board Rules (42 Pa.C.S.A.

§§ 89.2, 89.72, 89.74, 89.93(c), 89.141) which require that Petitioner be warned of any exclusion of his Expert Witness Evidence—especially when he was acting under the good faith belief that he was adhering to all Rules based on his counsel's representations. Nowhere in the record is there any Order issued by Respondent warning of such possible exclusion, despite all updates provided on his progress in obtaining the examinations and testing required to submit the evidence at hearing. Respondent's exclusion of it clearly reveals that the state court condoned a very arbitrary and liberal, case-specific application of its Rules as well as the Sixth and Fourteenth Amendments. *See* App. *infra*, 18-19. If so, how fair is it that the mitigation evidence gets rejected without simultaneously rejecting the parties' joint stipulations since all were to be submitted together? *See* App. *infra*, 14-15.

Even if this Court would consider the noted statutes to be merely vague, Respondent's application of them is unconstitutional (hence, the need for Petitioner's objection at hearing based on 42 U.S.C. § 1983). *See* Cert. Pet. 21. As this Court explained to all other courts in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by

> not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id.

Under the Rule of Lenity, the noted laws should be read narrowly in Petitioner's favor; and unconstitutional vagueness and ambiguity should also be found to exist in the text (*i.e.,* "The order may provide that failure to comply with it shall have the consequences described in § 89.93(c)[.]") and in Respondent's application of them. A remand will enable Respondent to evaluate relevant developments since the Petition was filed in this case that bear on the question of mental health as it not only affects attorneys as officers of the court nationwide, but also the courts nationwide themselves. On June 28th, 2019, Petitioner filed a motion for Appointment of Counsel in the Third Circuit pursuant to its Rules for representation and to present mitigation evidence. Around that same time, Petitioner also filed a similar motion in the District Court for the same purposes. As of the filing of this Supplemental Brief, the Circuit has not ruled. On August 1st, the District Court denied the motion finding its Rules do not authorize it, despite the Fifth and Sixth Amendments, and the Circuit's Order which consolidated the matters for hearing. *See* App. *infra*, 192-193.

At the first listing, the District Court continued the matter until October 17th, 2019, upon Petitioner agreeing to an interim suspension of his District Court Bar membership in exchange for being allowed to present his medical and neuropsychological Expert Witness evidence at the next listing—exactly as the state court proposed to Respondent during its hearing. *See* App. *infra*, 17. Needless to say, the presentation of such evidence by Petitioner *pro se* is impossible as it relates to his own physical and mental well being. Petitioner's ability to obtain counsel is further aggravated by other counsel declining to take his matter because of fear that Respondent shall retaliate against them.

As to the courts, on August 20th, 2019, for example, Pennsylvania's Judicial Conduct Board filed charges against one of its judges in the matter of *In re Lyris Younge*, No.: 2 JD 2019. In this matter, Pennsylvania's Superior Court found that the judge violated the Due Process rights of children, parents, and attorneys appearing before it. *See* Zack Needles, *JCB Files Complaint Against Former Phila. Family Court Judge Lyris Younge* at https://www.law.com/thelegalintelligencer/2019/08/20/jcb-files-complaint-against-former-phila-family-court-judge-lyris-younge/?slreturn=20190817214644 (August 20, 2019). Upon reasonable knowledge, information, and belief, the judge will raise existing mental health impairments in mitigation and as a defense. Yet the state's treatment of that situation stands in marked contrast to those same efforts of Petitioner serving to punish him in his attorney capacity, which now causes to defame him in his professional and personal livelihoods.

Given Respondent's silence, it is not surprising that it presumptively opposes certiorari here. But, how fair is it for a state to allow for defense counsel in a quasi-criminal prosecutorial matter, but not require the same to be effective? Respondent prefers to insulate itself from this Court's review in comparison to decisions of other state and federal courts that—unlike the state court's ruling below—uphold the review of attorney disciplinary matters based on the Constitution and precedence of this Court. But, Respondent is unwilling to defend those broad principles in this Court. Instead, it conjures a presumption that its prosecution and review of the matter was constitutionally correct and in accordance with its own rules. Even if Respondent's presumption was correct, that would be a reason to grant review under the framework of the Rule of Lenity and the Constitution—not deny it. If, as Respondent apparently contends, the state court is merely upholding its existing law without further applying core constitutional principles and without addressing critical questions—this Court should intervene to create a new relevant standard or clarify the old one.

Otherwise, the Court will repeatedly face cases like this one, in which the party opposing certiorari will silently defend the judgment below on grounds not addressed by the lower court. Contrary to Respondent's contentions, Petitioner's Expert Witnesses and their initial narrative Reports were available for Hearing purposes and were believed to have been presented without providing supplemental Reports. Finally, Respondent does not, and cannot, dispute the tremendous

practical importance of the question presented, as the state court, itself, declared that it is just not willing to go that far in extending this Court's established Law to Pennsylvania—as other states, territories, and federal Circuit Courts have done. *See* App. *infra*, 6.

CONCLUSION

For the foregoing reasons, the state court's record is infirm and review by this Court is warranted. The Court should at a minimum grant, vacate, and remand this case in light of *United States v. Davis* and all other precedence of the states which already adhere to the principles and precedence of that Law. If the Court welcomes *Amicus Curiae*, the National Association of Criminal Defense Lawyers welcomes an invitation for possible consideration and input. Lastly, if this Court deems appropriate, all other matters seeking to apply the Disbarment Order at issue should be stayed until further Order of this great, Supreme Court.

Dated: September 26, 2019

Beholden and Respectfully submitted,

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