No. 18-6160

In The

Supreme Court of the United States

KEVIN R. CARMODY,

Petitioner,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, *et. al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

PETITION FOR REHEARING

KEVIN R. CARMODY
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Savoy, IL 61874
217-356-0942

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this PETITION FOR REHEARING is as follows:

Board of Trustees of the University of Illinois

Ilesanmi Adesida

Sharon Reynolds

Joseph Bohn

Deborah Stone

Elyne Cole

Michael Hogan

Jong-Shi Pang

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Pursuant to Rule 44, Petitioner respectfully submits this *Petition for Rehearing* of the Court's January 7 2019 denial of Petition for Writ of Certiorari. Petitioner humbly acknowledges several errors in the Petition resubmitted on November 26 2018. The Petition Table of Authorities on page v, as well as pages 1 and 2, erroneously refer to the *Carmody II Appeal* and *Carmody II Decision* as "16-335" instead of "16-1335". Also, the date at I.B in the Report (App. 191) properly should have been flagged "[sic]".

REASONS FOR GRANTING REHEARING

I. THE PERRY MEMORANDUM WAS NOT THE ONLY ATTORNEY-CLIENT OR ATTORNEY-WORK DOCUMENT PROVIDED BY DEFENDANTS IN DISCOVERY AND REVEALS SHAM HEARINGS

Despite Defendants' attorneys claims, numerous "privileged and confidential" attorney-client documents or attorney-work products were provided to the Plaintiff and his attorney, see [Dkt. #55-1, p. 81 of 164], [Dkt. #55-1, p. 82 of 164], etc. (Compare [Dkt. #55-1, p. 82 of 164] with [Dkt. #54-1 p. 70 of 159].) In any case, once provided, Plaintiff and his attorney could not unlearn "facts" alleged in the Perry Memorandum. The fact that multiple deponents gave sworn statements that conflict not only with the assertions presented in the Perry Memorandum, but even with their own knowledge of the memo itself and its distribution, reveal sham pre-termination and post-termination Hearings. The

fact that the privilege logs are intentionally deceptive and do not properly uniquely identify the Perry Memorandum support Plaintiff's alleged sham.

The Perry Memorandum identifies one specific policy section alleged violated by Carmody. Reynolds declined to identify specific policy sections alleged violated in her response to Carmody's pre-termination request [Dkt. #51, pp. 40-41 of 197], and Bohn and others knew it [Dkt. #54-1, p. 83 of 159]. However, the Perry Summation (App.#10)[App.#45 - App.#57], submitted to the post-termination Hearing Officer only after Carmody rested, identified six policy sections allegedly violated.

The fact that Michael Corn, "the University's Chief Privacy and Security Officer" (per page 3 of the Perry summation), made pre-charge statements to Perry, then afterwards was intentionally misrepresented as making a conflicting statement in the Bohn investigation report, reveals a pre-termination sham that was fully revealed in the post-termination Hearing when Corn testified. (See Perry deposition [Dkt. #46-4, page 58 and 59]). The privilege logs fully reveal the numerous interactions of Perry, Bohn, and others right up to the employment termination.

II. HEARING OFFICER MICHAEL LEROY'S REPORT AND CONDUCT ARE ALONE SUFFICIENT TO WARRANT REVIEW

The Report is grossly and obviously inaccurate and self-serving and strongly supports Plaintiff's Petition. Leroy made disclosures in a November 8

2010 email [Dkt. #54-1, p. 106-108 of 159], and clearly and properly identified Hearing Officer challenges available to Carmody for substantial bias and substantial prior relationship.

Despite Leroy's claims in deposition, Leroy knew Carmody was bringing a paid court reporter to the post-termination Hearing [Dkt. #54-1, p. 109 of 159]. Leroy's Report vaguely and cleverly worded I.D.2 in fact documents that Kirchner had a Carmody-paid court reporter waiting outside the Hearing room and was denied entry by Leroy. Defendants admitted Leroy denied a Carmody-paid court reporter at the post-termination Hearing [Dkt. #28, p. 3 of 5, item 35], [Dkt. #1, page 8 of 15, item 35].

Of particular note, is that Perry's letter [Dkt. #49, pp. 12-13 of 148] on page 13 tells both Leroy, Yasunaga, and both Kirchner and Wyman that Perry has ruled "a court reporter will not be permitted". Hearing Officer Leroy's later "denial" of Kirchner's motion to allow a Carmody-paid court reporter into the Hearing, raises the question of whether constitutional due process is infringed on and significant bias revealed when the government prosecutor is allowed to assert authority that the Hearing Officer thinks he has, or when the Hearing Officer is not freely and independently making a ruling?

University Attorney Shig Yasunaga was present at the Hearing [Dkt. #88-1 , pp. 40,41 of 52, Leroy deposition pp. 79 thru 80], [Dkt.#46-4, page 21 of 37, Perry deposition p. 79] and copied on communications [Dkt. #54-1, p. 96,109,123,124,etc.

of 159]. However, Yasunaga's name, even though Perry identified Yasunaga as Leroy's attorney, never appears in any of the three Leroy Reports.

On October 22 2010, when Leroy asked "Are my notes of the hearing subject to subpoena?", that same day, after Bohn volunteered to take the lead on a response, Cole asked Bohn to respond on her behalf [Dkt.#54-1, pp. 102,103 of 169].

Leroy's baseless concern for Pang, characterization of Carmody's "self-help", and suspicion of witness intimidation as expressed to Chief O'Connor, was pure fiction. (Pang, who reported directly to Adesida, was clearly involved prior Carmody's receipt of Adesida's charge letter [Dkt.#46-9, p. 4 of 4] in addition to being named in the Perry Memorandum. Perry admitted Pang's relevance and indicated intention to call Pang as a witness [Dkt. #54-1, p. 96,70 of 159] but the Report documents Pang did not appear.) University Laboratory High School ("Uni") is located immediately north of Pang's IESE Department building, separated only by a parking lot. In fact, Carmody dropped off his son at Uni, circled the block and stopped at a traffic light, whereupon Pang pulled up alongside and greeted Carmody and a short "face-to-face" friendly exchange took place, as documented in the record. The record shows no complaint by Pang, but it does show Pang unavailable to Carmody for the nine months prior the Report, despite Perry's claim Carmody had a due process right to confront witnesses [Dkt.#1-1, exh. 12, pp. 32 through 34 of 53, item 9 on p. 33] and Pang's identification as a witness. Perry indicated

that Kirchner (and therefore Carmody after Kirchner's passing), was not prohibited from contacting employees and in fact responsible for securing the presence of witnesses [Dkt.#1-1, exh. 12, pp. 32 through 34 of 53, items 5 and 6].

In his email to Chief O'Connor, Leroy claimed Kirchner threatened to sue him (App. 161) thereby differing not only with Carmody's description (App. 164) but with the "implied threat" in the Report at I.G.6 and I.G.7. At App 161, Leroy claims Carmody "shouted out his own cross exam questions", but such claim does not appear in the Report.

Perry indicated Carmody's right to confront his accuser at [Dkt.#1-1, pp. 32 through 34, item 9 on p. 33]. At I.D.5.v.2 Leroy indicated "the need for Mr. Carmody to confront his accuser as a function of his Due Process rights". At I.E.1.viii, Leroy overruled Kirchner's objection as to hearsay evidence. At II.C.2.c Leroy found Carmody "failed to report a breach", but to whom? The "supervisor charge" was presented to Carmody for the first time in employment termination letter. Pang was disclosed as a University witness along with the content of expected testimony [Dkt. #54-1, p. 70 of 159]. Bohn's interview of Pang at [Dkt. #46-13, pp. 6,7 of 11], and Bohn's deposition at page 59 [Dkt. #46-8, p. 16 of 35], clearly indicate Pang as a witness source against Carmody but the Report shows Pang never testified. Does the Court see a conflict between I.D.5.v.2 and I.E.1.viii? Given I.D.5.v.2, when the supervisor identified in the employment termination letter and on page 40 of the Thompson deposition [Dkt.#46-19, p. 11 of 23] never testifies, is the charge exculpated?

(At trial, Stone testified Carmody should have reported the alleged breach to Thompson (App.#13)[App.#150 - #151]; Stone's testimony is directly in conflict with the Perry Memorandum and just one more example of deceptive conduct.)

At App. 146 Leroy granted a 120 day extension so that Carmody could secure proper legal representation. However, just twenty-seven minutes later, at App. 144, Leroy indicated that he merely was "inclined" to grant the motion. At I.I.18 in the Report, just over a month later, in the fog of Leroy's inclination, and despite the granted 120 day extension and knowledge that Carmody preferred an attorney representation in dealing with the Hearing Officer, Leroy directly contacts Carmody and introduces additional concern and burden on Carmody. Does the Court believe that post-termination rulings ought to be clear, firm, and immutable, and when they aren't, is fairness harmed? Does the Court believe the unrepresented Carmody ought to be able to understand Leroy's ruling on a motion for 120 day extension, when Kirchner, a seasoned attorney, even could not understand Leroy's ruling at I.E.1.x?

Curiously, page 9 of Perry's summation indicates "at least" six different specific sections of the "Appropriate Use Policy" were violated, but that:

> "It is true that during the hearing several witnesses pointed out different specific sections of the Appropriate Use Policy they felt were violated. The fact that each of them could identify different sections that had been violated supports the University's position that the

conduct was an egregious violation of the policy and worthy of immediate dismissal."

One of the three versions of the Report indicated a single specific "Appropriate Use Policy" section alleged violated, and it was not the same as the hidden specific section alleged violated in the Perry memorandum. The record shows Carmody requested Notice of the specific policy sections alleged violated in August 2010 [Dkt. #69-1, pp. 1 through 3 of 3], and Kirchner requested the same Notice on September 15 2010 [Dkt. #55-1, pp. 1 through 3 of 164, at page 2 "...specific policies claimed to be violated..."]. On September 21 2010, Kirchner again wrote to University Attorney Clower and stated: "We have not been provided citations to any specific policy you claim has been violated."

If Leroy, Cole, and Perry made full disclosure of their relationships, then Carmody could have asked for their recusal (as indicated by Leroy in [Dkt. #54-1, p. 106-108 of 159], but without knowledge of their private communications and relationships, Carmody was denied that opportunity. Leroy was unavailable to Carmody at trial [Dkt. #88-2, pp. 1 through 5 of 5].

III. DECISION-MAKER ELYNE COLE'S DECISION AND CONDUCT ARE ALONE SUFFICIENT TO WARRANT REVIEW

At App. 218, Cole indicated her review of "the record from the appeal hearing" all the way through the end of the Hearing on December 16 2010 when the University rested its' case; Cole only needed to know one side of the matter to make her Decision.

Perry's summation (App.#10)[App.#45 - App.#57], at page 2, documents Carmody's submission of a "summary for the defense" received June 26 2011. (Perry's summation contains no direct reference to Pang.)

After submitting his Report on July 11 2011, later the same day after Leroy's "charge as a Hearing Officer" had ended, Leroy used a private email account and sent an empty email with the "Subject: Suggestion" and absolutely no text but with an attachment which contained a letter to Associate Provost Cole and with Leroy's University credentials at the end, to Cole with cc to Perry [*Carmody II Appeal,* (App.#4)[App.#18 - App.#19]. Leroy indicates that due to his Hearing Officer charge he "did not offer possible resolutions", but then proceeds to suggest his own "private thought" and a suggestion for "improving the potential for a resolution". Leroy then indicates "Carmody is very bitter" and that Leroy's suggestion would perhaps "help him (Carmody) move on in his life". (See also [Dkt. #90-1, p. 94 through 96 of 99] which show Hearing Officer Leroy submitted the Report and ended his role at 2:51pm, and private citizen Leroy using his private email account weighed in on Carmody at 6:38pm the same day.) Plaintiff's trial exhibit #43 page 6 shows Cole thanking Leroy for the suggestion with cc to Perry at 11pm the same day, and stating "Accordingly, I will take it under consideration."

Defendants admit [Dkt. #28, p. 4 of 5, item 53] Cole's affirmation of Carmody's original employment termination was with Hogan's

concurrence [Dkt. #1, p. 11 of 15, item 53]. (Also see [Dkt. #90-1, p. 97 through 99 of 99].) Both Hogan and Cole knew that per clearly established constitutional due process law, Carmody had a right to a meaningful, notice of the charges, opportunity to confront accusers, unbiased hearing, and unbiased decision.

IV.THE RECORD AND POST-TERMINATION UNIVERSITY DISCLOSURES DOCUMENT PLAINTIFF'S WHISTLEBLOWER CONDUCT AND IMPROPER POST-TERMINATION EVIDENCE

Plaintiff's original complaint included a whistle-blower claim as documented in Exhibit 16 [Dkt. #1-1 page 52 of 53], a May 21 2007 memo from Carmody to Thurston. Bohn's notes from the alleged interview of Thurston on July 29 2010 [Dkt. #55-1, pp. 114-115 of 164] includes Thurston's desire to be "part of a larger group of people during this investigation" because she doesn't "want a situation that Kevin perceives me (Thurston) to be the only person filing a complaint". The Thurston deposition [Dkt. #46-15] does not reveal the same information claimed by Bohn. The Thurston deposition page 46 line 5 through page 47 line 6 [Dkt. #46-15, page 13 of 22], reveals Thurston was contacted by the Illinois Office of Executive Inspector General (OEIG) in 2010. Thurston said "there was some concern about popcorn" involving Harry Wildblood and Thurston's husband James Carnahan involving their use of University resources, but Thurston claimed no direct involvement and could not remember who made the complaint. Thurston denied being angry at Carmody

prior to the Group Exhibit A email situation and could not recall advocating Carmody's employment be terminated.

The January 15 2011 Leroy Report documented possible retaliation against Carmody and clearly showed Kirchner's defense had convinced Leroy that "other detractors in the College of Engineering" had "sufficient motivation, skill, and means to commit this offense", but Leroy removed that information from the final version. In deposition Pang verified a March 18 2010 Carmody email to Pang which indicated Pang told Carmody that Thurston had made recent complaints about Carmody [Dkt. #61, Page 10 of 129, Pang Exhibit #7 on page 32 of 129] by stating: "I also believe Kevin did not lie about this."

Attorney Ruth Wyman's November 10 2010 email to Leroy and Perry, with Perry's response two days later [Dkt. #49, pp. 12-17 of 148], on page 16 of 148, documented the last two of the University's thirty-seven Post-termination Hearing Disclosures, #36 and #37. University Disclosure #36 was a (Thurston) email from Carmody's personnel file dated May 24 2007, three days after Carmody's complaint regarding public resources being used for private non-University consulting on several large industrial popcorn machines, and undercuts the *Carmody I Seventh Decision* regarding post-termination. (University Disclosure #37 alone should have opened a fourteen year window on the whistleblower claim.) The presence of University Disclosure #36 in the post-termination proceedings support the case that the actions taken against

reinstating Carmody's employment were intentionally retaliatory, and both Cole and Hogan knew or should have known of the retaliation.

In deposition [Dkt. #57, page 13 of 185, p. 45 line 18 through p. 46 line 12], when shown the cover page of University Disclosure #5 (Cole exhibit #10 [Dkt. #57-1, page 48 of 51]), the Sixth Edition ethics handbook titled "A Handbook For Good Ethical Practice", Stone (like Cole), indicated no knowledge that Disclosure #5 was used in Carmody's post-termination Hearing. In the Report at I.B, Leroy accepted the University evidence binder containing University Disclosure #5.

Curiously, the public record of University of Illinois Board of Trustees website (http://www.trustees.uillinois.edu/trustees/agenda/September-23-2010/009a-sep-Ethical-Practice.pdf) shows President Hogan making a motion to the Board of Trustees for adoption of the Sixth Edition of the ethics handbook and their approval on September 23 2010. September 23 2010 was a busy day, but the timeline shows the adoption vote took place in late afternoon and only after: Carmody's employment termination was signed [Plaintiff's Trial Exhibit #17] by 10:13am, shortly after 11am, Clower sent an email with attached letter to Judge Leonhard [Dkt. #46-23, pages 1 through 3] to weigh in on Kirchner's motion for lifting the protective order, Judge Leonhard lifted the protective order preventing Carmody from discussing Group Exhibit A over the noon hour [Dkt. #46-7], and Carmody was fired prior to any Board of Trustees approval and distribution of the ethics handbook to University

employees. The Board of Trustees had been used to manufacture untimely post-termination evidence against Carmody; as Leroy correctly indicated in the Report at I.E.1.vi, "formal rules of evidence do not apply".

The September 16 2010 minutes of the Board of Trustees Governance, Personnel, and Ethics Committee (https://www.trustees.uillinois.edu/trustees/minutes/2010/GovPersEthics-Minutes-Sept16-2010.pdf) and the September 23 2010 minutes of the Board of Trustees (https://www.trustees.uillinois.edu/trustees/minutes/2010/2010-09-23-uibot.pdf) establish that the Sixth Edition of the ethics handbook was discussed only in executive session on September 16 2010.

CONCLUSION

For all of the above reasons, the *Petition for Rehearing* and should be granted.

Respectfully submitted,

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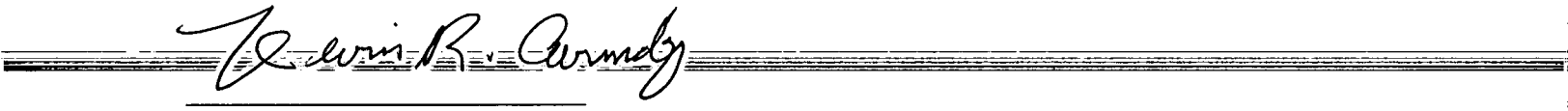
Original Petition filed: September 15 2018
Re-filed: November 26, 2018
Denied: January 7 2019

CERTIFICATE OF PRO SE PETITIONER

As I am the self-represented Pro Se Petitioner in this Petition, I hereby certify that this Petition for Rehearing is presented in good faith and not for the purpose of delay, and restricted to the grounds specified in Supreme Court Rule 44.

February 1 2019

Respectfully submitted,



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