No. 20-19-1430

ORIGINAL

IN THE

Supreme Court of the United States

RICHARD POLIDI,

Petitioner,

v.

MICHELLE K. LEE, JAMES O. PAYNE, ELIZABETH U. MENDEL, JOHN HEATON, KIMBERLY C. WEINREICH, UNITED STATES,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment to the United States Constitution provides a legal or declaratory remedy, consistent with Bivens v. Six Unknown Named Agents, in an instance when the same individuals entrusted to enforce high ethical standards on behalf of a Federal bar commit acts and omissions in contravention to the Constitution and to the ethical standards they enforce and promulgate, where no other meaningful remedy has been available and the respondents have taken the position that none is cognizable wherein the petitioner may obtain the single document he has sought from the outset, where that document is known by the respondents to be necessary for the petitioner to defend himself in the ethics matter brought against him by that Federal bar authority, to be neither privileged nor confidential, and to be in their possession.

2. Whether a Federal ethics attorney simultaneously (a) is permitted to withhold evidence, known to be exculpatory, notwithstanding the disclosure mandate under Brady v. Maryland based on a rationale that the attorney is not functioning as a prosecutor because the matter is not criminal in nature, even if a liberty right to work in one's field is placed at risk; and (b) is entitled to not only qualified immunity but absolute immunity, based on a rationale that the attorney is nonetheless functioning in a manner analogous to that of a criminal prosecutor; thereby eliminating a basic procedural safeguard in the ethics prosecution while simultaneously leaving the defendant without a remedy for the very misconduct that safeguard prevents, further enabling the continued withholding of the single necessary document.

3. Whether the United States Court of Appeals for the Federal Circuit may decline jurisdiction over the appeal in the instant matter under 28 U.S.C. §1295(a)(1), where the Federal Circuit simultaneously deemed the claims to involve the same issues as those in a prior appeal concerning the disclosure of exculpatory evidence over which it exercised exclusive appellate jurisdiction, where the United States Court of Appeals for the Fourth Circuit transferred the prior appeal to the Federal Circuit upon deeming the Federal Circuit to possess exclusive jurisdiction over those issues, where the United States Court of Appeals for the D.C. Circuit made clear in Jaskiewicz v. Mossinghoff that the Federal Circuit has exclusive jurisdiction over appeals relating to who may practice before the USPTO, where the Department of Justice on behalf of former USPTO principals indicated that the Federal Circuit has exclusive jurisdiction, and where the Federal Circuit previously exercised its subject matter jurisdiction in the same appeal when considering a motion of the petitioner concerning unethical conduct and deemed those issues to be considered more appropriately together with the merits; whether the Federal Circuit may also deprive the Petitioner of any further right of appeal notwithstanding the import of the present issues, by making a determination concerning issue preclusion without subject matter jurisdiction; and whether absolute immunity applied with a broad brush divested the District Court of subject matter jurisdiction as indicated thereby, or the District Court instead retained subject matter jurisdiction for the purpose of declaratory relief.

4. Whether the Fifth Amendment to the United States Constitution permits an ethics prosecution based on a premise known to be false as well as a reciprocal ethics prosecution knowingly based thereon, as neither the Respondents nor any other party has denied in this

matter or otherwise, and to which prosecution the Federal Circuit has acquiesced by deeming the instant matter to be estopped notwithstanding the unopposed allegations; and whether it permits such acquiescence when the Federal Circuit simultaneously avoided a duty to take appropriate action as prescribed by the Code of Conduct for United States Judges when confronted with ethics violations, which are unopposed and in plain view, in connection with the secreting of documents by other attorneys including the petitioner's former attorney in the underlying North Carolina prosecution, which violations have interfered with the petitioner's prosecuting the present matter, prior to proceeding further.

PROCEEDINGS BELOW

This petition is appealed from the Orders, Opinions, and Judgments located at the CM/ECF Docket of Polidi v. Lee et al., Eastern District of Virginia Case No. 1:17-cv-01133-LMB-IDD, Docket Entry Nos. 21, 26, 38, 39, & 42, granting a motion to vacate a scheduling order and dismissing the case for a lack of subject matter jurisdiction, and the appeal thereof, United States Court of Appeals for the Federal Circuit Case No. 18-2277, Docket Entry Nos. 39, 46, 47, 48, 52, & 53, denying motions to vacate and to bifurcate and dismissing the appeal for a lack of jurisdiction.

TABLE OF CONTENTS

Table of Authorities

Cases:

Constitutional Provision:

Statutes:

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

JURISDICTION

This petition for writ of certiorari is from a final judgment by the United States Court of Appeals for the Federal Circuit on November 8, 2019, petition for panel rehearing denied on January 16, 2020, in a direct appeal of dismissal of the case for a lack of subject matter jurisdiction in the United States District Court for the Eastern District of Virginia based on alleged violations of the Fifth Amendment to the United States Constitution. Accordingly, this Court is respectfully submitted to have jurisdiction over this petition and the matter referenced herein pursuant to 28 U.S.C. §1254 and 28 U.S.C. §2101.

CONSTITUTIONAL PROVISION & STATUTE

"No person shall be . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

"The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction (1) of an appeal from a final decision of a district court of the United States . . . in any civil action arising under . . . any Act of Congress relating to patents or plant variety protection . . .." 28 U.S.C. §1295(a)(1).

STATEMENT

The petitioner respectfully submits the obvious: that all of us share a primary loyalty to the very concept of the rule of law. While no one is above the law, its corollary is true as well. No one is below the law either.

In 2013, the North Carolina State Bar accused the petitioner of not disbursing funds, received in 2012 in connection with the representation of a client, to the client as he was required to do. This accusation is believed to be contained in a notarized report prepared by a deputy counsel of the Bar and by an investigator. The report was submitted to the grievance committee of the Bar for consideration and referral relating to further prosecution. The petitioner was given no opportunity to submit a response, as is otherwise customarily allowed.

The rule of law did not allow the petitioner to disburse the funds to the client. The North Carolina Rules of Professional Conduct required the petitioner to refuse to disburse the funds to the client. Those facts were known prior to the submission of the report.

The client had assigned the right to those funds (i.e. transferred ownership) to a third party in 2012 in an arms-length transaction. The funds therefore did not belong to the client. It is believed that the Bar concealed the existence of the assignment in its notarized report, even though the Bar had knowledge thereof.

The petitioner nonetheless did transfer funds to the client in 2012 and 2013 after receiving the above funds. The order in which the petitioner handled the subject funds was the only one in which they could have been used for the benefit of the client without running afoul of ethical or legal requirements in view of the existence the assignment, the requirement that the funds could not be countable to (controlled by) the client, and the order of priority existing between an attorney fee and the assignee. The assignee was to be due funds and satisfied in full

upon the receipt of additional proceeds in connection with the matter at a later dater, as liability was already established. A portion of the attorney fee was effectively being refunded to the client to make this possible.

Notwithstanding the foregoing, it is believed that the Bar proceeded to accuse the petitioner of criminal misconduct in the report, wherein the *sine qua non* of criminal misconduct was the non-existence, or concealment, of the assignment. In view of the assignment, there was not, nor could there have been, criminal activity.

In view of an increased possibility of a criminal prosecution in North Carolina if he refused to surrender his license, the applicant agreed to the surrender, even where a prospective criminal prosecution would have been ungrounded in fact and law. The petitioner is aware of the pressure sometimes applied by prosecutors to secure a plea from a defendant.

After the surrender, the applicant began to question seriously whether ulterior motives concealed from the him during the prosecution were operating to manipulate the Bar to pressure the petitioner to surrender his license. That belief has since grown, particularly in view of the overall procedural history of this matter in which no one, ever, has been forthcoming with the petitioner. The petitioner believes the ulterior motives likely to have been of a despicable nature.

It is respectfully noted that the statements of fact in both the affidavit of surrender and the consent Order effecting the disbarment are accurate. The petitioner is not seeking to withdraw or amend those statements of fact. The petitioner never expressly stated that he believed those facts to warrant disbarment. He did express a general opinion that he could not defend successfully against ethics charges, a statement which is required of all surrender

affidavits in North Carolina, a statement which is submitted to be similar to a plea of no contest.

After the surrender, a preliminary investigation took place before the USPTO in connection with a reciprocal disciplinary proceeding. The petitioner advised the USPTO staff investigator Kimberly Weinreich that he had concerns relating to due process in North Carolina, both in a telephone conversation and in written correspondence. The petitioner also requested an opportunity to review the report mentioned above, which is customarily provided to a defendant in an ethics prosecution in North Carolina; the report is neither confidential nor privileged.

Ms. Weinreich did not respond to the telephonic and written requests prior to the initiation of the USPTO disciplinary proceeding. The petitioner subsequently wrote to Ms. Weinreich, asking whether an attempt was made to obtain the item. To date, no one has expressly informed the plaintiff whether the USPTO obtained it.

The petitioner conveyed the same issues to Elizabeth Mendel, a USPTO Associate Solicitor, after the initiation of the USPTO disciplinary proceeding. Ms. Mendel would not advise whether any item was obtained from the North Carolina State Bar.

The petitioner then sought leave from the USPTO to request the issuance of a subpoena by the Eastern District of Virginia to obtain the report, and he simultaneously requested discovery from the Office of Enrollment & Discipline. James Payne, former Deputy General Counsel, denied both requests on the ground that hearing before the USPTO was "Uncontested." Importantly, that hearing on reciprocal discipline was deemed uncontested whether a response would subsequently be filed or not.

The petitioner inquired twice in writing with Mr. Payne about the position of the USPTO on whether exculpatory evidence must be disclosed. There was no response to either inquiry, from Mr. Payne or anyone else.

The petitioner requested that the USPTO issue an Order requiring the OED to disclose any exculpatory evidence in its possession. There was no response to this request either.

The petitioner then submitted a motion specifically under Brady v. Maryland, 373 U.S. 83 (1964), seeking the disclosure of exculpatory evidence. Ms. Mendel expressly opposed this motion (as opposed to stating simply, e.g., that the USPTO was not in possession of material known to be exculpatory). At this juncture, the petitioner had already sought three extensions of time yet still did not have the document he sought as proof, nor the information contained therein. Mr. Payne issued no ruling on the motion for exculpatory evidence prior to executing an Order of exclusion from the USPTO.

The petitioner later requested that the Assistant United States Attorney appearing on behalf of the USPTO, in connection with a petition for judicial review, discuss substantive issues with him. The United States Attorney obviated all substantive discussion, inquiring only about a possible remand to allow the USPTO Director Michelle Lee to issue a ruling.

The petitioner believes that multiple individual-capacity Defendants have concealed known misconduct in the underlying disciplinary proceeding, which misconduct was known to provide a defense to the USPTO reciprocal proceeding as it evidenced substantial deprivations of due process in connection with the North Carolina proceeding. The petitioner submits that the reciprocal proceeding has constituted a continuation of fundamentally dishonest conduct in the North Carolina prosecution.

The other parties challenged any requirement to disclose exculpatory evidence, or otherwise permit any discovery, in connection with the review of the Order of exclusion. Similarly, in the District Court in the present matter, the Respondents sought to vacate a scheduling Order in which discovery was authorized, immediately after its issuance. They indicated to the Court their right to an interlocutory appeal on any adverse ruling on qualified immunity prior to the authorization of discovery. They asserted virtually every conceivable immunity in their defense. In the appeal of the instant matter, the respondents opposed the petitioner's request that the Federal Circuit take appropriate action in view of the fact that the petitioner's original attorney in North Carolina had not sent a single document in response to the petitioner's request for communications between that attorney and the North Carolina bar, which communications belong in the petitioner's client file, in nearly three years notwithstanding indications that they would be sent.

Each effort to learn the truth has been challenged. It is respectfully submitted that acquiescing to their requests each time has reflected an imbalance. The manner in which the ethics authorities proceeded since the outset is submitted to be consistent with neither the due application of the rule of law nor the ethical standards required of practitioners. As they have sought to defend their conduct at each step and place the blame on the petitioner, they have yet to be held accountable for their unjust concealment of the truth. Instead they have repeatedly declared that the petitioner did not submit a response notwithstanding the extensions of time and therefore must be at fault.

REASONS FOR GRANTING THE WRIT

It is submitted that, when there exists prosecutorial misconduct, the fault ends there. It is not appropriate to accuse a defendant for failing to fight back in the face of such misconduct. Not fighting back provides no excuse for the prior misconduct. The issue is temporal; the impropriety exists at the time of the misconduct committed under color of law, and subsequent actions are distorted thereby. That is particularly the case in view of the substantial disparities in power which exist; after all, it is the rule of law, not power, which governs. One cannot fail to defend against a prosecution that is fraudulent. The failure is in the prosecution. One can try to respond in the best way possible, although it is often unclear what that is.

It serves no legitimate purpose and is not in the interest of justice for an ethics attorney to withhold exculpatory material. The Federal Circuit, however, has most recently suggested that such concerns are frivolous. Such incongruity does not appear consistent with the rule of law. Opinions based thereon, it is respectfully submitted, amount to a legal equivalent of a house of cards.

Selectively applying and withholding the rule of law appears to amount to a crime against the rule of law. In fact, without its due application, the rule of law does not exist; its application is every bit as important as its constitution. Here, it is submitted that the opinions have evidenced decision to look the other way, not once, but repeatedly. However, there exists no judicial notice that an ethics attorney always acts in good faith. The rule of law should not leave the room when an ethic attorney is alleged to have committed misconduct, particularly while simultaneously refusing to disclose exculpatory evidence. The rule of law should be

allowed to work and do its job. In fact, the purpose of immunity is not to be as impenetrable as possible; that is easy. The goal is to provide due immunity while still allowing the rule of law to work, a challenging balance indeed. Simultaneously, turning back to the rule of law provides due objectivity and helps to discourage misconduct, including that which might otherwise be reckless.

The most recent opinion of the Federal Circuit, viewed in the worst light, suggests a conclusion that, because a defendant pleads no contest or its equivalent or otherwise does not oppose a charge, it does not matter whether the defendant was guilty or not, regardless circumstances surrounding the plea.

The respondents' refusal to disclose exculpatory evidence, combined with the refusal to provide discovery, is submitted to increase the importance of recognizing a *Bivens* claim, particularly in view of the present position of the Department of Justice that the exculpatory evidence is unavailable under any other cause of action. This action has constituted a further effort by the petitioner to obtain the single document and learn the truth, a necessary step in seeking a meaningful remedy.

CONCLUSION

It is very respectfully submitted that the instant matter provides an opportunity to leave no ambiguity that ethics attorneys, who reside at a pinnacle of our legal system, are held to at least the very standards of conduct they expect and demand of all other attorneys, including by holding that ethical and legal safeguards required of prosecutors under Brady v. Maryland apply to ethics prosecutors as well. Such a holding may potentially have a positive effect throughout the legal system over which ethics attorneys obviously hold considerable power, from top to bottom, for ethics prosecutors oversee the entirety thereof. In fact, this issue should not even be an issue.

This the 15th day of June, 2020.

Respectfully Submitted,

By: _____

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