No. _____

In the Supreme Court of the United States

LORING EDWIN JUSTICE,

Petitioner,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Justice, relying on *Spevack v. Klein* and *McKune v. Lile*, invoked his Fifth Amendment right in a Tennessee disbarment proceeding. Did Tennessee violate the self-incrimination clause when it forced Justice to testify or suffer adverse inferences costing him his Tennessee law license?

2. Tennessee acknowledges this Court requires attorney disciplinary proceedings to be quasi-criminal but imposes civil law standards of proof for disbarring an attorney (*e.g.*, preponderance) and administrative law standards for review on appeal (*e.g.*, affirming factual findings based on a "scintilla or glimmer" of evidence). Tennessee's attorney disciplinary system also combines all investigative and prosecutorial functions within the Tennessee Supreme Court – going so far as to allow the panel judging the accused attorney, to prosecute the accused. Does the structure of Tennessee's disciplinary system violate the due process clause and *In re Murchison*, 349 U.S. 133 (1955) and *In re Ruffalo*, 390 U.S. 544, 551 (1968)?

LIST OF PROCEEDINGS

Supreme Court of Tennessee

No. E2017-01334-SC-R3-BP

Board of Professional Responsibility, Appellee v. *Loring Edwin Justice*, Appellant.

Date: July 2, 2019

Chancery Court for Knox County, Tennessee

No. 184818-3

Board of Professional Responsibility, Plaintiff v. *Loring Edwin Justice*, Defendant.

Date: May 31, 2017

Disciplinary District II of the Board of Professional Responsibility of the Supreme Court of Tennessee

No. 2013-2254-2-WM

In re: Loring Edwin Justice
BPR # 19446, Respondent
An Attorney Licensed to
Practice Law in Tennessee
(Knox County)

Date: March 9, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES AND RULES

OPINIONS BELOW

The Tennessee Supreme Court's opinion is reported at *Board of Professional Responsibility of the Supreme Court of Tennessee v. Loring Edwin Justice*, 577 S.W.3d 908 (Tenn. 2019) (App. 1-55). The order on rehearing was issued on July 22, 2019 (No. E2017-01334-SC-R3-BP) (App. 148-49).

The Chancery Court for Knox County, Tennessee issued its order disbarring Mr. Justice on February 2, 2017 (re-issued the order on February 9, 2017) (App. 80-114). The court issued its final order on May 31, 2017 (No. 184818-3) (App. 56-79). These orders are unreported.

The findings of fact and conclusions of law and judgment in Disciplinary District II of the Board of Professional Responsibility of the Supreme Court of Tennessee, authored by a panel of lawyers appointed by the Board of Professional Responsibility ("panel"), were issued on March 9, 2015 (No. 2013-2254-2-WM) (App. 115-47). This order is unreported.

JURISDICTION

The Supreme Court of Tennessee issued its judgment on July 2, 2019 and denied rehearing on July 22, 2019. On October 22, 2019, Justice Sotomayor extended time to file a petition for writ of certiorari to and including December 19, 2019. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution

Section 1.

> All persons born or naturalized 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.

Section 2.

> Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support

the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Tenn. Sup. Ct. R. 9 (2006)
Disciplinary Enforcement

See Appendix F.

Tenn. Sup. Ct. R. 8
Rules of Professional Conduct

See Appendix G.

STATEMENT OF THE CASE

Tennessee compelled Justice to testify by deposition over his Fifth Amendment objection and penalized Justice's invocation of the self-incrimination clause, invoked as an innocent person under *Ohio v. Reiner*, 532 U.S. 17 (2001), by threatening to disbar him by adverse inferences if he did not testify at trial.[1]

Justice asserted his Fifth Amendment privilege at the trial/panel level. The panel heard arguments before the hearing on Justice's Fifth Amendment privilege. *See* Jan. 20, 2015 Tr. The panel ruled if Justice invoked the self-incrimination clause he could be disbarred or sanctioned via adverse inferences. At hearing, the question became whether the Board of Professional Responsibility of the Supreme Court of Tennessee ("Tennessee" or "Board") made a sufficient case to secure adverse inferences under Tennessee's case law. The panel reserved ruling whether, given the evidence, it would draw the adverse inferences it was threatening Justice with if he invoked his Fifth Amendment privilege, until after the proceedings closed. Admin.IV 1182. Justice informed the panel *Spevack* forbade threatening him with or imposing adverse inferences for exercising his Fifth Amendment rights and at a minimum, he ought to know if the Board had presented sufficient evidence to secure an adverse inference, before he chose to testify. TR.28:24–29:10; TR.340:7–341:5; Jan. 20, 2015 Tr; *see also* Justice's Pet. for Certiorari 9-6-18 R.Supp.Vol.I 1 *et seq*. The panel stubbornly refused, in an undisputed

[1] There is no dispute Justice could genuinely invoke the self-incrimination clause and had not waived it.

attempt to pressure Justice to testify. *Id*.

The panel threatened Justice with an adverse inference that might well disbar him if he did not testify. However, after informing the panel this was Constitutional error, Justice also challenged the Board's proof and stated there was insufficient evidence to find adverse inferences, under Tennessee's adverse inference case law, even though the panel had threatened to unconstitutionally impose them, generally. TR.341. Justice stated the panel could potentially ameliorate its Constitutional violation by removing the threat of adverse inferences it improperly made, by determining under the evidence presented the Board did not prove enough facts to secure the improperly threatened adverse inferences it requested. TR.341-42. That way, if Justice knew adverse inferences were off the table, perhaps he could decide to testify or not without being unconstitutionally afflicted with a threatened penalty. The panel refused to ameliorate its unconstitutional threat of adverse inferences, thereby, also violating the Constitutional standards for an intelligent decision on exercising the Fifth Amendment right – another violation due to the panel's manipulative actions and separate from the fact the prior threats of adverse inferences were unconstitutional, barred by *Spevack* and *McKune*.

After raising these Constitutional violations before the panel, Justice then raised the Fifth Amendment violation as error before both the certiorari court and the Tennessee Supreme Court. App.37-39, n.18; 69-73; 92-98. The certiorari court ruled Justice's argument the panel violated the Fifth Amendment privilege against self-incrimination was "without merit." App.98. The Tennessee Supreme

Court then, admittedly, refused to discuss the issue in its opinion. App.39, n.18.

Justice is a Tennessee lawyer who represents individuals, particularly those injured by nuclear weapons operations and whistleblowers, and engages in civil rights litigation against the local, state and federal governments and often makes Constitutional challenges to Tennessee legislation. Ex.5, p.7; Ex.22. He graduated from the University of Tennessee, with a 4.0 grade point average and was the top Graduate of the College of Arts and Sciences, and Yale Law School. Ex.25, p.45; Ex.22. While at Yale, he taught in an inner-city school and worked in a Truancy Prevention Court featured in *The New York Times* describing his participation. He graduated in 1998 and served as clerk on the United States Court of Appeals for the Sixth Circuit. *Id.* Previous to these events, Justice never had a blemish on his integrity and never sanctioned for any ethics violation.

In June 2011, a lawyer's report to the Board suggested Justice committed ethical violations. The attorney represented Justice's former contractor, Mr. Kerschberg. Kerschberg conceded a diagnosis of manic-depression after leaving Justice's employ and was on a regimen of four psychotropic drugs: Lithium, Lamictal, Klonopin and Prozac. His pharmacological regimen was substantially increased from what it had been 9 years earlier when he was institutionalized. Kerschberg was the only witness called by Tennessee and he testified only by deposition on written questions.

The allegations claimed fraud concerning fees due Justice's client in *Thomas v. Lowe's Home*

Centers, Inc.[2] ("*Thomas*"). Attorney fees and expenses were awarded for discovery misconduct. Ex.18. The underlying case involved catastrophic injuries to Scotty Thomas ("Thomas"). On June 21, 2005, Thomas was working in a Lowe's, Inc. store for a contractor when a bay of metal sheets collapsed on his head, causing brain damage. Although Thomas was taken for urgent care, Lowe's not only denied liability, but also Thomas' presence in the store, knowledge or records regarding this injury on its premises, and knowledge of the mass remodeling on which Thomas was working. TR.183:20-25. After a three-year investigation, Justice found a former Lowe's manager, Mary Sonner, who confirmed her presence when the incident occurred and swore Lowe's lied. TR.184:14-15; 360:23-361:2 An order awarding fees and costs for discovery obstruction issued. Ex.18.

During his investigation in late 2008 to early 2009, after he became convinced sanctions would occur, Justice kept a time record in Microsoft Word. Ex.5, Feb. 17, 2012 TR.46:6-22; 95:18–96:2; Ex.6, Feb. 17, 2012 TR.40:8-19. Based on his experience and private investigation, Justice expected sanctions because he knew Lowe's was deceiving. Justice's paralegal initially worked with the billing document, and over time, Justice's employees who worked on *Thomas* had their time placed into the document. TR.197:6-23. Essentially, the firm followed a master document approach in which time records aggregated into a single document.

From mid-April to September 2009, Justice employed Kerschberg - a law school classmate and

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[2] No. 3:07-CV-372 (E.D. Tenn.).

friend who served with Justice as a fellow law clerk for the same judge after Justice recommended him - as a contractor. TR.342:25-43:7. Justice and Kerschberg worked closely on *Thomas*, sharing a room within Justice's law office as their common workspace. TR.373:13-16. Seven years prior, Kerschberg had mental health issues after failing the South Carolina bar examination. Ex.2, 6:1–9:1. While he was twice institutionalized, by the time Justice hired him, Kerschberg was five years past his treatment and release and represented himself to be stable, but the recession in 2009 caused him to lose his job. Justice spoke with Kerschberg, felt bad Kerschberg had lost his job, and hired Kerschberg as a contractor. TR.342:25-43:7.

Kerschberg assisted Justice's firm finding permanent office space, and enhanced technology, legal, and administrative assistance. Kerschberg's contract was terminated in September 2009 after admittedly lying to Justice. Justice did not meaningfully communicate with Kerschberg except as necessary until near Thanksgiving 2010 when Kerschberg called Justice and begged forgiveness. As Kerschberg swore, Justice "graciously" gave it. Ex.6. Justice sent the *Thomas* petition to Kerschberg for review prior to filing to check Kerschberg's work. TR.519:4-8; 560:15–61:16 Kerschberg appeared to review it without correction and communicated with Justice by pleasant e-mails shortly before his lawyer filed a complaint with Tennessee. *Id.*

In the petition, Justice followed the principles in *Chamberlain Mfg. Corp. v. Maremont Corp.*, 1995 WL 769782, (N.D. Ill. 1995), and related cases that when a lawyer is working with an associate or legal

assistant (on non-exceptional tasks), only the time of the highest billing professional is billed.[3] TR.220:9-24; 452:4–53:2; 475:25–76:21. When Justice and Kerschberg worked together, or their work overlapped (same thing at different times), absent exceptional circumstances, only Justice's time was billed. *Id.* Following *Chamberlain*, Justice sought payment only for his time or his associate's when they overlapped with a legal assistant, and he so instructed his staff. TR.220:9-24; 452:4–53:2; 475:25–76:21. Justice eliminated some of Kerschberg's billing from his request entirely as well, as he did with other members of his staff and with his own in billing judgment. TR.421:10-25. In a first submission of the draft itemization exhibited to a motion for extension long before any complaint, Justice informed the court he was following such an approach. Ex.13, p.15.

Thomas' case involving discovery misconduct, if not obstruction, by Lowe's, Inc. was stayed in June 2011 and remained stayed for a number of years, pending the disciplinary complaint. On August 7, 2012, after a previous home invasion he survived, Thomas was found dead in his home at 38. The cause of death identified was heart failure (presumed).

Tennessee filed its Petition against Justice on September 25, 2013 – three years after the alleged conduct. Admin.Vol.I, Pet. for Discipline. A hearing was held January 20-23, 2015, nearly five years ago. Admin.Vol.I 0287. Tennessee alleged Justice committed

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[3] The Tennessee Supreme Court claimed *Chamberlain* is not a ground-breaking case. App.26, n.7. This is irrelevant. Justice did not claim it was. He just claimed he read it and cases citing it and followed its conservative approach. TR.220:9-24; 452:4–53:2; 475:25–76:21.

fraud by falsely claiming Kerschberg's entries as his own. *Id*. Tennessee alleged Justice copied these entries and did not work the time reflected. *Id*. The Board also alleged Justice violated Rule of Professional Conduct 8.4(b), which provides "[i]t is professional misconduct for a lawyer to: … commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Admin.Vol.I Pet. ¶¶ 20-21. The Board never identified, either in its Petition or in proof or argument, what crime it alleges that Justice committed, nor did it identify or lay out proof supporting the elements of any such unidentified crime. The hearing panel concluded the Board abandoned or did not prove this allegation. *See* Admin.Vol.I Pet. for Discipline p. 6; *see also* Admin.Vol.VI 1717-18. The Tennessee Supreme Court later resurrected this allegation, to disbar Justice, without noting the panel found against the Board on it. App.25, n.12.

Justice was only charged with submitting knowingly false time entries. Admin.Vol.I Pet. for Discipline; TR.135:6-14. The Board did not describe the evidence establishing the burden or show how, even assuming an entry is incorrect, why it is knowingly false instead of resulting from mistake or misinformation from Kerschberg or any other staff member. Kerschberg testified he copied Justice's time notes in *Thomas* in 2009 to create his own invoices, explaining any language similarities between Kerschberg's invoices and the itemization for fees. Ex.4. Even had Kerschberg not so testified, Tennessee offered no evidence, assuming an entry is incorrect, why Justice, as opposed to someone else, is the author of the mistake or wrongdoing. When the petition was prepared, the firm had to put everyone's billings

together and sort Sonner from non-Sonner. TR.200:12-201:13. Initials were placed to the side and Justice was the default. Exs.20-21; TR.360:14-18, 493:17–494:4. Justice's partner and staff, Rickman (attorney), Vaughn (legal assistant), and Myers (legal assistant), were tasked with attributing entries to various persons, removing overlapping or duplicative billings, and protecting work product information. TR.220–226:17; Ex.31. The fact alternative "suspects" existed for any alleged misdeed/error, like the staff tasked with working on the entries, was never addressed at any level. Admin.R.Vol.VI 1696 *et seq.*; R.Vol.III 293 *et seq.*

There was no evidence Justice was the wrongdoer. Tennessee acknowledged its case is "totally circumstantial," and there is no direct evidence of any wrongdoing by Justice. TR.132:22-24. Tennessee had to force Justice to testify to prevail and it did so by threatening to disbar or punish him via adverse inferences if he did not.

Kerschberg testified he has no way of knowing whether Justice did the work in "these entries," despite the fact his attorney filed a complaint. Ex.2. Given Kerschberg's testimony he copied from Justice's billing notes and can no longer dispute Justice performed this work, and his refusal to appear live at hearing, there was no meaningful case against Justice. Ex.2, 14:20–15:2; Ex.4. Justice was advised to and did take the Fifth Amendment's self-incrimination privilege as an innocent person under *Ohio v. Reiner*. Tennessee would not let him do that and forced him on the stand with unconstitutional compulsion. Tennessee compelled Justice to testify by deposition and at hearing over his objection. Ex. 1. TR.28:2 4–29:4.

The Board advocated before the panel suspension *or* disbarment, stating, "The Board submits that the appropriate sanction is a disbarment or lengthy suspension." Admin.Vol.III 627. The panel issued its findings and judgment ("judgment") on March 9, 2015, Admin.Vol.VI 1696, and imposed a penalty of a one-year suspension. Admin.Vol.VI 1720. The Board filed its petition for writ of certiorari on April 13, 2015 appealing the panel's findings and seeking disbarment, although the Board informed the panel a suspension would be acceptable. Admin.Vol.III 627. The certiorari court[4] to which the Board appealed signed its order disbarring Justice on February 2, 2017, finding the panel abused its discretion in not disbarring Justice, although Tennessee informed the Panel a suspension was an appropriate choice. R.Vol.III 302 *et seq*. After post-hearing motions, Justice timely filed his Notice of Appeal to the Tennessee Supreme Court. R.Vol.V 650.

a. The Clerk and Master Lost the Record and the Trial Court Shredded It

On October 18, 2017, R.Vol.VI 759, Justice's counsel learned the record was missing from the courthouse and had been mailed to the Judge's office. The record from the panel proceedings with the transcript of the panel hearing is over 2,000 pages. On October 20, 2017, Justice's counsel received a phone call from the clerk's office informing the record, on file in the Chancery Court, had been lost or destroyed

[4] The Chancery Court for Knox County, Tennessee; Judge Robert E. Lee Davies, Senior Judge presiding, handled the first level of appeal from the panel's decision.

[destruction 1]. The clerk's office also informed the Board's practice is to send a copy of the record to judges appointed to hear disciplinary cases on appeal, and the copy of the record the Board sent to the court was missing or destroyed [destruction II]. Since the realization two copies of the record had gone missing and/or been destroyed, the Board sent an additional, alleged "certified copy" of the "record" to the clerk for filing, however, there was no order approving the "record" to be filed. 7-24-18 R.Supp.Vol.I 28-30. The court ordered Justice's counsel to examine the "record" sent to the clerk's office before a January 5, 2018 hearing. Justice's counsel did in full. Justice moved the court to disclose what happened to the court's copy of the record and transcript. On January 5, 2018, the court informed the official record was shredded by the trial judge but denied an evidentiary hearing on the fact the Chancery Court's record was also destroyed. R.Vol.VI 770-74. An explanation was given only for one destruction of the file, not both. The record was never properly re-created.

The court later clarified it shredded not only the official record but the official transcripts of the disciplinary hearing. These transcripts were never authentically replaced. The Tennessee high court refused to address whether the record and transcripts were properly re-created. App.44-45, n.21.

REASONS FOR GRANTING THE PETITION

I. PENALIZING INVOCATION OF THE FIFTH AMENDMENT

The opinion refuses to address Justice's arguments on the panel's violation of his privilege against self-incrimination and admits avoiding the issue. App.39, n.18. The opinion concedes it will not address all challenges Justice raised. App.33-34, n.16. The opinion finds there is no unconstitutional compulsion in threatening an attorney with disbarment via adverse inferences if he invokes the self-incrimination clause. App.37-39. The notion invocation of the self-incrimination clause can be so penalized ignores the last 50 years of this Court's jurisprudence. *Spevack v. Klein*, 385 U.S. 511 (1967); *In re Gault*, 387 U.S. 1 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *In re Ruffalo*, 390 U.S. 544, 551 (1968); *McKune v. Lile*, 536 U.S. 24 (2002).

The opinion states, "The Hearing Panel reserved its ruling on whether it would actually draw an adverse inference based on Mr. Justice's invocation of the privilege at his prehearing deposition until after the Board presented its proof so that it could determine whether the requirements of *Akers*[5] had

[5] *Akers* is Tennessee's decision allowing adverse inferences when the self-incrimination clause is invoked in a purely civil case. *Akers v. Prime Succession of Tennessee, Inc.*, 387 S.W.3d 495 (Tenn. 2012). Since adverse inferences are a prohibited punishment that may not be imposed on one invoking the privilege in a disbarment proceeding under *Spevack* and progeny, this passage makes clear Tennessee acted unconstitutionally.

been satisfied." App.37-39. This is false. The panel did not inform Justice of any such thing after the Board presented its proof. Had the panel told Justice their adverse inference decision on any refusal to testify at hearing once the Board rested as the opinion suggests, and as Justice repeatedly requested, he could have at least made a knowing and intelligent decision. The opinion states virtually the opposite of what happened. The panel's actions were a violation of Justice's constitutional rights as Justice had the right to be free from any penalty for exercising the privilege and under the knowing and intelligent waiver case law, he had the right to know whether the panel thought it could impose an adverse inference *before* he invoked his Fifth Amendment privilege – both in discovery and at hearing – but the panel refused to inform him of whether it thought the Board had met its burden under *Akers* to draw an adverse inference once the Board rested.

Despite the inaccuracy of the Tennessee Supreme Court's recitation of events, the opinion makes transparent the Tennessee Board and panel ordered him to testify by deposition and threatened him with adverse inferences to induce him to testify at hearing over his Fifth Amendment objection. TR.28:2 4–29:4; Admin.Vol.IV 1182. Tennessee unconstitutionally compelled Justice's testimony twice: (1) when the Panel granted the Board's motion to compel his deposition; and (2) when the panel held an adverse inference over his head, if he did not testify, after he invoked the self-incrimination clause. Admin.Vol.IV 1182.

The opinion does not mention *Spevack v. Klein*, 385 U.S. 511 (1967), and does not mention the Board

unconstitutionally commented to the panel on Justice's exercise of his privilege attempting to induce prejudice. TR.387:23– 88:24. No one would know the Board violated Justice's constitutional rights in these ways by reading the opinion as these issues are ignored.

Justice was placed in a position he cannot be Constitutionally placed as he was punished for invoking a Constitutional right, compelled to testify at a deposition, and was in no position to intelligently exercise his Constitutional right given the opacity about whether the panel would draw adverse inferences. The panel ruled if Justice invoked the self-incrimination clause he could be disbarred or sanctioned via adverse inferences. At hearing, the question became whether the Board made a sufficient case to secure adverse inferences under Tennessee's case law for imposing adverse inferences. Although Justice requested the panel rule whether *Spevack* allowed an adverse inference for exercising the privilege, the panel reserved ruling whether it would draw the adverse inferences it threatened Justice with if Justice invoked his Fifth Amendment privilege until after the proceedings closed. Admin.IV 1182. The panel refused to remove the threatened adverse inferences from over Justice's head before he decided to testify. Attorneys in lawyer disciplinary proceedings, particularly ones seeking disbarment, may exercise their right not to be a witness against themselves without penalty. *Spevack v. Klein*, 385 U.S. 511 (1967). Any waiver of any important Constitutional right must be "knowingly and intelligently" made. *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938).

The opinion dodges whether any penalty may befall an attorney for invoking the Fifth Amendment privilege, including a threat of an adverse inference. This Court's answer is "no." The Tennessee Court collapses the *Spevack-McKune* issue into the intelligent waiver issue, to escape the fundamental question – is a threatened adverse inference or penalty of any kind unconstitutional when disbarment is at issue? This Court has been clear *no penalty*, including the threat of an adverse inference, may be applied in a state lawyer disciplinary case for an attorney invoking the privilege. *Spevack v. Klein*, 385 U.S. 511 (1967); *McKune v. Lile*, 536 U.S. 24 (2002). The opinion sidesteps the issue in a footnote. App.39, n.18. In the same footnote, the opinion goes on to cite cases from various jurisdictions **before** this Court's clarifying, "no penalty" decision in *McKune v. Lile*, 536 U.S. 24 (2002). In *McKune*, the Court reiterated the potential loss of a professional license is so coercive, exercising the right against "self incrimination" cannot be punished *in any way*. *McKune*, 536 U.S. 24, 50 (2002). The reason the Fifth Amendment applied in *Spevack,* as if it were a criminal case, was because the State sought disbarment and losing a livelihood is just as coercive, if not more, than many criminal penalties. *McKune*, 536 U.S. 24, 39 and 50 (2002). The Tennessee Court's avoidance of this jurisprudence by pretending *Spevack* and *McKune* do not exist denies Justice due process. Although Tennessee has recognized this Court requires attorney disbarment proceedings be "quasi-criminal,"[6] the phrase quasi-criminal never appears in the opinion. App.1-55. The opinion extols a pre-

[6] *Hyman v. Bd. of Prof'l Respon.*, No. E2012-02091-SC-R3-BP (Mar. 31, 2014).

McKune Georgia case allowing adverse inferences only because Georgia attorney discipline cases are civil and not quasi-criminal. App.39, n.18. Tennessee ignored this Court's precedents on the self-incrimination clause and the quasi-criminal nature of attorney-discipline proceedings.

a. The Panel Violated the Fifth Amendment Privilege against Self-Incrimination

In *Spevack,* this Court forbade *any penalty* on the lawyer for invoking the Fifth amendment privilege against self-incrimination. The case involved a state, not federal, disciplinary proceeding. The Court held:

> We conclude that *Cohen v. Hurley* should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it. *Spevack* at 514.

The Court cited *Miranda* stating, "In this Court, the privilege has consistently been accorded a liberal construction." *Spevack* at 511. Other states get this correct. The Kansas Supreme Court held the Fifth Amendment "self-incrimination" privilege attaches in full in lawyer disciplinary proceedings because of *Spevack* in *State v. Russell*, 610 P.2d 1122, 1129 (Kan.1980). The Kansas Court found, given *Spevack*

extends to the States via the Fourteenth Amendment, no State can legitimately deny a right in the federal Constitution extended to the States, given the Supremacy Clause.[7] In *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926), this Court held a State may not compel the surrender of a constitutional right as a condition of a State privilege, making the famous analogy of coercion imposing "no choice except a choice between the rock and the whirlpool," and noting to allow any punishment for exercising a Constitutional right is to surely allow the right to be "manipulated out of existence." *Frost* at 593-94. This is exactly what Tennessee is doing, manipulating the right away in disciplinary proceedings. Justice was placed between the "rock and the whirlpool" and coerced to testify at hearing by the panel, TR.340:7–341:5, and he was compelled to give a pre-hearing deposition. The panel coerced Justice to choose between foregoing a Constitutional privilege or submitting to a finding ultimately made by the panel, *after the proceedings*, it could impose an adverse inference. Admin.IV 1182; Admin.VI 1718. Though Tennessee has followed this Court and held disciplinary proceedings must be "quasi-criminal,"[8] even if it had not, *Spevack* extends the self-incrimination clause to state lawyer disciplinary proceedings. The panel, in its judgment, asserted it could have drawn an adverse

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[7] *In The Matter Of Frazier*, 1 Cal. Rptr. 676 (1991), dealt with the same issue and forbade an adverse inference or the threat of an adverse inference in a disbarment proceeding. *See also Oklahoma ex rel. Oklahoma Bar Association v. Wilcox*, 227 P.3d 642 (Ok. 2009).

[8] *Moncier v. Bd. Of Prof'l Respon.*, 406 S.W.3d 139, 155 (Tenn. 2013); *Hyman v. Bd. of Prof'l Respon.*, No. E2012-02091-SC-R3-BP (Tenn. 2014).

inference and punished or disbarred Justice just because Justice invoked his privilege, had the threat of those adverse inferences not forced him on the stand and the Tennessee certiorari court and Supreme Court *affirmed* the panel's assertion it could have drawn an adverse inference and disbarred Justice had the threat of such inferences not forced him to testify at hearing.

1. "Quasi-Criminal" must mean Something

Contrary to Tennessee's assertion, a proceeding cannot be both "quasi-criminal" and "civil" as different standards of due process exist in each. Tennessee claims when this Court held lawyer disciplinary cases were "quasi-criminal," *In re Ruffalo*, 390 U.S. 544, 551 (1968), it meant they were just civil. TR.VIII 119; App.98. If the cases were to proceed purely under civil standards, this Court well knows how to state this. The term "quasi-criminal" has a long history in federal law, and while it does not mean all or most rights of criminal defendants apply, it has universally meant the right against "self-incrimination" does.[9]

A state cannot avoid *Spevack* by claiming its disciplinary cases are civil or stating quasi-criminal and civil are synonymous. This Court has been explicit in state lawyer disciplinary proceedings the privilege against self-incrimination applies, no matter how the state describes their lawyer disciplinary proceedings. *Spevack*, 385 U.S. 511 (1967). *In re Gault*, 387 U.S. 1 (1967), extended the privilege

[9] *See, e.g., State v. Russell*, 610 P.2d 1122, 1129 (Kan. 1980).

against self-incrimination to juvenile delinquency cases though these proceedings are "civil" because the interests of a juvenile are much like those of an adult criminal defendant. In citing *Gault*, the Court in *Ruffalo* at 551 (1968), held the same approach adopted for juvenile delinquency is appropriate in lawyer discipline. Considering the Court's holdings in *Gault* and *Ruffalo*, unlike civil cases where one must invoke his or her Fifth Amendment privilege to each inquiry, in criminal or quasi-criminal proceedings one may invoke the Fifth Amendment privilege by choosing not to take the witness stand. *Griffin v. California*, 380 U.S. 609, 613-15 (1965).

The phrase "quasi-criminal" is understood, nearly universally, to encompass the privilege against self-incrimination. In *U.S. v. Ward*, 448 U.S. 242, 255 (1980), after respondent discharged oil contaminating a tributary, the United States assessed a civil penalty under the Water Pollution Control Act. Respondent sued, arguing the reporting requirements of the Act violated the Fifth Amendment privilege. This Court held Congress had not provided for sanctions so punitive as to transform a civil remedy into a criminal penalty and rejected the argument the penalty was quasi-criminal, but made clear if the proceedings had been designated quasi-criminal, the self-incrimination clause would apply in full. This Court found that quasi-criminal actions are not so grave as to "trigger the protections of the Sixth Amendment, the Double Jeopardy Clause of the Fifth Amendment, or the other procedural guarantees normally associated with criminal prosecutions" but such actions are "'so far criminal in [its] nature' as to trigger the Self-Incrimination Clause of the Fifth Amendment." *Ward,* 448 U.S. at 253-54. Ward could be forced to take the

stand because his proceeding did not involve sufficient penalization to be termed "quasi-criminal," but here it is conceded, even by Tennessee, the proceeding is required to be "quasi-criminal." A determination a proceeding is "quasi-criminal" always places a defendant within the scope of the Fifth Amendment's privilege against compulsory self-incrimination. *Id.* at 253-54 (citing *United States v. Regan,* 232 U.S. 37, 50 (1914)). That Tennessee obstinately ignores the Constitution to disbar Justice shows irrational hostility to him and insufficient loyalty to the Constitution.

2. "No Penalty" May Be Imposed

In *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), this Court held:

> The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.

Garrity v. New Jersey, 385 U.S. 493 (1967), holds:

> We held in *Slochower v. Board of Education*, 350 U. S. 551, that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee: 'The privilege against self-incrimination would be

> reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. . . . The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.' *Id.*, at 557-558. We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights. There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.

In *McKune v. Lile*, 536 U.S. 24 (2002), this Court explained:

> The Court's so-called "penalty cases" establish that the potential loss of one's livelihood through, *e. g.*, the loss of employment, *Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation of City of New York*, 392 U. S. 280, and the loss of the right to participate in political associations and to hold public office, *Lefkowitz v. Cunningham*, 431 U. S. 801, are capable of coercing incriminating testimony. *Id.*

This Court held the "threat of disbarment" is a "powerful form of compulsion." *McKune*, 536 U.S. 24, 40 (2002). As evidence of the impact of *McKune*, every federal court disciplinary system, post-*McKune*, allows the Fifth Amendment and prohibits the imposition of adverse inferences for invoking the

Fifth.[10] In *McKune*, the Court determined the potential loss of a professional license is so coercive, the choice to exercise the right against "self incrimination" cannot be punished *in any way*. *McKune* at 50. The *McKune* Court went to great lengths to make transparent the right to be free from compelled testimony is far broader than a right to be free from a direct order to testify:

> Since *Malloy,* we have construed the text to prohibit not only direct orders to testify, but also indirect compulsion effected by comments on a defendant's refusal to take the stand, *Griffin* v. *California,* 380 U. S. 609, 613-614 (1965), and we have recognized that compulsion can be presumed from the circumstances surrounding custodial interrogation, *see Dickerson* v. *United States,* 530 U. S. 428, 435 (2000) ("[T]he coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be `accorded his privilege under the Fifth Amendment ... not to be compelled to incriminate himself'") (quoting *Miranda* v. *Arizona,* 384 U. S. 436, 439 (1966)). Without requiring the deprivation of any other liberty interest, we have found prohibited compulsion in the *threatened loss* of the right to participate in political

[10] *See, e.g.*, Local Rule 83.7 for the District Court of the Eastern District of Tennessee; see also, https://www.pacer.gov/psco/cgi-bin/links.pl. (same view in all other federal courts).

> associations, *Lefkowitz* v. *Cunningham,* 431 U. S. 801 (1977), forfeiture of government contracts, *Lefkowitz* v. *Turley,* 414 U.S., at 82, loss of employment, *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York,* 392 U. S. 280 (1968), and disbarment, *Spevack* v. *Klein,* 385 U. S. 511, 516 (1967).

As held in *Spevack* and *McKune,* when disbarment is sought, the circumstances are so coercive the self-incrimination clause applies as if the case were criminal. The general rule is, "in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Garner v. United States*, 424 U.S. 648, 654 (1976) (footnote omitted). An exception is applied where "assertion of the privilege is penalized so as to 'foreclos[e] a free choice to remain silent, and ... compe[l] ... incriminating testimony." *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984) (quoting *Garner*, 424 U.S. at 661) (alterations in original). In these "penalty exception" cases, "the state not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.'" *Murphy*, 465 U.S. at 434 (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977)). The question is: is the sanction so severe as to coerce the "self-incrimination" the Amendment forbids? This Court has said it is when disbarment is sought. Tennessee obstinately pretends the penalty exception cases do not exist.

In *McKune*, this Court reviewed the types of penalties capable of "coercing incriminating testimony" and found the threatened "loss of a professional license" among them. *McKune,* 536 U.S. at 50 (O'Connor, J., concurring). In *Cunningham,* the Court "rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need," adding that the interests of the state, even if compelling, do not "justify infringement of Fifth Amendment rights." 431 U.S. at 808.

The privilege against self-incrimination applies in civil as well as criminal proceedings. *Malloy v. Hogan*, 378 U.S. 1, 11 (1964). It protects against the use in prosecution of police officers of incriminating statements that they made when given the choice "to forfeit their jobs or to incriminate themselves," *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967), and the same is true when persons make the opposite choice in those circumstances. *Cf. id.* at 498; *Union Pac. R.R. Co. v. Pub. Serv. Comm'n*, 248 U.S. 67, 70 (1918).

3. The Panel Denied Justice the Ability to make an Intelligent Constitutional Choice

Justice could not intelligently choose whether to assert his Constitutional right without being fully informed of the consequences – potential imposition of adverse inferences resulting in disbarment. The panel held generally it could draw adverse inferences, despite *Spevack* before the hearing began. After Tennessee rested, before Justice testified, Justice

asked the panel to determine whether Tennessee had met its evidentiary burden to be entitled to adverse inferences, before he chose to testify, so he could make an intelligent, Constitutional choice. The panel refused and left potential disbarment or other sanction, by adverse inferences, hanging over Justice's head at the time he had to decide to testify. TR.341-42. Justice also informed the panel, under the Constitution, it should review this Court's case law and revisit whether *Spevack* allowed an adverse inference for exercising his Fifth Amendment rights, before he chose to testify, however, the panel refused, and reserved ruling whether it would draw the adverse inference it threatened, until after Justice testified or not. TR.28:24–29:10; TR.340:7–341:5; Jan. 20, 2015 Tr; *see also* Justice's Pet. for Certiorari 9-6-18 R.Supp.Vol.I 1 *et seq*. Justice was placed in a position he cannot be Constitutionally placed as he was in no position to intelligently exercise or waive his Constitutional right because the panel did not tell him whether it was in position to draw an adverse inference until *after* he testified, rendering the proceeding constitutionally moribund due to the Fifth Amendment violation. Any waiver of a Constitutional right must be "knowingly and intelligently" made. *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). If any State actor interferes with a knowing and intelligent waiver, the right is not waived and the Constitutional provision is violated. *Id*.

4. The Board Prejudiced the Panel on Fifth Amendment Issues

The Tennessee high court did not mention the outrageous attempt to prejudice the panel. Commenting on exercising the Fifth Amendment right requires reversal. Invoking the Fifth Amendment privilege in quasi-criminal proceedings will not result in an adverse inference against the accused and any attempt to penalize or prejudice results in a mistrial. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Yet, even after Justice's counsel pointed to this authority, the Board did so anyway, repeatedly, informing the panel it should be biased against Justice for invoking the self-incrimination clause. TR.387:23–388:24. The panel then unconstitutionally forced Justice to abandon his decision not to testify by threatening loss of his license by adverse inferences.

II. What's Causing All This?

Tennessee avoided Justice's *Spevack-McKune* argument and never mentioned those two cases in its obfuscating opinion; oddly claimed civil and quasi-criminal are synonymous; made no mention of the fact its Board directly attempted to arouse prejudice in the panel and certiorari court because Justice invoked the Fifth Amendment and held adverse inferences may be used in a disbarment case when a lawyer invokes the self-incrimination clause. Respectfully, it seems difficult to believe Tennessee missed the impropriety of all these things given the transparency of this Court's extensive "penalty exception" jurisprudence and the fact all federal appellate courts understand this Court's jurisprudence in accord with Justice's understanding.

Tennessee has an unfortunate history of looking the other way on judicial misconduct and retaliating against whistleblowers. *United States v. Lanier*, 520 U.S. 259 (1997). Before Tennessee's Board proffered charges against him, Justice reported *ex parte* communications between opposing counsel and the trial judge during a medical negligence jury trial. After the same trial, he reported off the record, *ex parte* communications between the presiding judge and the jury, when he learned of them. Opposing counsel and the judge admitted these facts and they lead to appellate reversal of the underlying jury verdict and remand for re-trial. *Burchfield v. Renfree*, No. E2012-01582-COA-R3-CV (Tenn. App. 2013). However, Tennessee's Board of Professional Responsibility and Board of Judicial Conduct refused to take any action of any kind against the judge and lawyer involved and Justice filed suit on behalf of his clients for arbitrariness by the state lawyer disciplinary and judicial conduct boards for ignoring the deplorable conduct that victimized his clients.

Below, Justice pointed out if one looks at the results of Tennessee lawyer disciplinary decisions, it would be inconsistent with uniformity of discipline to disbar Justice, even setting aside the Fifth Amendment violation and assuming he committed the misconduct Tennessee failed to prove. Justice pointed out the panel could not possibly have abused its discretion in suspending him because the Board informed the panel a suspension would be appropriate. Nonetheless, Tennessee not only disbarred Justice but promptly removed uniformity of discipline as a consideration in lawyer discipline cases. *Meehan v. Board of Prof'l Responsibility*, No. M2018-01561-SC-R3-BP (Tenn. 2019). Tennessee now reserves the right

to treat similarly situated lawyers differently and disbar one arbitrarily even when it does not disbar another for more egregious conduct. Even lawyers are entitled to equal protection. Although Tennessee has removed uniformity of discipline as a factor so they may arbitrarily discipline, that cannot change the right to equal justice under law and that the due process and equal protection provisions of the Fifth and Fourteenth Amendments require a state to at least endeavor to equally treat those similarly situated. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 488 U.S. 336 (1989).

The disciplinary process must not be weaponized to target or disproportionately punish lawyers. This Court's jurisprudence reflects active push-back when states use the disciplinary process to target lawyers and ride roughshod over the Constitution in so doing. *In Re Ruffalo*, 390 U.S. 544 (1968) suggests an attorney was deprived of due process when prosecuted by the chair of the local bar who often represented the type of clients the accused sued. This is exactly what happened below.[11] *Ruffalo* arose in the context of railroad work and the Court, repeatedly interjected the terms "railroad," "railroad man" and "railroading" – both in a literal and seemingly figurative way, highlighting the lack of due process and respect for the Constitution in the underlying Ohio proceeding. *In Re Ruffalo*, 390 U.S. 544 (1968).

[11] The panel chair, Michael King, is an asbestos defense lawyer and Justice is an asbestos victims' lawyer.

III. Administrative Law

While acknowledging in passing this Court has required it to administer disciplinary proceedings under quasi-criminal standards, Tennessee combines all functions within the Tennessee Supreme Court and maintains its disciplinary system under administrative law standards without even reaching the level of civil law process. Judicial review of panel and lower court decisions by Tennessee's high court is done under administrative law -- a substantial and material evidence standard. The standard allows the Tennessee Supreme Court to affirm a panel finding even if review shows the panel judgment and/or the Board's case is not supported by a preponderance of the evidence. App.30-33. A Tennessee certiorari court or the Tennessee Supreme Court may affirm disbarment or other sanction by a panel if the Board has proven its case more than a "scintilla or glimmer," even if that is less than a preponderance. *Id*. This happened here. App.43-49. The use of administrative law standards of "scintilla" review in a quasi-criminal matter offends the Constitution. Oddly, if Justice were not disbarred but subjected to $500.00 in punitive damages, Tennessee would require more than the preponderance standard used at the panel level and require more than "scintilla" standard review on appeal. Punitive damages must be proven by clear and convincing evidence. *Hodges v. S.C. Toof*, 833 S.W.2d 896 (Tenn. 1992). An administrative law standard cannot be used in a quasi-criminal case and neither can a preponderance standard. Because Tennessee does so, its disciplinary system is unconstitutional under *Ruffalo* and progeny. This Court has repeatedly held the preponderance standard and surely administrative law standards ("scintilla") are insufficient in quasi-criminal

disciplinary cases; yet, Tennessee persists in using them. Disciplinary proceedings are "adversary proceedings of a *quasi*-criminal nature." *Ruffalo*, 390 U.S. 544, 550 (1968). "Noncriminal [disciplinary proceedings] bear close relationship to proceedings criminal in nature." *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *In re Gault*, 387 U.S. 1, 30 (1967). An attorney is entitled to meaningful appellate review of discipline given its "quasi criminal" impact. *In re Snyder*, 472 U.S. 634, 646 (1985). By using the "scintilla" standard for appellate review of disbarments, Tennessee violates *Snyder* and the Constitution. The Tenth Circuit held attorney discipline cases are judicial, not administrative.[12] This Court strongly suggested, if not held, the same.[13] Beyond *Middlesex*, *Theard v. United States*, 354 U.S. 276, 282-283 (1957) recognized disciplinary proceedings are "very serious business." "Very serious business" is resolved under formal procedure, not preponderance standards, much less administrative concepts designed for less weighty matters. Tennessee ignores *Goldberg v. Kelly*, 397 U.S. 254 (1970), holding when considering due process, courts should be mindful "the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Id.* at 262. There is no question of grievous loss in disbarment. When facts are critical or a stigma is risked, due process dramatically heightens. *Greene v. McElroy*, 360 U.S.

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[12] *Razatos v. Colorado Supreme Court,* 746 F.2d 1429, 1435 (10th Cir. 1984).

[13] *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 433-34 (1982).

474, 496-97 (1959); *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,* 367 U.S. 886, 898 (1961).

Tennessee's Board is an administrative entity, not a judicial system. *Moncier v. Bd. Of Prof'l Respon.*, 406 S.W.3d 139, 155 (Tenn. 2013). It is an organ of the Tennessee Supreme Court with its members appointed by the Tennessee Supreme Court. App.161. The Tennessee Supreme Court, not the Board, appoints the Chief Disciplinary Counsel of the Board. The Board is authorized to investigate any allegation of attorney misconduct or incapacity. Tenn. Sup. Ct. R. 9, §§ 5.5(a), 8.1 (App.158-59; 162-64). The Board is empowered to adopt and submit to the Tennessee Supreme Court for approval "written guidelines to ensure the efficient and timely resolution of complaints, investigations, and formal proceedings." *Id*. at § 5.5(b) (App.159). The Board assigns district committee members "to conduct disciplinary hearings and to review and approve or modify recommendations by Disciplinary Counsel for dismissals or informal admonitions." *Id*. at § 5.5(c). The Board reviews, at Disciplinary Counsel's request, the determination of a reviewing district committee member "that a matter should be concluded by dismissal or by private informal admonition without the institution of formal charges." *Id*. at § 5.5(d) (App.159). The Board may also privately reprimand attorneys for misconduct. *Id*. § 5.5(e) (App.159). The Board receives regular reports from Chief Disciplinary Counsel. *Id*. at § 7.1 (App.161). Petitions initiating formal disciplinary proceedings are filed with the Board. *Id*. § 8.2 (App.163-66). Once a petition and answer are filed, the Chair of the Board assigns the hearing panel to adjudicate the matter. *Id*. The Board

reviews Disciplinary Counsel's recommendation to appeal from a hearing panel's judgment. *Id.* § 5.3 (App.157-58). The Board, or a panel of the Board, hears petitions for relief from costs. *Id.* § 24.3 (App.202-03). The Tennessee Supreme Court thus controls all the functions of the Board. *See generally* App.150-223. The panel members who try the attorney are not chosen at random but appointed by the Board which also prosecutes the case. *Id.* at § 6.4 (App.160). Tennessee admits its Board has overlapping investigative, prosecutorial, and adjudicative functions but claims some overlapping "is inherent in administrative agencies" and acceptable under *Withrow v. Larkin*, 421 U.S. 35 (1975). *Moncier v. Board of Prof'l Responsibility*, 406 S.W.3d 139, 159 (Tenn. 2013).

To make matters worse, the certiorari judges who preside over appeals from the panel level are "Special Judges" not elected or appointed by the Governor, as is the normal process, but instead specially appointed by the Tennessee Supreme Court to carry out special responsibilities and assignments for it and who can be removed by it. *Id.* at § 1.5 (App.152). So, if one is the accused in a disciplinary case in Tennessee, he or she is facing a Board, appointed and maintained by the Tennessee Supreme Court; a panel of lawyers appointed by the Tennessee Supreme Court Board and those lawyers all hold their licensure at the arbitrary pleasure of the Tennessee Supreme Court because Tennessee has determined holding a law license is a privilege and not a right and this right/privilege distinction allows a law license to be taken under administrative procedures. *Hughes v. Board of Prof'l Responsibility*, 259 S.W.3d 631 (Tenn. 2008); App.31-34. Everyone but the defending lawyer

– from the Board to the panel to the certiorari judge is in the first degree of relationship to the Tennessee Supreme Court. So, to complain of grievous error or unconstitutional action or misconduct or ignorance of the Constitution on behalf of the Board, the panel or a certiorari judge is to risk being heard to say by the Tennessee Supreme Court -- *you appointed incompetent folks or designed a bad system*. This is not Constitutional.

Tennessee has found its panel and certiorari judges in the disciplinary context are "administrative adjudicators" and the normal judicial standards do not apply to them. *Moncier*, 406 S.W.3d 139, 159-60. If the Board of the Tennessee Supreme Court prevails, the accused attorney must pay costs and attorney's fees, but those fees are lost to the State and taxpayers if the attorney prevails. *Id.* at 150-51. Tennessee's system is not "constitutionally tolerable." *Withrow* at 47.

Tennessee allows its panel members to function as prosecutors. Tennessee imposes no limits on panel questioning of the accused lawyer, even though panel members are to be impartial decision-makers in theory, despite the system of combined functions in which they act. Justice's panel was chaired by an asbestos defense lawyer, although Justice is an asbestos victim's lawyer.[14]

Disciplinary counsel finished questioning Justice within an hour. Then, the panel kept Justice on the stand for several hours with its chair cross-examining him with an extraordinary amount of questions which lasted most of the last day and required 156 pages of

[14] Michael King is an asbestos defense lawyer in Knoxville, Tennessee.

transcript. The panel chairman admitted to asking "a lot" of questions. TR.558:17-18. The extensive and lengthy questioning by the panel chair biased the decision-making process by his stepping outside the role of judge and stepping into the role of prosecutor. A reasonable person, after the panel chair's improper, extensive questioning of Justice lasting most of the last day of the proceeding, would question the panel's impartiality, and at least wonder whether the panel sought to engineer a result, and the Tennessee court allowed it to get away with this, holding that a panel member, even in a system of combined functions, may interrogate to an unlimited extent and add the prosecutorial role to the judging role. App.39-40. It is not proper for asbestos defense lawyers to prosecute asbestos victim's lawyers or vice versa. The panel denied Justice due process by taking on a prosecutorial role, *In re Murchison*, 349 U.S. 133 (1955), particularly in a system of profoundly combined functions that denies the Fifth Amendment to the accused and imposes preponderance and administrative law standards of proof and for appellate review. In *Murchison*, a judge served as a "one-man grand jury" and investigated a crime. Later, the same judge found two witnesses guilty of contempt and sentenced them. This Court held their trial and conviction before the same judge violated due process holding, "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Id*. The American system rejects merging judge and prosecutor as inherently unfair. We should not allow by the back door what the founding fathers closed at the front.

This is considering all things: Tennessee will not follow *Spevack* and allow an attorney to exercise the self-incrimination clause without penalty;

Tennessee has a tremendous combination of functions and uses a preponderance standard at the panel level, where it also allows unlimited discretion of judges (panel members) to prosecute the charges they are judging and there is no meaningful appellate review because that review is conducted under an administrative law "scintilla" standard.

CONCLUSION

Justice asks the petition for certiorari be granted and the Tennessee decision vacated.

Respectfully submitted,

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