No.

IN THE

Supreme Court of the United States

IN RE:

ASHTON R. O'DWYER, JR., PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ASHTON R. O'DWYER, JR.
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QUESTION(S) PRESENTED

1. Whether, prior to his participating in rendering decision in this reciprocal attorney disciplinary case, the failure of a Panel Member to disclose to Respondent conflicts of interests due to the Panel Member's long-standing direct, extensive and substantial associations and relationships with the State of Louisiana, which had disbarred Respondent, requires vacature of the Panel's decision pursuant to *Commonwealth Coatings v. Continental Cas.*, 393 U.S. 145 (1968), and remand for consideration of the case by a fair and impartial Panel, devoid of any disqualifying conflicts of interests?

2. Whether the three-Judge Panel below could possibly have discharged its *Selling v. Radford*, 243 U.S. 49 (1917) obligation to perform "an intrinsic consideration of the state record" in this reciprocal attorney disciplinary case, when Respondent's Exhibits, which were critical to understanding the merits of Respondent's Affirmative Defenses to disbarment by the State, were never transmitted to the U.S. Court of Appeals for the Fifth Circuit by the Louisiana Supreme Court, and remain "missing" entirely from the record?

3. Whether under *Williams v. Pennsylvania*, 136 S.Ct. 1988 (2016), all of the original Panel Members should have been disqualified from deciding Respondent's "Motion to Re-Open Case, etc.," and his "Motion for Reconsideration," which had put the entire Panel "on notice of" undisclosed conflicts of interests by their "Brother" Panel Member?

4. Whether the Court should exercise its inherent equitable power to vacate reciprocal discipline

imposed against Respondent, a lawyer, because an Article III Federal Appellate Judge committed judicial misconduct, perhaps unwittingly, by failing to disclose conflicts of interests to Respondent, which should have disqualified the Judge from participating in the case?

PARTIES TO THE PROCEEDING

No other parties than listed in the caption

STATEMENT OF RELATED CASES

1) In re: Ashton R. O'Dwyer, Jr., Case No. 18-98009, on the docket of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit Per Curiam Opinion of May 31, 2019 is set forth in the Appendix hereto. (App. 10-13.)

The Fifth Circuit Order denying Respondent's "Motion to Reopen the Case" due to non-disclosure of conflicts of interests by a Panel Member is set forth in the Appendix hereto. (App. 108.)

The Fifth Circuit Order denying Respondent's Motion for Reconsideration is set forth in the Appendix hereto. (App. 120.)

2) In re: Ashton R. O'Dwyer, Jr., Case No. 16-B-1848 before the Louisiana Supreme Court, in which an Order of Permanent Disbarment issued on March 15, 2017, is reported at 221 So.3d 1 (La. 2017).

3) In re: Ashton R. O'Dwyer, Jr., Docket No. 10-DB-006 before the Louisiana Attorney Disciplinary Board, which recommended disbarment to the Louisiana Supreme Court, is unreported

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The unreported four-page Per Curiam Opinion of the three-Judge Circuit Court Panel is dated May 31, 2019, and is reprinted in full at Appendix pages 10 through 13.

The unreported one-page Circuit Court Order of November 18, 2020, which is the subject of this writ application, is reprinted in full at Appendix page 108.

The unreported one-page Circuit Court Order of December 9, 2020, also a subject of this writ application, is reprinted in full at Appendix page 120.

JURISDICTION

The Order of the U.S. Court of Appeals for the Fifth Circuit for which this Writ of Certiorari is sought is dated November 18, 2020.

Respondent's Motion for Reconsideration of that Order was filed within 14 days of November 18, 2020, namely on December 2, 2020.

Respondent's Motion for Reconsideration was denied by the Fifth Circuit on December 9, 2020.

This Petition for Writ of Certiorari is filed within the time allowed by 28 U.S.C. §2101(c) and Supreme Court Rule 13(3), namely within 90 days of November 18, 2020.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

U.S. Constitution, Fifth Amendment

> 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.

Canon 2 Of The Code Of Conduct For United States Judges
Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities.

A) Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B) Outside Influence. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge.

COMMENTARY to Canon 2

Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges, including harassment and other inappropriate workplace behavior. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family.

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently.

The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased. The judge should adhere to the following standards:

A) Adjudicative Responsibilities.

1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

2) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested.

B) Disqualification.

1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

d) the judge or the judge's spouse, or a person related to either within the

third degree of relationship, or the spouse of such a person is:

i) a party to the proceeding, or an officer, director, or trustee of a party;

ii) acting as a lawyer in the proceeding; or

iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

f) "proceeding" includes pretrial, trial, appellate review, or other states of litigation.

C) Remittal of Disqualification. Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (1) through (e), disclose on the record the basis of disqualification. The judge may participate in the

proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

COMMENTARY to Canon 3A(3)

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

28 United States Code, Section 455 – Disqualification of Justice, Judge, or Magistrate Judge

a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

b) He shall also disqualify himself in the following circumstances:

1) Where he has a personal bias or prejudice concerning a party, or personal

knowledge of disputed evidentiary facts concerning the proceeding;

2) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy; or

3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

STATEMENT

This case involves a Federal Appeals Court Judge, who, for reasons unknown, failed to disclose to Respondent prior to his participation in rendering decisions in the case, numerous conflicts of interests arising out of the Judge's long-standing associations and relationships with the State of Louisiana, which had wrongfully disbarred Respondent. Had the conflicts of interests been disclosed to Respondent, then Respondent would have immediately sought the Judge's recusal and disqualification.

On March 16, 2017, culminating an eight-year-long battle with his post-Katrina nemesis, the State of Louisiana, over Respondent's ability to practice law in the State, the Louisiana Supreme Court issued an

Order of Permanent Disbarment, stripping Respondent of his law license (App. 3-4, 35-36, 45-46, 54, 69-70.)

Thereafter, on October 26, 2017, the Chief Judge of the U.S. Court of Appeals for the Fifth Circuit, the Honorable Carl E. Stewart, issued a "Show Cause Order," which directed:

> "On March 15, 2017 the Supreme Court of Louisiana issued an order of permanent disbarment entitled "In Re: Ashton R. O'Dwyer." At the direction of the Chief Judge, IT IS ORDERED that Ashton R. O'Dwyer, Jr.'s name shall be removed from the roll of attorneys admitted to practice in this court effective 35 days from the date of this order unless the Court receives prior to that date a response from Mr. O'Dwyer showing case why his right to practice before this Court should not be terminated.

See FRAP 46(b)."

Respondent complied with Judge Stewart's Order by submitting a number of Exhibits and letter briefs, explaining in detail Respondent's assertion that he had been disbarred by a corrupt Louisiana Attorney Disciplinary System in retaliation and retribution for his having exposed public corruption in the "Victims of KATRINA" litigation in the U.S. District Court for the Eastern District of Louisiana, Civil Action No. 05-4182. The plaintiff lawyer Cabal to whom the corrupt presiding Federal Judge had handed control and management of the massive KATRINA litigation secretly represented the State of Louisiana, but kept that representation secret for two (2) years, but with full knowledge of the secret representation by the presiding Judge. But when the USA was determined to

be immune, "the Class" of KATRINA's innocent victims could not recover a dime in damages, because the plaintiff lawyer Cabal did not sue their "secret" client, the State.

Nothing further was heard from Judge Stewart until September 27, 2018, when he issued the following Order:

"O R D E R

> After consideration of the response of attorney Ashton R. O'Dwyer, Jr., to the show-cause order issued by the clerk on October 26, 2017, I have determined that the matter should be referred to a panel of the court. The panel, which shall consist of Judges Gregg J. Costa, Don R. Willett, and Stuart Kyle Duncan, is empowered to conduct a hearing or hearings, and to act for the court in resolving all issues raised by the show-cause order and the response."

On October 5, 2018, the Clerk of Court informed Respondent as follows:

> "You responded to this court's order to show cause why you should not be removed from the roll of attorneys admitted to practice in this court as a result of the March 15, 2017 disbarment order entered by the Supreme Court of Louisiana. You requested a hearing pursuant to FRAP 46.
>
> "Your hearing, in the form of oral argument, will be held before a panel of this court on December 4, 2018, at 4:00 p.m. (CST) in the

> West Courtroom on the second floor of the John Minor Wisdom Court of Appeals Building, 600 Camp Street, New Orleans, Louisiana. You may be represented by counsel. The hearing will be recorded.
>
> "The sole issue for consideration is whether the United States Court of Appeals for the Fifth Circuit should impose upon you reciprocal discipline based on the order of the Supreme Court of Louisiana. See *Selling v. Radford*, 243 U.S. 46 (1917).
>
> "This court will attempt to obtain a certified copy of the record of the disciplinary proceeding directly from the Supreme Court of Louisiana, and will notify you if it is necessary for you to supplement that record in any way.
>
> "Please direct any questions to Suzanne Butler via email to Suzanne_Butler@ca5.uscourts.gov or by telephone at (504) 310-7768."

In *Selling v. Radford*, 243 U.S. 46 (1917), this Court considered the effect of disbarment from state court in a federal disbarment action, finding that although admission to a state bar may be a predicate to admission to a federal bar, a state disbarment order does not automatically bind a federal court. This Court reconciled the interest in judicial economy with the "quasi-criminal nature" of a disbarment proceeding and concluded that a state disbarment gives rise to a rebuttable presumption that an attorney lacks the "private and professional character" to remain a member of the federal bar, saying:

> "...We are of opinion that we should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1) that the state procedure from want of notice or opportunity to be heard was wanting in due process; 2) that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject, or 3) that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do." 243 U.S. at 50 and 51.

In other words, this Court in *Selling v. Radford* spelled out very specific exceptions to the imposition of reciprocal discipline imposed by State disbarment proceedings, namely (1) want of due process, (2) unwarranted conclusions not supported by facts, and (3) other grave and sufficient reasons that would result in grave injustice or fundamental unfairness, all of which were present in Respondent's case. Indeed, Respondent averred that if the exceptions to reciprocal discipline did not exist in his case, then they would never exist anywhere, at any time, in any case. (App. 61, 81-85, 95-96.)

On October 10, 2020, Respondent was advised by the Fifth Circuit as follows:

"Thank you for your email of earlier today.

"We are in the process of making arrangements to obtain the complete record of your disciplinary proceeding from the Supreme Court of Louisiana. The state court record, including documents from the Louisiana Disciplinary Board and the Eastern District of Louisiana proceedings, as well as your communications with this court and documents you have provided the court, will be in the record of this court's disciplinary proceeding for the panel."

On November 20, 2018, one of Respondent's Panel members, Judge Costa, issued the following Order:

"O R D E R

IT IS ORDERED that the petitioner's motion to visit the Court in order to review the contents of the case record, including the documents that have been sent to the Fifth Circuit by the Louisiana Supreme Court, is GRANTED.

Our Court's record is the electronic record on PACER and petitioner can access the record via PACER. Petitioner may look at the paper record that this court received from the Louisiana Supreme Court. Arrangements will have to be made with the U.S. Marshall's Office for petitioner to be escorted, and a date and location for him to review the Louisiana record will be coordinated with the Clerk's Office, the

> Circuit Mediation and Judicial Support Office and the U.S. Marshall's Office."

As of that date, Respondent had submitted to the Fifth Circuit a total of 25 Exhibits, in addition to letter briefs, in compliance with Chief Judge Stewart's Show Cause Order. And on November 28, 2018, in accordance with the permission granted by Judge Costa, Respondent inspected "the paper record that this court received from the Louisiana Supreme Court" in order to verify whether the entire record in the state disciplinary proceedings (Docket No. 10-DB-006 before the Louisiana Attorney Disciplinary Board, and Case No. 16-B-1848 before the Louisiana Supreme Court) been transmitted to the Fifth Circuit by the Louisiana Supreme Court. Respondent's Exhibits in the state proceedings were critical to Respondent's defenses to his disbarment, and Respondent needed to verify that his Exhibits from the state proceedings were available to the Fifth Circuit for its *Selling v. Radford* mandated "intrinsic consideration of the state record." 243 U.S. at 51.

In the Fifth Circuit, a reviewing Court's obligation under *Selling v. Radford* was enunciated by Judge Wisdom in the 1974 case of *In re Wilkes*, 494 F2d 472 (5th Cir. 1974), as specifically including the following:

> "Wilkes is on solid ground in asserting that disbarment by federal courts does not automatically flow from disbarment by state courts. Federal courts must 'determine for ourselves the right to continue to be a member of...[the federal Bar]' after giving 'intrinsic

consideration' to the underlying record. (Citations omitted)." 494 F.2d at 474-475.

Unfortunately, all of Respondent's Exhibits in the state disciplinary proceedings were entirely "missing in action," just as Respondent had feared they would be, meaning that it was impossible for Respondent's Panel to give "intrinsic consideration" to the woefully incomplete state record from the Louisiana Supreme Court, and therefore unable to "determine for ourselves [Respondent's] right to continue to be a member of" the Fifth Circuit Bar.

Oral argument in the Fifth Circuit before a Panel consisting of Judges Costa, Willett and Duncan proceeded on December 4, 2018. During oral argument, Respondent was granted leave to submit one additional written submission to the Court. This was accomplished on December 7, 2018 in "Respondent's Court-Authorized Post-Hearing Written Submission and Incorporated Report on Respondent's Review of What Was Represented to Him as the Louisiana Supreme Court Record," (App. 1-9), which addressed the fact that the purported "state record," which the Louisiana Supreme Court claimed to have sent to the Fifth Circuit, did not contain Respondent's Exhibits in the state proceedings, which were critical to Respondent's defenses to disbarment. (App. 4-6, 8, 55.) The fact that Respondent's Exhibits were "missing," and not included in the state record, rendered it impossible for Respondent's Fifth Circuit Panel to have conducted the "intrinsic consideration of the state record" mandated by *Selling v. Radford.*

Other very serious shortcomings in "the record" transmitted to the Fifth Circuit by the Louisiana Supreme Court also were addressed by Respondent in

his December 7, 2018 Post-Hearing Written Submission (App. 6-9, 55), which also rendered it impossible for the Panel to have given "intrinsic consideration of the underlying state record." *Id.*

Respondent heard nothing further from the Fifth Circuit until May 31, 2019, when his Panel issued a three-page Per Curiam Opinion, which reflected:

> "O'Dwyer seeks to relitigate his underlying discipline in the United States District Court for the Eastern District of Louisiana that led to his state disbarment. 221 So.3d at 19 (concluding that O'Dwyer engaged in a 'panoply of serious professional violations' based on his conduct in New Orleans Federal Court). But our task in considering reciprocal discipline is much more limited. We did not review as an original matter the allegations that resulted in disbarment. Instead we must give effect in our Court to the state disbarment unless 'an intrinsic consideration' of the State Court record reveals that:
>
> 1. The state procedure, from want of notice or opportunity to be heard, was wanting due process,
>
> 2. [T]hat there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject, or

> 3. [T]hat some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles or right and justice, we were constrained so to do.

Selling v. Radford, 243 U.S. 46, 51 (1917); see also *In re Jones*, 275 F. App'x. 330, 331 (5th Cir. 2008) (applying the *Selling* factors)." (App. 11.)

Ignoring for a moment the inherent contradiction in the Panel's assertion that "we do not review as an original matter the allegations that resulted in disbarment" when contrasted with the necessity of having to perform "an intrinsic consideration of the state record" to determine *inter alia* "an infirmity of proof as to facts found," Respondent reasonably concluded that his substantive defenses to disbarment had not been considered at all by the Panel, which simply "rubber-stamped" his wrongful disbarment by the Louisiana Supreme Court. This conclusion by Respondent is reasonably supported by the fact that the Panel's Per Curiam Opinion failed to address, even in cursory fashion, any of Respondent's Affirmative Defenses to his disbarment. See Respondent's "Motion to Unseal the Record," which was filed below on August 30, 2019, (App. 56, 69-76, 85-99.)

In addition, the Panel made a series of very serious errors in its Per Curiam Opinion, which should have been readily apparent to anyone who had performed a competent intrinsic consideration of the

state record, including the following false "findings," which could even be called "malicious":

> "Having considered the record of the state proceeding, O'Dwyer's numerous responses to the show cause order, and his oral argument, we conclude that the disbarment findings do not suffer from the substantial infirmities needed for us to decline to follow the same course the state court took. The attacks O'Dwyer levels against the state court findings at most argue for a different interpretation of his conduct in New Orleans federal court; he cannot show that the contrary view of the Supreme Court of Louisiana – and the federal district court for that matter – lacked evidence. To take just one example of serious misconduct, there was strong support for the finding that O'Dwyer engaged in the unauthorized practice of law following his suspension from the Eastern District of Louisiana. A motion was filed in an O'Dwyer case under the signature of O'Dwyer's cousin who was a lawyer. What evidence supported the conclusion that O'Dwyer wrote the brief and forged his cousin's signature so it could be filed? One of the most powerful types: a confession. O'Dwyer admitted in response to an inquiry from state disciplinary counsel that he had signed his cousin's name to the filing. 221 So.3d at 8. The egregiousness of this conduct, occurring while O'Dwyer was already subject to court discipline, speaks for itself. And nothing in the stacks of paper submitted in this matter undermines the state court's conclusion that

> O'Dwyer engaged in this unauthorized practice." (App. 12-13.)

Those totally unwarranted, and false, factual determinations by the Panel are belied by the uncontradicted evidence in the underlying disciplinary case, which would have been readily apparent to the Panel if its members had actually given intrinsic consideration to the state record, and listened to the evidence identified by Respondent at oral argument on December 4, 2018, and actually considered that evidence. (App. 56, 77-81, 83.)

But Respondent submits that another, even more egregious "tell-tale" supporting of the conclusion that no intrinsic consideration of the state record was performed, is the fact that the Panel took the virtually unprecedented action of sealing the entire record in Respondent's case (App. 55-56, 59, 62-70), which ran directly contrary to a Fifth Circuit Opinion that had recently been authored by Panel Member Judge Costa in the case of *BP Exploration & Production Incorporated v. Claimant ID 100246928*, 920 F.3d 209 (5th Cir. 2019), in which he had stated:

> "The right to public access 'serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness.' (Citations omitted.) Public confidence in this courts is the issue: How can the public know that courts are deciding cases fairly and impartially if it doesn't know what is being decided? *In re Hearst Newspapers, L.L.C.*, 641 F3d 168, 179 (5th Cir. 2011) (discussing the need

> for 'openness' of court proceedings in the criminal context); *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 230 (5th Cir. 2008) (noting same interest for attorney's fee dispute in civil case). Sealing a record undermines that interest, but shutting the courthouse door poses an even greater threat to public confidence in the justice system. 'Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law.' *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980) (Brennan, J., concurring)."

Coupled with the fact that his Panel failed to address any of his substantive defenses to disbarment "on the merits," and that the Panel erroneously concluded that Respondent committed the crime of forgery, the sealing of the record caused Respondent to ask rhetorically, "What was the Panel hiding? Who was the Panel protecting? What was the Panel covering up?"

With this background, a "revelation" occurred on September 10, 2020, when Respondent casually read some "publicity" about Panel Member Stuart Kyle Duncan, who was being touted as being on the President Trump's "short list" for possible nomination to this Honorable Court. While reading about Judge Duncan's background, Respondent first learned about his long "history" of direct, substantial and extensive associations and relationships with the State of Louisiana, with the Louisiana Department of Justice, with the Office of the Louisiana Attorney General, and

with other State entities, cases and individuals. Although Judge Duncan knows better than anyone else the details of his history with the State, those currently known about are summarized in "Respondent's Declaration Under Penalty of Perjury." (App. 34-57.)

Respondent does not wish to substitute the following summary for the contents of his Declaration, but Respondent only recently learned information about Judge Duncan's undisclosed associations and relationships with the State between 2008 (when he left direct employment by the State) and May 2017 (when he assumed the Federal Bench, following the confirmation process). Among the conflicts of interests that Judge Duncan failed to disclose to Respondent are:

1) The fact that between 2008 and 2012, he acted as "Solicitor General of the State of Louisiana," while in the direct employ of the Louisiana Department of Justice and the Louisiana Attorney General, and in the capacity of "Appellate Chief" of the LDOJ, with all of the duties and powers that those titles entailed, including representing the interests of the State, and State entities and individuals, in the massive KATRINA litigation, *inter alia*, in which Respondent had represented almost 2,000 plaintiffs.

2) The fact that he represented the State, and State entities and individuals, in a plethora of other cases involving issues inimical to Respondent and his 2,000 or so KATRINA clients, involving co-counsel

who were directly opposed to Respondent and wanted him disbarred.

3) The fact that between 2012 (when he left the state's direct employ) and May 2017 (when he assumed the Federal Bench), Judge Duncan and/or his private law firm "signed six (6) different professional services contracts with the State of Louisiana worth more than $843,000," calling for the payment of an hourly billing rate to Judge Duncan of approximately $385.00 per hour. Indeed, it appears that while he was in private practice, the State of Louisiana was one of Judge Duncan's "best" clients and, perhaps, his most financially lucrative client. (App. 39-40, 42, 49.)

In addition to failing to disclose his conflicts of interests to Respondent, Judge Duncan also failed to disqualify himself (i.e., he failed to "self-recuse") from participating as a decision-maker in Respondent's case, after he knew or should have known that his prior employment by the State of Louisiana, the Louisiana and Department of Justice, and the Louisiana Attorney General, and his representation of the State's interests as a private attorney, coupled with his knowledge of:

(a) The State's involvement in Respondent's disbarment;

(b) The State's involvement in the corruption of the "Victims of KATRINA" litigation; and

(c) The State's involvement in the events of September 20, 2005,[1]

all rendered it impossible for Judge Duncan to render an unbiased and fair and impartial decision.

In short, Respondent has produced uncontradicted evidence that during the entire time period spanning ten (10) years, from 2008 to May 2017, Judge Duncan's associations and relationships with the State were "repeated and significant," and resulted in "close business connections" and "significant contact and business dealings," giving rise to a "significant compromising relationships" that were not "trivial," "insubstantial" or "tangential, limited, and stale."

None of Judge Duncan's currently known associations and relationships with the State, which Respondent avers constituted conflicts of interests, were disclosed to Respondent by Judge Duncan prior to his participating in this case, which included his participation at oral argument on December 4, 2018, and his signing off on the Per Curiam Opinion of May 31, 2019.

Following his accidental discovery of Judge Duncan's long history with the State on September 10, 2020, Respondent immediately transmitted the following email to Judge Duncan at the email address that is identified under his name on the Louisiana State Bar Association website. The email to Judge Duncan, asked:

"To: kyle_duncan@ca5.uscourts.gov

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[1] Being the subject of Case No. 08-30052 on the docket of the U.S. Court of Appeals for the Fifth Circuit. See also App. 46, 72-73, 85-86, 88-89.

Subject: Judge Duncan's Participation in Fifth District Case No. 18-98009

Dear Sir: I have a few questions:

(1) Why did you not disclose to me your prior position as "Chief, Appellate Division" of the Louisiana Department of Justice and Office of the Louisiana Attorney General?

(2) Why did you not . "self-recuse" yourself in my case, due to your conflict of interests and inability to be unbiased, fair and impartial in matters involving me?

Ashton O'Dwyer"

No response to the email has been forthcoming from Judge Duncan.

On November 17, 2020, Respondent filed a "Motion to Re-Open Case and to Set Aside the Panel's May 31, 2019 Per Curiam Opinion in its Entirety." (App. 14-33.) Within 24 hours of the filing of that Motion, the same Panel which had ordered that Respondent's name "be removed front the roll of attorneys admitted to practice in the Fifth Circuit," including Judge Duncan, who was the focus of Respondent's Motion, summarily ruled against Respondent, saying simply:

"Before Costa, Willett, and Duncan, *Circuit Judges.*

Per Curiam:

> IT IS ORDERED that the Petitioner's motion to reopen the case is DENIED.
>
> IT IS FURTHER ORDERED that the Petitioner's motion to vacate the panel's May 31, 2019, Per Curiam opinion is DENIED." (App. 108.)

Following his receipt of the adverse decision, Respondent filed a "Motion for Reconsideration" (App. 109-119), drawing attention to the fact that, since the relief which Respondent was seeking involved undisclosed conflicts of interests by Judge Duncan, for which the entire Panel was then "on notice," neither Judge Duncan nor the other Panel Members should participate in deciding the Motion for Reconsideration. However, once again the original Panel, including Judge Duncan, summarily ordered that:

> "Before Costa, Willett, and Duncan, *Circuit Judges.*
>
> Per Curiam:
>
> This panel previously DENIED the Petitioner's motion to reopen the case and to vacate the panel's May 31, 2019, Per Curiam opinion. The panel has considered Petitioner's motion for reconsideration.
>
> IT IS ORDERED that the motion is DENIED." (App. 120).

In the Motions which Respondent filed in the Court below, and his Declaration, Respondent described Judge Duncan's association and relationships with the State by using the following talismanic words:

undisclosed
conflicts of interests
direct, extensive and substantial
close business connections
close financial relations
business relationship
prior significant contacts and business dealings
repeated customer
repeated and significant patronage
regular customer
dealing that might create an impression of possible bias
substantial interest
more than trivial business
significant compromising relationship
a concrete, not speculative impression of bias
not trivial
not insubstantial
not tangential, limited, and stale (App. 36-46, 51-53.)

Neither of the most recent Orders issued by Respondent's Fifth Circuit Panel provided any explanation for Judge Duncan's non-disclosure of his conflicts of interests or for the Panel's summary and repeated use of the word "DENIED."

This timely Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

1. Judge Duncan Failed to Disclose Material and Relevant Conflicts of Interests to Respondent, and in so Doing Engaged in Unethical Behavior, Perhaps Unwittingly.

The undisclosed associations and relationships between Panel Member Stuart Kyle Duncan and the State of Louisiana, the Louisiana Department of Justice, the Office of the Louisiana Attorney General, and others, are set forth in Respondent's Declaration. (App. 34-57.)

Respondent's discovery of Judge Duncan's undisclosed associations and relationships with the State resulted in Respondent filing a Motion to re-open his case and to set aside the Panel's May 31, 2019 Per Curiam Opinion (App. 14-33), which the Panel, including Judge Duncan, summarily denied only 24 hours later (App. 108.)

In his Motion, Respondent averred that the setting aside of the Panel's Per Curiam Opinion was mandated by this Court's decision in *Commonwealth Coatings v. Continental Cas.*, 393 U.S. 145 (1968), which vacated an arbitral award where one of the arbitrators failed to disclose prior "close business connections" and a "business relationship" with a "repeated customer," who gave the arbitrator "repeated and significant" patronage, but also was party to the arbitration. A more detailed discussion of *Commonwealth Coatings* follows, *infra.*

Respondent further avers that, by virtue of his aforesaid conflicts of interests, Judge Duncan should have disqualified himself in Respondent's case (i.e., he should have "self-recused"), which he also did not do.

And by failing to disclose his prior associations and relationships with the State of Louisiana to Respondent, and by failing to disqualify himself, Judge Duncan deprived Respondent of the opportunity to seek Judge Duncan's disqualification and recusal and, therefore, violated the following:

1. Respondent's absolute entitlement to procedural and substantive due process of law and the constitutional right under the 5th Amendment to have his case adjudicated by unbiased, unprejudiced and fair and impartial arbiters of the facts and the law, without Judge Duncan on the Panel.

2. Canon 2 of the Code of Conduct for United States Judges and the COMMENTARY which follows the Canon, which requires respect for and compliance with law so as to promote public confidence in the integrity and impartiality of the judiciary, and which disallows political, financial or other relationships to influence judicial conduct or judgment, and which proscribes impropriety and the appearance of impropriety in all activities.

3. Canon 3 of the Code of Conduct for United States Judges, which requires Judges to perform the duties of office fairly, impartially and diligently, without bias or prejudice, and more particularly Canon 3(C)(1), which also imposes an

affirmative duty on an Article III Judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," such as in Respondent's case. Which specific subparts to Canon 3 were violated by Judge Duncan are better known to him than to Respondent, but Respondent avers violation of Canon 3(C)(1)(a) [personal bias]. Respondent also avers that it is also quite possible that Judge Duncan violated Canon 3(C)(1)(b), Canon 3(C)(1)(c) [financial interest in the State's solvency, or legal fees earned from his law firm's representation of the State, or other interest that could be affected substantially by the outcome], Canon 3(C)(1)(d)(i through iii) [party or acted as lawyer or known interest that could be affected substantially by the outcome], Canon 3(C)(1)(e) [governmental employment as counsel or advisor, or expressed an opinion], as well as Canon 3(D) [remittal of disqualification through disclosure]. All such information is known to Judge Duncan, but not to Respondent.

4. 28 U.S.C. §455(b)(1) and (3), due to Judge Duncan's actual personal bias and prejudice in favor of the State or against Respondent, or both, and possibly having knowledge of facts concerning the proceeding or having served in

governmental employment as counsel or adviser concerning the proceeding.

5. 28 U.S.C. §455(a), which mirrors Canon 3(C)(1), and which requires disqualification of "[a]ny...judge...of the United States...in any proceeding in which his impartiality might reasonably be questioned," such as this proceeding.

2. *Commonwealth Coatings* Mandates The Setting Aside Of The Panel's Per Curiam Opinion Due To Judge Duncan's Failure To Disclose Conflicts Of Interests

Respondent reiterates that the relief which he is seeking, namely the setting aside of the Panel's Per Curiam Opinion of May 31, 2019, and assembling an unbiased, unprejudiced, and fair and impartial Panel, which is devoid of any taint and conflicts of interests, in order to render decision in this case, is mandated by this Court's decision in the case of *Commonwealth Coatings v. Continental Cas.*, 393 U.S. 145 (1968) and its progeny.

Here, like in *Commonwealth Coatings*, which imposed "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias" or risk "vacation of an award," Judge Duncan's failure to disclose to Respondent his prior "direct, extensive and substantial" associations and relationships with the State of Louisiana, and with State entities, cases and individuals, must result in the setting aside of the Panel's Opinion below. In the words of Justice Black, "We have no doubt that, if a litigant could show that a

foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge." (Emphasis supplied.) The term "any such relationship" used by Justice Black meant "the undisclosed business relationship" described in detail by Justice Black in the *Commonwealth Coatings* decision, which was less "egregious" than the undisclosed associations and relationships that Judge Duncan had with the State of Louisiana in this case. Justice Black went on to say, "We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." Respondent respectfully submits that the same should be true for Article III Judges in proceedings such as this one, where, to again quote Justice Black, "elementary requirements of impartiality [are] taken for granted."

Well, not in this case, and certainly not by Judge Duncan.

Judge Duncan's prior undisclosed associations, and relationships with the State, are set forth in detail in "Respondent's Declaration" (App. 34-57), and are much more worthy of disclosure than the undisclosed "close business connections" between the *Commonwealth Coatings* arbitrator and his "repeated customer," who showered the arbitrator with "repeated and significant" patronage, but was a party to the arbitration. Even Justice White clearly stated in his concurring opinion, "But it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed."

Respondent submits that in no sense can Judge Duncan's prior undisclosed associations and relationships with the State be categorized as "trivial" or "insubstantial." To the contrary, the available evidence overwhelmingly shows that they were "direct, extensive and substantial," and that they stood the test of time, commencing in 2008, when Judge Duncan went to work for the State, enduring until ten (10) years later, when Judge Duncan assumed the Federal Bench in May 2017.

In partial justification for vacating the arbitral award in *Commonwealth Coatings*, Justice Black cited "that part of the 33rd Canon of Judicial Ethics" then-in-effect, which provided: "...[A judge] should, however, in pending or prospective litigation before him, be careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct."[2] Justice Black went on to say, "This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias." And Respondent submits that no matter what ethical "Standards of Behavior" may apply to arbitrators versus Article III Judges, like Judge Duncan, particularly with respect to the standard to be applied to "disclosure" of conflicts of interests, to "disqualification," or to both, *Commonwealth Coatings* makes clear that Judge Duncan should be held to an equal, or even higher, standard than arbitrators. Respondent reavers that Justice Black made that fact

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[2] Former Canon 33 mirrors the current language of Canon 2, as well as the COMMENTARY following Canon 2.

abundantly clear when he said, "We have no doubt that, if a litigant could show that...a judge in a court of justice had, unknown to the litigant, any such relationship [as the one existing between the party in *Commonwealth Coatings*], the judgment would be subject to challenge." And in his concurring opinion, Justice White said, "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III Judges, or indeed of any judges," language which Respondent avers clearly indicates that Justice White believed an Article III Judge like Judge Duncan would be held to a higher standard than the standard applicable to an arbitrator, whose arbitral award the *Commonwealth Coatings* Court vacated for non-disclosure.

This same subject (i.e., whether the applicable disclosure standard may be more rigorous for arbitrators than for Article III Judges) was addressed by Judge Reavley in his dissent in *Positive Software Solutions, Inc. v. New Century Mortgage Corporation*, 476 3d, 278 (5th Cir. 2007), where he interpreted Justice White's plain language in his *Commonwealth Coatings* concurring opinion *as* follows:

> "...even though Justice White 'does not expressly define the standard that should govern arbitrator conduct. his opinion only makes it clear that...arbitrators will be governed by a standard less than the standard governing judges.' Elizabeth A. Murphy, Note, *Standards of Arbitrator Impartiality: How Impartial Must They Be?* 1996 J. DISP. RESOL. 463, 470." (Emphasis added.)

Respondent submits that the Article III Judge involved in this case, Stuart Kyle Duncan, like the arbitrator in *Commonwealth Coatings,* should have disclosed to Respondent his "substantial compromising relationship" with the State, and that the setting aside of the Panel's Per Curiam Opinion must result from his failure to meet the standard for disclosure applicable to Article III Judges.

Summarizing, Respondent has produced evidence that during the entire time period spanning ten (10) years, from 2008 to May 2017, Judge Duncan's associations and relationships with the State were "repeated and significant" and resulted in "close business connections," and "significant contact and business dealings," giving rise to a "significant compromising relationship" that was not "trivial," "insubstantial" or "tangential, limited, and stale" (App. 37, 38-46, 51-53), requiring that the Per Curiam Opinion should be set aside due to Judge Duncan's non-disclosure, if the Rule of *Commonwealth Coatings, supra,* is to be followed, for as Justice White stated in his *Commonwealth Coatings* concurring opinion:

> "But it is enough for present purposes to hold, as the Court does, that where the arbitrator has substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed."

3. Judge Duncan's Misconduct in Failing to Disclose Conflicts of Interests is Bad Enough, but Respondent Avers that Judicial Misconduct on the Fifth Circuit Bench Runs Much Deeper Than Just Judge Duncan.

The filing of Respondent's "Motion to Re-Open Case" put Judge Duncan (and the entire Panel) "on notice" that the subject matter of Respondent's Motion was "undisclosed conflicts of interest" on Judge Duncan's part. Respondent maintains that that fact alone should have disqualified Judge Duncan from participating any further in this case. Accordingly, Respondent was more than "just a little" surprised when Judge Duncan's name appeared on the summarily issued "...motion to reopen the case is DENIED" Order that emanated from the Panel within 24 hours of the Motion being filed. And the said Order did not provide Respondent with any insight as to why Judge Duncan had failed to disclose his conflicts of interests to Respondent. Nor did it address any of the consequences that this Court has said must flow therefrom under *Commonwealth Coatings*.

The lack of any meaningful "communication" from Judge Duncan and the Panel put Respondent at a disadvantage, because Respondent simply does not know what "may be in Judge Duncan's head." The complete depth, breadth and scope of Judge Duncan's associations and relationships with the State of Louisiana, and with State entities, cases and individuals, since 2008, are known to and can be attested to by Judge Duncan better than by anyone else. Nevertheless, it is evident that Judge Duncan has, since 2008, dutifully served, as his "Lord and Master," the State of Louisiana, upon whose good graces he was

virtually totally dependent for his livelihood until May 2017, when he assumed the Federal Appellate Bench.

Judge Duncan knows what cases he handled and/or supervised for the State, the names of those cases, the identities of the parties, and the nature of the issues in those cases. Judge Duncan knows what KATRINA cases he handed or supervised, and the issues that were litigated in those cases. He knows whether he had ever heard of Respondent prior to this case, and whether he ever discussed Respondent or any of his litigation or disbarment proceedings with colleagues within the Louisiana Department of Justice, the Office of the Attorney General or any other State entity, or with anyone else. Judge Duncan also knows whether he might harbor any bias or prejudice in favor of his former employer and client, the State, or against Respondent, even "unconscious bias." And Judge Duncan knows why he failed to make disclosure in this case, and why he failed to disqualify himself, perhaps because "the most biased judges [are] the least willing to withdraw." See John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U.L. Rev. 237, 245 (1987).

It is readily apparent from Judge Duncan's responses to Senators during his confirmation process demonstrated that he contemplated both "disclosure" and possible "disqualification," once he was on the Federal Bench, particularly in cases that might involve the State of Louisiana (App. 47-48). Why Judge Duncan did neither in this case is unknown.

Respondent avers that the fact that Judge Duncan failed to disclose his associations and relationships with the State gave rise to, in reasonable minds, "a concrete, not speculative impression of bias."

Respondent maintains that, at the very least, Judge Duncan's personal interest in this case, which placed his own undisclosed conflicts of interests "front and center," should have disqualified him from acting further in Respondent's case pursuant to a Rule that fair tribunals must follow, recently reinforced in *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016), which held:

> "Due process guarantees 'an absence of actual bias' on the part of a judge. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, L.Ed. 942 (1955). Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position' is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias'. *Caperton*, 556 U.S., at 881, 129 S.Ct. 2252. Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. See *Murchison*, 349 U.S., at 136-137, 75 S.Ct. 623. This objective risk of bias is reflected in the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.' *Id.*, at 136, 75 S.Ct. 623." (Emphasis supplied.)

Applying the objective test to Judge Duncan's undisclosed conflicts of interests, coupled with his continued participation in deciding Respondent's Motion to Re-Open the Case, and Respondent's Motion for Reconsideration (App. 108, 120), resulted in the likelihood or appearance for bias rising to an unconstitutional level. *Peters v. Kiff*, 407 U.S. 495, 502 (1972). Indeed, the fact that Judge Duncan failed to make proper disclosure to Respondent, and concealed from Respondent information about his multiple direct, extensive and substantial associations and relationships with the State of Louisiana, brings to mind the words of Fifth Circuit Judge Jacques Weiner in his dissent in *Positive Software Solutions, Inc. v. New Century Mortgage Corporation*, 376 F.3d 278 (5th Cir. 2007), namely: "But Shurn's very act of preemptively deciding, solely on his own, that his relationship with council for New Century need not be disclosed and then withholding that information conveys an unmistakable appearance of impropriety," 376 F.3d at 293.

And because Respondent avers that "whatever" may have motivated Judge Duncan's failure to disclose his conflicts of interests with the State indubitably stemmed from relationships that began to be forged as early as 2008, Judge Duncan's bias and prejudice, actual or likely (but reasonably "plausible" under the circumstances), was "extra-judicial." *Liteky v. United States*, 510 U.S. 540 (1994).

Unfortunately, this concrete, not speculative impression of bias also extends to Judge Duncan's brethren on the Panel, Judges Costa and Willett. More particularly, Respondent avers that these other Panel Members were also corrupted, tainted and polluted by permitting Judge Duncan's continued participation in the case once they were "on notice" that Respondent

was claiming that Judge Duncan had failed to disclose conflicts of interests to Respondent. Judges Costa and Willett were put on notice by virtue of the contents of Respondent's "Motion to Re-Open Case, etc.," as well as by the contents of "Respondent's Rule 27.4 Certificate of Interested Persons and Entities" (App. 14-33, 100-105), which was filed on November 27, 2020, along with Respondent's Motion.[3] The Certificate clearly reflects that "These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal."

The "response" by Judges Costa and Willet (as well as Judge Duncan) to being placed "on notice" of Judge Duncan's undisclosed conflicts of interests was to summarily deny Respondent's Motion to Re-Open Case, as well as his Motion for Reconsideration, without any written reasons, and to allow Judge Duncan's participation in both decisions notwithstanding the fact that Respondent had squarely placed Judge Duncan's conduct at issue by virtue of his non-disclosed conflicts of interests (App. 108, 109-119, 120.)

Judges Costa, Willett and Duncan were members of the very same Panel which:

1. SEALED the entire record in Respondent's case, a virtually unprecedented action which ran directly contrary to the Fifth Circuit Opinion which had been only recently authored by Judge Costa in the case of *BP Exploration & Production Incorporated v. Claimant ID 100246928*, 920 F.3d 209

[3] Another such Certificate also was filed simultaneously with Respondent's "Motion for Reconsideration."

(5th Cir. 2019), and which prompted Respondent to ask rhetorically: "Does the actual bias and prejudice run deeper than just Judge Duncan? What is the Panel hiding? Who is the Panel protecting? What is the Panel covering up?"

2. Failed to address, even in cursory fashion, any of Respondent's Affirmative Defenses to his disbarment in the Federal or State disciplinary proceedings. See Respondent's "Motion to Unseal the Record" (App. 69-76, 85-99) and his "Declaration Under Penalty of Perjury." (App. 56.) Respondent's Motion was summarily denied without any written reasons.

3. Made a false finding "on-the-record" in the Per Curiam Opinion, even going so far as to falsely and maliciously accuse Respondent of the crime of forgery by forging his cousin's signature on a pleading, which was the "linchpin" of the Panel's (and the Louisiana Supreme Court's) erroneous conclusion that Respondent had engaged in the unauthorized practice of law while under suspension. (App. 56, 77-81, 83.)

By joining their Brother-on-the Federal-Bench, Judge Duncan, in improvidently sealing the record, failing to address material issues, and making blatantly false statements "on-the-record," Respondent avers that it is entirely plausible for reasonable minds to

conclude that something other than "truth, justice and the American way" was at work in this case.

Accordingly, Respondent avers that by allowing Judge Duncan's continued participation in Respondent's case, and by continuing to participate in the case themselves, Judges Costa and Willett became Judge Duncan's all-too-willing "partners in crime," and actually joined in Judge Duncan's unethical behavior. In so doing, Respondent avers that Judges Duncan Costa and Willett ran afoul of *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016), and cases cited therein.

Williams is important, not only because it stands for the proposition that a constitutional violation of a due process right by one Judge on a Panel of three Judges cannot constitute "harmless error," but because it implicitly recognizes the truth of the proverb: "One bad apple spoils the whole barrel." The *Williams* Court expressed this concept much more eloquently than Respondent could ever hope to do by saying:

> "The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive. *Puckett v. United States*, 556 U.S. 129, 141, 129 S.Ct. 1423, 173 L.Ed.23 266 (2009) (emphasis deleted). The deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decision-making processing. Indeed, one purpose of judicial confidentiality is to assure jurists that they can

reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. As Justice Brennan wrote in his *Lavoie* concurrence,

> 'The description of an opinion as being [for the court] connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." 475 U.S., at 831, 106 S.Ct. 1580.

"These considerations illustrate, moreover, that it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party. See *id.*, 15 831-832, 106 S.Ct. 1580 (Blackmun, J., concurring in judgment).

> "A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the role of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless."

Separate and apart from whatever "influence" their "bad-apple" Panel Brother may had on them, Respondent also does not know what Judges Costa and Willett "knew or didn't know," and "when." Respondent does not know precisely when they acquired knowledge of Judge Duncan's undisclosed associations and relationships with the State of Louisiana. Did they have such knowledge when they were assigned to the Panel in 2018? Did they acquire that knowledge at some later date, independently of what they may have been informed about by Respondent?

But what Respondent does know is that Judges Costa and Willett, like Judge Duncan, remained completely silent, even after they had become familiar with the contents of Respondent's Motion to Re-Open Case, etc., with Respondent's Declaration, and with Respondent's Motion for Reconsideration (App. 14-33, 34-57, 109-119), remaining silent, while "circling the

wagons" around their Brother Judge.[4] They then ruled against Respondent, in Judge Duncan's "favor," in Orders that were issued summarily, without any explanation or written reasons. Respondent avers that such conduct renders Judges Costa and Willett equally as guilty of unethical behavior as Judge Duncan.

CONCLUSION

To recapitulate, Respondent respectfully submits that the decision of This Honorable Court in *Commonwealth Coatings* mandates that the Panel's Per Curiam Opinion should be set aside because of Judge Duncan's failure to disclose conflicts of interests to Respondent, namely his direct, extensive and substantial associations and relationships with the State of Louisiana, which not only disbarred Respondent, but which has been Respondent's "nemesis" for the past 15 years. These undisclosed associations and relationships constituted "a substantial compromising relationship," which Judge Duncan should have disclosed. Non-disclosure gave rise to, in reasonable minds, "a concrete, not speculative impression of bias." The very fact of Judge Duncan's non-disclosure, for whatever reason, requires that the Per Curiam Opinion should now be set aside in accordance the with *Commonwealth Coatings* mandate. For all of the reasons identified herein, a Writ of Certiorari should issue to review the Orders of the United States Court of Appeals for the Fifth Circuit, with instructions to vacate the May 31, 2019 Per Curiam Opinion, with the entire matter being

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[4] They also ignored, again, the detailed contents of Respondent's "Motion to Unseal the Record." (App. 58-99.)

remanded to the Fifth Circuit for reconsideration by an unbiased and unprejudiced, fair and impartial Panel of Judges.

Respectfully submitted,

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