No. 20-1712

In the Supreme Court of the United States

CHARLES PAUL-THOMAS. PHOENIX,

PETITIONER,

v.

THE FLORIDA BAR,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held there is a lack of due process in attorney disciplinary proceedings when the lawyer was disciplined upon a charge "not in the original charges made against him." *In re Ruffalo*, 390 U.S. 544, 549 (1968).

> 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' These are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence.

Id. at 551 (internal citations omitted). The question presented is:

Whether a charge, in a state bar attorney disciplinary proceeding for which the attorney grievance committee had determined there was no probable cause, may be added during the closing argument.

PARTIES TO THE PROCEEDING

Petitioner Charles Paul-Thomas. Phoenix was the respondent in the Supreme Court of Florida.

Respondent The Florida Bar was the complainant in the Supreme Court of Florida.

RELATED PROCEEDINGS

Supreme Court of Florida:

The Florida Bar v. *Charles Paul-Thomas Phoenix*, No. SC17-585 (Jan. 28, 2021, *reh'g denied* Mar. 9, 2021) (on cross-appeals, ordering suspension from the practice of law for two years effective Mar. 1, 2021 for violations of Rules 4-1.16, 4-4.1, and 4-8.4(c))

The Florida Bar v. *Charles Paul-Thomas Phoenix*, No. SC17-585 (Oct. 15, 2019) (following argument of counsel, successor referee recommending guilt on three charges and a suspension from the practice of law for 90 days for violations of Rules 4-1.16, 4-4.1, and 4-8.4(c))

The Florida Bar v. *Charles Paul-Thomas Phoenix*, No. SC17-585 (Jul. 11, 2019) (on The Florida Bar's appeal, order disapproving presiding referee's report and for the referee to make findings)

The Florida Bar v. *Charles Paul-Thomas Phoenix*, No. SC17-585 (Jul. 28, 2018) (following three-day trial, presiding referee recommending no adjudication of guilt and no finding of violations of Rules 4-1.16, 4-4.1, or 4-8.4(c))

The Florida Bar v. *Charles Paul-Thomas Phoenix*, The Florida Bar File No. 2014-10,980 (20A)

(Jun. 24, 2016) (grievance committee finding of probable cause for violations of Rules 4-1.16 and 4-4.1; no finding of probable cause for violation of rule 4-8.4(c))

United States District Court (M.D. Fla.):

In re: Charles PT Phoenix, No. 3:21-mc-15-TJC (pending petition for relief from automatic suspension)

United States Bankruptcy Court for the Middle District of Florida (Bankr. M.D. Fla.):

In re: Charles Paul-Thomas Phoenix, No. 2:21-MP-00001-FTM (pending motion to stay and for relief from suspension order)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Paul-Thomas Phoenix respectfully petitions for a writ of certiorari to review the order of the Supreme Court of Florida.

RULINGS BELOW

The rulings and reports in the Supreme Court of Florida are not published but are included in the appendix. App., *infra*, 1a—49a and 90a—100a.

JURISDICTION

The Supreme Court of Florida entered its order of suspension on January 28, 2021 (App. 1a) and entered an order denying the petitioner's motion for rehearing and reconsideration on March 9, 2021 (App. 49a). This Court's jurisdiction is invoked under 28 U.S.C. §§ 1257(a) and 2104.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provision is U.S. Const. amend. V: "No person shall ... be deprived of life, liberty, or property, without due process of law," as this Court has applied to attorney disciplinary proceedings when a lawyer is disciplined upon a charge "not in the original charges made against him." *In re Ruffalo*, 390 U.S. 544, 549 (1968).

> 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' These are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence.

Id. at 551 (internal citations omitted). The other pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 112a—135a.

STATEMENT

This case presents an important federal question decided by the Florida Supreme Court in conflict with this Court's decision on due process in attorney grievance proceedings. This Court held there is a lack of due process in attorney disciplinary proceedings when a lawyer is disciplined upon a charge "not in the original charges made against him." *In re Ruffalo*, 390 U.S. 544, 549 (1968). Citing *In re Ruffalo*, the Florida Supreme Court ruled:

> Bar Rule 4-8.4(c) was properly charged. Generally, as a matter of due process,

> the Bar's complaint must allege all rule violations the Bar seeks to prosecute ... However, the violation of specific Bar Rules not named in the complaint may be considered if such misconduct is "within the scope of the Bar's accusation" and the attorney was "clearly notified of the nature and extent of the charges pending against him or her."

(Internal citations omitted.) App., infra, 9a—10a. In doing so, the decision below conflicts with the procedural history and this Court's long-settled view that grievance proceedings "are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence." *In re Ruffalo* at 551.

A. Grievance Committee Proceedings: No Probable Cause of a Rule 4-8.4(c) Violation

The Florida Bar's Grievance Committee met on June 24, 2016 to consider whether probable cause existed for further proceedings to consider if the petitioner violated Rules Regulating The Florida Bar 4-1.16 (Declining or Terminating Representation) 4-4.1 (Truthfulness in Statements to Others), or 4-8.4(c), Rules Regulating The Florida Bar (Misconduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation). After considering over 2,000 pages of documents (only 68 of which related to the petitioner), the Grievance Committee determined there was only probable cause for further proceedings as to violations of Rules 4-1.16 (Declining or Terminating Representation) and 4-4.1 (Truthfulness in Statements to Others). App., *infra*, 90a—100a.

B. The Complaint: No Charge of a Rule 4-8.4(c) Violation

1. On January 25, 2017, having found no probable cause for proceedings on a violation of Rule 4-8.4(c) (Engaging in Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation), the bar asked the petitioner to enter a conditional guilty plea for consent judgment alleging only violations of Rules 4-1.16 and 4-4.1. App. 86a, *infra*, at ¶ 6.

2. On March 31, 2017, the bar filed a complaint alleging only violations of Rules 4-1.16 and 4-4.1. App. 101a, *infra*, at ¶ 2 and 108a at ¶ 50.

C. The Trial Proceedings; No Prosecution of a Rule 4-8.4(c) Violation and No Finding of Guilt on Any Charge

1. Based on the Grievance Committee's probable cause finding and the bar's complaint, the bar prosecuted violations of Rules 4-1.16 and 4-4.1 App., *infra*, 65a:9—10. During the trial's opening, the bar explained to the court that a different lawyer "had one additional rule violation that pled to, which was [Rule] 484-C [sic]," but did not mention raising the charge against the petitioner. App., *infra*, at 53a:6—8.

2. The trial proceeded before the Hon. Judge Judith Miriam Goldman (sitting as a referee) for three (3) full days on May 9, 10, and 23, 2018. There were seven (7) live witnesses and transcript testimony from seven (7) other witnesses. App., *infra*, 41a.

3. During closing argument, the bar sought to add the Rule 4-8.4(c) charge. App., *infra*, at 65a:11—67a:22. The petitioner objected (*Id.* at 69a:25—71a:8), noting "It's certainly not within the scope of the

complaint," to which Judge Goldman acknowledged, "No" (*Id.* at 70a:7—9).

4. Near the close of the trial, Judge Goldman orally-pronounced this finding of fact:

> I don't think there's any dispute, however, that whatever advice he gave or whatever services he provided, there is no rebuttal before this court that it wasn't consistently how to comply with applicable law, what must be restructured or disclosed if something is deemed not be a security transaction. So I don't want there to be any additional clouds over the nature of the services because really ***I think what we're down to is the fact of the services and how long they continued and whether they could have or should*** **have terminated sooner**. And that's just a gratuitous remark, but at the same time ***constitutes a finding***.

(***Emphasis*** added.) App., *infra*, 62a:15—63a:3.

5. The bar, however, invited error by instructing Judge Goldman to make "no findings" when the court asked "What kind of findings would one have to make?" for a diversion order. App., *infra*, 74a:20—75a:2. The court concluded the trial:

> THE COURT: . . . I think you could see my unbridled enthusiasm and my belief without any hesitation or doubt that Mr. Phoenix should be given a diversion program. So I'll recommend that and

hope that it will be accepted.

App., *infra*, 77a: 13—17.

6. On the bar's guidance, Judge Goldman drafted her report as a "summary of the evidence" rather than as "findings" (App., *infra*, 42a) and concluded her "narrative summary of the case":

> I did not adjudicate Charles P.T. Phoenix to be guilty of violating any of these rules, and I do not make any findings whatsoever that Charles P.T. Phoenix has violated any Rules Regulating The Florida Bar.

Id. at 45a.

7. The bar appealed[1] and, on this semantic, the Florida Supreme Court overlooked the bar's clearly

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[1] "Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal." *Goodwin v. State*, 751 So.2d 537, 544 n.8 (Fla. 1999).

> If the error is "invited," or the [appellant] "opens the door" to the error, the appellate court will not consider the error a basis for reversal.... Indeed, our case law is filled with procedural pitfalls that may preclude an error from being considered on appeal.

Id. at 544. Not even fundamental error can be asserted as a basis for reversal if the appellant invited the error in the lower tribunal. *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977). The Eleventh Circuit has also announced and routinely applied a doctrine that renounces the power to review any error, no matter how clear and decisive, if it views the error as "invited." *See, e.g.*, *United States v. Fulford*, 267 F.3d 1241, 1247 (11th Cir. 2001).

invited error and well-established caselaw, disapproved Judge Goldman's report in July 2019, and remanded the case for further proceedings to make "findings."

C. The Proceedings on Remand

1. Judge Goldman had since retired, so the Hon. Judge Kimberly C. Bonner took up the matter as successor referee with no new testimony or evidence. Relying on Judge Goldman's record and argument of counsel, finding the petitioner guilty of all charges, including Rule 4-8.4(c), and recommended a 90-day suspension. App., *infra*, 38a.[2] Judge Bonner found:

> The Referee is convinced beyond any doubt that the Respondent is currently a highly competent attorney who takes no shortcuts, deal absolutely within the confines of the law, and holds himself the highest ethical standards. There is zero percent likelihood that he will engage in future misconduct and he poses no risk to the community or his clients.

Id. at 35a. Judge Bonner found the petitioner "was often at odds with the principals over their business practices" (*Id.* at 36a), "society would not be nest served in this case by a lengthy suspension" and the petitioner's "conduct in the decade since the violations has been above reproach" (*Id.* at 37a), and the matter "has arguably resulted in a specific prejudice, because

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[2]A successor judge may not enter an order or judgment based upon evidence heard by the predecessor judge. *See, e.g., Nowlin v. Nationstar Mortg., LLC*, 193 So.3d 1043 (Fla. 2d DCA 2016).

the sanction is so far removed from the conduct" and the petitioner's "circumstances have changed as well" (*Id.* at 35a).

2. The parties cross-appealed. The petitioner argued due process violations based on *In re Ruffalo*. Addressing the petitioner's argument, the Florida Supreme Court ruled:

> Bar Rule 4-8.4(c) was properly charged. Generally, as a matter of due process, the Bar's complaint must allege all rule violations the Bar seeks to prosecute ... However, the violation of specific Bar Rules not named in the complaint may be considered if such misconduct is "within the scope of the Bar's accusation" and the attorney was "clearly notified of the nature and extent of the charges pending against him or her."

(Internal citations omitted.) App., infra, 9a—10a.

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court's order conflicts with this Court's long-settled ruling: There is a lack of due process in attorney disciplinary proceedings when a lawyer is disciplined upon a charge "not in the original charges made against him." *In re Ruffalo*, 390 U.S. 544, 549 (1968). Because this case provides a sound vehicle for addressing a recurring and important issue of federal law, the petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts with this Court's Long-Settled View

The decision below conflicts with the procedural history and this Court's long-settled view that grievance proceedings "are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence." *In re Ruffalo* at 551.

Citing *In re Ruffalo*, the Florida Supreme Court ruled:

> Bar Rule 4-8.4(c) was properly charged. Generally, as a matter of due process, the Bar's complaint must allege all rule violations the Bar seeks to prosecute ... However, the violation of specific Bar Rules not named in the complaint may be considered if such misconduct is "within the scope of the Bar's accusation" and the attorney was "clearly notified of the nature and extent of the charges pending against him or her."

(Internal citations omitted.) App., infra, 9a—10a.

But this Court held there was a due process violation where the lawyer faced discipline in federal court after being disbarred in a state proceeding when a charge No. 13 was added immediately after the petitioner and a primary witness testified. *In re Ruffalo* at 546. Charge No. 13 "was not in the original charges made against him" and "no additional evidence . . . was taken." *Id.* at 549. There, this Court recognized that while "state action is entitled to

respect, it is not conclusively binding on the federal courts." Id. at 547. The lawyer was "entitled to procedural due process, which includes fair notice of the charge . . . [, but he] had no notice . . . until after" testimony "on all the material facts pertaining to this phase of the case." *Id.* at 550—51.

> 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' These are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence.

Id. at 551 (internal citations omitted).

B. The Decision Below Is Incorrect

This Court's review is also warranted because the Florida Supreme Court erred. This case is much like *In re Ruffalo*: "This absence of fair notice ***as to the reach*** of the grievance procedure ***and the precise nature of the charges*** deprived petitioner of procedural due process" (***emphasis*** added). *Id.* at 552.

1. Here, the Rule 4-8.4(c) charge was added in the closing argument. Even worse, the Grievance Committee's no probable cause determination steered the petitioner away from the notion a Rule 4-8.4(c) violation was in the horizon. App., *infra*, 90a, 101a at ¶ 2 and 108a at ¶ 50.[3] When the trial commenced, the

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[3] The Rules Regulating the Florida Bar required the proceedings to be framed by a complaint alleging rule violations based on findings of probable cause. Rule 3-3.2(b)(1) requires "a formal complaint may be filed if there has been a finding under

bar mentioned a different lawyer had consented to a Rule 4-8.4(c) violation, but did not state intentions to proceed with the trial on the same charge. *Id.* at 53a:6—8. There is no amended complaint in the record. The petitioner was not oriented to defend a Rule 4-8.4(c) violation.

2. For the petitioner to have been on notice of the allegations, the specific must be subsumed in the conduct and rule violations alleged in the complaint. The Florida Supreme Court view makes Rules 4-4.1 (truthfulness in statements to others) and 4-8.4(c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation) synonymous and interchangeable. It is illogical for Rules 4-4.1 and 4-8.4(c) to be subsumed one within the other and vice versa—that would make them the same rule. The plain language of the rules shows they are, however, not the same rules. Rule 4-4.1 states:

> ***In the course of representing a client*** a lawyer shall not ***knowingly***:

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these rules the probable cause exists." App., *infra*, at 112a. Rule 3-7.6(b) punctuates:

> When a finding has been made ... that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action, and the formal complaint ***based on such finding of probable cause*** has been assigned....

(***Emphasis*** added). *Id.* at 115a. Rule 3-7.6(h)(1)(B) requires: "The complaint shall set forth the particular act or acts of conduct for which the attorney is sought to be disciplined." *Id.* at 117a. Rule 3-7.6(h)(6) allows: "Pleadings may be amended by order of the referee, and a reasonable time shall be given within which to respond thereto." *Id.* at 118a.

> (a) make a false statement of material fact or law to a third person; or
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

(***Emphasis*** added.) App., *infra*, 128a. Rule 4-8.4(c), on the other hand, states "***a lawyer shall not engage*** in conduct involving dishonesty, fraud, deceit, or misrepresentation" (***emphasis*** added). *Id.* at 130a.

3. Violating Rule 4-4.1 does not inherently include a violation of Rule 4-8.4(c). Rule 4-8.4(c) refers to conduct in general (not merely within a client representation)—and implies intent is not a necessary element. Rule 4-4.1, however, has a narrow context to (i) actions while representing a client and (ii) with knowledge. It is not reasonable for the petitioner to have believed he was being prosecuted in strict liability beyond the scope of actions in the client representation (particularly when the other charge was for failure to decline or terminate representation under Rule 4-1.16). Another way of putting it, Rule 4-8.4(c) was not a "lesser-included offense" of Rule 4-4.1.

4. The concept of due process is inherent to American society. It cannot be left to the prosecutor to decide it had afforded due process (as is the case here where the bar is an instrument of the Florida Supreme Court). Granting this petition for a writ of certiorari would eliminate the conflict created by the Florida Supreme Court's order. The relief the Court would provide is narrow.

C. The Question Presented Warrants Review, And This Case Provides A Sound Vehicle For Addressing It

The question presented is important; a fundamental one. This case also presents a sound vehicle for resolving the question.

1. The Florida Supreme Court's order conflicts with this Court's long-settled ruling that there is a lack of due process in attorney disciplinary proceedings when a lawyer is disciplined upon a charge "not in the original charges made against him." *In re Ruffalo*, 390 U.S. 544, 549 (1968). Because this case provides a sound vehicle for addressing a recurring and important issue of federal law, the petition for a writ of certiorari should be granted.

2. The concept of due process is inherent to American society. It cannot be left that due process does not apply to some people of certain professions in particular states. Granting this petition for a writ of certiorari would eliminate the conflict created by the Florida Supreme Court's order

3. This case provides a sound vehicle for addressing the question presented. This case therefore cleanly presents the issue provides this Court with an opportunity to resolve this new conflict with long-settled law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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