No. _____

In The

Supreme Court of the United States

In re JONATHAN B. ANDRY,
Louisiana Bar Roll No. 20081,

Petitioner.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED FOR REVIEW

In attorney disciplinary proceedings, due process requires that the precise charges against the attorney be made known at the outset of the proceedings. Due process also prohibits disciplining an attorney for misconduct not set out in those charges.

Following Andry's disciplinary proceedings in district court, the United States Court of Appeals for the Fifth Circuit upheld only a single violation against Andry, but it did so on grounds that had never been alleged or found by the *en banc* district court. The Fifth Circuit's legal rationale for its action was that "we may affirm for any reason supported by the record, even if not relied upon by the district court."

The question presented is:

> Does an appellate court violate an attorney's right to due process of law when it upholds a disciplinary violation in a quasi-criminal proceeding on grounds that were never charged and for reasons that were not relied upon by the district court?

RELATED CASES

In re: Jonathan B. Andry, Appellant, No. 18-31245, United States Court of Appeals for the Fifth Circuit. Judgment entered March 27, 2019.

In the Matter of Jonathan B. Andry, Attorney-Respondent, No. 15-2478, United States District Court for the Eastern District of Louisiana. Judgment entered April 20, 2022.

Jonathan B. Andry, Louisiana Bar Roll No. 20081, No. 22-30231, United States Court of Appeals for the Fifth Circuit. Judgment on rehearing entered February 3, 2023.

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Jonathan B. Andry respectfully petitions this Honorable Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals affirming the *en banc* district court's finding that he violated Rule 8.4(d) of the Louisiana Rules of Professional Conduct.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the *en banc* district court is reported as *Jonathan B. Andry, Louisiana Bar Roll No. 20081, Appellant*, 59 F.4th 203 (5th Cir. 2023), and is attached at App. 1. The findings of the *en banc* district court holding that Andry violated the Louisiana Rules of Professional Conduct are reported as *In the Matter of Jonathan B. Andry, Attorney-Respondent*, 2022 WL 17292083, April 20, 2022, and are attached to this petition at App. 17.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the disciplinary proceedings pursuant to 28 U.S.C. § 2701, and its inherent authority over attorneys appearing before it. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). The Court of Appeals for the Fifth Circuit had jurisdiction over Andry's appeal pursuant to 28 U.S.C. §§ 1291 and 1294. That court's opinion on rehearing was issued on

February 3, 2023. This petition for a writ of *certiorari* is therefore timely, and this Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law. . . .

Rule 8.4(d) of the Louisiana Rules of Professional Conduct provides in pertinent part:

> **Rule 8.4 Misconduct**
>
> It is professional misconduct for a lawyer to:
>
> ***
>
> (d) Engage in conduct that is prejudicial to the administration of justice;

STATEMENT OF THE CASE

1. Introduction

It has been settled law, at least since this Court's decision in *Bankers Association v. Schultz,*[1] if not much

[1] *Bankers Association v. Schultz*, 416 U.S. 21, 71 (1974) – "Since [the plaintiffs] are free to urge in this Court reasons for affirming the judgment of the District Court which may not have

earlier,[2] that a court of appeals may affirm a lower court's decision in civil matters for any reason supported by the record, even if it was not the one relied on by the district court. This rule has been employed in one form or another by every circuit court of appeals, in a wide variety of contexts. Its most common use is in summary judgment motions in civil cases, where the rule is embodied in Fed.R.Civ.Proc. 56(f)(2).

More recently, however, the Circuit Courts of Appeals have begun using the rule in criminal cases. But heretofore, those courts have confined such usage to aspects of criminal cases that do not relate directly to the adjudication of guilt. *See United States v. Paniagua*,[3] – sentencing; *United States v. Sampson*,[4] – sentencing; *United States v. Marquez*,[5] – proceedings under Fed.R.Crim.Proc. 41(g); *United States v. Davis*,[6] – determination of "navigability" in a misdemeanor

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been relied upon by the District Court, we consider here the Fifth Amendment objections to both the foreign and the domestic reporting requirements."

[2] *See Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208 (1921).

[3] *United States v. Paniagua*, 481 Fed. Appx. 162 (5th Cir., July 11, 2012).

[4] *United States v. Sampson*, 717 Fed. Appx. 493 (5th Cir., April 3, 2018).

[5] *United States v. Marquez*, 2022 WL 17335821 (5th Cir., November 30, 2022).

[6] *United States v. Davis*, 339 F.3d 1223, 1227 (10th Cir. 2003).

prosecution; and *United States v. Knox*,[7] – error regarding the admissibility of evidence.

But in *this* case the Fifth Circuit crossed the conceptual line that separates civil matters from criminal matters, and the legal boundary that separates issues that must be found by the original trier of fact, and issues that can be revisited by the court of appeals. These were lines recognized by this Court in its consideration of the scope of appellate review over 100 years ago, in *Frey & Son v. Cudahy Packing Co.*:[8]

> Having regard to the course of dealing and all the pertinent facts disclosed by the present record, we think whether there existed an unlawful combination or agreement between the manufacturer and jobbers was a question for the jury to decide, and that the Circuit Court of Appeals erred when it held otherwise.[9]

Here, to uphold the *en banc* district court's finding that Andry had violated Rule 8.4(d) of the Louisiana Rules of Professional Conduct, the Fifth Circuit had to ignore the actual charges against Andry – perhaps because they were unconstitutionally vague to begin with – and it had to disregard the actual findings of the *en banc* district court – ultimately relegating them to a footnote. But in doing so, the Fifth Circuit violated a fundamental principle of due process that applies to all disciplinary matters, because they are quasi-criminal:

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[7] *United States v. Knox*, 124 F.3d 1360 (10th Cir. 1997).

[8] *Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208 (1921).

[9] *Id.* p. 210.

a respondent in an attorney disciplinary proceeding has a constitutional right to know the precise charges he or she faces; and has a constitutional right to an adjudication on those charges, and only those charges, by the trier of fact. *Certiorari* is appropriate here to correct the Fifth Circuit's error, and to prohibit any further use of this appellate rule to adjudicate guilt on appeal in disciplinary matters.

2. The disciplinary proceedings

A disciplinary complaint was filed against Andry in the United States District Court for the Eastern District of Louisiana, on July 8, 2015. This complaint was filed by Special Master Louis Freeh, who had been appointed by a district court to conduct an investigation into alleged attorney misconduct in " . . . the Court-Supervised Settlement Program established in the wake of the 2010 Deepwater Horizon oil rig disaster." App. 1.

The complaint (which served as the formal charges) alleged in very broad fashion that Andry violated Rule 1.5(e), Rule 3.3, Rule 8.4(a), Rule 8.4(c), and Rule 8.4(d) of the Louisiana Rules of Professional Conduct.[10] Particulars regarding the charges were later provided to Andry by the Lawyer's Disciplinary

[10] The Louisiana Rules of Professional Conduct have been adopted by the Eastern District.

Committee,[11] and with regard to Rule 8.4(d), the precise allegation was that Andry's

> . . . facilitation of payments to [a lawyer employed by the Court Supervised Settlement Program] . . . created the *perception* that the claims administration was compromised" and that "Andry's conduct with [that lawyer] including going to lunch and the volume of calls and texts to [him] . . . furthered the *perception* of impropriety in the administration of claims at the CAO.

App. 61 (emphasis added).

After two appeals, and numerous delays, the federal disciplinary proceedings went forward, and resulted in a finding by the *en banc* district court that Andry had violated Rule 1.5(e)(1), Rule 8.4(a), and Rule 8.4(d) of the Louisiana Rules of Professional Conduct.

Consistent with the specifics of the original charges, the *en banc* district court's findings regarding the alleged Rule 8.4(d) violation were limited to whether Andry's conduct had created the *perception* of misconduct. In support of its finding that it had, the *en banc* court cited testimony regarding "a tremendous amount of adverse publicity, criticisms of Mr. Juneau, of the claims facility, of the Court, of everybody concerned with this"; and it cited testimony from the Director of the Court Supervised Settlement Program that "the allegations of misconduct 'subjected us to

[11] The Lawyer's Disciplinary Committee, consisting of three attorneys appointed by the *en banc* district court, was responsible for prosecuting the disciplinary case.

criticism and it called into question whether the program was biased or not, that was the issue for us.'" App. 62-63.

3. The appeal

Andry appealed to the United States Court of Appeals for the Fifth Circuit. Regarding the Rule 8.4(d) violation, Andry argued that as a matter of well-established law, creating an appearance of misconduct is not sufficient – there must be actual misconduct.[12] In its original opinion, the Fifth Circuit reversed the *en banc* district court's findings and the discipline imposed on Andry's alleged violations of Rule 1.5(e) and Rule 8.4(a), but upheld its findings regarding the alleged violation of Rule 8.4(d). App. 1. But it did so by relying on evidence that did not form part of the

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[12] Andry cited both Louisiana authority, and authority from this Court for that proposition. In *Louisiana Legal Ethics: Standards and Commentary, 2021*, Professor Dane Ciolino flatly rejects the notion that the mere "appearance of impropriety" constitutes "misconduct" under Rule 8.4 of the Louisiana Rules of Professional Conduct:

> Although lawyers are often mistaken on this point, the term 'misconduct' clearly does not include conduct that may have the 'appearance of impropriety.' Indeed, that term appears neither in the Louisiana Rules of Professional Conduct, nor in the ABA Model Rules of Professional Conduct. On the contrary, the ABA has repeatedly stated that a lawyer should not be sanctioned or disqualified under such an 'undefined,' 'question-begging' standard. *See* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 342 (1975).

See also In re Snyder, 472 U.S. 634 (1985), at 646.

disciplinary hearing, this being evidence from the *sanctions* hearing.

Consequently, Andry petitioned for panel rehearing, arguing it was improper to look to the sanctions hearing (not the disciplinary hearing) for evidence to support the district court. Andry's petition for rehearing was granted, and on February 3, 2023, the Court of Appeals withdrew its earlier opinion, and superseded it with its opinion reproduced at App. 1-16. *It is this opinion on rehearing that denies Andry due process of law.*

As can be seen from the face of the Fifth Circuit's opinion, Andry was found *by that Court* to have violated Rule 8.4(d) for the following reasons:

> Next, Andry argues that the en banc court erred in holding his conduct violated Rule 8.4(d), which prohibits attorneys from "[e]ngag[ing] in conduct that is prejudicial to the administration of justice." La. R. Prof'l Conduct 8.4(d). Andry contends that because the payments between Lerner and Sutton were "permissible under Louisiana law and did not violate Rule 1.5(e)," they do not constitute misconduct. Andry asserts that underlying misconduct, not merely "the appearance of impropriety" is necessary for an 8.4(d) violation.
>
> Here, we disagree. Andry's argument ignores that it was not just the appearance of misconduct, but *actual misconduct* that the en banc court uncovered. Andry's underlying misconduct was the "payment or facilitation of

> payments" to a CSSP staff attorney while representing claimants in the CSSP process. It was these payments, not merely the perception they created, that violate Rule 8.4(d).

App. 12-13 (footnote 13 omitted, *see* below).

Tellingly, the Court of Appeals acknowledged, in footnote 13, reproduced below, that these were *not* the grounds relied upon by the *en banc* district court:

> It is true that in its application of Rule 8.4(d), the en banc court heavily emphasized the negative perception that Andry's behavior created rather than Andry's underlying misconduct. **However, "we may affirm for any reason supported by the record, even if not relied on by the district court." *United States v. Gonzalez*, 592 F.3d 675 (5th Cir. 2009) (emphasis added).**

App. 13.

This was error. To state the matter in the negative: in a criminal or quasi-criminal case, a court of appeals *cannot* "affirm for any reason supported by the record, even if not relied on by the district court," if what is being affirmed is a finding that must be made by the trier of fact. Due process prohibits it.

ARGUMENT AND REASON FOR GRANTING THE WRIT

The Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court.

It is not necessary to look any further than this Court's decision in *In re Ruffalo*[13] to understand the egregious nature of the error committed by the Fifth Circuit. As Justice Douglas wrote in *Ruffalo*:

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall. 333, 380; *Spevack v. Klein*, 385 U.S. 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge. *See In re Oliver*, 333 U.S. 257, 273. It was said in *Randall v. Brigham*, 7 Wall. 523, 540, that when proceedings for disbarment are '**not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence**.'[14] (emphasis in original).

In Andry's case, he was charged with conduct that created the *perception* of misconduct. He was suspended by the *en banc* district court for a year based on that *perception* of misconduct. On appeal, the Court of Appeals avoided the constitutional defects inherent

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[13] *In re Ruffalo*, 390 U.S. 544 (1968).

[14] *Id.*, p. 550.

in that finding, by finding *actual misconduct* – something that was never charged, or found – except by the Court of Appeals.

It is one thing to be found responsible for, and then disciplined for a "lesser included offense." It is quite another to be found responsible for, and then disciplined for a "greater included offense."

Suspension from the Federal Bar is an extremely serious matter. It warrants the same due process required in disbarment cases. Correction of the Fifth Circuit's action is needed.

CONCLUSION

Wherefore this Court is respectfully urged to grant this petition for a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit, vacate the opinion of that Court, and remand the matter to that Court for further proceedings.

Respectfully submitted,

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