22-6339

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DEREK JONES,
Petitioner,

vs.

STATE BAR OF CALIFORNIA,
Respondent.

Captioned as "Jones on Discipline" by the
Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

FOLLOWING DENIALS OF PETITIONS FOR REIVEW AND REHEARING BY THE SUPREME COURT OF CALIFORNIA CONCERNING DISBARMENT ON THE RECOMMENDATION OF THE REVIEW DEPARTMENT OF THE STATE BAR COURT

SUPREME COURT OR CALIFORNIA CASE NO. S273733
STATE BAR COURT CASE NO. 16-O-17503

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QUESTIONS PRESENTED

1. Whether the State of California violated Petitioner's Fourteenth Amendment guarantees of due process in an attorney discipline proceeding resulting in Petitioner's disbarment where, contrary to this Court's holdings in Brady v. Maryland, 373 U.S. 83, 87 (1963), Giglio v. United States, 405 U.S. 150 (1972), Willner v. Committee on Character & Fitness, 373 U.S. 96, 102-103 (1963) and their respective progeny, the prosecution **withheld potentially exculpatory or mitigating materials** which were necessary for the Petitioner to adequately prepare his defense and confront his accuser in a quasi-criminal matter.

2. Whether the State of California violated Petitioner's Fourteenth Amendment guarantees of due process in an attorney discipline proceeding resulting in Petitioner's disbarment where, contrary to this Court's holdings in Coffin v. United States, 156 U.S. 432, 458-461 (1895), Taylor v. Kentucky, 436 U.S. 478, 485-486 (1978) and their respective progeny, the State Bar Court **relied upon a presumption of culpability rather than innocence** in connection with Petitioner's alleged misconduct, even in the absence of reliable evidence that such misconduct occurred, in a quasi-criminal matter.

PARTIES INVOLVED

Petitioner Derek Jones is an individual California resident formerly licensed to practice law in California.

Respondent State Bar of California is an administrative agency in the judicial branch of the State of California which receives, investigates, or prosecutes complaints for professional misconduct against California attorneys. "California is the only state with an independent professional Court dedicated to ruling on attorney discipline cases. The State Bar Court hears charges filed by the State Bar's Office of Chief Trial Counsel against attorneys whose actions allegedly involve misconduct. The State Bar Court has the authority to recommend that the California Supreme Court suspend or disbar attorneys..."[1]

[1] https://www.statebarcourt.ca.gov/

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PETITION FOR WRIT OF CERTIORARI

Petitioner Derek Jones respectfully seeks a Writ of Certiorari concerning the published Opinion of the Review Department of the State Bar Court of California – a division of the Supreme Court of California – which Opinion the Supreme Court of California subsequently declined to review or rehear.

OPINIONS BELOW

In declining to review it, the Supreme Court of California has allowed to stand the Opinion of the Review Department of the State Bar Court of California, which Opinion was designated for publication on or about April 22, 2022. *In the Matter of Derek James Jones,* Case No. 16-O-17503 (pending publication in the California State Bar Court Reporter). (App. F.) The Decision and Order of Involuntary Inactive Enrollment by the Hearing Department of the State Bar Court of California is publicly available in an electronic format but was not otherwise reported. (App. I.)

JURISDICTION

The Supreme Court of California denied Petitioner's Petition for Review on July 20, 2022, effectuating his immediate removal from membership in the State Bar of California. Petitioner then filed a Petition for Rehearing on or about August 8, 2022 which was likewise denied by the

Supreme Court of California on August 31, 2022. This Court has jurisdiction to review the decision of the State Bar Court of California – a division of the Supreme Court of California – pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

- U.S. Const. amend. XIV: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law..."

- CA Constitution art I § 7(a): "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws..."

STATEMENT OF THE CASE

Petitioner Derek Jones respectfully seeks review of an Order by the Supreme Court of California disbarring him upon the recommendation of the State Bar of California for conduct which, at worst, constituted negligent accounting for funds that were deposited with Petitioner outside the scope of any attorney-client relationship. As guardians of the United States Constitution, the Supreme Court of the United States must now intervene to prevent the establishment of dangerous and misguided precedent in the form of the State Bar Court's published Opinion which will otherwise become controlling authority for the State Bar's 196,000

active members[2] who in turn comprise more than 15% of all the active attorneys in our nation.[3]

Most significantly, the State Bar of California violated the Fourteenth Amendment to the U.S. Constitution – along with parallel language appearing at Article 1, Section 7(a) of the California Constitution[4] – by withholding evidence that even the State Bar Court acknowledged is "relevant" to determining Petitioner's culpability as to any alleged misconduct, the corresponding discipline to be imposed, and the credibility of his sole accuser, and also by employing an impermissible presumption of culpability with respect to alleged misconduct even in the absence of evidence that such misconduct occurred.

This Court, which has from its inception in 1790 been comprised entirely of attorneys, has a long and proud tradition of protecting attorneys from disciplinary proceedings that run afoul of Constitutional guarantees of due process. These Constitutional guarantees – applicable to both the process for an attorney's entry into the profession as well as a person's removal from it – were resolutely upheld by the Court in a trio of cases in the 1960's: Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); Spevack v. Klein, 385 U.S. 511 (1967); and In re Ruffalo, 390 U.S. 544 (1968). However, the U.S. Supreme Court has been relatively silent on due process issues in attorney disciplinary matters for the nearly 55 years since deciding Ruffalo, despite many state bar associations and indeed the American Bar Association ("ABA") apparently seeking to curtail the scope of due process rights which have historically protected their members and

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[2] https://apps.calbar.ca.gov/members/demographics.aspx
[3] https://www.abalegalprofile.com/demographics.php
[4] CA Constitution art I § 7(a): "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws..."

their respective livelihoods. For example, in Ruffalo this Court clarified that that attorney disciplinary proceedings – or at least those that involve a risk of disbarment – are "quasi criminal" in nature because "[d]isbarment, designed to protect the public, is a *punishment* or *penalty* imposed on the lawyer."[5] An accused attorney "is accordingly entitled to procedural due process."[6] By contrast, in their most recent iteration of their Model Rules for Lawyer Disciplinary Enforcement, the ABA attempts to characterize disciplinary proceedings as "neither civil nor criminal but...*sui generis*."[7] The ABA also attempts to justify the application of state-based rules of *civil* procedure and evidence to enforcement matters rather than their criminal-law counterparts, along with the neither-civil-nor-criminal standard of proof that is "clear and convincing evidence."[8] In their commentary on the Model Rules, the ABA suggests that "Lawyer discipline actions are in fact licensing proceedings."[9] The ABA's contemporary position seems like a significant departure from this Court's guidance in Ruffalo and its companion cases.

Petitioner respectfully submits that after largely abstaining from discussions about due process rights in attorney discipline matters during the past five decades, the instant Petition for Certiorari presents the Court with a timely opportunity to clarify the scope of protection that must be afforded to accused attorneys – particularly given the scale of the California State Bar's jurisdiction along with the magnitude of the procedural errors it committed in this instance including but not limited to

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[5] Ruffalo, 390 U.S. at 550, emphasis added.
[6] *Id.*
[7] ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 18 (July 2020). /
[8] *Id.*
[9] *Id.*

denying Petitioner's repeated written requests for production of the investigative files of a prior State Bar case against Petitioner involving the same Complainant and the same alleged misconduct but which was apparently closed "on the merits" more than five years earlier. A particularly interesting question, about which various state bar associations are apparently at odds and on which the ABA has apparently not announced any specific position, is whether Brady or Giglio or their respective progeny compel the disclosure by state-bar prosecutors of evidence that is material to culpability or punishment, or to the potential impeachment of witnesses for the prosecution, in attorney discipline cases. Petitioner respectfully submits that such compulsory disclosures are indeed applicable to attorney discipline proceedings and that the entire national community of practicing attorneys would benefit from the Court's definitive resolution of this issue. Additionally, the instant matter prominently features a "presumption of misappropriation" which is, to Petitioner's knowledge, unprecedented in the jurisprudence of attorney discipline cases. In the words of the State Bar's Office of Chief Trial Counsel in support of their request for publication of the resulting opinion:

> [Petitioner] argued that he could not be held culpable as *there was no evidence as to where the check was initially deposited or how the funds were used.* Yet, the evidence showed [Petitioner] endorsed the check and the money was taken out of the payor's account, thus *establishing the presumption* that [Petitioner] misappropriated the money.[10]

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[10] Letter from Office of Chief Trial Counsel to Presiding Judge of State Bar Court dated March 22, 2022 requesting publication of Review Department Opinion. (Emphasis added.) A true and correct copy of this Letter is attached hereto as Exhibit 1.

By virtue of the State Bar's decision to publish the subject Opinion of the Review Department, this truly bizarre and counterfactual holding would apparently turn on its proverbial head hundreds of years of caselaw espousing a presumption of innocence, at least as applied to the nation's largest mandatory-membership bar association.[11]

A. The Subject Disciplinary Action Was Initiated by a Vexatious Former Business Partner Several Years After the Occurrence of the Alleged Misconduct Which Resulted in No Harm Whatsoever to the Complainant Nor Any Other Party. Moreover, the Subject Disciplinary Action Does Not Meaningfully Advance the State Bar's Stated "Public Protection" Objectives.

This entire matter stems from Petitioner's role as an executive in a real estate development company between 2008 and 2012, and specifically his role in 2011 as an intermediary for the sale of some restaurant equipment and a liquor-license owned by a prior tenant of one of the company's properties. Petitioner has acknowledged that he did not immediately place approximately $125,000 in deposits into a designated attorney-client trust account in connection with his handling of what subsequently became an informal "escrow" for the convenience of the parties. However, Petitioner has also articulated his good-faith belief that those funds could lawfully be held in a business checking account insofar as neither the buyer nor seller of the restaurant equipment and liquor-

[11] It is especially shocking that California has apparently regressed so very far from the position (rightly) articulated by its own Supreme Court nearly 125 years ago: because an accusation against an attorney "is in the nature of a criminal charge... all intendments are in favor of the accused." Matter of Haymond, 121 Cal. 385, 388 (1898)

license were Petitioner's clients, nor was the entity that sought a substitute tenant for the restaurant space. Moreover, every penny that the third-party buyer and seller had deposited with Petitioner was paid to the designated party *immediately* upon receiving the parties' authorization to do so. Accordingly, no harm resulted to any party except the Petitioner himself. If given the opportunity to slow down the negotiations and utilize a professional escrow-holder or other service-provider further removed from the negotiations to avoid any conceivable appearance of impropriety, Petitioner would enthusiastically accept the do-over.

By way of context – and fully germane to the stated "protecting the public" objective of State Bar disciplinary proceedings – Petitioner has not had a public-facing law practice since 2007 when he left the lobbying and legislative advocacy division of an AmLaw 200 firm after more than six years of distinguished service. Even setting aside for the moment the question of whether Petitioner ever provided legal services in the course of his work with the Complainant at the "Legado Companies" enterprise where Petitioner served as Chief Operating Officer, there can be no dispute that Petitioner has not performed legal services for third-party clients since 2007 apart from his extensive *pro bono* work.[12] A government-

[12] Petitioner was hired in Autumn 2007 as the sole Vice President of a real estate investment and development enterprise called EMC Development LLC. During a reorganization in Spring 2010, Petitioner was named Chief Operating Officer for a consortium of real estate investment and development enterprises collectively doing business as "Legado" which had the same beneficial ownership as the EMC entity but which by this time had nearly doubled in size. At no point did Petitioner's title – nor his

relations specialist by training, Petitioner left the commercial real estate arena altogether in 2017, focusing his professional energies since that time on advising startups in life sciences and sustainability. It is an unfortunate reality that Petitioner's value to these enterprises has already been significantly diminished as a direct result of these high-visibility disciplinary proceedings. It is likewise unfortunate that these proceedings were initiated at the unflagging insistence of a single vexatious Complainant who already got much more than the proverbial pound of flesh from Petitioner through eighteen months of expensive civil litigation (settled in May 2014) and strategic infliction of reputational damage from which Petitioner may never fully recover. In imposing the harshest disciplinary measures available to it, the State Bar of California has answered the prayers of this single Complainant who is demonstrably fixated on maximizing harm to Petitioner. It has also committed and compounded a litany of factual and procedural errors that now require correction by the Supreme Court of the United States to ensure the integrity of California's autonomous attorney discipline system and prevent further breaches of the applicable Constitutional safeguards.

For additional background concerning Petitioner's five-year business relationship with the Complainant, please refer to pages 3 through 6 of App. H (Opening Brief of Appellant).

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portfolio of responsibilities – include "corporate counsel" or "general counsel," as was counterfactually alleged but not substantiated by the Complainant.

B. Notwithstanding the State Bar's Failure to Produce Potentially Exculpatory Evidence, Petitioner Has Identified Myriad Factual and Legal Obstacles to Establishing Culpability for the Alleged Violations Set Forth in the Notice of Disciplinary Charges.

Although the purpose of this requested review by the Supreme Court of the United States is not to substantively evaluate the merits of the lower courts' rulings, it is nonetheless important to understand the nature and extent of the allegations set forth in the Notice of Disciplinary Charges filed by the State Bar of California's Office of Chief Trial Counsel ("OCTC") in December 2018.

As a preliminary matter, the Notice of Disciplinary Charges uniformly and incorrectly identifies Legado Companies, a California corporation, as Petitioner's "client." In reality, not only was there no attorney-client relationship between Petitioner and any "Legado" entity at any pertinent juncture here, but the entity alleged by the Notice of Disciplinary Charges to be Petitioner's "client" was not even operational until July 26, 2011 – fully three months after a non-binding letter of intent had preliminarily outlined the business terms of the subject transaction on or about April 29, 2011.[13]

[13] An entity called Legado, Inc. was formed in California in 2008 by parties wholly unrelated to any of the "Legado" enterprises referenced herein. In or about 2011, that entity was purchased and renamed "Legado Companies" by Edward Czuker (Complainant) and Derek Jones (Petitioner), its President and Secretary respectively, as memorialized in the Restated Articles of Incorporation they filed with the California Secretary of State on or about July 26, 2011.

Petitioner received a good-faith deposit of $50,000 from "Killer Shrimp Marina del Rey LP" – a potential sub-tenant of the subject commercial property and presumptive buyer of the associated restaurant equipment and liquor license, henceforth sometimes referred to as "Buyer" – on or about April 8, 2011, exactly three weeks before the delivery of the above-referenced letter of intent. It is therefore illogical for the State Bar to assert that Petitioner's handling of this $50,000 deposit was necessarily governed by a *subsequently drafted* and expressly *non-binding* letter of intent that became central to the State Bar's theory of the case. In any event, Petitioner then received another deposit of $50,000 from Buyer on or about April 29, 2011, which was specifically earmarked for the purchase of furniture, fixtures, and equipment ("FF&E") belonging to The Organic Panificio LLC, the prior occupant of the space (henceforth sometimes referred to as "Seller"). The parties' negotiations continued throughout the remainder of 2011. Then Petitioner received a third and final deposit of $75,000 from Buyer on or about February 9, 2012 which was specifically earmarked for the purchase of the liquor license belonging to Seller.

Petitioner's receipt of these three deposits was documented in an amended and restated (but nonetheless expressly non-binding) letter of intent dated February 23, 2012 which made no reference whatsoever to any expectation by Buyer or Seller or any other party that the deposits would be held in "escrow" or "trust" or any place in particular. Indeed, the term

"escrow" did not appear in any correspondence let alone formal documentation concerning the subject transaction until a letter was issued by the California Department of Alcoholic Beverage Control ("ABC") on June 5, 2012 designating "JonesPLC" – Petitioner's consultancy which had been largely mothballed during Petitioner's tenure with Legado Companies – as the "Escrow Holder" for the transfer of a specific liquor license from The Organic Panificio LLC to Killer Shrimp Marina del Rey LP.[14] The apparent origin of this designation is further explained in the attached Declaration of Charles Colby, managing member of the Seller and "Transferor" of the liquor license.[15] In sum, California law requires that whenever financial consideration is involved in the transfer of a liquor license or related business assets a "qualified escrow holder" must be identified before the Department of Alcoholic Beverage Control will process the proposed transfer.[16] California law also provides that any person "licensed to practice law... who is not actively engaged in the business of an escrow agent" may nonetheless provide escrow services for the limited purpose of facilitating such a license transfer.[17] Accordingly, when the Seller asked Petitioner – a non-practicing attorney but

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[14] A true and correct copy of the letter Petitioner received from the Department of Alcoholic Beverage Control in June 2012 is attached hereto as Exhibit 2.

[15] A true and correct copy of the Declaration of Charles Colby dated February 19, 2021 is attached as Exhibit 3.

[16] "Before the filing of such a transfer application with the department, if the intended transfer of the business or license involves a purchase price or consideration, the licensee and the intended transferee shall establish an escrow with some person, corporation, or association not a party to the transfer acting as escrow holder, and the intended transferee shall deposit with the escrow holder the full amount of the purchase price or consideration." Cal. Bus. & Prof. Code § 24074.

[17] Cal. Fin. Code § 17006.

nonetheless a then-current licensee of the State Bar – in May of 2012 to serve as the designated Escrow Holder for the limited purpose of facilitating the transfer of the liquor license along with Seller's other remaining business assets, and when the Buyer consented to same, Petitioner became identified as the Escrow Holder in the parties' respective filings with ABC. Unfortunately, what occurred in the subsequent months (and indeed, years) plays directly to the sardonic adage, "No good deed goes unpunished" – not owing to any dissatisfaction by the actual parties to the transfer, both of whom provided exculpatory testimony to the State Bar Court, but rather owing to an opportunistic and extraordinarily vindictive former business partner.

What follows is a brief summary of the eleven (11) alleged violations set forth in the Notice of Disciplinary Charges or "NDC" provided herewith as Appendix L. Despite what may appear to the objective reader as obvious fallacies or erroneous assumptions embedded in these charges, the State Bar Court opined that Petitioner was culpable for each and every one.

Counts One through Three of the Notice of Disciplinary Charges allege that (with respect to each of the three deposits referenced above) Petitioner violated a Rule of Professional Conduct which states: "All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more

identifiable bank accounts labeled 'Trust Account' et cetera."[18] All three of these charges are dependent upon the demonstrably false premises that: (a) Legado Marina LLC, the "landlord" entity specified in the pertinent sub-lease transaction, was a "client" of Petitioner and (b) that all of the funds in question were the rightful property of that specific entity.[7] In making findings in the affirmative, the Hearing Department relied upon several extraordinary assumptions that are ultimately not supported by the evidence. Although the Complainant and his CFO made self-serving statements at Petitioner's trial before the State Bar Court that they regarded Petitioner as a sort of general counsel for Legado Companies, Petitioner forcefully negated their argument and Petitioner's position was buttressed by two additional witnesses – including a General Partner of the Buyer entity in the subject transaction – who credibly testified that Petitioner had not held himself out as an attorney for Legado Companies but instead exclusively as a principal (consistent with his title of Chief Operating Officer). The managing member of the Seller entity in the subject transaction also averred (via a declaration that he submitted for the Review Department of the State Bar Court) that Petitioner was *not* an attorney for Legado Companies generally nor for Legado Marina LLC, the entity that was seeking a new tenant for their Marina del Rey property. The Seller's declaration also buttresses documentary evidence in the record –

[18] Rule of Professional Conduct 4-100(A).

namely, materials on-file with the California Department of Alcoholic Beverage Control indicating that the sum of $125,000 (i.e., $50,000 for furniture, fixtures, and equipment, and $75,000 for a liquor license) was ultimately to be transferred from Killer Shrimp as Buyer to The Organic Panficio LLC as Seller and *not* to Legado Marina LLC nor any other Legado entity. In other words, neither Legado Marina LLC (the landlord entity) nor any other Legado entity had any claim to the "escrow" sum of $125,000 until at least mid-September 2012 when both the Buyer and Seller entities agreed in that the funds should instead be delivered to Legado Companies, after ABC's conditional approval of the liquor-license transfer and after Legado Marina LLC's eventual agreement to relieve The Organic Panificio LLC of its back-rent obligations in exchange for said funds.[19]

As briefly noted above, Count One further ignores the reality that at the time of that alleged misconduct (i.e., upon Petitioner's receipt of a $50,000 deposit on April 8, 2011 and placement of same in an account other than an attorney-client trust account) there was no written agreement –

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[19] The Buyer and Seller of the restaurant equipment and liquor license ultimately directed Petitioner to pay their deposited funds to Legado Marina LLC as part of a proposed "global resolution" that involved an extension of Buyer's sublease at the subject property and retirement of Seller's delinquent rent obligations. Petitioner was not involved in Buyer and Seller's negotiations with Legado Marina LLC regarding these issues – indeed, Petitioner's employment with Legado Companies ended approximately three weeks prior. In any event, Petitioner timely complied with this joint request of Buyer and Seller and delivered the sum of $125,000 to Legado Companies on the very same day the Seller entity provided its written consent to the modification. The letter from Petitioner's counsel which accompanied the delivery of said funds is attached hereto as Exhibit 4. As further detailed below, Petitioner had likewise timely complied with Buyer's request to deliver a $50,000 security deposit to Legado Marina LLC on or about August 10, 2012, the earliest date on which Buyer had agreed that such deposit should be "released" to Legado as non-refundable earnest money.

not even a non-binding letter of intent – regarding the placement, use, or maintenance of the subject funds. Even more astonishingly, Count Two ignores the reality that no evidence was presented that even suggests — let alone proves by "clear and convincing evidence" — that Petitioner mishandled the $50,000 FF&E deposit received from Killer Shrimp at the end of April 2011. That is, at the time of his trial in State Bar Court in November and December of 2019, neither the prosecution nor Petitioner were able to produce documentation concerning the specific account into which this FF&E deposit was placed nearly nine years earlier. And Count Three ignores the reality that a non-binding letter of intent dated February 23, 2012 which is the only writing concerning Petitioner's receipt of a third and final deposit (specifically earmarked for the liquor-license purchase) makes no reference whatsoever as to where or how that third deposit nor the prior two deposits were to be placed or held. As noted above, Petitioner was effectively *assigned* the role of an "Escrow Holder" by the California Department of Alcoholic Beverage Control in May 2012 – more than three months after receiving the last of three deposits from Buyer – for the sole purpose of assisting the parties' efforts to complete the liquor license as quickly and cost-effectively as possible.

Counts Four through Six (alleging misappropriation of all three of the above-referenced deposits) likewise derive from the false premise that the funds Petitioner received as a good-faith accommodation of the evolving

restaurant sublease and asset-purchases were already (i.e., at the time of their receipt) the property of Legado Marina LLC or its parent Legado Companies. As discussed above, prior to the agreements or instructions by the Buyer and Seller to deliver the deposited funds to Legado Companies (i.e., $50,000 in August 2012 and $125,000 in September 2012), no Legado entity had any claim of ownership or entitlement to those funds. Accordingly, Counts Four, Five, and Six all incorrectly state that Petitioner was required to hold all three deposits totaling $175,000 "in escrow for Legado and Killer Shrimp." Count Four artificially imposes an "escrow" obligation on a $50,000 security deposit that was never associated with any escrow – ABC-directed or otherwise. Counts Five and Six counterfactually assert that funds were to be held in escrow for Legado and Killer Shrimp, when in fact (as noted above) no Legado entity had any legitimate or even conditional claim to those dollars until such time as The Organic Panificio surrendered to Legado Marina LLC the proceeds of its business-asset sale (ultimately in October 2012). These facts are corroborated by the pertinent ABC paperwork and the Seller's declaration, attached as Exhibits 2 and 3 respectively. Additionally, the February 2012 letter of intent between Legado Marina LLC and Killer Shrimp acknowledged that the liquor license was *not* the property of any Legado entity insofar as Legado Marina LLC specifically asked to buy such license from Killer Shrimp if and when they were to discontinue operations at the subject property. In other words, per the

express terms of the superseding letter of intent dated February 23, 2012, the only money that was even conceivably allowed by Buyer to go to Legado Marina LLC was a $50,000 "security deposit" that was in fact delivered to Legado upon Buyer's approval circa August 10, 2012, more than a month prior to the eventual authorization(s) for release of the other two deposits. Just like Count Two, Count Five also paradoxically stems from a complete absence of evidence of any misappropriation, or commingling, or any impropriety whatsoever on the part of Petitioner with respect to the $50K deposit for FF&E. Again, how can one reasonably conclude that *no evidence* is actually "clear and convincing" evidence?

Count Seven (alleging breach of fiduciary duty) is the "greatest hits" version of the charges, insofar as it invokes: (a) the same erroneous implications as Counts One, Two, Three and Four that Legado Marina was a client of Petitioner; (b) the same erroneous implications as Counts Two and Five that the absence of bank records nine years later somehow constitutes evidence that Petitioner mishandled the FF&E deposit; and (c) the same erroneous implications as Counts Two, Three, Five and Six that Legado Marina LLC had a claim of ownership or entitlement to the proceeds of sale of Organic Panificio business assets prior to any such agreement by and between the parties. Count Seven further requires a finding of fact that funds were disbursed without knowledge or consent of the parties with the

intended effect of "enriching" Petitioner. This is simply not supported by the record.

Count Eight (alleging misrepresentation to Killer Shrimp) depends on the false premise that Petitioner had some cognizable fiduciary duty to his *non-client* Killer Shrimp. In reality, this was directly negated by the trial testimony of its General Partner. More shocking still, Count Eight also requires a completely nonsensical finding that a non-binding letter of intent dated April 29, 2011 constituted the "lease agreement" by and between Legado Marina LLC and Killer Shrimp. In reality, this too was negated by documentary evidence – i.e., it was superseded by an August 2011 Restaurant Management Agreement (prepared by the *actual* counsel of Legado Companies, a large law firm in downtown Los Angeles) as well as the above-referenced February 2012 letter of intent – and further negated by the testimony of the Complainant himself and even by one of the State Bar prosecutors who acknowledged that the April 2011 letter of intent was *not* a contract.

Count Nine (alleging "moral turpitude" for a returned check) ignores the reality that Petitioner's counsel messengered checks on September 18, 2012 ahead of receiving Petitioner's confirmation that paper checks were even to be utilized, versus the wire that Petitioner undisputedly sent (and Legado received) on September 21, 2021. The Hearing Department's Decision and Review Department's Opinion likewise imply that a check for

$50,000 was returned when in fact it cleared immediately, despite Petitioner having then been in the process of setting up wire transfer(s).

Count Ten (alleging misrepresentation to the State Bar Court) would impose discipline upon Petitioner for his innocently mistaken recollection – offered without reference to the underlying documents – about the routing of funds that were received by Petitioner from Killer Shrimp several years prior.

Lastly, Count Eleven (alleging misrepresentation to State Bar investigators) would similarly penalize Petitioner for having an incomplete recollection of events that occurred several years prior, which Petitioner reasonably believed were in his proverbial rear-view mirror once the original State Bar investigation undertaken at the request of the same Complainant was *closed on-the-merits in October 2013*, and the civil action between Petitioner and the Complainant was *fully settled in May of 2014.*

In sum, the State Bar Court's findings of culpability on each and all of these eleven counts were based on erroneous or unsubstantiated assumptions, including but not limited to: 1) mischaracterizing the nature and extent of the business relationship between Petitioner and Legado Companies; 2) mischaracterizing the nature and extent of the "escrow" function associated with the subject lease negotiations and eventual sale of business assets; 3) mischaracterizing the nature and extent of Petitioner's errors in managing the funds in question; and 4) mischaracterizing the

nature and extent of the controversy that played out in a civil action that was fully and finally resolved nearly five years before the Notice of Disciplinary Charges was even filed.[20] Adding insult to injury, the six counts that could conceivably warrant the level of discipline ultimately imposed by the State Bar Court (i.e., Counts One through Six alleging failure-to-deposit and misappropriation) are all based on completely illogical and unsupported hypotheses. Counts One and Four would punish Petitioner for his handling funds prior to the existence of any documentation about how (or where) they were to be managed; Counts Two and Five would punish Petitioner for "mishandling" funds in the absence of any evidence whatsoever concerning where those funds were placed; and Counts Three and Six would punish Petitioner for his handling of funds that were never intended to go to any Legado entity whatsoever –

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[20] The nature and extent of the civil action between Complainant and Petitioner is germane to a determination of whether the State Bar's prosecution was precluded by the applicable five-year (or 60-month) limitations period. Counts One through Eight of the Notice of Disciplinary Charges stem from incidents that are all alleged to have occurred (and concluded) between April 8, 2011 and February 10, 2012 – approximately 92 months and 82 months, respectively, prior to the NDC. Petitioner was involved in civil litigation that was initiated by the Complainant on September 14, 2012. A settlement of all claims and cross-claims was reached on May 28, 2014. Because the "escrow" issue comprised only a few paragraphs of the Complaint and did not constitute a separate cause of action, there exists a credible argument that that civil litigation should not trigger the tolling provision of the State Bar Court's Rule of Procedure 5.21(C)(3) which calls for a tolling of the limitations period during "proceedings based on the same acts or circumstances as the violation." Even if that provision is invoked, however, a tolling period of 20 months for the civil litigation still renders Counts One through Eight time-barred pursuant to Rule 5.21(A)'s 60-month limitation on State Bar disciplinary actions. Additionally, Counts Nine and Ten as set forth in the NDC stem from incidents that are all alleged to have occurred (and concluded) on September 18, 2012 and January 24, 2013 – approximately 75 months and 70 months, respectively, prior to the NDC. There is no logical basis to apply any tolling period to these events, both of which occurred subsequent to the filing of the above-referenced civil action and neither of which were addressed in that action.

completely independent of any inquiry regarding an attorney-client relationship. To say the State Bar Court failed to rigorously analyze pertinent facts here would be an understatement.

C. Independent of the Overt Constitutional Violations, the State Bar Failed to Follow Several of Their Own Rules Ostensibly Designed to Ensure Procedural Due Process.

On October 9 2019, approximately five weeks prior to the scheduled start of his trial in State Bar Court, Petitioner (through his counsel at that time) submitted a written request that the State Bar's Office of Chief Trial Counsel ("OCTC") produce "the entire unprivileged portion of the State Bar investigation files" for an investigation that apparently commenced in 2016 (based on the file number) and culminated in the Notice of Disciplinary Charges dated December 5, 2018, as well as a prior investigation that apparently commenced in 2013 (based on the file number) and instead culminated in a letter dated October 30, 2013 which included the following language:

> The State Bar has completed its investigation of the allegations of professional misconduct reported... on behalf of Edward M. Czuker and The Legado Companies and determined that this matter does not warrant further action. Therefore, the matter is closed.[21]

Petitioner's request was made pursuant to the State Bar's Rule of Procedure 5.65(G) which specifies, "If a party receives a written request for discovery, the party receiving the request has a continuing duty to provide discovery of items listed in the request until proceedings before the Court

[21] Letter from OCTC Investigator Shelia Campbell to Petitioner dated October 30, 2013, attached hereto as Exhibit 5.

are concluded." Senior Trial Counsel for OCTC responded in writing the very next day indicating that he would have the 2013 investigative files retrieved from storage and forward Petitioner's request to his supervisor. Then on October 18, 2019, Senior Trial Counsel wrote "OCTC understands your arguments regarding the relevance of the 2013 investigation but believes that they are without merit." On October 25, 2019 when OCTC sent Petitioner's counsel their "Response to Request for Discovery," no portion of the 2013 investigative file was produced nor was any privilege log provided.

A few days later Petitioner filed a Motion to Compel with the State Bar Court stating *inter alia*:

> [Petitioner] contends that it is not within OCTC's purview to determine whether the investigation file for the 2013 Case is or is not "relevant" to the instant action. That would be usurping the power of this Court to make such evidentiary determinations. The language of Rule of Procedure 5.65(C) is not permissive – it is mandatory (i.e., "Upon request a party must provide to the other party...) In fact, the only basis on which OCTC would be excused from complying with a legitimate written request for production of an investigative report would be through invocation of a privilege or protection pursuant to Rule of Procedure 5.65(I). But OCTC has not specifically claimed... the contents of the 2013 Case are entitled to any such privilege or protection. Additionally, Rule of Procedure 5.65(I) clarifies that "[s]tatements of any witness interviewed... by any investigators... are not protected work product." Even if OCTC were to claim that internal communication contained in the investigative file for the 2013 Case were subject to some privilege or protection (which they have not expressly claimed), at a bare minimum [Petitioner] would have the opportunity to review statements from any witnesses interviewed by OCTC investigators in the 2013 Case. Moreover, a prosecutor has a continuing duty to disclose all material evidence favorable to [Petitioner], even beyond the requirements of Rule of Procedure 5.65. [Citations omitted, including to Brady v. Maryland, *supra*.] The State Bar's ethical rules likewise prohibit withholding evidence

> that prosecutors (including OCTC) have a legal obligation to produce. For example, Rule of Professional Conduct 3.8(d) requires prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." Here, there is no protective order in place, and for the reasons stated above it is not only reasonable to expect that the content of the investigative file for the closed 2013 Case would negate or mitigate the alleged culpability of the Petitioner, it is actually known or knowable by OCTC. Notwithstanding OCTC's unfounded assertions to the contrary, the 2013 Case is inextricably linked with the instant matter. Because the 2013 Case was closed on the merits it is reasonable to assume that it contains exculpatory evidence and furthermore that it will indicate whether [State Bar Rules of Procedure] Rule 2603 was violated when OCTC effectively reopened the 2013 Case. All unprivileged portions of the investigation file for the 2013 Case should be immediately produced for the reasons summarized above and in the interests of justice.[22]

Two days later, and still several days prior to the scheduled commencement of his trial in State Bar Court in November 2019, Petitioner also filed a Motion to Dismiss the Notice of Disciplinary Charges on the basis of three significant procedural errors:

> In prosecuting the instant action the Office of Chief Trial Counsel ("OCTC") has committed numerous procedural errors which have been compounded by a lack of transparency and good-faith. At least three of these errors independently compel an immediate dismissal of the disciplinary charges. First, OCTC has failed to follow its own rules governing the reopening of cases. Second, OCTC has completely ignored [Petitioner's] legitimate requests to access the investigative file for a 2013 case involving the same Complainant and the same alleged conduct, but which was closed on the merits. Third, OCTC has advanced disciplinary charges that are clearly time-barred. But taken together, these three "errors"

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[22] Petitioner's Notice of Motion and Motion to Compel Production filed on or about November 6, 2019.

> look less like honest mistakes and more like excessive coordination between OCTC and a vindictive Complainant who was not satisfied by the level of damage he was able to inflict in his 2012 civil action against [Petitioner]. The extent to which OCTC has apparently been coopted by this Complainant and his counsel undermines the legitimacy not only of the instant proceeding but of the entire State Bar disciplinary system.[23]

On the first day of a trial that included at least portions of six days, Judge Dennis Saab of the Hearing Department of State Bar Court ruled from the bench to deny Petitioner's Motion to Compel and his Motion to Dismiss. Judge Saab also denied Petitioner's request for a brief adjournment so he could pursue an interlocutory appeal to the Review Department of State Bar Court. Specifically, regarding the Motion to Compel, Judge Saab stated "the Court doesn't see much relevance in that 2013 investigation file." On the fifth day of trial, however, Judge Saab *expressly acknowledged* the relevance of the 2013 case. Petitioner presented an oral motion for reconsideration of the prior Motion to Compel, which Judge Saab nonetheless denied. "Although the Court does see [the] older file as being relevant, after testimony, that motion was untimely..." Judge Saab cited to State Bar Court Rule of Procedure 5.65(B) which generically states "All requests for discovery must be made in writing and served on the other party within 10 days after service of the answer to the notice of disciplinary charges, or within 10 days after service of any amendment to the notice." But this provision is a *non-sequitir*, as was its invocation. In the first place, it is preposterous to suggest that the prosecution should be fully relieved of any obligation to produce any material whatsoever if the accused requests such material more than 10

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[23] Petitioner's Notice of Motion and Motion to Dismiss, filed on or about November 8, 2019.

days after answering a notice of disciplinary charges, irrespective of the potential exculpatory or mitigating value of such material. Moreover, in this instance, the prosecution raised no objection to the timing of Petitioner's written request for the 2013 investigation files and indeed *complied* with Petitioner's written request for the 2016 investigation files (which was communicated via the very same letter in October 2019, more than five weeks before the start of his trial in State Bar Court).

As more fully discussed below, Petitioner has consistently argued – to both the Hearing Department and Review Department of the State Bar Court, and also to the Supreme Court of California – that the prosecution's refusal to produce any portion of the 2013 investigation files was (and is) a violation of Petitioner's due process rights, which has been compounded by the refusal of the California courts to provide any appropriate remedy. Relatedly, Petitioner contends that the State Bar's delay in prosecuting the instant matter – by reopening a previously closed investigation and commencing prosecution nearly eight years after the occurrence of the alleged misconduct – was also prejudicial insofar as Petitioner was generally unable to access contemporaneous notes or records or communications with Buyer or Seller or Legado concerning the subject transactions after the loss or access to an exchange-server in Spring 2018. As further discussed below, this made access to the 2013 investigation files all the more vital to Petitioner's defense, including but not limited to materials that elucidate the nature of Petitioner's business relationship with the Complainant and would assist Petitioner in rebutting Complainant's allegations which here were the sole impetus for disciplinary action against an individual who had an otherwise unblemished professional record. Again, because the 2013 investigation

was closed on the merits – with the State Bar having expressly "determined that this matter does not warrant further action" – it is entirely reasonable to expect that it contains exculpatory evidence and furthermore that it would indicate whether the State Bar violated its own Rules of Procedure (specifically, Rule 2603) by reopening a case that was previously closed on the merits without following the proper procedure for obtaining authorization from its Office of General Counsel for a "second look" at the matter. To be clear, evidence of such a violation of Rule 2603 would presumably be "exculpatory" in and of itself because it would have prevented the State Bar from prosecuting the case in the first instance – i.e., it would have established Petitioner's *legal* innocence. The same is true for a determination that the prosecution is time-barred. Insofar as the civil litigation between Complainant and Petitioner was in full swing when the State Bar determined in October 2013 that the matter "does not warrant further action," any analysis contained in the 2013 investigative files regarding whether that civil litigation was or was not "based on the same acts or circumstances as the violation" would also presumably be exculpatory because it would have likewise prevented the State Bar from prosecuting the instant case.

REASONS FOR GRANTING THE WRIT

The record in the instant matter is replete with evidence that the State Bar of California failed to follow its own Rules of Procedure by (inter alia) reopening a closed case in violation of rule 2603(b), denying a member-attorney access to the contents of his own investigative file in

violation of rule 5.65(C)(3)(c), ignoring the applicable limitations period for initiating attorney discipline in violation of rule 5.21(C)(3), and ignoring the presumption of innocence which is embedded in rule 5.103's insistence that the burden of proof is on the State Bar to prove culpability by "clear and convincing evidence." But these are not merely *technical* violations of the State Bar's Rules of Procedure – they are also individually and collectively violations of Petitioner's Constitutional guarantees of due process. That the Review Department's Opinion upholding and effectuating such flagrant violations has been designated for publication ensures that nearly 200,000 active members of the State Bar of California are now at far greater risk of prosecution *without* a recognized right to access exculpatory or mitigating material to aid their defense and/or to confront their accuser(s) – and instead *with* a "presumption of misappropriation" – absent a timely intervention by the Supreme Court or the United States.

Specifically, the State Bar has violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution – and presumably also Section 7(a) of the California Constitution which sets forth materially similar protections – by withholding evidence that is material to determining Petitioner's culpability as to any alleged misconduct and also the corresponding discipline to be imposed, as well as evidence for the potential impeachment of Petitioner's accuser. Additionally, the State Bar has violated the Fourteenth Amendment to the U.S. Constitution – and presumably also Section 7(a) the California Constitution – by employing a presumption of culpability with respect to alleged misconduct even in the absence of evidence that any such misconduct occurred.

D. The Supreme Court's Intervention Is Necessary to Resolve Apparent Disagreements Between and Among the States as to Whether *Brady*, *Giglio* and their Progeny Compel Disclosure by State Bar Prosecutors of Evidence Which Is Material to Either Culpability, Punishment, or the Credibility of Witnesses for the Prosecution in Attorney Discipline Cases.

Under the 14th Amendment to the U.S. Constitution, the prosecution in any criminal case must timely disclose to the defense evidence favorable to the accused and material either as to guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963). Likewise, the prosecution must timely disclose information bearing on the credibility of its witnesses. Giglio v. United States, 405 U.S. 150 (1972).

Despite recent attempts by the American Bar Association and its various counterparts across the States to recast attorney discipline proceedings as *sui generis* and therefore not subject to these Constitutional guarantees of due process, for nearly sixty years the Supreme Court of the United States has regarded such proceedings as "quasi criminal" and recognized that they indeed contain many characteristics of criminal proceedings including prosecutors who are seeking to impose punishments or penalties on lawyers accused of misconduct.[24] As this Court unequivocally stated in Ruffalo, an accused attorney "is accordingly entitled to procedural due process."[25] Petitioner respectfully submits that

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[24] Ruffalo, 390 U.S. at 550.
[25] *Id.*

the time is right for the Supreme Court to now erase any doubt as to the applicability of Brady and Giglio disclosure obligations in attorney discipline proceedings, at least when a punishment as severe as disbarment is being sought by the prosecution, and that the instant litigation provides a sufficiently compelling fact-pattern – and otherwise a sufficiently consequential and dangerous precedent in California – to make such a pronouncement.

However, even if *arguendo* the Supreme Court were disinclined to affirmatively impose Brady and Giglio obligations on all state bar prosecutors, at least some improvement in due process protection(s) could be achieved through an incremental extension of the right of an accused attorney, as clarified in Willmer, to meaningfully confront and cross-examine his or her accuser – which in this instance compels the disclosure of evidence which may likewise bear, at least collaterally, on matters of guilt, punishment, or impeachment.[26]

By way of summarizing the pertinent facts set forth above, here the State Bar Court erred by not giving appropriate consideration to Petitioner's due process arguments surrounding the prosecution's refusal to produce potentially exculpatory or mitigating evidence. In denying

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[26] In Willner v. Comm. on Character & Fitness, 373 U.S. 96, 103 (1963), this Court noted, "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood . . . We think the need for confrontation is a necessary conclusion from the requirements of procedural due process."

Petitioner's Motion to Compel, initially on grounds of "relevance" and later on the specious rationale that his request for production of potentially exculpatory or mitigating evidence was "untimely" (because it was not made *within 10 days* after filing his initial answer to the Notice of Disciplinary Charges), and then stubbornly refusing to address Petitioner's argument regarding the impact of the prosecution's non-disclosure in its final opinion, the State Bar Court brushed aside the legitimate due process issues – and corresponding Brady violations – which are directly implicated by such non-disclosure. The State Bar Court likewise violated both Giglio and Willmer in the instant matter by denying Petitioner access to materials known to be in the prosecution's investigative files which objectively tend to diminish the credibility of the Complainant's testimony *and* which are central to Petitioner's ability to effectively cross-examine the Complainant.

How do we know such materials are in the investigative files? Because Petitioner *provided the materials himself*, in the Summer of 2013. By way of just one example, although OCTC prosecutors originally identified as a trial exhibit an August 2013 letter from Petitioner to OCTC Investigator Rose Ackerman (during the investigation that led to the matter being *closed* in October 2013), OCTC prosecutors then withdrew the letter and refused to produce the thirteen (13) documents that were attached. However, alternate copies of the documents were *not* in

Petitioner's possession nor otherwise available to him for reference in his trial, fully six years and two office-relocations later. Included among them are documents that would have directly assisted Petitioner in challenging the Complainant's credibility while simultaneously rebutting Complainant's "aggravation" testimony regarding certain Legado projects.[27] When asked by OCTC, "Mr. Czuker, what harm did you experience based on your relationship with Mr. Jones," the very first thing that the Complainant mentioned – he called it the "straw that broke the camel's back" – was a proposed redevelopment in Channel Islands Harbor, approximately 70 miles northwest of downtown Los Angeles, in coastal Ventura County. (Reporter's Transcript, Vol. I, 153:18-155:9.) The Complainant claimed that Petitioner was the primary reason Ventura County declined to extend Legado's ground lease for the property and by extension that the Complainant "lost the ability to develop 600 apartment units, plus retail" and missed out on what "would have been more than a couple-hundred-million-dollar project, overall..." *Id.* However, had the prosecution complied (voluntarily or otherwise) with Petitioner's written request to produce the 2013 investigative file, naturally including each and

[27] On the very first day of trial, before Petitioner could pursue an interlocutory review or otherwise address the denial of his Motion to Compel, Motion to Dismiss, or request to stay the proceedings, let alone put on any defense to culpability, Judge Saab invited aggravation testimony from the Complainant. Petitioner objected to the hearing of aggravation testimony prior to the hearing of Petitioner's defense. RT, Vol. I, 146:9-13. Even though the Complainant expressed willingness and ability to return on the afternoon of the next scheduled trial date – November 18, 2019 -- the Court insisted on taking his aggravation testimony out of order. RT, Vol. I, 150:1-21. This is yet another means by which Petitioner was denied a fair hearing by Judge Saab.

all of these thirteen (13) documents that were provided by Petitioner *himself* to OCTC, then Petitioner would have been able to compellingly rebut Complainant's aggravation testimony – and also impugn Complainant's credibility – by referring to Legado's internal underwriting that showed the redevelopment project to be financially infeasible ("Exhibit E" to Petitoner's August 2013 letter to OCTC); or referring to a letter from the Ventura County Harbor Director expressing concerns about the density and mass of the proposed redevelopment project ("Exhibit F" to same); or referring to and an internal report of then-existing cashflow which showed the project in its then-extant form to be a massive money-loser for Legado ("Exhibit H" to same).

Here, for all intents and purposes, Complainant Edward Czuker was the only witness upon whose word the prosecution sought to deprive Petitioner of his livelihood.[28] Petitioner's opportunity to confront the Complainant before the State Bar Court – which was already limited to a small portion of the first day of Petitioner's trial and prior to any opportunity for Petitioner to seek an interlocutory audience with the Review Department of the State Bar Court – was effectively rendered meaningless because the prosecution withheld key documents regarding the events at issue and that were necessary to ensure an effective cross-examination. As noted above, this was especially true in a case where the

[28] Although exactly two other witnesses testified for the prosecution, these were the attorney for Mr. Czuker and the CFO who reports directly to Mr. Czuker.

trial occurred several years after the events at issue. The withheld documents, which included emails and related correspondence that were contemporaneous with those events, would therefore have been essential to ensuring that the record elicited at the trial was as accurate as possible.

D. The Court's Intervention Is Likewise Necessary to Prevent the Establishment of a Dangerous "Presumption of Culpability" Precedent in the Nation's Largest Mandatory-Membership Bar Association.

In 1895, the Supreme Court of the United States recognized that the "presumption of innocence" is a bedrock principle of our legal system, rooted in the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution.[29] Around the same time, the Supreme Court of California also recognized the Constitutional imperative of a presumption of innocence and extended it specifically to attorneys accused of misconduct.[30] Approximately eight decades later, in 1978 the Supreme Court of the United Stated further underscored the primacy of a presumption of innocence in all federal or state criminal proceedings. Specifically, in Taylor v. Kentucky, this Court held that the presumption of innocence is so integral to due process that a jury must be expressly instructed that the guilt or innocence of the accused must be determined *solely* on the basis of

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[29] Coffin v. United States, 156 U.S. 432 (1895)

[30] Because an accusation against an attorney "is in the nature of a criminal charge... all intendments are in favor of the accused." Matter of Haymond, 121 Cal. 385, 388 (1898). Similarly, the State Bar Court has held that all reasonable doubts are to be resolved in favor of respondents and if equally reasonable inferences may be drawn from a fact then the inference to be accepted is the one leading to a conclusion of innocence. In the Matter of Respondent B (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424.

evidence introduced at trial and *not* on grounds of suspicion, indictment, custody, or other circumstances not adduced as proof at trial.[31]

Here, by instead invoking a "presumption of misappropriation" in connection with *at least* three Counts set forth in the subject Notice of Disciplinary Charges for which no evidence of misappropriation was identified, the State Bar has violated this Constitutionally-based presumption of innocence. Most notably, in connection with Counts Two, Five, and Seven of the NDC, the Review Department's so-called reasoning was as follows: "The evidence shows the $50,000 check for the FF&E was endorsed by Jones and the money was taken out of Killer Shrimp's account, which establishes a presumption that Jones misappropriated the money. Therefore, Jones must rebut the presumption to avoid culpability for misappropriation." App. F at 21. The Review Department cites no authority for the proposition that merely depositing funds into an account that could not be precisely identified nor audited by any party several years afterwards somehow "establishes a presumption that [Petitioner] misappropriated the money." Indeed, there is no authority for such an outlandish premise. If this published Opinion is allowed to stand, the State Bar can rely on it in prosecuting any attorney who cannot retrospectively document the location of funds – even after seven or eight years have elapsed, even in the absence of evidence that such funds were used for anything other than their intended or designated purpose, and even if the funds were not required to be deposited in a client trust account! From the perspective of a member of the State Bar prosecuted under such a theory,

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[31] Taylor v. Kentucky, 436 U.S. 478 (1978).

it is difficult to conceive of a precedent more recklessly out-of-step with the due process protections guaranteed by our State and federal Constitutions.

That the State Bar Court would employ a "presumption of misappropriation" here is especially shocking because prior published cases suggest that it has historically acknowledged the importance of a presumption of innocence. For example, in 1991 the State Bar Court held:

> An attorney's license to practice law creates a continuing presumption, in the absence of proof to the contrary, that the attorney is not only morally fit but also mentally competent to practice law. This presumption underlies *the rule in disciplinary proceedings that all reasonable doubts are to be resolved in favor of [the accused]* and that, if equally reasonable inferences may be drawn from a fact, the inference to be accepted is the one leading to a conclusion of innocence.[32]

Similarly, in 2006 the State Bar Court held:

> Where the record supports an inference beneficial to [the accused] as equally as it supports an inference adverse to [the accused], *the inference favoring the [accused] must be accepted.*[33]

However, in the instant matter, the State Bar Court deviated from its own guideposts concerning a presumption of innocence in connection with other findings as well – not limited only to their unprecedented and unconstitutional "presumption of misappropriation." Indeed, significant factual determinations – i.e., those specifically bearing on multiple

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[32] In the Matter of Respondent B (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424. (Emphasis added.)

[33] In the Matter of Oheb (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920. (Emphasis added.)

elements of multiple charges of misconduct – made by the Hearing Department and endorsed by the Review Department (in their published Opinion) diverge rather sharply from the principle of reasonable doubt being weighed in Petitioner's favor, especially where the Complainant Edward Czuker is the primary source of information that is directly contradicted by other credible testimonial or documentary evidence in the record.

Most notably, no presumption of *innocence* was abided by the State Bar Court in arriving at the counterfactual conclusion that an attorney-client relationship existed between Petitioner and Legado Marina LLC (the landlord entity) at times pertinent to the subject lease and asset-purchase. In rebutting this allegation, Petitioner produced the sole written agreement by and between Petitioner and any entity associated with the Complainant, which was devoid of any reference to the formation of an attorney-client relationship or provision of legal services. Petitioner produced multiple emails delineating his decidedly non-attorney responsibilities at Legado and correspondence with Complainant about their joint-venture activities in real estate development. Petitioner also elicited sworn testimony from *four different witnesses* who cast further doubt on the existence of an attorney-client relationship between Petitioner and Legado Marina LLC. After the trial but in an ongoing effort to further elucidate the issue, Petitioner provided additional documentary

evidence regarding the continued separate corporate existence of Legado Companies from Legado Marina LLC (the landlord entity) and also from the specific entities with whom Jones began his business relationship on November 30, 2007. In sum the Hearing Department and the Review Department both failed to weigh reasonable doubt in Petitioner's favor in connection with this pivotal issue.

Similarly, no presumption of *innocence* was abided by the State Bar Court in arriving at the counterfactual conclusion that Legado had a direct and propriety interest in each and all of the deposited funds. As noted above, Counts One through Three of the NDC are all predicated on allegations that Petitioner failed to place "client" funds into a client trust account in contravention of former Rule of Professional Conduct 4-100(A) (which applies only to funds held for the benefit of *clients* and not third parties). Even if one were to assume *arguendo* that an attorney-client relationship existed between Petitioner and Legado Marina LLC at the time of the subject transaction, there is a metaphorical mountain of evidence corroborating Petitioner's assertion that none of the funds in question belonged to Legado Marina LLC nor any other Legado entity *at the time they were received by Petitioner*. Indeed, the Complainant himself testified that the escrow involved "the transfer of the liquor license from Organic Panificio to Killer Shrimp as the assignee of the liquor license."[34]

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[34] RT Vol. I, 134:19-21.

Indeed, the Complainant himself acknowledged that "Organic Panificio... was the prior tenant in control of the liquor license..."[35] Indeed, the Complainant himself acknowledged that with respect to the liquor license funds, "the money did not come to Legado" and instead the entire proceeds of the sale of the liquor license were used to pay off tax liens incurred by The Organic Panificio.[36]

Likewise, no presumption of *innocence* was abided by the State Bar Court in arriving at the counterfactual finding that a letter of intent executed on or about April 29, 2011 was binding on Petitioner with respect to the location and availability of a $50,000 "security deposit" along with a $50,000 "FF&E deposit" (which, as discussed above, was for equipment belonging to The Organic Panificio which was not a party to the letter of intent). This counterfactual finding ostensibly forms the basis of Counts One, Two, Four, Five, Seven and Eight of the NDC – each and all of which allege that Petitioner somehow contravened the terms of the April 2011 letter of intent. This finding deliberately ignored the realities that the letter was: a) expressly non-binding; and b) expressly superseded by another letter dated February 23, 2012 which included no reference whatsoever to any client-trust account nor "escrow" nor Petitioner acting in any capacity other than as Chief Operating Officer for Legado Companies. Indeed even the prosecution apparently acknowledged that

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[35] RT, Vol. I, 100:19-20.
[36] RT Vol. I, 135:25-136:1

the April 29, 2011 letter of intent should never have been mischaracterized by the Hearing Judge as a "lease agreement." In referring the Complainant to the April 29, 2011 letter of intent, the prosecution asked, "... this document isn't a lease agreement... [i]t just memorializes some of the terms that are still under negotiation, correct?" The Complainant responded, "Correct."[37] Even more alarmingly, for Counts Three and Six – concerning a liquor-license transfer from Organic Panificio to Killer Shrimp that was not even contemplated by the April 29, 2011 letter of intent – Petitioner is being subjected to discipline based on *another* non-binding letter of intent dated February 23, 2012 that (as noted above) makes no reference whatsoever to Petitioner holding funds in an escrow or client-trust account or otherwise handling the funds in any particular way.

Lastly, no presumption of *innocence* was abided by the Review Department of the State Bar Court in arriving at the counterfactual conclusion that Petitioner engaged in "intentional misappropriation" of the deposited funds whereas the Hearing Department had found Petitioner culpable of "negligent misappropriation" – a lesser offense for which disbarment is *not* generally the recommended consequence.[38] In light of the

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[37] RT Vol. I, 95:24-96:4.

[38] "The distinction between negligent and dishonest misappropriation can be very significant in determining appropriate discipline." In the Matter of Sklar (Review Dept. 1993) 2 Cal. State Bar Rptr. 602, 618. For example, according to section 2.1 of the State Bar's Standards for Attorney Sanctions for Professional Misconduct, whereas disbarment is appropriate for intentional or dishonest misappropriation, "suspension or

foregoing analyses and normative application of the ubiquitous principle that any reasonable doubt must benefit the accused, there was simply not an evidentiary basis for the Review Department to go beyond Judge Saab's attribution of *negligence* and to instead find Petitioner culpable of intentional misappropriation resulting in his disbarment.

CONCLUSION

Petitioner respectfully submits that the State Bar of California violated the Fourteenth Amendment to the U.S. Constitution by: a) withholding evidence that bears directly on Petitioner's culpability as to any alleged misconduct, the corresponding discipline to be imposed, and the credibility of Petitioner's sole accuser; and b) by employing an impermissible presumption of culpability with respect to alleged misconduct, even in the absence of evidence that such misconduct occurred. For the reasons set forth herein, this Court should GRANT certiorari and vacate the published Opinion of the State Bar Court which is otherwise a dangerous and misguided precedent applicable to disciplinary actions in the nation's largest mandatory-membership bar association. Furthermore, this Court should announce that Brady-Giglio disclosure requirements apply to attorney-discipline proceedings, as do Coffin-Taylor presumptions of innocence.

DEREK JONES, Petitioner
November 29, 2022

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reproval is appropriate for misappropriation that does not involve intentional misconduct."