No.

In The
Supreme Court of The United States

LOUIS A. PICCONE,

Petitioner – Appellant,
v.

TEN UNKNOWN U.S. PATENT AND TRADEMARK OFFICE EMPLOYEES

Respondents - Appellees.

On Appeal from The Court of Appeals
For the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Louis A. Piccone
Pro Se
593 McGill St.
Hawkesbury, Ontario
CANADA
K6A-1R1
(613) 632-4798
louis@piccone.us

19-8844

No.

In The
Supreme Court of The United States

LOUIS A. PICCONE,

Petitioner – Appellant,
v.

TEN UNKNOWN U.S. PATENT AND TRADEMARK OFFICE EMPLOYEES

Respondents - Appellees.

On Appeal from The Court of Appeals
For the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Louis A. Piccone
Pro Se
593 McGill St.
Hawkesbury, Ontario
CANADA
K6A-1R1
(613) 632-4798
louis@piccone.us

QUESTIONS PRESENTED

I. Are Attorneys undergoing bar disciplinary proceedings before the U.S. Patent and Trademark Office to determine whether they may continue to practice their chosen profession, entitled to material exculpatory information obtained by government investigative attorneys in view of this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), federal regulations such as 37 C.F.R. 11.801, and Rule 3.8(d) of the Virginia Rules of Professional Conduct?

II. When delegated authority, including delegated authority to execute official government documents, violates federal regulation, including specific federal regulations as to whom may sign documents such as 37 C.F.R. § 11.34(a)(5), and is contrary to the Congressional intent expressed in 35 U.S.C. § 26 statute, is the presumption that said delegation was authorized as held in *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, (D.C. Cir. 2004) overcome?

LIST OF PARTIES

Petitioner Louis A. Piccone, and, Respondents, the U.S. Patent and Trademark Office ("USPTO") and ten unknown USPTO employees are the only parties to this action at present.

TABLE OF CONTENTS

Question Presented 2

i. List of Parties 3

ii. Table of Contents 4

iii. Table of Authorities 6

iv. Opinions Below 12

Statement of Jurisdiction 13

Constitutional and Statutory Provisions Involved 13

Statement of the Case 13

Reasons for Granting the Writ 17

A. Review is Warranted to Resolve Whether This Court's Ruling in *Brady v. Maryland*, 373 U.S. 83 (1963) is applicable to civil enforcement proceedings 17

B. Review Is Warranted Because An Executive Branch Agency Is Willfully Disobeying This Court's Binding Precedent, It's Own Regulations and State Law By Delegating USPTO Signature Authority 26

Conclusion 33

Appendices:

Appendix A: June 16, 2016, Decision of the USPTO ALJ Suspending Mr. Piccone's License for three years.

Appendix B: November 13, 2018, Decision of United States District Court for the Eastern District of Virginia ("USDC EDVA") Reviewing United States Patent and Trademark Office ("USPTO") Decision Suspending Mr. Piccone's Registration To Practice Before the USPTO.

Appendix C: November 20, 2019, Decision of the Court of Appeals for the Federal Circuit.

Appendix D: February 22, 2020, Decision of the Court of Appeals for the Federal Circuit denying en banc review – not available on CAFC website.

TABLE OF AUTHORITIES

CASES

Accardi v. Shaughnessy,
347 U.S. 260 (1954) 28

Auer v. Robbins,
519 U.S. (1997) 30

Brady v. Maryland,
373 U.S. 83 (1963) 2,10,18,19,20,21,22,23,25

Calabretta v. Floyd,
189 F.3d 808 (9th Cir.1999) 14

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 30

Demjanjuk v. Petrovsky,
10 F.3d 338, 353 (6th Cir. 1993) 21

EEOC v. Los Alamos Constructors, Inc.,
382 F. Supp. 1373, at 1374 (D.N.M.1974) 21

Escoe v. Zerbst,
295 U.S. 490 (1935) 27

In re Matthew H. Swyers,
USPTO Disciplinary Matter D2016-20) 27

In re Ruffalo,
390 U.S. 544 (1968) 21

Kia P. v. McIntyre,
235 F.3d 749 (2d Cir.2000) 14

Kingsland v. Dorsey,
338 U.S. 318 (1949) 20

Kyles v. Whitley,
514 U.S. 419 (1995) 23

Mooney v. Holohan,

294 U.S. 103 (1935) 18

Napue v. Illinois,
360 U.S. 264 (1959) 18

Polidi v. Lee, No. 1:15-cv-1030, 2015 WL 13674860,
2015 U.S. Dist. LEXIS 191329 (E.D. Va. Nov. 24, 2015),
aff'd sub nom. Polidi v. Matal, 709 F. App'x
1016 (Fed. Cir. 2017) 18,19,20,27

Roska v. Peterson,
304 F.3d 982 (10th Cir.2002) 14

Sessions v. Demaya,
584 U. S. ____ (2018) 19

Sperry & Hutchinson Co. v. FTC,
256 F. Supp. 136, 142 (S.D.N.Y. 1966) 22

Spevak v. Klein,
385 U.S. 511 (1967) 21

Stone v. F.D.I.C.,
179 F.3d 1368 (CAFC 1999) 25

United States v. Bagley,
473 U.S. 667 (1985) 22

United States v. Edwards,
777 F. Supp. 2d 985 (E.D.N.C. 2011) 21

United States v. Nixon,
418 U.S. 683 (1974) 29

U.S. Telecom Ass'n v. FCC,
359 F.3d 554, (D.C. Cir. 2004) 2,26,31

Valmonte v. Bane,
18 F.3d 992 (2nd Cir. 1994) 15

Vitarelli v. Seaton,
359 U.S. 535 (1959) 29

Yellin v. United States,

374 U.S. 109 (1963) 29

Young v. Department of Housing and Urban Development,
Case No. 2011-3232 (C.A. Fed., Feb. 12, 2013) 25

LAWS

5 U.S.C. § 558(c) 28

28 U.S.C. § 530B 24,32

28 U.S.C. §1254(2)(a) 12

35 U.S.C. § 24 18,22,23,25,31

35 U.S.C. § 26 13,27,28,32

42 U.S.C. § 1983 14

REGULATIONS

37 C.F.R. § 11.2 32

37 C.F.R. § 11.3 32

37 C.F.R. § 11.34 10

37 C.F.R. § 11.38 25

37 C.F.R. § 11.39(b)(2) 24

37 C.F.R. § 11.52 18,22,31

37 C.F.R. 11.303 24

37 C.F.R. 11.304 24

37 C.F.R. 11.401 24

37 C.F.R. 11.801 2,24

STATE LAW

Pennsylvania Rules of Professional Responsibility, Rule 8.3 16

Rule 3.8(d) of the Virginia Rules of Professional Conduct 2,24

OTHER

"Child Abuse: Guilty Until Proven Innocent or Legalized Governmental Child Abuse" by Karen Radko, available at http://www.ipt-forensics.com/journal/volume5/j5_2_6.htm) 15

"No Prison Sentences For Most Felony Convictions" See, https://www.crimeinamerica.net/2010/01/25/crime-statistics-no-prison-sentences-for-most-felonyconvictions/ 20

"Statistics Suggest Bleak Futures For Children Who Grow Up In Foster Care", Amarillo Globe-News, By BRITTANY NUNN, Sunday, Jun 24, 2012 15

https://www.govloop.com/community/blog/crime-statistics-no-prison-sentences-for-most-felonyconvictions/ 20

QUESTIONS PRESENTED

I. Are Attorneys undergoing bar disciplinary proceedings before the U.S. Patent and Trademark Office to determine whether they may continue to practice their chosen profession, entitled to material exculpatory information obtained by government investigative attorneys in view of this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), federal regulations such as 37 C.F.R. 11.801, and Rule 3.8(d) of the Virginia Rules of Professional Conduct?

II. When delegated authority, including delegated authority to execute official government documents, violates federal regulation, including specific federal regulations as to whom may sign documents such as 37 C.F.R. § 11.34(a)(5), and is contrary to the Congressional intent expressed in 35 U.S.C. §26 statute, is the presumption that said delegation was authorized as held in *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, (D.C. Cir. 2004) overcome?

LIST OF PARTIES

Petitioner Louis A. Piccone, and, Respondents, the U.S. Patent and Trademark Office ("USPTO") and ten unknown USPTO employees are the only parties to this action at present.

JURISDICTION

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the February 22, 2020, judgment of the Court of Appeals for the Federal Circuit, dismissing her appeal of an administrative Order suspending his license to practice law before that agency for a period of three years, and dismissing his damages and declaratory relief causes.

OPINIONS BELOW

On February 22, 2020, the Court of Appeals for the Federal Circuit dismissed Petitioner's appeal of the District Court for the Eastern District of Virginia appealing the suspension of his license to practice patent law before the U.S. patent and Trademark Office and dismissing her civil rights suit for damages resulting from being denied due process and Declaratory Judgment suits. This decision is not yet published but is attached hereto as Exhibit A as is the dismissal of Petitioner's request for en banc review (Exhibit B). The District Court's decision is also attached as Exhibit C.

JURISDICTION

The Court of Appeals for the Federal Circuit entered an order dismissing Petitioners' appeal on February 22, 2020. The Court has jurisdiction under 28 U.S.C. §1254(2)(a).

STATUTES AND POLICIES AT ISSUE

37 C.F.R. § 11.34 Complaint.

(a) A complaint instituting a disciplinary proceeding *shall*:

(1) Name the person who is the subject of the complaint who may then be referred to as the "respondent";

(2) Give a plain and concise description of the respondent's alleged grounds for discipline;

(3) State the place and time, not less than thirty days from the date the complaint is filed, for filing an answer by the respondent;

(4) State that a decision by default may be entered if an answer is not timely filed by the respondent; and

(5) ***Be signed by the OED Director***.

(b) A complaint will be deemed sufficient if it fairly informs the respondent of any grounds for discipline, and where applicable, the USPTO Rules of Professional Conduct that form the basis for the disciplinary proceeding so that the respondent is able to adequately prepare a defense.

(c) The complaint shall be filed in the manner prescribed by the USPTO Director.

(d) ***Time for filing a complaint.*** A complaint shall be filed within one year after the date on which the OED Director receives a grievance forming the basis of the complaint. No complaint shall be filed more than ten years after the date on which the misconduct forming the basis for the proceeding occurred.

(e) ***Tolling agreements.*** The one-year period for filing a complaint under paragraph (d) of this section shall be tolled if the involved practitioner and the OED Director agree in writing to such tolling.

35 U.S.C. § 26. Effect of defective execution

Any document to be filed in the Patent and Trademark Office and which is required by any law, rule, or other regulation to be executed in a specified manner may be provisionally accepted by the Director despite a defective execution, provided a properly executed document is submitted within such time as may be prescribed.

STATEMENT OF THE CASE

Facts Giving Rise To This Case

Shortly after Petitioner Attorney Louis Piccone's case was featured in a prominent legal publication for having prevailed against false charges brought by Massachusetts Child Protective Services ("CPS")[1], indigent parents, without the training, experience, or, resources to represent themselves, began to contact him requesting legal help (A5705, P. 363) to return their children from State authorities. Mr. Piccone changed the mix of his practice from almost exclusively intellectual property matters to seek correction of the CPS system by, for example, employing federal civil rights actions under 42 U.S.C. § 1983 et seq., (A5705, P. 363) to bring federal court attention to State misconduct. These lawsuits, brought in 11 different states, sought to, for example, raise the low "reasonable cause to believe" evidentiary standard currently used by 48 of the 50 states to remove custody of children from their parents', to the "probable cause" required by the 4th amendment to the U.S. Constitution[2]. Mr. Piccone's advocacy on behalf of parents accused of abuse and/or neglect was bitterly contested and had the potential to cost States hundreds of millions of dollars in federal matching funds if the parents prevailed on any of the seemingly straightforward constitutional challenges.

In addition, Mr. Piccone engaged in protected speech[3] by appearing on radio shows (A5720, P.420) and participating in the leadership of not-for-profit political organizations (A6161) seeking to organize

---

[1] All charges against Mr. Piccone, and his wife, were dismissed as baseless and as having been brought as retaliation for Mr. Piccone refusing to allow interviews of his children unless the interviews were video-recorded.

[2] "[T]he Fourth Amendment applies in the context of the seizure of a child by a government-agency official during a civil child-abuse or maltreatment investigation." *Kia P. v. McIntyre*, 235 F.3d 749, 762 (2d Cir.2000). For example, under federal law there is no social worker exception to the strictures of the Fourth Amendment. See e.g., *Roska v. Peterson*, 304 F.3d 982, 989 (10th Cir.2002); *Calabretta v. Floyd*, 189 F.3d 808, 816 (9th Cir.1999).

[3] Freedom of expression is protected by the 1st Amendment in the United States and by Section 2 of the Canadian Charter of Rights and Freedoms.

grass roots protest to a grossly unconstitutional system for the removal and destruction of American children in the foster care system[4]. All of the misconduct charges against Mr. Piccone relate to these cases against State CPS agencies and personnel.

After expending his savings, and retirement funds defending his family, Mr. Piccone proceeded on the good will of others, and, those sums he made from doing contract legal work. Despite drafting "sophisticated"[5] complaints, being clearly authorized by statute to aid pro se litigants, and having clearly established Supreme Court, or, Court of Appeals authority supporting the legal causes pursued, Mr. Piccone was repeatedly accused of engaging in the unauthorized practice of law for helping pro se litigants in what are highly unpopular causes.

With little or no funds to proceed, Mr. Piccone was administratively suspended from practice by Pennsylvania bar authorities from September 1, 2011, to October 19, 2011, for failure to comply with CLE requirements because he could not afford the costs of taking the necessary classwork. Mr. Piccone was again administratively suspended from October 19, 2012, to December 21, 2012, for similar reasons. Then again, Mr. Piccone was administratively suspended a third time from September 30, 2013, to August 13, 2014, for not having sufficient funds to pay required fees to

---

[4] Of all children in foster care, 66% will be homeless, go to jail, or, die within one year of aging out of the foster care system when they turn 18. "Statistics Suggest Bleak Futures For Children Who Grow Up In Foster Care", Amarillo Globe-News, By BRITTANY NUNN, Sunday, Jun 24, 2012. Most of the children taken into foster care are removed in error due to the low evidentiary standard used, with there being an error rate of between 75% (*Valmonte v. Bane*, 18 F.3d 992 (2nd Cir. 1994)) and 92% (See, "Child Abuse: Guilty Until Proven Innocent or Legalized Governmental Child Abuse" by Karen Radko, available at http://www.ipt-forensics.com/journal/volume5/j5_2_6.htm) in adjudications using low evidentiary standards. This means more than 1/2 of the children in foster care will have a poor life outcome, **and**, will have been removed from their parents by mistake.

[5] This is the term the USDC DMA used to describe Mr. Piccone's 42 U.S.C. § 1983 Complaints.

maintain his license. Attorneys at various bar authorities were legally obligated[6] to notify the USPTO of both the 2011 and 2012 administrative suspensions in the same manner that the USPTO was notified of Mr. Piccone's 2013 suspension, so as to trigger the USPTO's 1 year statute of limitations for alleged misconduct, in 2011, and in 2012, in the same manner that this statute of limitations was triggered in 2013. By operation of law according to the presumption that government employees acted according to their legal obligations. See, *United States v.Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) Mr. Piccone had a viable statute of limitations defense.

In 2013, after being advised that Mr. Piccone's Pennsylvania License was administratively suspended, the USPTO began an investigation into Mr. Piccone's actions, which was first heard by an Administrative Law Judge ("ALJ") from the Environmental Protection Agency ("EPA"). Mr. Piccone filed two different motions for permission to engage in discovery seeking evidence to bolster his many defenses, including that the USPTO had been advised of Mr. Piccone's 2011, and, 2012, administrative suspensions to support his defense that the 1 year statute of limitations period to prosecute him had expired. These motions, attaching substantially form document requests and interrogatories were denied in toto. All of Mr. Piccone's document requests and interrogatories under the Fed.R.Civ.Pro. were denied and he was not allowed to subpoena a single former client whose facts were used against him in the USPTO disciplinary matter. The ALJ did allow Mr. Piccone to propound a single interrogatory written by the ALJ.

Moreover, shortly after issuance of the complaint alleging disciplinary misconduct, Mr. Piccone filed a motion pointing out that the requirement that the OED Director execute all complaints and requested that the complaint be re-issued in conformance with USPTO regulation. Mr. Piccone was concerned that he was being pursued in a political vendetta and that if

---

[6] See, for example, Pennsylvania Rules of Professional Responsibility, Rule 8.3, titled "Reporting Professional Misconduct".

the OED Director knew about exculpatory evidence and insulated himself from the proceedings, (i.e., one OED Staff knew about receipt of Mr. Piccone's 2011 and 2012 suspensions and reported them to the OED Director, but the OED Director did not report them to the Staff attorney prosecuting Mr. Piccone) then the USPTO would be able to bury evidence which should exist and had the potential to resolve all but one of the charges against Mr. Piccone in his favor.

PROCEDURAL HISTORY

The U.S. Patent and Trademark Office ("USPTO") Office of Enrollment and Discipline ("OED") Director filed a disciplinary complaint on December 10, 2014, (A84) initiating what became a contested case before the USPTO once Mr. Piccone filed his answer on February 9, 2015 (A167). A two (2) day hearing was held on October 13, (A5604) and October 14, 2015 (A5685), after which the presiding Environmental Protection Agency ("EPA") Administrative Law Judge, ("ALJ") issued a June 16, 2016, preliminary decision issued (A1). Mr. Piccone appealed that decision to the USPTO Director, who issued a final agency action on May 25, 2017 (A6125), for which reconsideration was requested on June 14, 2017 (A6163), and denied on February 9, 2018 (A6225). A petition for review by the U.S. District Court for the Eastern District of Virginia ("USDC EDVA") was filed on March 18, 2018, and denied in it's entirety on November 13, 2018 (See Doc. 34). Mr. Piccone appealed to the Court of Appeals for the Federal Circuit and his appeal was denied in toto on November 11, 2019. Mr. Piccone requested en banc review, and his request was denied on February 22, 2020.

REASONS FOR GRANTING THE WRIT - ARGUMENT

The USPTO`s policy of withholding material exculpatory evidence during disciplinary proceedings is well known[7], and, combined with the USPTO's

---

[7] The USPTO has actively litigated it's position that it's attorneys are under no duty to disclose material

enactment of 37 C.F.R. § 11.52 regulating away the substantial due process protection of written discovery under the Federal Rules of Civil Procedure guaranteed by 35 U.S.C. § 24, reduces the accuracy of disciplinary adjudications and denies practitioners due process. The disciplined practitioner has not received her guaranteed meaningful opportunity to contest the charges laid, and the public`s confidence in USPTO administrative proceedings is lessened. In fact, there does not appear to be any legitimate government purpose for the USPTO to hide the very information which a practitioner requires to exonerate himself.

There are several overlapping bodies of law requiring USPTO attorneys to disclose exculpatory evidence, including this Court's decisions, USPTO regulation and Virginia State law. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court ruled that due process demands that prosecutors provide exculpatory evidence to the accused during criminal proceedings. In Brady, the Supreme Court began its analysis by noting that deliberately deceiving the trial court and jury by presenting evidence known to be false had been held to be incompatible with the "rudimentary demands of justice" as early as *Mooney v. Holohan*, 294 U.S. 103 (1935). In, *Napue v. Illinois*, 360 U.S. 264 (1959), the Court had held that the same result occurs "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Brady* states: "[s]uppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution". *Id.* At 84. Yet these same principles have equal application and importance to civil prosecutions.

Due process is designed to further several important policies of the United States government in order to receive permission from it`s governed citizens to rule. First, due process is designed to afford those in

---

exculpatory information. In, *In re Polidi*, USDC EDVA Docket No.: 1:15-cv-01030 the USPTO failed to cite to it`s own regulations requiring disclosure of exculpatory information, arguably causing the District Court to issue a decision not mentioning that controlling authority.

jeopardy of serious loss by government interference with life, liberty and/or property, certain procedures which will ensure an accurate judicial result. These procedures ensure that the guilty will likely be found guilty and the innocent will likely be acquitted. It is not reasonably contestable that material exculpatory evidence, which Brady says must be disclosed, will change the outcome of a matter, and therefore effect the accuracy of a trial. Second, due process ensures that the person faced with a serious deprivation will have a fair opportunity to oppose the charges against them. There can be no reasonable doubt that an accused will believe a trial was not fair when material exculpatory evidence is withheld. And third, due process ensures that the citizen's of the United States will have confidence that the judicial system entrusted to the government for operation on the people's behalf, is sound.

While Brady is universally acknowledged to apply to criminal cases, it's holding has only been applied in selected civil prosecutions. The District Court in this matter stated: "Brady only applies beyond criminal prosecutions to civil proceedings in those unusual cases where the potential consequences equal or exceed those of most criminal convictions"[8]. But as Justice Gorsuch recently noted in *Sessions v. Demaya*, 584 U. S. ____ (2018) at 11:

> In fact, if the severity of the consequences counts when deciding the standard of review, shouldn't we also take account of the fact **that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes**? Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit

[8] See, JA – 0175, Page 4 of 8 of the District Court's decision in this matter, *Polidi v. Lee*, as of yet believed to be an unpublished decision issued by this Court.

> persons against their will indefinitely. **Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies.**

Judge Gorsuch's bold statement minimizes the statistics showing that **most** individuals convicted of both felonies and misdemeanors in the United States do not serve prison time upon conviction, with less than 50% of convicted criminals actually being incarcerated[9]. The reality is that individuals convicted of felonies and misdemeanors in the United States are unlikely to serve jail time, with most (approximately 60%) of criminals being sentenced to probation and/or pay fines. As Brady disclosures are necessary in all criminal matters that can potentially result in jail time, recidivist criminal defendants are afforded better constitutional Brady rights than an attorney, presumed innocent, whom has lead a blameless life[10], and, has more at stake, than the inconvenience, and, probable fine, associated with being found guilty of most criminal misdemeanors. In bar disciplinary matters, the USPTO is interfering with a practitioner's

---

[9] In 2010, "Most felony convictions do not end up in prison" and "[t]he new research states that 41 percent of felony convictions end up in State prison". See, 21 https://www.govloop.com/community/blog/crime-statistics-no-prison-sentences-for-most-felonyconvictions/. When updated in 2016, the results were, as expected, substantially similar, "No Prison Sentences For Most Felony Convictions" See, ttps://www.crimeinamerica.net/2010/01/25/crime-statistics-no-prison-sentences-for-most-felonyconvictions/. The statistics for misdemeanors, not including infractions, which are almost always resolved with a monetary fine, are even more illuminating. According to a March, 2017, U.S. Department of Justice, Bureau of Justice Statistics, "Federal Justice Statistics, 2014 Statistical Tables", of all of those individuals convicted of misdemeanors within the federal justice system, only 39.9% were incarcerated, 31.6% received probation and 21.1% received a fine.

[10] According to the Supreme Court's holding in *Kingsland v. Dorsey*, 338 U.S. 318 (1949), Mr. Polidi was of exceptionally high moral character when he was admitted to the Patent Bar.

fundamental liberty interest in pursuing their chosen profession. Patent Attorneys have typically invested 4 undergraduate years into a technical degree and 3 years into a law school education to be initially qualified to apply for admission to the patent bar at a cost of tens, if not hundreds of thousands of dollars. The stigma attached to being a disbarred or suspended attorney, destroys these years of study, the huge sums funding that education, and, prevents a practitioner from practicing their chosen profession. These consequences, equal or exceed those of most criminal prosecutions.

Referring to bar discipline, Justice Douglas' opinion in *In re Ruffalo*, 390 U.S. 544 (1968) states: "[t]hese are adversary proceedings of a quasi-criminal nature." *Id.* at 551 and "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer." Id. at 550. Earlier in *Spevak v. Klein*, 385 U.S. 511 (1967), the Supreme Court extended the protection of the Fifth Amendment to disbarment proceedings by equating a "criminal case" with a case involving a "penalty" not restricted to fine or imprisonment, but involving the imposition of any sanction that made the assertion of the privilege against self-incrimination "costly." *Id.* at 515[11].

Federal courts finding a Brady duty in civil cases have indicated numerous circumstances where the consequences of the government interference with life, liberty, or, property interests, are as serious as a criminal prosecution, including: a denaturalization and extradition case in *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993); a civil commitment case, *United States v. Edwards*, 777 F. Supp. 2d 985 (E.D.N.C. 2011), a case where the "government's litigation tactics [were] egregious or designed to make the case virtually impossible to defend."[12] *EEOC v. Los Alamos Constructors, Inc.*, 382 F. Supp. 1373, at 1374

---

[11] For an analysis of the Spevak decision see Chilingirian, "State Disbarment Proceedings and the Privilege Against Self-Incrimination", 18 BuF. L. REV. 489 (1968).

[12] The withholding of exculpatory evidence which can exonerate a practitioner and change the outcome of a disciplinary matter is an egregious discovery violation in it`s own right.

(D.N.M.1974), and generally to civil litigation with executive branch agencies, See, *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136, 142 (S.D.N.Y. 1966).

As quasi-criminal litigation involving government interference with a fundamental liberty interest, and considering the apparent lack of any legitimate governmental interest in denying an accused attorney a fair trial, the case for requiring USPTO attorneys to disclose exculpatory evidence is compelling. In the era of multi-million, and even billion, dollar enforcement judgments, forfeiture provisions, and lifetime bars on an individual's ability to practice their chosen profession, the distinction between the consequences of criminal versus civil enforcement actions collapses.

One basis Courts have used to justify limiting Brady to criminal matters is that criminal defendants do not have a right to discovery, making the prosecutions' disclosure of exculpatory information more important than in civil proceedings. Some courts have disallowed the *Brady* Rule in civil enforcement cases by relying on the Federal Rules of Civil Procedure's broad discovery provisions to defeat the *Brady* Rule. But as the Supreme Court noted in *U.S. v. Bagley*, 473 U.S. 667 (1985) the *Brady* rule is one of disclosure, not one of discovery. This point is further highlighted by the fact that the *Brady* Rule places an obligation on prosecutors to affirmatively disclose *Brady* materials regardless of whether a defendant requests such evidence. Additionally, because the *Brady* Rule applies to law enforcement broadly, and not just prosecutors themselves, prosecutors are required to look for exculpatory evidence in the possession of law enforcement. Without that obligation, civil enforcement attorneys may well never discover the exculpatory evidence in the first place. However, even if this rationale did not exist, there is a presumption against any discovery, and no discovery as a matter of right, in USPTO disciplinary proceedings. The USPTO's enactment of 37 C.F.R. § 11.52 to regulate away the "important due process"[13]

---

13 *In re Natta*, 388 F.2d 215 (3d Cir. 1968)(" [t]his statute [35 U.S.C. § 24] **manifests a clear congressional intent** to make available to parties to [contested cases] the broad discovery provisions of the Federal Rules of Civil Procedure . . . **This approach insures that the fundamental elements of**

guarantee in 35 U.S.C. § 24 that "[t]he provisions of the Federal Rules of Civil Procedure relating to the attendance of witnesses and to the production of documents and things shall apply to contested cases in the Patent and Trademark Office", should obviate any argument that discovery is available in USPTO contested cases. Courts have already held that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419 (1995) at 434 (1995). In view of these considerations, the USPTO policy of denying an accused practitioner exculpatory evidence, defies logic and good sense.

Numerous executive branch agencies have already adopted the Brady rule, or a variant thereof, in civil prosecutions including: the U.S. Department of Transportation; the Federal Energy Regulatory Commission; and, the U.S. Securities and Exchange Commission (SEC)[14]. Other agencies, like the Federal Trade Commission and Federal Communications Commission, have rejected using the *Brady* Rule altogether.

The policy reasons for requiring Brady disclosure, that justice be done, is as important in civil matters as criminal matters. Government attorneys obtaining an erroneous result in a civil prosecution is just as much an insult to the principles upon which the American judicial system is built as in criminal matters. The citizen deprived of his law or stock-broker license, is just as likely to lose confidence in the government's ability to discharge it's obligation to dispense justice as is the person erroneously convicted under a criminal statute. Moreover, there does not appear to be any credible reason for federal government attorneys to

---

procedural and substantive due process will be accorded to parties to [contested cases]. (emphasis added, bracketed material added]".

[14] https://nclalegal.org/2020/02/its-time-for-agencies-to-adopt-the-brady-rule-in-civil-enforcement-actions/

commit what is arguably fraud on the Court by omission, to secure an erroneous civil conviction by withholding exculpatory information. The opposite is true. The United States has long had a policy for the most accurate adjudication result possible in view of the importance of the liberty interest being litigated.

Other laws, also require USPTO attorneys to disclose exculpatory information to accused practitioners. For example, Rule 3.8(d) of the Virginia Rules of Professional Conduct, which all USPTO attorneys are obligated to follow according to 28 U.S.C. § 530B, requires a "lawyer engaged in a prosecutorial function shall (d) make timely disclosure . . . of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment . . ." There can be no doubt that the USPTO attorneys act in the capacity of prosecutors as they are routinely referred to such by USPTO regulation, (for example, 37 C.F.R. § 11.39(b)(2)) as Rule 3.8(d)'s clear and unambiguous language covers attorneys engaged in a 'prosecutorial' function, whether civil or criminal, as the Committee Commentary for Rule 3.8(d) point out. While Disciplinary Rules are merely "advisory" for State attorneys, federal attorneys working in Virginia, are required to comply with the Virginia Rules of Professional Conduct by federal statute. See, 28 U.S.C. § 530B.

Numerous USPTO regulations, such as, 37 C.F.R. 11.303, 37 C.F.R. 11.304, 37 C.F.R. 11.401, and, 37 C.F.R. 11.801 also create an obligation to produce exculpatory evidence. 37 C.F.R. 11.801, states "[a] Practitioner[15] in connection with a disciplinary matter,

---

[15] Attorneys employed by the U.S. Government, including the USPTO, are obligated to follow regulations, including those in 37 C.F.R. Part 11, as being "practitioners" defined by 37 C.F.R. § 11.1. Similarly, 37 C.F.R. § 11.111, titled, "Former or current Federal Government employees"[1], makes all current USPTO employed attorneys as well as all Assistant United States Attorneys subject to the USPTO's Rules of Professional Conduct, contained in 37 C.F.R., Part 11. The USPTO has publicly admitted: "[a] practitioner representing a United States Government Agency, whether employed or specially retained by the United States

shall not: (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter . . ." when the withholding of material exculpatory information, by definition, would certainly create a "misapprehension", each would seemingly require the OED Director and his agents, all admittedly "practitioners", to disclose exculpatory evidence during disciplinary proceedings. As the overlapping legal obligations created by Virginia law and USPTO regulation are each co-extensive with the duty created by Brady, it makes sense to explicitly find that USPTO attorneys have such a duty to correct any mistaken ideas to the contrary.

As this Court has ruled in the past, "[p]rocedural due process requires 'that certain substantive rights - life, liberty and property - cannot be deprived except pursuant to constitutionally adequate procedures". See, *Stone v. F.D.I.C.*, 179 F.3d 1368, 1375 (CAFC 1999). Yet due process protections come into play when the government interferes with an important liberty interest such as pursuit of one's chosen calling. "Our system is premised on the procedural fairness at each stage, and when these rights are undermined, the [accused] is entitled to relief regardless of the stage of the proceedings". *Id.* See also, *Young v. Department of Housing and Urban Development*, Case No. 2011-3232 (C.A. Fed., Feb. 12, 2013) ("Mr. Young was entitled to "procedural fairness at each stage of the removal proceedings," not just upon review of the termination decision"). 35 U.S.C. § 24 and 37 C.F.R. § 11.38, as a federal statute, and regulation, respectively, take second priority to the constitutional requirement that practitioners be afforded due process at a meaningful time, regardless of statutes or regulations covering the same proceedings, when fundamental liberty interests are at stake. Without discovery there was no way for Mr. Piccone to develop evidence supporting his defenses, including exculpatory evidence such as that supporting his statute of limitations defense. To deny Mr. Piccone, or any practitioner, the due process right to exculpatory information, when as here, the USPTO denied Mr. Piccone all requested discovery of USPTO

Government, is subject to the USPTO Rules . . . ". See, Federal Register 20179, regarding Section 11.111.

personnel and files, denies the accused the ability to know exculpatory information which may completely exonerate him, support a defense, or effect a punishment developed with the substantial resources available to the government, so as to deny a fundamentally fair trial guaranteed by the constitution. As such procedural due process requires the USPTO disclose exculpatory information during disciplinary proceedings, the disclosure of exculpatory evidence during disciplinary proceedings.

Any Presumption That A USPTO Signature Represents A Valid Delegation Of Authority Under *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, (D.C. Cir. 2004), Does Not Attach When An Individual Executes Official Agency Documents In Violation of USPTO Regulation And Federal Statute

i) The Office of Enrollment and Discipline ("OED") Director Is Legally Obligated To Comply With All Agency Regulations Circumscribing His Actions

The disciplinary action against Mr. Piccone was unauthorized and ultra vires because the USPTO disciplinary complaint initiating this matter (the "Complaint") was not executed by the only USPTO

employee[16] authorized to do so by 37 C.F.R. § 11.34[17] ("A complaint instituting a disciplinary proceeding shall: . . . (5) [b]e signed by the OED Director"). The purpose of the law is to ensure that the government supervisor at the pinnacle of the relatively small Disciplinary staff pyramid[18] will review the complaint to ensure it's compliance with all applicable law and facts known to the agency. 35 U.S.C. § 26 allows only the provisional acceptance of defectively executed documents submitted to the USPTO. This statute is the Congressional statement that delegation of signatory authority is not allowed in violation of USPTO regulation.

A disciplinary complaint is subject to the statutory requirements of 35 U.S.C. § 26 as falling into the clear and unambiguous meaning of the term "any document" which is "filed in" the USPTO, that is "required by . . . regulation to be executed in a

---

[16] The USPTO does not dispute that the Deputy OED Director William Griffen, and not the OED Director, William Covey, executed the complaint initiating Mr. Piccone's disciplinary matter. See, Document JA-87 in *Polidi v. Matal*, No.: 2016-1997 (CAFC 2017) for another example of a USPTO complaint initiating disciplinary proceedings which was **not signed by either** the OED Director or his Deputy according to what they testified was the official OED policy. The OED Director and Deputy Director know their action violate the requirements of USPTO regulations including 37 C.F.R. § 11.34. this is misconduct. See, *In re Matthew H. Swyers*, D2016-20 (engaging in disreputable or gross misconduct by, inter alia, directing or allowing his employees to prepare, sign, and file submissions to the USPTO without his involvement or supervision which resulted in the validity of documents being jeopardized)

[17] The word shall is significant because 'shall' is the language of command, *Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818, 79 L.Ed. 1566 (1935).

[18] The OED Director supervises about 20 people prosecuting approximately 30 - 40 disciplinary actions (mostly state reciprocal suspensions requiring a minimum of work) per year after a one year investigatory period. It appears eminently reasonable for the OED Director to execute each of these complaints since he drafted and enacted 37 C.F.R. § 11.34 on behalf of the USPTO and the United States Government.

specified manner . . . ". This fact belies the USPTO's argument at the District Court that "[s]ection 26 applies exclusively to documents filed *to* the USPTO, not documents filed *by* the USPTO"[19]. Nothing in the statute limits the phrase "[a]ny document to be filed in" the USPTO, to exclude documents filed by the agency, and the USPTO has not provided any justification for an interpretation not in accord with the statute's plain meaning.

Once Mr. Piccone placed OED and the ALJ on actual notice of Complaint's failure to meet USPTO signature requirements by his February 9, 2015, motion (A178), it was incumbent upon the USPTO to correct the defective signature to comply with 37 C.F.R. § 11.18, requiring an "original handwritten signature personally signed, in permanent dark ink or it's equivalent, **by that person**[20]". The OED Director, knew, or should have known, that failing to issue a remedial complaint under his own signature would jeopardize the validity of that filing and the viability of Mr. Piccone's entire disciplinary matter[21].

It is beyond peradventure that an agency must follow it's own regulations. See, *Accardi v. Shaughnessy*, 347 U.S. 260, 261-62, 268 (1954) (failure of Attorney General to follow procedural regulations makes deportation order invalid even though petitioner was "[a]dmittedly deportable"). This case is all the more egregious because of the regulatory

---

[19] See, Doc. No.: 24 Page 16.

[20] This regulation specifically renders the ALJ's finding that the OED Deputy Director could have signed for the OED Director *Pro Procurationem* (A259 and A382) contrary to law invalidating multiple USPTO regulations.

[21] By virtue of the OED Director being the sole and exclusive member of the OED staff who is required to have a security clearance, 37 C.F.R. § 11. 34 has the function of ensuring that the USPTO employee, i.e., the OED Director, having the requisite credentials, staff, chain of authority, and regulatory and factual knowledge at the apex of the OED hierarchy has reviewed the complaint and certifies that all appropriate agency requirements have been met. Such requirements would include the certification that the provisions of 5 U.S.C. § 558(c) has been met before seeking a probable cause determination under 37 C.F.R. § 11.32.

language is clear, the subject USPTO officials were notified of their error in the first year of the litigation, and they had the ability to correct this issue before the matter went to trial. *Vitarelli v. Seaton*, 359 U.S. 535 (1959)("Having chosen to proceed against petitioner on security grounds, the Secretary was bound by the regulations which he had promulgated for dealing with such cases, even though petitioner could have been discharged summarily and without cause independently of those regulations. Pp. 359 U. S. 539-540"). *Yellin v. United States*, 374 U.S. 109 (1963)("It appears from the record that the Committee violated its own Rule in this case by deciding to interrogate petitioner publicly without giving any consideration to the question whether to do so would injure petitioner's reputation. Pp. 374 U. S. 118-119.") *United States v. Nixon*, 418 U.S. at 696, ("So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it."). To be clear Mr. Piccone maintains that he is actually innocent of the misconduct found against him, and but for the bizarre interpretation of multiple laws used to judge his behavior[22], this matter would have been resolved in his favor years ago.

---

[22] All of the charges against Mr. Piccone should have been resolved in his favor, but for the unreasonable and misguided interpretations used by the USPTO to evaluate Mr. Piccone's actions. For example, 37 C.F.R. § 11.14(e) authorizes officers of associations to "appear" to prosecute Trademark applications owned by the association. Despite the agreement of all parties that while Mr. Piccone's Pennsylvania law license was administratively suspended, he was in fact an officer of the not for profit association filing a trademark application authorized to "appear" before the agency in trademark matters. Yet, the USPTO and lower courts, convicted Mr. Piccone of the unauthorized practice of trademark law by misinterpreting the language of 37 C.F.R. § 11.14(e) to mean that Mr. Piccone was authorized "appear" but not to "practice" before the USPTO in the subject trademark matters, when the actions authorized by "appear" fall wholly within any reasonable definition of "practice", and the USPTO's interpretation of the law renders the law useless.

Any deference afforded to the USPTO's misguided reading of regulations discussed herein under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) or *Auer v. Robbins*, 519 U.S. 452 (1997) is misguided for several reasons: 1) the language of the regulation is clear and so no interpretation is necessary; 2) the agency's interpretation renders the regulation unworkable because an officer prosecuting a corporate or association's trademark is authorized to "appear" but not "practice" to prepare the underlying documents necessary to obtain the trademark such as a response to office action (as in Mr. Piccone's case); 3) there is no legitimate governmental interest in the proffered agency interpretation other than to convict Mr. Piccone of misconduct.

The bulk of the charges against Mr. Piccone are for the unauthorized practice of law. Mr. Piccone believes all of his actions aiding pro se litigants were authorized by, for example, Massachusetts Rules of Professional Conduct, Rule 5.5(c), because that Rule provides a safe harbor because a Pennsylvania "lawyer. . . may provide legal services. . . in this jurisdiction [Massachusetts] that are in . . . a . . . potential proceeding . . . if . . . **a person the lawyer is assisting**, is authorized by law . . . to appear in such proceeding". As pro se litigants are authorized to appear in federal district Courts to represent themselves by 28 U.S.C. § 1654, Mr. Piccone's actions aiding in the preparation of a complaint for a pro se litigant were authorized by law but for the USPTO's misinterpretation that the phrase "a person the lawyer is assisting" is limited to just lawyers. The Rule's obvious use of the word "person" to include pro se litigants, to achieve the laws intended purpose of improving the public's access to attorney help should have authorized Mr. Piccone's actions resulting in the dismissal of approximately half the charges against him.

Mr. Piccone was also convicted of the unauthorized practice of law in Illinois despite Mr. Piccone never having been present personally, electronically or telephonically in that State during the period of his Pennsylvania Administrative suspension (the client was located in Missouri and Mr. Piccone was located in Canada). The USPTO misinterpreted 37 C.F.R. § 11.505 titled "Unauthorized practice of law" stating "[a] practitioner shall not practice law **in** a jurisdiction **in** violation of the regulation of the legal profession **in** that jurisdiction, or

ii. Violation of Federal Law In Executing USPTO Documents Overcomes Any Presumption Under *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, (D.C. Cir. 2004) That The OED Deputy Director, Or Any Other OED Staff Member, Was Legally Delegated

assist another in doing so" to convict Mr. Piccone of the unauthorized practice of law "in" a jurisdiction "in" which the practitioner was never legally present.

The USPTO and lower Courts also refused to acknowledge, mention, or, fairly evaluate, this Court's binding precedent in *Foley Bros., Inc. V. Filardo*, 336 U.S. 281, 285 (1949) that U.S. law is generally, and the US patent laws specifically (*Brown v. Duchesne*, 60 U.S. 183, 195 (1856)) are limited to enforcement within the territorial boundaries of the United States, so as to find Mr. Piccone's actions taken outside the United States as violating 37 C.F.R. Part 11, to find Mr. Piccone guilty of the unauthorized practice of law during the year that Mr. Piccone was in Canada, while his Pennsylvania license was suspended.

The USPTO and the ALJ hearing the matter also denied substantially all of Mr. Piccone's discovery requests by mis-interpreting 35 U.S.C. 24's clear language that "[t]he provisions of the Federal Rules of Civil Procedure relating to the attendance of witnesses and to the production of documents and things shall apply to contested cases in the Patent and Trademark Office" to mean that the USPTO can regulate away and otherwise narrow any use of the Fed.R.Civ.P. in contested cases before this agency. For example, 37 C.F.R. 11.52 states "[d]iscovery shall not be authorized . . ." to create a presumption against any discovery in disciplinary cases. Whole classes of discovery allowable under the Fed.R.Civ.P. are not discoverable under the USPTO's regulations.

The USPTO and the lower courts have also ignored the definition of fraud in 37 C.F.R. 11.1 as requiring a false statement, when even the ALJ acknowledged, the statements Mr. Piccone made constituting misconduct, that he was an attorney because he graduated from an accredited law school, were "arguably true".

These additional issues would have been briefed and presented to this Court for consideration if the word limitations and realistic time constraints on hearing any greater number of issues by this court were not what they are.

Authority To Execute Disciplinary Complaints By The OED Director

The District Court's own November 13, 2018, opinion in this case stating that "delegation is 'permissible absent affirmative evidence of a contrary congressional intent' **or a violation of an agency's own regulation**"[23], provides all authority necessary to conclude that the presumption of a valid delegation of authority has been rebutted by the OED Director's failure to execute the Complaint according to agency regulations, including 37 C.F.R. § 11.34. 35 U.S.C. § 26 provides the clear congressional intent to ensure that USPTO signature requirements are met and cannot be delegated. As demonstrated above, any delegation in this case was done in violation of the agency's own regulations, including specific signature requirements, not supported by any of : 1) a written delegation order; or, 2) a petition under 37 C.F.R. 11.3 to waive "any requirement of the regulations of this Part which is not a requirement of statute"[24].
The USPTO's issuance of a complaint in this case was ultra vires whether signed by OED Director Covey's wife, a USPTO secretary, or the Deputy OED Director, because without meeting the mandatory signature requirement of 37 C.F.R. § 11.34 there is no presumption that any delegation was authorized, or, valid rendering the complaint an unauthorized document, and a legal nullity.

Even if the signature requirements are deemed met for whatever reason, it is clear that the **Deputy** OED Director did not have authority to sign a complaint on appointment by the OED Director because: 1) agency regulations reserve appointment of an "acting OED Director" for the USPTO Director (See, 37 C.F.R. § 11.2) denying the OED Director the authority to appoint the acting OED Director; 2) the Deputy Director did not meet the job qualifications for

---

[23] See page 10 of Doc. 34.

[24] Here there was no evidence that the OED Director filed a petition to waive the complaint signature requirements of 37 C.F.R. 11.34, and as stated in 37 C.F.R. § 11.3, the USPTO cannot waive "any requirement of statute" such as the requirements of 35 U.S.C. § 26.