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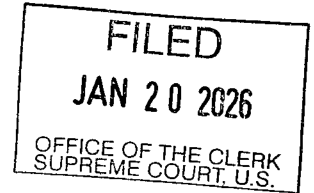

UNITED STATES SUPREME COURT

WILLIAM MAXWELL,
Petitioner/Appellant/Plaintiff,
VS.
COMMISSION FOR LAWYER DISCIPLINE
Respondent/Appellee/Defendant.

ON PETITION FOR CERTIORARI TO THE TEXAS SUPREME COURT
RE: CASE NO. 25-0191 MAXWELL v. CLD

On Appeal from the Board of Disciplinary Appeals
of the Supreme Court of Texas
BODA No. 56591

PETITION FOR CERTIORARI

Respectfully submitted,

William Maxwell
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FCI Beaumont Low
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Pro se'

QUESTIONS PRESENTED FOR REVIEW

Maxwell, a Texas licensed attorney (SBN# 24028775), was convicted in a foreign district, New Jersey, in 2014. The Commission for Lawyer Discipline (CLD) has alleged such conviction requires mandatory disbarment under Texas Law (without a meaningful opportunity to be heard in any forum). This practice in Texas of denying an opportunity to be heard prior to the imposition of collateral consequences violates this Court's teaching in Boddie v. Connecticut, 401 U.S. 371, 377-79 (1971); Selling v. Radford, 243 U.S. 46, 51 (1917) and Padilla v. Kentucky, 559 U.S. 356, 176 L.Ed.2d 284, 293 (2010) among others and this Court's guidance is required as follows:

I. The question for this Court is whether the due process clause of the United States Constitution (U.S. CONST. AMENDS. V; XIV) as explained in Boddie v. Connecticut, 401 U.S. 371, 377-79 (1971) requires notice and an opportunity to be heard before the imposition of collateral consequences (here disbarment)?

II. The question for this Court is whether the minimum Due Process afforded in attorney compulsory discipline cases is that which is described in Selling v. Radford, 243 U.S. 46, 51 (1917)?

III. The question for this Court is whether the Court's holding in Padilla v. Kentucky, 559 U.S. 356, 176 L.Ed.2d 284, 293, 130 S.Ct. 1473 (2010) requires an opportunity to be heard under Strickland v. Washington, 466 U.S. 668, 689 (1984) prior to collateral consequences (here disbarment)?

LIST OF PARTIES

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PROCEEDINGS RELATED BELOW

This Petition for Certiorari to the Texas Supreme Court is related to collateral action taken as a result of a conviction in a Federal District Court.

Direct

Texas Supreme Court

Maxwell v. Commission for Lawyer Discipline, Case No. 25-0191

Board of Disciplinary Appeals

Maxwell v. Commission for Lawyer Discipline, Case No. 56591

Ancillary

United States Supreme Court

Maxwell v. United States, Case No. 23-7404; 220 L.Ed.2d 39 (2024)

United States Court of Appeals for the Third Circuit

Maxwell v. United States, Case No. 15-2925; 2022 WL 2763761 (3d Cir. July 15, 2022)

United States District Court

United States v. William Maxwell, Case No. 1:11-CR-0740-003-RBK

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II. The minimum Due Process afforded in attorney compulsory discipline cases is that which is described and adopted by this Court in Selling v. Radford, 243 U.S. 46, 51 (1917). 25

III. This Court's holding in Padillia v. Kentucky, 559 U.S. 356, 176 L.Ed.2d 284, 293 130 S.Ct. 1473 (2010) requires an opportunity to be heard under Strickland v. Washington, 466 U.S. 668, 689 (1984) prior to collateral consequences (here disbarment). 30

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CITATIONS OF OPINIONS BELOW

Maxwell does not have access to the Southwest Reporter, Texas Reporter, or other Texas data bases at FCI-Beaumont-Low. The Texas Supreme Court's decision was delivered on a postcard dated October 24, 2025. See Appendix 1.

JURISDICTION

Maxwell's Petition is filed within 90 days of the Texas Supreme Court's affirmance and denial of Maxwell's Motion to Stay, entered on October 24, 2025. See Appendix 1.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257. The jurisdiction of the Texas Supreme Court is invoked under Board of Disciplinary Appeals Rule 10.01. See Appendix 3.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The Constitutional Provisions, Statutes, and Rules are voluminous and are in Appendix 3. They include:

United States Constitution AMEND. V

United States Constitution AMEND. VI

United States Constitution AMEND. XIV

28 U.S.C. §2254

28 U.S.C. §2255

Board of Disciplinary Appeals Internal Procedural Rules

Texas Rules of Disciplinary Procedure

STATEMENT OF THE CASE[EN1]

Maxwell, SBN# 24028775, was charged by the Commission for Lawyer Discipline (CLD), in a "Petition for Compulsory Discipline", based on a foreign judgment (New Jersey, 2014), in which Maxwell was convicted of conduct that the CLD alleges violates intentional crimes as defined by Rule 1.06(T), Texas Rules of Disciplinary Procedure. CLD additionally alleges that Maxwell's foreign judgment of conviction was for serious crimes as defined by Rule 1.06(Z), Texas Rules of Disciplinary Procedure. (See Board of Disciplinary Appeals (BODA) Clerk's Record (CR 3-7)[EN2]

Maxwell, being continuously incarcerated since July 3, 2014, did not contest the interlocutory order of suspension. (CR 686-692) Prior to the interlocutory order of suspension, Maxwell had closed his law practice, returned files to clients, notified the courts in which he had pending cases, if any, and ceased the practice of law. Maxwell provided written notice to the Bar of same.

On May 16, 2024, the CLD, with Maxwell's petition for certiorari to the United States Supreme Court (see 23-7404) still pending, filed a motion for Entry of Judgment of Disbarment. (CR 718-721) Maxwell moved for continuance. The BODA granted a continuance.

Maxwell properly notified the CLD and BODA that the United States Supreme Court denied certiorari on October 7, 2024. (CR 827-828)

Maxwell filed a "Motion to Continue Hearing on Chief Disciplinary Counsel's Motion for Entry of Judgment of

Disbarment, and Objections". (CR 829-868)

BODA denied Maxwell's continuance and overruled Maxwell's objections. (CR 869-870) The BODA issued a judgment of disbarment. (CR 871-874)

Maxwell raised lack of a hearing, structural error, and ineffective assistance of counsel below (before BODA). Because the record is voluminous, a summary is presented here. The complete documents are contained in Appendix 6. Below are relevant portions of documents filed at BODA and contained fully in Appendix 6.

@ 6.1 BODA Order (CR 740-741):

> Pursuant to Texas Rule of Disciplinary Procedure 8.05, when a motion for final judgment of disbarment is supported by affidavits or certified copies of court documents showing that the conviction has become final, a <u>respondent is entitled to a hearing on the motion only if the respondent files a verified denial contesting the finality of the conviction within ten days of service of the motion</u>. TEX. RULES DISCIPLINARY P. R. 8.05. If a verified denial is not filed within ten days of service, the Board must decide the matter "<u>without hearing</u>." <u>Id.</u>; see BODA INTERNAL PROCEDURAL RULE 6.02(b)(2). (CR 741) (emphasis added)

@ 6.2 Maxwell's Motion for Continuance and Motion to File Paper Motions (Rule 1.05(a)(4)(iii)) (CR 742-784):

> Second, Maxwell noted structural error [in the conviction] because the Government had tendered to the jury two hundred and seventy-six (276) [286 is the correct number of exhibits] that were never offered for admission into evidence by the Government, and were never admitted into evidence by the trial court. The two hundred and seventy-six (276) [286] exhibits were material and prejudiced the case. Maxwell notified the [United States] Supreme Court of the Government's concession of these facts. See Exhibit 6, attached hereto on May 23, 2024. (Referring to Case No. 23-7404 before this Court.) (CR 743-744)

@ 6.3 BODA Order Granting Continuance (CR 804-805):

> Respondent's motion for a continuance is Granted. Petitioner's Motion for Entry of Judgment of Disbarment is

set for decision at the Board's next quarterly en banc meeting, set for October 24-25, 2024. The matter remains set for decision by the Board without a hearing. (emphasis added) (CR 805)

@ 6.4 BODA Corrected Order (CR 806-807):

Pursuant to Texas Rule of Disciplinary Procedure 8.05, when a motion for final judgment of disbarment is supported by affidavits or certified copies of court documents showing that the conviction has become final, a respondent is entitled to a hearing on the motion only if the respondent files a verified denial contesting the finality of the conviction within ten days of service of the motion. TEX. RULES DISCIPLINARY P. R. 8.05. If a verified denial is not filed within ten days of service, the Board must decide the matter "without hearing". Id.; see BODA INTERNAL PROCEDURAL RULE 6.02(b)(2). (emphasis added) (CR 807)

@ 6.5 Order Denying Continuance (CR 869-870):

By orders dated June 18, 2024, July 3, 2024, and September 19, 2024, the Board ordered that this compulsory discipline case would be decided by the board without hearing. To the extent that Respondent requests a hearing on the Motion for Entry of Judgment of Disbarment, that request is DENIED.

Maxwell timely filed his notice of appeal which was docketed by the Texas Supreme Court on March 4, 2025.

On June 9, 2025, the Texas Supreme Court notified Maxwell his "May 5, 2025 notification" regarding his not having received the Record on Appeal (ROA), was construed as a "Motion for Extension of Time to File Brief". Maxwell's brief was timely.

Below are relevant portions of Maxwell's Opening Brief and CLD's Response.

@ 6.6 Opening Brief Texas Supreme Court (not in the Clerk Record) Attached in its entirety at 6.6:

SUMMARY OF THE ARGUMENT

The structural error, irregularities, and collapse of adversarial judicial procedure that permeated Maxwell's conviction are so untoward that this judgment cannot support compulsory discipline.

> Because the United States Supreme Court (U.S.S.C.) overturned the legal premises in a series of cases, issued post Third Circuit Judgment (July 2022) and prior to Maxwell's petition for certiorari was determined (October 2024), Maxwell has been denied due process to be heard on those cases. (emphasis added)
>
> Maxwell's alleged conduct was within his legal services agreement and immune against third parties under Cantey Hanger, LLP v. Boyd. Disbarment, designed to protect the public; a continuance or arrest of judgment, in this particular case, is proper until resolution of the §2255. Maxwell argues in the alternative throughout. (emphasis added)

Maxwell's Opening Brief at the Texas Supreme Court, p. 3, ¶¶3-7:

> The forum for determining this structural error is a §2255, it is a U.S. confession and involves Maxwell's counsel. Maxwell raised these issues in objection to the probity and sufficiency of the underlying judgment to support disbarment. (CR 834 in CR 829-847); Maxwell's Opening Brief, p. 3, ¶7.

Maxwell argues in his Opening Brief at ¶¶10-20:

> Here, there are no facts in the record, as confessed by the United States (supra, at ¶¶3-7) to support disbarment. There is only structural error, procedural error, plain error and irregularities." (Maxwell's Opening Brief, ¶11)
>
> The error affected the manner in which the trial was carried out, was a lack of adversarial structure, and a denial of due process. (Maxwell's Opening Brief, ¶15)
>
> The U.S. confessed it violated Maxwell's Sixth Amendment rights (see ¶7). (Maxwell's Opening Brief, ¶19)
>
> Maxwell's argument addresses the unique collapse of the adversarial system, which is more properly handled, in the first instance, by the U.S.D.C. assigned to handle this trial fiasco. (Maxwell's Opening Brief, ¶20)
>
> Maxwell has been denied due process to be heard on the retroactive rulings which overturn the legal underpinning of Maxwell's conviction, prior to his conviction finality. (Maxwell's Opening Brief, p.7)
>
> '[The Supreme Court] has not hesitated to find the proceedings violate due process.' (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994)) (Maxwell's Opening Brief, ¶21)

Normally attorneys have an opportunity to raise legal arguments as part of the direct appeal, except in this case where the Supreme Court's decisions underlying the case arose post appeal and prior to petition for certiorari... This time period is 90 days. (See U.S.S.C. Rules Rule 13) ... Further, the series of U.S.S.C. cases and confessed structural errors are properly addressed, for the first time in the U.S.D.C. in Maxwell's §2255 (where the U.S. confessions took place). (Maxwell's Opening Brief, ¶22)

... Second, given the structural error and lack of opportunity to be heard in any forum, yet, the current procedures (by adopting the underlying tainted conviction) impairs the public interest in fundamental fairness. (Maxwell's Opening Brief, p. 9, ¶23 [mislabeled ¶25])

Maxwell confesses that if he is unsuccessful in his §2255 petition, any subsequent due process claims before the Texas Supreme Court related to the new U.S.S.C. cases would necessarily fail. (Maxwell's Opening Brief, p.10)

BODA denied relief (CR 869-870) solely on the issue of whether the underlying judgment was final, and overruled Maxwell's objections without comment. (Maxwell's Opening Brief, ¶30)

Maxwell's verified motion established grounds for continuance/arrest of judgment to allow the U.S.D.C. to rule in the §2255, in the first place, based on all the structural error and other procedural irregularities. (Maxwell's Opening Brief, ¶34)

IN RESPONSE THE CLD URGES THAT:

BODA then issued an order granting Maxwell's motion for continuance and re-set the Commission's Motion for decision without a hearing at BODA's October 2024 quarterly meeting. (emphasis in the original) (CLD's Response Brief to Maxwell's Opening Brief, p. 12-13)

The Texas Supreme Court affirmed the BODA disbarment and denied Maxwell's Motion to Suspend Enforcement of Judgment of disbarment on October 24, 2025 on a postcard. (See Appendix 1)

Maxwell's petition to the United States Supreme Court was due on or before January 22, 2026. This petition is timely.

STATEMENT OF UNDISPUTED FACTS[EN3]

1) The Commission for Lawyer Discipline (CLD) filed a Motion for Entry of Disbarment based on Maxwell's conviction in Cause

No. 1:11-CR-00740-(03) out of the U.S.D.C. in New Jersey. (CR 718-721) There are three 28 U.S.C. §2255 petitions related to this matter. Scarfo v. United States, No. 1:23-CV-22432-MAS, John Maxwell v. United States, No. 1:23-CV-2300-MAS, and William Maxwell v. United States, No. 25-16419-MAS, all pending before Judge Shipp in the District Court of New Jersey. The United States confesses in its filed responses to two of these §2255 petitions (United States response not due to William Maxwell, yet) structural error and egregious irregularities in the joint trial before the U.S.D.C. (See 11-740-RBK) As Maxwell notified CLD (through his filings) his case has been transferred to Judge Shipp. (See Appendix 4)

2) Before trial, defendants objected to the use of unadmitted exhibits before the jury. In response, the AUSA and Court had the following colloquy prior to the Court allowing use of unadmitted exhibits in front of the jury. It reads:

> **AUSA Gross**: ... if [AUSA] Mr. Weaner talks about a particular transcript in his opening and that transcript, that tape doesn't come into evidence for any reason, we're going to be sorry that we talked about it in the opening statement...
> **The Court**: It might also be grounds for a mistrial, wouldn't it?
> **AUSA Gross**: That's true as well. So your Honor, we talk about these exhibits and quote from these transcripts at our peril. We understand that.

(Joint Appendix "B" 4102-4103:10) (CR 831-832)

3) Due to the volume of exhibits, the trial Court sought to upload only the admitted evidence and exhibit list to juror iPads. The United States did not obtain admission of these six exhibits used in opening statements or offer and obtain admission of an additional 280 exhibits (for a total of 286 exhibits). (See Appendix 5, listing non-offered/non-admitted exhibits) (CR 849-

867) The United States, nevertheless, without notice uploaded the 286 material and prejudicial unoffered exhibits to the juror iPads. The United States admits these facts. Unadmitted evidence cannot be considered by juries/courts. Inferences are drawn solely from admitted evidence.[EN4] The United States confesses in their response to Maxwell's co-defendant Scarfo's §2255 petition[EN5] (see Scarfo v. United States, No. 1:23-CV-22432-MAS, Doc. 7, PageID# 101):

> ... To be sure, the cases discussed above did not involve anywhere near the number of unadmitted exhibits at issue here. Nor does the Government dispute that, had the unadmitted exhibits been excluded from evidence, the overall strength of the Government's case against [the defendants] would have been eroded.

(emphasis added) (CR 832) (Joinder - Appendix 4)

4) The uploaded United States exhibit list falsely listed the 286 exhibits as being offered/admitted on dates certain. At (CR 851) appears:

200 Series	Miscellaneous Recordings	Date	ID	Evid
200	SP2 Session #21084	3/5/14	X	X
200A	Transcript	3/5/14	X	X
200	SP1 Session #1580	4/10/14	X	X
200A	Transcript	4/10/14	X	X

See Appendix 5. See also (CR 832-833) (**Fraud upon the Court**)

5) These are but four of the 286 unoffered and unadmitted material and prejudicial exhibits as the Government has conceded (supra at ¶3). The United States covered up its structural and/or plain errors by uploading a materially false exhibit list with the listing of dates on which the offending exhibits were alleged to be offered and admitted into evidence. They were not at any point offered or admitted into evidence.

6) At the February 14, 2019 hearing in the trial court (11-740-RBK) [Doc. 1450], five years post trial, the Trial Court, for

the first time, disclosed that the Court's staff had lost/destroyed the Court's exhibit list requiring the defendants to rely solely on the false United States' exhibit list uploaded to the jurors' iPads, on appeal. (CR 833)

7) The United States additionally concedes facts that violate Maxwell's Sixth Amendment right to compel witnesses in his defense. Vivian Huntsman, William Maxwell's personal assistant, was to testify in rebuttal to all of the United States' allegations. Ms. Huntsman kept Maxwell's docket. Ms. Huntsman would testify to Maxwell's non-presence at the dates and times of the purported criminal events. Maxwell was out of town in trial as counsel during the relevant time frames. When preparing to testify, she was emailed that if she testified, she would be indicted. The United States confesses these facts are true. See John Maxwell v. United States, No. 1:23-CV-2300-MAS; U.S.D.C. - New Jersey, p. 38, fn.7. The response reads:

> Huntsman spoke at sentencing hearings for both of her brothers [John] Maxwell and William Maxwell, and claimed she had been threatened by the Government with possible indictment if she had testified at trial. JAF 141 (William Maxwell sentencing); JAF 198-199 ([John] Maxwell sentencing)
>
> [At William Maxwell's sentencing, after Ms Huntsman produced the email with the United States' threat contained therein, the Court instructed William Maxwell's counsel, Huff, to speak with Ms. Huntsman]
>
> But Ms. Huntsman [some time later at John Maxwell's sentencing] admitted that Michael Huff, the attorney for William Maxwell, had informed her that she had "misinterpreted" what the Government had said to her in that regard. JAF 198 (Joinder of cases - Appendix 4)

The email reads that Ms. Huntsman will be indicted if she testifies. The United States did not confess and acknowledge this error until it responded to John Maxwell's §2255 filing post trial and post Third Circuit appeal (in 2024, while Maxwell's

direct appeal was pending before this Court (23-7404)). The forum for determining these structural errors is a §2255, it is a United States confession of wrongful conduct and the conduct also involves Maxwell's counsel. Maxwell raised these issues in objection to the probity and sufficiency of the underlying judgment to support disbarment. (CR 834, 829-847)

8) The BODA overruled Maxwell's challenges. (CR 869-870) BODA's rational (CR 869)[EN6] did not consider any facts or law which had changed after Third Circuit decision and prior to this Court's denial of certiorari. BODA held, "[b]y orders dated June 18, 2024, July 3, 2024, and September 19, 2024, the Board ordered that this compulsory disciplinary case would be decided by the Board without hearing. To the extent that Respondent requests a hearing on the Motion for Entry of Judgment of Disbarment, that request is DENIED." (emphasis added and in original) Id. (CR 869-870)

Maxwell timely appealed to the Texas Supreme Court and urged that his license suspension should remain in place while he prosecuted his 28 U.S.C. §2255 in the United States District Court, the proper forum to address changes in law and fact which were disclosed post Third Circuit decision but prior to this Court's denial of certiorari. (See Maxwell's Texas Supreme Court Opening Brief, p. 3-10, Appendix 6.6) The Texas Supreme Court denied Maxwell's Motion to Suspend Enforcement of Judgment of disbarment and affirmed the decision of the BODA on a postcard. See Appendix 1.

Maxwell also complained throughout that he had not been afforded a meaningful opportunity to be heard on any of these

issues in any forum. (Maxwell's Opening Brief at Texas Supreme Court at ¶22) (CR 829, ¶2) (CR 838, ¶10 - 841, ¶32)

9) The cataract of errors (plain and structural errors) of the underlying case resulted from conduct of the lead prosecutor, Steve D'Aguanno, who committed suicide shortly after sentencing, evidencing his questionable mental state during trial. The lead defense counsel, appointed to represent co-defendant Pelullo, Mike Farrell (who also advised Maxwell on whether to testify at trial), was under indictment and investigation during this monster trial. Mr. Farrell has, since judgment was handed down, been convicted, served his sentence, exhausted all his habeas relief, all during the time Maxwell's direct appeal was pending (over 10 years). See United States v. Farrell, 921 F.3d 116 (4th Cir. 2019)

ARGUMENT

I. The Due Process Clause of the United States Constitution (U.S. CONST. AMENDS V; XIV) as explained in Boddie v. Connecticut, 401 U.S. 371, 377-79 (1971) requires notice and an opportunity to be heard before the imposition of collateral consequences (here disbarment).

The United States Constitution AMEND. V provides, in relevant part: "No person shall ... be deprived of life, liberty, or property without due process of the law..." The United States Constitution AMEND. XIV applies Fifth Amendment to the States. See also Loper v. Beto, 405 U.S. 473, 480 (1972); Padilla v. Kentucky, 559 U.S. 356, 176 L.Ed.2d 284, 293 (2010); Boddie v.

Connecticut, 401 U.S. 371, 377-379 (1971).EN7

As Justice Harlan writes in Boddie v. Connecticut, 401 U.S. 371, 377-379 (1971):

> Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. [ ] ... the Constitution does require [ ] "an opportunity ... granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66, 85 S.Ct. 1187 (1965) (emphasis added [in original]), "for [a] hearing appropriate to the nature of the case," Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313, 94 L.Ed. 865, 70 S.Ct. 652 (1965) ... [ ] ... In short, "within the limits of practicability," Id., at 318, 94 L.Ed. at 875, a state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.EN8

In Texas "the record of conviction is conclusive evidence of the attorney's guilt." Tex. Disc. R. Rule 8.02. The Texas Supreme Court in hearing BODA appeals does not "consider any underlying facts or mitigating circumstances in [ ] compulsory proceeding[s]." In re Lock, 54 S.W.3d 305, 309-10 (Tex. 2001) The Texas Supreme Court and BODA only considers the elements of the crime and whether compulsory discipline was appropriate, not the [constitutionality or] validity of the underlying conviction." See id. at 310-11. See also Tex. R. Disc. P. Rule 8.04, 8.05.

We know that in Maxwell's case the practice and procedure of denying an opportunity to be heard "in any meaningful" forum regarding a unconstitutional underlying conviction prior to the imposition of collateral consequences being imposed is unconstitutional. For example, in Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) this Court teaches that: "A state

cannot exclude a person from the practice of law ... in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Id. at 353 U.S. at 235-39 (emphasis added). Pertinent here, the Court instructs "[e]ven in applying permissible standards, officers of a state cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards." Id. (emphasis added). See also Wilner v. Committee on Character Fitness, 373 U.S. 96, 108 (1963) holding "of course, if the denial depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded." Whether the impact on the lawyers license is caused by testimony or an "infirmity of proof", or both, in order to comply with the due process clause, the attorney is required to have an opportunity to be heard on the insufficiency of proof of professional or private character (in some forum) prior to disbarment. Baxstrom v. Herold, 383 U.S. 107, 15 L.Ed.2d 620, 86 S.Ct. 760 (1966) (holding that it is a general rule that collateral consequences of a conviction may not be imposed without a new hearing). This challenge, in relevant cases may be performed by the 28 U.S.C. §2255 in the court of conviction, prior to disbarment against Maxwell. "While [disbarment] is not a criminal case, its consequences for [Maxwell] take it out of the ordinary run of civil cases. The committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer," Konigsberg v.

State Bar of Calif., 353 U.S. 252, 257 (1957) "It matters not that this case involves the disbarment of an attorney instead of the denial of admission to the bar, or that this case involves a federal bar rather than a state bar." In the matter of Calvo, 1966 U.S. App. LEXIS 18027 *6 (11th Cir. 1996) (discussing jurisdictional issues)

The Court's teachings in Schware, supra, Konigsberg, supra and Selling v. Radford, 243 U.S. 46, 51 (1971) are sign posts along the paradigmatic journey to the "meaningful opportunity to be heard" described in Boddie, supra, the most basic due process that is ensconced in the Fifth and Fourteenth Amendments to the United States Constitution.

As Justice Harlan explains:

> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law... It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Boddie, 401 U.S. at 375

This Court instructs, "[o]ur cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." Id. 401 U.S. at 379. As important as "religious freedom, free speech, or

assembly" this Court teaches is "the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it..." Id., 401 U.S. at 379-380 (citing Mullane v. Central Hanover Tr. Co., supra; Covey v. Town of Somers, 351 U.S. 141, 100 L.Ed. 1021, 76 S.Ct. 724 (1956)).

In re Ruffalo, 390 U.S. 544, 550, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968) the Court explains that an attorney has a right to procedural due process in a disciplinary proceeding. And this due process is afforded when the attorney is provided notice and a "meaningful opportunity to be heard." Boddie, 401 U.S. at 378-79.

As taught in Ruffalo:

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. Ex parte Garland, 4 Wall 333, 380, 18 L.Ed. 366, 369 (1867); Spevack v. Klein, 385 U.S. 511, 515, 17 L.Ed.2d 574, 577, 87 S.Ct. 625 (1967). He is accordingly entitled to procedural due process, which includes fair notice of the charge. See In re Oliver, 333 U.S. 257, 273, 92 L.Ed. 682, 694, 68 S.Ct. 499 (1948). It was said in Randall v. Brigham, 7 Wall 523, 540, 19 L.Ed. 285, 293 (1869), that when proceedings for disbarment are "not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense." Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether "the state procedure from want of notice or opportunity to be heard was wanting in due process." Selling v. Radford, 243 U.S. 46, 51, 61 L.Ed. 585, 587, 37 S.Ct. 377 (1917)

(emphasis added)

In a related due process context this Court instructs that the "... abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this

Court has stated from its first due process cases, traditional [trial] practice provides a touchstone for constitutional analysis." Honda Motor Co. V. Oberg, 512 U.S. 415, 430 (1994) (internal citations omitted) (emphasis added). "Because the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party complained of their denial." Id. (internal citations omitted) (emphasis added) "When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violate due process." Id. (internal citations omitted) (emphasis added) (argued below at CR 845 and Opening Brief to the Texas Supreme Court, p. 3-10)

In this particular case's context, the Supreme Court instructs that it has long held that the procedural mechanisms of the adversarial process is the bedrock of our system of justice United States v. Nixon, 418 U.S. 683, 709 (1974) ("We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law... The very integrity of the justice system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.") (emphasis added)

The Rules of Evidence and the adversarial system of jurisprudence require evidence to be both admissible and in admissible form, and that the evidence actually be offered into evidence by the moving party, providing notice and opportunity to be heard (object) prior to the exhibits admission into evidence by the court. Without this procedure there is no due process

regarding the admission of the evidence used to convict. Without this procedure there is no due process afforded in appellate review (Appellate Court cannot rule on the admissibility of evidence without an offer for a particular purpose under the FRE). Without this procedure the entire adversarial process of criminal justice breaks down. Without this procedure there is no due process.

The adversarial system requires "that a jury's verdict 'must be based upon evidence developed at trial' [which] goes to the fundamental integrity of all that is embraced in the constitutional concept of a trial by jury." Turner v. Louisiana, 379 U.S. 466, 472 (1965) (footnotes omitted) This includes the prohibition against prosecutors using in their closing arguments non-admitted evidence. United States v. Brown, 765 F.3d 271, 296 (3d Cir. 2004) (prosecutor's closing statement improper because they were not supported by admitted evidence); United States v. Bennett, 874 F.3d 236, 254 (5th Cir. 2017) (prosecutor's closing statements referencing documents not admitted at trial improper); United States v. McGill, 815 F.3d 846, 920 (D.C. Cir. 2016); United States v. Fulton, 837 F.3d 281, 306 (3d Cir. 2016) (prosecutor's closing statements about G.P.S. location improper because reasonable inference not supported by the evidence).

Typically in the reciprocal discipline context we look at the due process provided by the CLD itself and not at the due process in the court issuing the precipitating convictions. (See Tex. R. Disc. P. PART IX) In the compulsory discipline context (only in Texas), resulting from a conviction in a different jurisdiction, "the record of conviction ... is conclusive

evidence of the attorney's guilt. Tex. R. Disc. P. 802. BODA may only consider if the underlying crime is an intentional crime and if compulsory discipline was proper. [ ] The Supreme Court of Texas, in hearing BODA appeals, is not permitted 'to consider any underlying facts or mitigating circumstances in a compulsory discipline proceeding.' In re Lock, 54 S.W.3d 305, 309-10 (Tex. 2001). The Texas Supreme Court only considers the elements of the crime and whether compulsory discipline was appropriate, not the [constitutionality or] validity of the underlying conviction". See Id. at 310-11, Bender v. Davis, 2017 U.S. Dist. LEXIS 32976 *5 (S.D. Tex. Feb. 6, 2017) (emphasis added); see also In re Berleth, 2020 U.S. Dist. LEXIS 15877 *fn.167 (S.D. Tex. Jan. 31, 2020) (generally).

Texas proceedings do not provide for an attorney to be heard in any meaningful forum on whether there was structural error, or unconstitutional convictions, or admissions of the United States that there was a lack of due process, an infirmity of proof, or other grave error where these issues could not be heard on direct appeal, nor on whether counsel was constitutionally ineffective under Strickland -- which will be determined at a 28 U.S.C. §2255 hearing in the first instance.

Typically, those issues could be brought on direct appeal. See Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994) (discussing waiver at the appellate level for items not originally raised below).

Of course, in Maxwell's case, the United States' confessions came post Third Circuit opinion and prior to this Court's denial of certiorari (during direct appeal). In an analogous context,

this Court allows for impeachment of foreign judgments prior to collateral consequences being imposed. In Hilton v. Guyot, 159 U.S. 113, 190 (1895) (discussing "the conclusiveness of foreign judgments"), the Court wrote:

> It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment by showing that the Court had no jurisdiction; or that he never had any notice of the suite; or that it was procured by fraud; or that upon its fact it is founded in mistake; or that it is irregular and bad by local law, fori fei judicatae.

(emphasis added)

In re Wilkes, 494 F.2d 472 (5th Cir. 1974) explains that, typically, attacks to a [federal] Bar's reliance on a judgment for reciprocal discipline are limited to (1) want of due process; (2) infirmity of proof; and (3) "other grave error". The Court wrote regarding reciprocal discipline, the attorney must demonstrate that a different disposition would be appropriate, considering the three elements supra and that discipline would be inconsistent with "principles of right and justice". See Selling v. Radford, 243 U.S. at 51 (emphasis added). See In re Wilkes, 494 F.2d at 476-77.

All prior disbarment cases have at least some facts to support disbarment. No such evidence exists in the record here. None.

The CLD, exhibit 1 (CR 24-130), as part of its evidentiary support relies on the indictment. The indictment contains references to alleged phone calls. The unoffered and unadmitted exhibits (see Appendix 5) were not offered or admitted on 14 separate dates throughout trial (01-13-2014; 01-14-2014; 01-15-2014; 01-16-2014; 02-27-2014; 03-04-2014; 03-15-2014; 04-02-2014;

04-08-2014; 04-09-2014; 04-10-2014; 04-21-2014; 04-28-2014; and 05-01-2014). The redacted indictment went to the jury. None, not one, of the phone calls purported to be quoted therein was ever offered or received into evidence. (CR 132-214) There was structural error throughout trial. A summary of the phone calls in the indictment relied upon by the CLD follows. The phone calls in the indictment paragraphs listed below were never offered nor admitted in evidence: CR 153, ¶46; CR 154, ¶47a; CR 145, ¶47b; CR 156, ¶48a; CR 157, ¶48b; CR 158, ¶48c; CR 158, ¶48d; CR 159, ¶48e; CR 159, ¶49a; CR 160, ¶49b; CR 162, ¶54; CR 163, ¶55, CR 169, ¶65; CR 171, ¶70b; CR 173, ¶73; CR 174, ¶76a; CR 174, ¶76b; CR 174, ¶76c; CR 175, ¶76d; CR 175, ¶76f; CR 176, ¶76h; CR 184, ¶90d (not offered for admission, not admitted into evidence); CR 188, ¶101; CR 196, ¶104; CR 199, ¶109 (adopting paragraphs with alleged phone calls that were neither offered nor admitted into evidence, ever).

As a result there is no factual record to support disbarment in this case -- for any misconduct (alleged or otherwise).

The only other evidence that the CLD produces is the Judgment and Commitment itself (CR 222-228), and this is subject to attack. See <u>Selling v. Radford</u>, 243 U.S. at 51 ("infirmity of proof" to support the conviction; "other grave error"; or conviction itself irregular); <u>Hilton v. Guyot</u>, 159 U.S. at 190 (allowing an attack on foreign judgments in the international context.[EN9]) Notably, Maxwell's compulsory discipline is not reciprocal, after a chance to be heard by a prior state bar.[EN10]

As noted <u>supra</u> at ¶¶1-3 in the undisputed facts, post appeal and prior to denial of certiorari, it was confessed that the

United States uploaded to the juror iPads 286 material and prejudicial exhibits that were neither offered for admission into evidence nor admitted by the trial court. (See Appendix 5) (CR 849-867) These constitute an infirmity of proof; other grave error; or were grossly irregular in violation of Selling, 243 U.S. at 51. Maxwell was not afforded a meaningful opportunity by the CLD to be heard on these issues. The Texas Supreme Court did/does not afford a meaningful opportunity to be heard or consideration thereon. In re Lock, 54 S.W.3d at 309-10.

As noted supra at ¶7 in the undisputed facts, post appeal and prior to denial of certiorari, it was disclosed (confessed) by the United States that it had threatened Maxwell's main defense witness with indictment if she testified on Maxwell's behalf. This constitutes a due process violation; other grave error; or grossly irregular practice in violation of Selling, 243 U.S. at 51. Maxwell was not offered a meaningful opportunity by the CLD to be heard on this issue. The Texas Supreme Court did/does not afford a meaningful opportunity to be heard or consideration thereon. In re Lock, 54 S.W.3d at 309-10.

As noted supra at ¶¶4-5 (CR 849-867) in the undisputed facts, post appeal and pre denial of certiorari, it was disclosed that the United States falsely uploaded an exhibit list to the juror iPads that indicated that the 286 material and prejudicial exhibits were offered and admitted into evidence. This was false, and disclosed by the United States post direct appeal while Maxwell's case was pending before this court (23-7404). (See Appendix 5) This constitutes a due process violation and other grave error in violation of Selling, 243 U.S. at 51.

Maxwell was not afforded a meaningful opportunity to be heard by the CLD on this issue. The Texas Supreme Court did/does not afford a meaningful opportunity to be heard or consideration thereon. In re Lock, 54 S.W.3d 309-10. This practice violates both Boddie, supra, and In re Ruffalo, supra.

As noted supra at ¶6 (CR 833) in the undisputed facts the court disclosed for the first time, 5 years post trial, that it had lost or destroyed its own exhibit list requiring defendant to rely on the United States' false exhibit list. This constitutes a due process violation; grave error; or grossly irregular practice in violation of Selling, 243 U.S. at 51. Maxwell was not afforded a meaningful opportunity to be heard thereon by the CLD on this issue. The Texas Supreme Court did/does not afford a meaningful opportunity to be heard consideration thereon. In re Lock, 54 S.W.3d at 309-10.

As Baxstrom teaches, a hearing must be afforded attorneys prior to collateral consequences being imposed, 383 U.S. at 110. Texas practice of considering the underlying convictions as conclusive evidence, without affording attorneys a meaningful opportunity to point out the unconstitutionality of the conviction, the want of due process, infirmity of proof, or other grave error at a meaningful hearing (Selling, 243 U.S. at 51) violates the due process clause of the United States Constitution. See Boddie, supra, In re Ruffalo, supra.

This Court teaches that "Due Process requires that there be an opportunity to present every available defense." see Lindsey v. Normet, 405 U.S. 56, 66 (1972) (quoting American Surity Co. v. Baldwin, 287 U.S. 156, 168 (1932)). This is equally true for

collateral consequences. See Padilla v. Kentucky, 559 U.S. 356, 176 L.Ed.2d 284, 293, 130 S.Ct. 1473 (2010) ("We ... have never applied a distinction between direct and collateral consequences to define the scope of constitutionality reasonable professional assistance required under Strickland v. Washington, 466 U.S. 668, 689 (1984)" Id. at 293; see also Baxstrom v. Herold, 383 U.S. 107, 15 L.Ed.2d 620, 865 S.Ct. 760 (1966); Specht v. Patterson, 386 U.S. 605, 608 (1967)).

Texas precludes attorneys being heard as to whether the underlying conviction is unconstitutional. See BODA, Internal Proc. Rules 6.02(b)(2); Tex. R. Disc. P. Rule 8.05.

This Court recognizes Sixth Amendment rights to compel witnesses. The Court explains that "[o]ur cases establish, at a minimum, the criminal defendants have the right to the government's assistance in the compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987). Few rights are more fundamental than that of an accused to present witnesses in his own defense. See Chambers v. Mississippi, 410 U.S. 284, 302 (1973). The United States' confession in response to the 28 U.S.C. §2255 petitions of Maxwell's co-defendants, while Maxwell's direct appeal was still pending, that it threatened to indict Maxwell's main defense witness if she presented to testify in Maxwell's defense is a violation of Maxwell's Sixth Amendment rights and requires, at a minimum, that Maxwell have the right to be heard before collateral consequences are imposed.[EN11]

Typically the time period between a circuit court judgment

and a petition for certiorari due date is 90 days. See United States Supreme Court Rules, Rule 13. In this case, the time period between Third Circuit Court opinion and denial of certiorari was more than 2 years. (See 23A399, granting extension and 23-7404) This Court sought a response from the Solicitor General (23-7404) and ultimately denied certiorari on October 7, 2024.

During this time period while Maxwell's case remained on direct appeal, the United States made a series of factual confessions in response to Maxwell's co-defendants' 28 U.S.C. §2255 petitions. Those cases are to be joined with Maxwell's §2255. (See Appendix 4) All of the issues, factual and legal, are retroactive to Maxwell. See <u>Teague v. Lane</u>, 489 U.S. 288, 303 (1989); see also <u>Rock v. Arkansas</u>, 483 U.S. 44, 62 (1987) (new rulings "should always be applied retroactively to cases on direct review...") (internal citations omitted) As a result, Maxwell has not had a meaningful opportunity to be heard or to have his factual or legal issues (structural error, ineffective assistance of counsel, etc.) determined by any court or in any forum or form.**EN12**

In <u>Mathews v. Eldridge</u>, 429 U.S. 319, 334 (1976) the Court teaches that "[d]ue process", unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. See also <u>Cafeteria Workers v. McElroy</u>, 367 U.S. 886, 895 (1961) ("[D]ue Process is flexible and calls for such procedural protections as the particular situation demands."); see also <u>Morrissey v. Brewer</u>, 408 U.S. 471, 481 (1971). In <u>Mathews</u>, the Court described a sliding scale for

determining whether a particular set of procedures was constitutionally adequate. The Court looks at three factors: (1) the private interest at stake; (2) the risk that existing procedures will wrongly impair this private interest, and the likelihood that additional procedural safeguards can affect a cure; and (3) the government interest in avoiding those additional procedures. Mathews, supra at 335.

This Court has never deviated from the principle that due process requires a meaningful opportunity to be heard on whether a conviction was constitutional before collateral consequences are imposed. Title 28 U.S.C. §2255 and §2254 expressly allow challenges to unconstitutional criminal convictions. (28 U.S.C. §2255 -- "A prisoner in custody ... claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States ... or is otherwise subject to collateral attack, may move the court..."). Texas, in compulsory discipline cases (Tex. R. Disc. P. Rule 8.05), before applying collateral consequences, does not allow or permit a "meaningful" hearing in any form or forum. This practice, denying a meaningful opportunity to be heard, is unconstitutional.

Additionally, if we apply the Mathews' test, all three elements favor Maxwell. First, allowing him to be heard on unconstitutional convictions (private interest).**EN13** Second, given the structural error facts confessed by the United States while Maxwell was on direct appeal (post Third Circuit opinion, pre- denial of certiorari) and Maxwell's lack of a meaningful opportunity to be heard by the CLD, Texas Supreme Court, BODA, or

in any forum, the current procedures (adopting an unconstitutional conviction) impairs the public interest in fairness of adjudications and Maxwell's most basic due process rights. Third, given Maxwell's continued incarceration and law license suspension throughout the resolution of the §2255 and Maxwell's cessation of practice 11 years ago, there is no risk to the public during the time period required for a hearing (28 U.S.C. §2255 or otherwise). In light of Padilla's holding (no distinction between direct and collateral consequences when evaluating the scope of constitutionally reasonable professional assistance under Strickland) due process demands Maxwell have a meaningful opportunity to be heard on whether the criminal conviction was unconstitutional prior to collateral consequences being imposed.

The merits of Maxwell's underlying arguments (conviction is unconstitutional) do not need to be addressed by this Court. Rather, Texas must provide a "meaningful opportunity to be heard" prior to disbarment, that allows Maxwell to challenge the unconstitutionality of his conviction, whether before the CLD itself or by collateral attack in the court of conviction via the 28 U.S.C. §2255. This is the most basic due process, a meaningful opportunity to be heard on the constitutionality of the conviction. See Boddie, 401 U.S. at 377-79.

II. The minimum Due Process afforded in attorney compulsory discipline cases is that which is described and adopted by this Court in Selling v. Radford, 243 U.S. 46, 51 (1917).

> "In Thread v. United States, 354 U.S. 278, 281 (1957), the Supreme Court stated, as dicta, that '[i]t is not for this Court, except for the narrow limits for review open to this Court, as recently canvassed in Konigsberg v. State Bar of California, 353 U.S. 252 (1957) and Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment.' Thread is simply the most recent moderate pronouncement of the flatter rule of Selling v. Radford, 243 U.S. 46 (1917) that 'we have no authority to reexamine or reverse, as a reviewing court, the action of the Supreme Court of Michigan in disbarring a member of the Bar of the courts of that State for personal or professional misconduct." Id. at 50.
>
> The 'exempt' clause in the foregoing note from Thread is important. Schware, cited within the clause, specifically left room for federal constitutional questions. 'A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.' 353 U.S. at 238-239.

Keenan v. Board of Law Examiners, 317 F.Supp. 1350, 1358-59 (E.D.N.C. Aug. 13, 1970)

Typically an attorney has a meaningful opportunity to be heard on relevant issues, either before the CLD in reciprocal discipline cases or in the court of conviction in compulsory discipline cases.**EN14** In reciprocal discipline cases the federal courts, prior to federal disbarment, based on prior state court disbarment, an attorney's challenges to disbarment are limited to three issues.**EN15** First, whether there was a want of due process; second, whether there was an infirmity of proof of personal or professional character; and third, whether there was some other grave error such that discipline would be inconsistent with "principles of right and justice." Selling, 243 U.S. at 51. See Tex. R. Disc. P. Rule 9.04 (Appendix 3) Maxwell, of course, was not afforded this opportunity due to the timing of the U.S. factual confessions and the post Third Circuit rulings by this

Court, prior to certiorari denial.

This Court teaches in In re Ruffalo, 390 U.S. 544, 550 (1968) that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer" (citing Ex parte Garland, 4 Wall 333, 380 (1867)); Spevak v. Klien, 385 U.S. 511, 515 (1967). "He is accordingly entitled to procedural due process..." See In re Oliver, 333 U.S. 257, 273 (1948) (emphasis added).

In Randall v. Brigham, 7 Wall 523, 540 (1869) this Court explains that when proceedings for disbarment are "not ... in open court, in the presence of the judges, notice should be given ... and [an] opportunity for explanation and defense." (emphasis added) This is not afforded in Texas under compulsory discipline rules (see T. R. Disc. P. Rule 8.05). (Appendix 3)

In other contexts of ancillary punishment based on a criminal conviction, hearings to determine the collateral consequences are required. See Baxstrom v. Herold, 383 U.S. 107, 110, 15 L.Ed.2d 620, 86 S.Ct. 760 (1966)[EN16]; Specht v. Patterson, 386 U.S. 605, 608 (1967)[EN17]. And as this Court informed, disbarment is a quasi-criminal proceeding. Konigsberg, 353 U.S. 257 (out of the ordinary run of civil cases). Baxstrom, supra, is a fellow traveller in the due process analysis. Two different practices for collateral consequences. Texas does the same thing. Reciprocal discipline cases get a hearing. Compulsory discipline cases do not. See Tex. R. Disc. P. Rules 8.04 and 8.05 and 9.04.

In Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961) the Circuit reasons that:

> the denial of applicants applications for the law license significantly curtailed their ability to follow an employment in which they had previously engaged. This was a curtailment of their liberty. See Allgeyer v. State of Louisiana, 165 U.S. 578, 589-590 (1897), and Williams v. Fears, 179 U.S. 270, 274 (1900), particularly the latter's reference to 'the natural right to labor'. There was perhaps at the same time a deprivation of a property interest. Green v. McElroy, 360 U.S. 474, 492 (1959).

See also the citations therein.

When there is a deprivation of constitutional rights by the United States or the individual states it is not valid unless accomplished in a manner consistent with the due process of law. Id. at 722. See also Cafeteria Workers, 367 U.S. at 895 (where there are "constitutional restraints upon state and federal governments" in dealing with persons subject to their supervision, the pursuits in question have "a constitutional right to notice and a hearing before they can be removed.")

It is undisputed that the disclosure of the structural error facts and change in law took place while Maxwell's underlying case was an appeal (not final). See (CR 742-826) It is also undisputed that Maxwell has not had a meaningful opportunity in any forum to address these issues.

Selling, 243 U.S. at 51, in reciprocal discipline cases, instructs that Courts must examine whether the state procedure, "from want of notice or opportunity to be heard, was wanting in due process; [second, whether] that there was such an infirmity of proof as to the facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistent with our duty, accept as final the conclusion on that subject; or [third] that some other grave reason existed which should

convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we are construed to do so. Id.

This is the most basic tenet of due process, the right to a meaningful opportunity to be heard. A practice or procedure in a state disbarment case (Tex. R. Disc. P. Rules 8.04 and 8.05) that denies a meaningful opportunity to be heard on the constitutionality of the conviction in any forum prior to disbarment is necessarily unconstitutional.

Initially, this Court in Selling was not called upon to determine the validity of the disbarment by the Supreme Court of Michigan, Id. 243 U.S. at 50, but solely to the propriety of the collateral disbarment from the federal bench. Texas provides two separate paradigms: one for reciprocal discipline (Tex. R. Disc. P. Rule 9.04) and one for compulsory discipline (Tex. R. Disc. P. 8.05). Reciprocal discipline allows for a meaningful opportunity to be heard. Compulsory discipline does not. Maxwell would argue that the Selling parameters are sufficient to comply with due process for purposes of a meaningful opportunity to be heard. While Maxwell cannot locate a single case in United States' history involving the number of exhibits (286 in this case), both material and prejudicial, being secreted to the jury, as was done in this case. There are other cases of witness intimidation by the government. A CLD procedure in compulsory discipline cases must, at a minimum, allow the attorney to challenge a conviction for want of due process, lack of evidence of personal or

professional character, or other grave error; and this practice would afford notice and a meaningful opportunity to be heard. Alternatively, the CLD could wait until the conviction is challenged by 28 U.S.C. §2255 and/or §2254. Counsel would have an opportunity to be heard therein (or have waived that right). Other disciplinary rules would keep the lawyer's license suspension in place during the interim. (See Tex. R. Disc. P. Rule 8.04)

III. This Court's holding in Padilla v. Kentucky, 559 U.S. 356, 176 L.Ed.2d 284, 293, 130 S.Ct. 1473 (2010) requires an opportunity to be heard under Strickland v. Washington, 466 U.S. 668, 689 (1984) prior to collateral consequences (here disbarment).

It is undisputed, that under Texas law Maxwell has not been afforded a meaningful hearing on these issues in any forum. See Appendix 4 and (CR 869-870) (To the extent that Respondent requests a hearing on the Motion for Entry of Judgment of Disbarment, that request is DENIED).

This Court explains In re Ruffalo, 390 U.S. at 550 that: "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process... " (internal citations omitted)

In Randall, 7 Wall at 540 this Court teaches that when proceedings for disbarment are "not ... in open court ... notice should be given to the attorney of the charges made and opportunity for him for explanation and defense." Therefore, the question is whether "the state procedure [suffered] from want of notice or opportunity to be heard [or] was wanting in due

process." Selling, 243 U.S. at 51.

It is undisputed that Texas currently disbars attorneys on final criminal convictions without ensuring that there was a "meaningful opportunity to be heard" as to whether the conviction was unconstitutional.**EN18** See Tex. R. Disc. P. Rule 8.05. The disbarment takes place prior to attorneys' constitutional challenges to the conviction under 28 U.S.C. §2255 being heard.

Because of the nature of a criminal conviction, attorneys are suspended pending direct appeal. See Tex. R. Disc. P. Rules 8.04 and 8.05. (Appendix 3)

As this Court reasoned in Loper v. Beto, 405 U.S. 473, 480 (1972) the question was: "Does the use of prior, void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case?" The Court answers in the affirmative and instructs in Loper, that an unconstitutional conviction obtained in violation of Gideon v. Wainwright, 372 U.S. 335 (1963) cannot stand, writing that:

> To permit a conviction obtained in violation of Gideon v. Wainwright to be used against that person either to support guilt or enhance punishment for another offense ... is to erode the principle of that case.

Loper, 405 U.S. at 482.

In Padilla, 176 L.Ed.2d at 293, this Court discusses whether collateral consequences can be imposed on a defendant where counsel has been determined to be ineffective under Strickland v. Washington, 466 U.S. 668, 689 (1984). Padilla was an immigration case and the Court determined that it did not need to reach the issue, relying on McMann v. Richardson, 397 U.S. 759, 771 (1970) (Before deciding whether to plead guilty, a defendant is entitled

to "the effective assistance of counsel") and the failure to advise of immigration consequences was ineffective assistance of counsel per se'.

This Court informed in Padilla, "[w]e ... have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' under Strickland v. Washington, 466 U.S. 668, 689 (1984)." Padilla, 76 L.Ed.2d at 293.

In this case, Maxwell raised ineffective assistance of counsel in his 28 U.S.C. §2255, William Maxwell v. United States, No. 25-16419-MAS, before the United States District Court of New Jersey, Honorable Michael A. Shipp now presiding. See Appendix 4.

Further, the Structural error issues in this case will necessarily be addressed by the United States District Court in the first instance at the §2255 hearings where the confessions were made. Disbarment, a collateral consequence, should be held in abeyance, depending **upon the** constitutionality of the conviction and whether under Strickland's ineffective standard, structural error, or some other constitutional irregularity.

The relief Maxwell seeks, in context, is required when the Texas practice rules are examined. PART XI of the Tex. R. Disc. P. requires that Maxwell wait an additional 5 years after his underlying conviction is declared unconstitutional prior to seeking reinstatement. See Tex. R. Disc. P. Rule 11.01.

The net effect is that an unconstitutional conviction can be used to support a license suspension while the conviction is on direct appeal. Once the direct appeal is final and the issues properly raised in a §2255 are decided if the attorney prevails

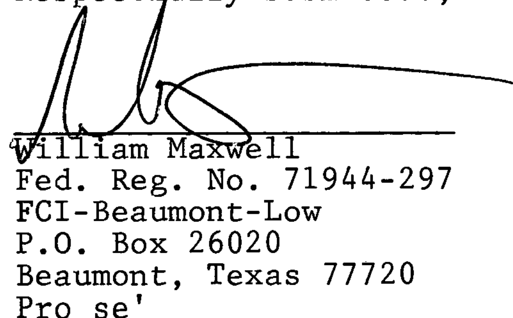
on collateral attack -- in Texas it does not matter -- the attorney, without due process, has had his property (law license) unconstitutionally taken in violation of the United States Constitution.

The merits of Maxwell's underlying claims need not be determined here. The United States District Court, the court of conviction, will decide in the first instance whether Maxwell's conviction is constitutional. Alternatively, the CLD can have its own hearing on the matter. The only question for this Court is whether collateral consequences (here disbarment) may be imposed prior to hearing being afforded (meaningful opportunity to be heard) such as occurs in a 28 U.S.C. §2255 hearing.**EN19**

PRAYER

FOR THESE REASONS, Maxwell prays for certiorari to the Texas Supreme Court and full briefing. Maxwell prays for such other and additional relief to which he may be entitled whether in equity or in law.

Respectfully submitted,



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END NOTES

EN1) The record is BODA CR (Board of Disciplinary Appeals Clerk Record). Maxwell abbreviates to "CR".

EN2) The Tex. R. Disc. P. Rule 106(w)(T) is the definition of serious crime. Rule 106(z) defines "sanction" available.

The Tex. R. Disc. P. process is divided into two types of proceedings: the standard grievance procedure; and the compulsory discipline procedure. The standard grievance procedure applies in all instances of alleged attorney misconduct, except where an attorney is alleged to have committed an "intentional crime". In re Caballero, 272 S.W.2d 595, 597 (Tex. 2008)

EN3) These facts are not disputed, and were not disputed by the CLD, BODA, nor before the Texas Supreme Court. In this section, the paragraphs are individually numbered for ease of reference throughout. William Maxwell is referenced as "Maxwell" throughout. John Maxwell is referenced as "John Maxwell".

EN4) Evidence and inferences from the evidence can only be considered by the jury from the evidence actually admitted into the record. Lockhart v. Nelson, 488 U.S. 33, 40-42 (1988) ("It is quite clear from our opinion in Burks[v. United States, 437 U.S. 1, 16-17 (1978)] that a reviewing court must consider all of the evidence admitted by the trial court...") (emphasis added)

EN5) This U.S. Response, in Case No. 1:23-CV-22432-MAS, Doc. 7 PageID#: 101 was filed in 2024 while Maxwell's direct appeal (23-7404) was pending before this Court.

EN6) "On October 30, 2024, the Board received notice from Respondent that the United States Supreme Court denied certiorari in Respondent's criminal appeal. The board finds no remaining basis to conclude that Respondent's criminal conviction is not final. See BODA Internal Procedural Rule 6.02(a) ("For purpose of rendering final judgment in a compulsory discipline case, the

direct appeal of the criminal conviction is final when the appellate court issues its mandate.") Therefore, Respondent's Motion for Continuance is DENIED. Any objections raised in Respondent's Motion are OVERRULED." (CR 869-870) (emphasis in original) Maxwell raised all issues before this Court at BODA and before the Texas Supreme Court. (See Appendix 6.5 and 6.6)

EN7) Loper v. Beto (the use of prior void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case) Id. at 480; Padilla, 76 L.Ed.2d at 293 ("We ... have never applied a distinction between direct and collateral consequences to define the scope of constitutionality reasonable professional assistance required under Strickland...")

EN8) The full quote in context, from Boddie, 401 U.S. at 377-79 is dispositive. Maxwell, having been denied a "meaningful opportunity to be heard" in any forum on his issues, has been denied due process. The relevant text reads:

> Early in our jurisprudence, this Court voiced the doctrine that "[w]herever one is assailed in his person or his property, there he may defend," Windsor v. McVeigh, 93 U.S. 274, 277, 23 L.Ed. 914, 915 (1876). See Baldwin v. Hale, 1 Wall 223, 17 L.Ed. 531 (1864); Hovey v. Elliot, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897). The theme that "due process of law signifies a right to be heard in one's defense," Hovey v. Elliot, supra, at 417, 41 L.Ed. at 221, has continually recurred in the years since Baldwin, Windsor, and Hovey. Although "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause," as Mr Justice Jackson wrote for the Court in Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 94 L.Ed. 864, 70 S.Ct. 652 (1950), "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Id., at 313, 94 L.Ed. at 873. [emphasis added]
>
> [ ] What the Constitution does require is "an opportunity ... granted at a meaningful time and in a

meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66, 85 S.Ct. 1187 (1965) [...] "for [a] hearing appropriate to the nature of the case," Mullane v. Central Hanover Tr. Co., supra, at 313, 94 L.Ed. at 873. The formality and procedural requisites for hearing can vary, depending upon the importance of the interest involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirements that an individual be given an opportunity for a hearing before he is deprived of any significant property interest... In short, "within the limits of practicability," id., at 318, 94 L.Ed. at 875, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. [emphasis added]

(footnotes omitted)

EN9) States and federal districts are foreign to each other. The State of Rhode Island v. The State of Mass., 9. L.Ed. 1233, 12 Peters 657, 720 (1838) (In the jurisdictional context... "the parties who are States of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all federal purposes."); Goetze v. United States, 103 F. 72, 83 (2d Cir. 1900) ("... the different States are usually held to be foreign to each other, except as concerns international relations. Sister State judgments are for most purposes foreign judgments, and generally, for all purposes other than those specifically mentioned in the Constitution, our States are foreign to each other.") See also Howlett v. Rose, 496 U.S. 356, 367 (1990) (discussing that as to enforcement of laws in State courts and federal courts of the same district they are not foreign to each other...) (e.g. State and Federal Courts in Houston, Texas are not foreign to each other) (generally)

EN10) Maxwell's conviction being out of New Jersey is being relied upon by the CLD, no hearing in Texas has taken place on

Maxwell's disbarment (CR 740-741; 806-807) ("Pursuant to Texas Rule of Disciplinary Procedure 8.05, when a motion for final judgment of disbarment is supported by affidavits or certified copies of court documents showing that the conviction has become final, a respondent is entitled to a hearing on the motion only if the respondent files a verified denial contesting the finality of the conviction..." Tex. R. Disc. P. Rule 8.05. Otherwise, "the Board (BODA) must decide the matter 'without hearing' Id.; see BODA Internal Procedural Rule 6.02(b)(2)")

EN11) See Taylor v. Illinois, 484 U.S. 400, 409 (1988) ("The right to compel a witness presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have their witnesses' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words: 'The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecuting witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process law.'" (citing Washington v. Texas, 388 U.S. 14, 19 (1967)) (emphasis added)

Maxwell is being denied a meaningful opportunity to be heard in any forum in violation of Boddie, supra; In re Ruffalo, supra.

EN12) For example, Ciminelli v. United States, 598 U.S. 306 (2023); Fischer v. United States, 603 U.S. 480 (2024); New York Rifle & Pistol v. Bruen, 597 U.S. 1 (2022); and Macquarie Infrastricture Corp. v. Moab Partners, 601 U.S. 257 (2024). Bruen was issued post counsel's briefing and a couple weeks prior to Third Circuit opinion in July of 2022. The issue here is Maxwell's right to be heard before collateral consequences are imposed.

EN13) In Konigsberg, 353 U.S. at 257 this Court further elucidated the due process to be afforded before denying or removing bar licenses. There the Court teaches that a disbarment proceeding is not a traditional civil proceeding, but rather a quasi criminal proceeding. Id. ("Out of the ordinary run of civil cases...") As such, Maxwell has extensive due process protections in his law license. See Schware, 353 U.S. at 238-39 (bar license has protections under due process and equal protections). At a minimum, he has a right to be heard prior to an unconstitutional conviction being used to support the collateral consequences, disbarment.

EN14) Tex. R. Disc. P. Rule 9.04 adopts the Selling paradigm, substantially. (Appendix 3)

EN15) Tex. R. Disc. P. Rule 9.04 subsections A-C follow Selling, Texas adds two additional grounds on which counsel can attack reciprocal discipline. (Appendix 3)

EN16) Baxstrom, 383 U.S. at 110: "We hold that petitioner was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all

other persons civilly committed in New York."

EN17) Specht, 386 U.S. at 608: "These commitment proceedings whether determined civil or criminal are both subject to the Equal Protection Claause of the Fourteenth Amendment as we held in Baxstom ... and to the Due Process Clause." (emphasis added) This Court in Specht, citing the Third Circuit approvingly, wrote: "It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before a magnified sentence was imposed... A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine witnesses against him." (citing Gerchman v. Maroney, 335 F.2d 302, 312 (3d Cir. 1965)) "We agree with that view." Specht, 386 U.S. at 608.

EN18) It is axiomatic that ineffective assistance of counsel claims are generally not properly presented on direct appeal, but are raised for the first time in a 28 U.S.C. §2255.

EN19) CLD confirms Maxwell's framing of the argument in its opening brief to the Texas Supreme Court at p. 20:

> Here, the direct review of Maxwell's criminal conviction ended, and his conviction became final, with the U.S. Supreme Court's denial of his petition for writ of certiorari on October 7, 2024.
> [ ]
> Maxwell's collateral attack on his criminal conviction is not part of his direct appeal and does not serve to extend his interlocutory suspension or invalidate his disbarment.