

IN THE SUPREME COURT OF PENNSYLVANIA

DONALD A. BAILEY : NO. 1760 (discipline docket)  
Petitioner :  
v. :  
OFFICE OF DISCIPLINARY COUNSEL : (No. 72 WM 2011)  
Respondent : (Review of 11 DB 2011)

**MOTION TO DISMISS IN THE NATURE OF HABEAS CORPUS AND/OR  
MOTION FOR JUDGMENT OF ACQUITTAL**

NOW COMES petitioner, and moves this Court to dismiss the above-referenced disciplinary matter now pending before this Court, and its Disciplinary Board, and in support thereof avers as follows:

1. Two days of the hearing in the referenced matter were held on August 11 and 12, 2011. The record remains open pending the Petition for Review filed by Respondent on August 2, 2011. A King's Bench motion for extraordinary relief was filed late in the afternoon on August 9, 2011, just before the close of business at No. 72 WM 2011. It was dismissed by Justice Castille by 10 a.m. the next morning. The motion consisted of hundreds of pages of documents and other materials.

2. After refusing a brief continuance, thus forcing the proceedings against respondent to go forward, this Court sat on a petition for review of the Order of Mr. Cali quashing subpoenas, and for enforcement of others, filed by respondent on August 2, 2011, until only recently. On October 19, 2011, the Court issued a rule to show cause, which provided for no opportunity for respondent to respond. Disciplinary Counsel filed a response to the rule to show cause on October 28, 2011. In the absence of a prescribed process by general rule or order, Respondent files this motion in response thereto.

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Respondent also raises additional issues that support and mandate the dismissal of these claims against him.

3. Respondent complains at the outset that he has already been subjected to irremediable constitutional violations, and that these matters are ripe for immediate disposition by this Court without the necessity of remand to the hearing panel for further proceedings, which, under the circumstances, would only inflict additional injury. This Court denied the petition for King's Bench/extraordinary relief without any consideration whatsoever. Notably, this response/motion is not simply a reassertion of those issues but rather it augments them. The course of proceedings, including the transcripts of the hearings, have revealed the substantial merit to the King's Bench/extraordinary relief motions when first filed, and have added substantially to their basis. They require full and complete consideration and disposition, with all due process protections, before any further proceedings are had in this matter. A copy of the transcripts of the August 11 and 12 hearings are attached hereto as Exhibit A (August 11, 2011 Notes of Testimony) and Exhibit B (August 12, 2011 Notes of Testimony), and incorporated herein by reference in their entirety.

**Request for Due Process in Connection with This Motion.**

4. At the outset, respondent complains of, and requests relief from, the absence of rules governing the filing of motions such as the present. This Court has exclusive province over matters of attorney discipline, and specifically all rulemaking over such matters under Article 5, Section 10 of the Constitution. There are no rules governing procedural motions, even prescribing briefing schedules and responses, etc. The rules have further been shown to be deficient in material respects in this case, as set

forth in the King's Bench petition. Respondent incorporates the Motion for Extraordinary Relief/King's Bench Petition herein by reference in its entirety. The issues raised therein were never substantively considered by this Court. They must be considered now, particularly in light of the developments in these proceedings, and mandate dismissal.

5. Respondent intends to submit a set of proposed findings of fact and conclusions of law based upon the hearing transcript and the exhibits of record on the constitutional defenses to this proceeding, as well as the factual issues that establish that he has not, as a matter of law, violated the Rules of Professional conduct in any way. Respondent demands due process in connection with the submission of this motion, and that the Court direct timelines and other directives for further proceedings on this issue. Respondent specifically requests the opportunity to brief and argue the issues raised herein as the bases for his motion to dismiss, and that this Court enter an appropriate Order governing any further proceedings.

**Procedural Default in the Petition for Review demands dismissal.**

6. The rule to show cause has been issued by this Court to disciplinary counsel only, and not to the subjects of the subpoenas. This is error, and in violation of the Court's own recognized procedure. By correspondence dated August 8, 2011, attached hereto as Exhibit C, this Court instructed respondent to file a proof of service of the petition for review for enforcement of the subpoenas upon all parties who filed a motion to quash the subpoena served upon them.<sup>1</sup> At the very least, subject to the

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<sup>1</sup> The August 8, 2011 correspondence incorrectly states that Eckert Seamans filed a motion to quash. Respondent filed a motion for sanctions arising out of this matter insofar as Eckert served a motion, but never filed one in an attempt to have their

procedural defaults otherwise set forth herein, rules to show cause should be issued upon all parties who filed motions to quash. No further process is or has been prescribed by general rule or order of this Court.

7. The petition for review proceedings are fatally flawed as a result of non-compliance with D.B.R. 91.3. This Court has exclusive province over matters of attorney discipline, and specifically all rulemaking over such matters under Article 5, Section 10 of the Constitution. All other rules are specifically rendered without effect in these matters. D.B.R. 91.3(b) prescribes a specific procedure for the disposition of motions to quash subpoenas, and specifically provides that:

(3) The Office of the Secretary must transmit the motion and any answer to the person designated in subsection (a)(1) or (a)(2) to hear the motion, who must schedule a hearing on the motion within ten days after the date on which an answer must be filed. A report with findings of fact and conclusions of law must be filed with the Office of the Secretary within ten days after the conclusion of the hearing.

In this case, there has been complete non compliance with that procedure, which cannot be remedied, and allowing the hearing to go forward under these circumstances is a clear due process violation under both the state and federal constitutions.<sup>2</sup>

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subpoena quashed along with that of Montgomery, who did file a motion. Mr. Cali quashed the motion of Eckert Seamans by Order, though one was never filed.

<sup>2</sup> In the response of ODC to the Rule to Show Cause, counsel suggests that the June 15 prehearing conference was a hearing on the motions to quash. This simply was not the case. It was a prehearing conference at which respondent, in violation of his rights, was forced to make lengthy proffers of witness and document relevance. It was participated in by respondent with all reservation of his rights, and under objection. The *prehearing conference* was even held before the response times to the motions to quash had expired, and before some had even been filed. Rule 91.3 further requires a *hearing* and findings of fact and conclusions of law, none of which were provided for. The reference by ODC to the June 15, 2011 prehearing as a hearing to substantively address the subpoena issues is not only disingenuous, but is intentionally misleading.

**Requests for relief in the nature of a writ of habeas corpus and complete structural error.**

8. The irremediable constitutional violations that have occurred make these matters ripe for immediate disposition by this Court without the necessity of remand to the hearing panel for further proceedings. The basis for this assertion is revealed by the hearing transcripts themselves, which show a proceeding devoid of basic due process, as will be further argued in any subsequent briefing that may be scheduled.

9. The two days of hearings that were held were procedurally deficient in violation of both federal and state due process standards, notwithstanding respondent's efforts to present his case in a complete, orderly, deliberate fashion in strict accord with the issues before the Board. Because of the due process violations, respondent was neither able to effectively cross-examine the ODC witnesses,<sup>3</sup> or to present an effective defense of his own.

10. The hearing is effectively a nullity, given the due process violations in connection with the subpoena issues, and allowing the hearing to go forward at all, under

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<sup>3</sup> Judges Jones and Conner, the ODC's only witnesses, were both subject to unresolved subpoena issues. They voluntarily appeared as witnesses for the ODC, but opposed the subpoenas *ad testificandum* and *duces tecum*. A hearing was required on these issues before the formal hearing on the charges was convened per Rule 91.3. This cannot be remedied, and the hearing transcript attached hereto shows that respondent's subpoenas are both necessary and appropriate in order for him to effectively defend himself in these hearings. This applies to both the testimony of these two Judges, and the additional federal judicial officers and employees, and to the documents upon which an effective examination is based. Respondent reserves the right to supplement his argument in these regards through appropriate further proceedings relating to this motion, as specifically requested herein. This Court cannot just rule that any error was not prejudicial, and proceed to push these proceedings through when the matter at issue is a very basic due process hearing prescribed by this Court's own Rules, which have exclusive province over all matters relating to attorney discipline.

the circumstances, ODC having rested its case on a deficient record, the charges must be dismissed.

11. Respondent asserts that the case must be dismissed because of what amounts to a complete structural error, where dismissal is the only remedy.<sup>4</sup>

**Motion for judgment of acquittal/summary dismissal.**

12. Respondent moves, in the nature of a motion for judgment of acquittal on the record submitted by the ODC at the time they rested.

13. The only issue in the case is whether the statements made by respondent in the motion for rehearing en banc were known to be false or were made with reckless disregard as to their truth or falsity, and/or were knowingly frivolous and made without factual basis, and/or constituted conduct prejudicial to the administration of justice in violation of Rules 3.1, 4.1(a), 8.2(a), 8.4(c), and/or 8.4(d) of the Pennsylvania Rules of Professional conduct. Plaintiff submits that the record on its very face cannot support

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<sup>4</sup> In conducting the analysis of constitutional violations in direct appeal and habeas corpus cases, the United States Supreme Court repeatedly has reaffirmed that “[s]ome constitutional violations ...by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless.” *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988); accord *Neder v. United States*, 527 U.S. 1, 7 (1999) (“[W]e have recognized a limited class of fundamental constitutional errors that ‘defy analysis by “harmless error” standards’...Errors of this type are so intrinsically harmful as to require automatic reversal (i.e., ‘affect substantial rights’) without regard to their effect on the outcome.”); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (“Although most constitutional errors have been held to harmless-error analysis, some will always invalidate the conviction.” (citations omitted)); *id* at 283 (Rehnquist, C.J., concurring); *United States v. Olano*, 507 U.S. 725, 735 (1993); *Rose v. Clark*, 478 U.S. 570, 577-78 (1986) (“some constitutional errors require reversal without regard to the evidence in the particular case...[because they] render a trial fundamentally unfair”); *Vasquez v. Hillary*, 474 U.S. 254, 263-264 (1986); *Chapman v. California*, 386 U.S. 18, 23 (1967) (“there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error”).

these charges in any respect, and that the case should be dismissed without further proceedings.

14. Respondent requests the right to submit findings of fact and conclusions of law and to further brief these issues.

**Prosecutorial misconduct/selective and vindictive prosecution.**

15. Respondent moves to dismiss, and requests a hearing before the Court, on the issue of prosecutorial misconduct and selective and vindictive prosecution, as set forth in the King's Bench, and as supplemented by the record of these proceedings. Respondent is charged with making false statements about, *inter alia*, coordinated efforts between ODC and Judges Conner and Jones, among others, to "get" him. According to the testimony of Sam Stretton, Judges Muir, McClure, and Rambo were the original judges identified as part of this plan. N.T. August 12, 2011, pp. 63-64.

16. Judge Conner is believed to have testified falsely on the issue of whether he was a complainant to the ODC, testifying in the hearing that he was not. Bailey received a "Complaint of the Honorable Christopher C. Conner" sent by ODC to Bailey dated November 29, 2006 outlining 5 separate cases on his docket upon which he was requesting action by the ODC, i.e., ODC identified him as the complainant, and the information about the specific cases had come from somewhere. A copy of this correspondence is attached hereto as Exhibit D. Respondent has alleged that Paul Killion told him that Conner was "pestering" Killion to "do something" about respondent, and as of November 29, 2006, that contention was substantiated. The conversation between Killion and Bailey was in December 2008, meaning that there must have been more contact until 2008. At the August 11, 2011 proceeding, Conner testified as follows:

Q: Okay. Now have you ever written a complaint about me that you sent to the Disciplinary Board?

A: The only indication in which I forwarded a concern to the Disciplinary Board was in connection with the Conklin matter and that was contained in an order in which I directed the Clerk of Court to forward my opinion to the Disciplinary Board to determine whether or not there needed to be an action taken.

Q: Okay. That's

A: Beyond that, no.

N.T. August 11, 2011, pp. 119.

Judge Conner's testimony is false, and this Court has an obligation to do something about it, in addition to dismissing all charges against respondent. Incidentally, all of the allegations in the Conner complaint are bogus, as will be more fully addressed by further submission, if permitted as requested. Regardless, Respondent's contention that he was told by Killion that he was being prosecuted because Judge Conner, and perhaps others, were "pestering" Killion to "do something" is substantiated.

17. Respondent's contention is additionally substantiated through the testimony of Judge Jones, and of Samuel Stretton and Andrew Ostrowski regarding Jones' specific contacts to Killion or others with instructions, in the paraphrased words of Ostrowski, to "stop Ostrowski from helping Bailey." N.T. August 12, 2011, pp. 326-27. The testimony of Stretton and Ostrowski was un-impeached and further specifically substantiated Respondent's contention that he was informed of a plan by other judges to get him, and that Stretton was specifically instructed by a federal judge to warn respondent.

18. Under all the circumstances, respondent has shown through the record of these proceedings that the allegations in the King's Bench petition were not just

conclusory allegations, but are supported by competent evidence, and he has clearly shown that he should be entitled to a hearing on these matters, at the very least, and ultimately dismissal of these charges based upon prosecutorial misconduct. Unless Conner and Jones testified falsely, Killion and Fulton lied about the basis for their prosecution to Bailey, his lawyer, and this Court.

19. Respondent is entitled to a hearing on all of these issues, see Middlesex County Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982), and the complete dismissal of the prosecution in its entirety.

**The Court lacks jurisdiction due to the composition of the Board.**

20. Respondent further specifically reasserts as a jurisdictional matter the faulty composition of the Board, as set forth in the King's Bench petition. The acts of the Board in the present case were all taken by a Board not properly constituted under law, and are void and were void *ab initio*.

**The rules as written and as applied violate the First Amendment**

21. Respondent submits that the specific rules being applied to him, .i.e., rules cutting off his right to honest and objective judicial criticism are, as applied, and as written, the 1<sup>st</sup> Amendment and of in violation of his First Amendment rights to free expression, as well as the First Amendment rights of his clients. They are also in violation of Mr. Bailey's clients right of access to the courts, leaving them without recourse or remedy when they have legitimate complaints of judicial misconduct. The record of these proceedings show that there was validity to the complaining being done about the actions of certain judges, all made in an appropriate manner, and the

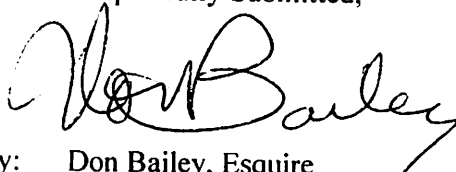
disciplinary rules are being used to completely cut off any and all rights to have such matters addressed.

**Cali must be recused.**

22. If this matter is sent back for further proceedings, those hearings cannot go forward under hearing Chairman Brian J. Cali, as the records reflects that he presided over a proceeding that was so lacking in procedural integrity and due process, and his unaddressed and undisclosed conflicts which precipitated a prehearing motion for recusal became an issue on the record. N.T. August 12, 2011, pp. 303. The motion for recusal was denied without a word of discussion, despite a reasonable basis for it, and respondent is entitled to have the matter addressed substantively, and, have Cali recused if this matter goes back for further proceedings, which respondent submits should not happen.

WHEREFORE, respondent requests an appropriate dismissing these matters in their entirety.

Respectfully Submitted,

A handwritten signature in black ink that reads "Don Bailey". The signature is written in a cursive, flowing style.

By: Don Bailey, Esquire  
Pa ID 23786  
4311 N. 6<sup>th</sup> Street  
Harrisburg, Pa 17110  
717-221-9500

**PROOF OF SERVICE**

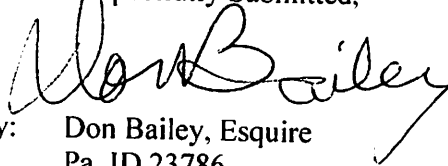
I, Don Bailey do hereby certify that I served upon Robert Fulton, Esquire on this 7th day of December, 2011, the foregoing Document upon the following attorney at the address listed below by First Class Mail.

Robert Fulton, Esq.  
16<sup>th</sup> Floor, Seven Penn Center  
1635 Market Street  
Philadelphia, Pa 19103

Elaine Bixler, Secretary of  
Supreme Court of Pennsylvania  
601 Commonwealth Avenue  
Harrisburg, Pa 17106

Chairman Brian Cali, Esquire  
103 E. Drinker Street  
Dunmore, Pa 18517

Respectfully Submitted,



By: Don Bailey, Esquire  
Pa. ID 23786  
4311 N. 6<sup>th</sup> Street  
Harrisburg, Pa 17110  
717-221-9500