IN THE SUPREME COURT OF THE STATE OF OREGON

IN RE:

COMPLAINT AS TO THE CONDUCT OF

FREDRIC SANAI, OSB #981372,

ACCUSED.

OREGON STATE BAR 13-100

S063514

APPEAL FROM OREGON STATE BAR TRIAL PANEL RULING,

SIMEON RAPOPORT, TRIAL PANEL CHAIRMAN

THE ACCUSED'S REPLY BRIEF

Filed by the Accused *pro se*.
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In Re: Complaint as to the Conduct of	Case No.: S 063514
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Summary of the Arguments

The grounds for rejecting imposition of reciprocal disbarment in Oregon are limited to the absence of due process in the other state's proceedings, or some other overriding reason. BR 3.5(c)(1)-(2). In this case, two of the three fundamental requirements of due process—an opportunity to be meaningfully heard, and an impartial tribunal—were absent. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

First Assignment of Error: the Accused was Denied Due Process of Law in Washington: the Denial of the Right to Confront Witnesses

The Bar's Answering Brief asserts there is no Confrontation Clause right to confront witnesses in a Bar proceeding, as that right only attaches to criminal cases. Ans. Brief 25.

There are two separate and procedurally distinct rights to confront witnesses. The first right is the "Confrontation Clause" applicable to criminal cases. There is

extensive authority finding that in quasi-criminal cases such as bar disciplinary matters, the Confrontation Clause does apply. As discussed in Plaintiff's Opening Brief, the states are divided on whether the Confrontation Clause applies here.

However, the US Supreme Court has found that the right to confront persons whose negative statements are entered into a state bar proceeding arises from a different source: 5th and 14th Amendment due process. The leading case is *Willner v. Committee on Character and Fitness*, 373 US 96 (1963). Willner cited to numerous state court decisions which find that the right to confront witnesses in civil cases arises from due process.

The Confrontation Clause and the due process right to confront witnesses operate differently in many situations and lead to different results. For example, as pointed out by the Bar, the Confrontation Clause applies only to testimonial conduct. The due process confrontation right is broader in this respect. The due process right to confrontation applies to non-testimonial communications as well, such as writings—in *Willner*, the evidence which the Accused had been deprived of a right to respond were written communications to the Bar.

Under the Confrontation Clause, a party can create the Confrontation Clause dilemma by engineering the non-availability of the witness. Thus in *Crawford v. Washington,* 541 U.S. 36 (2004), the criminal defendant objected to his wife being called as a witness at trial based on marital privilege, then asserted under the

Confrontation Clause that his wife's testimonial communication in a police investigation could not be used against him. Such conduct would not likely succeed under due process analysis, as due process rights can be waived.

In *Willner,* the United States Supreme Court cited for its position (that due process requires the right to cross-examine persons whose written statements are submitted against the Accused in a bar proceeding) a decision of this Court, *In re Crum,* 103 Or 296, 204 P 948 (1922). The Bar's cryptic response to the Accused's reliance on *Crum* is to state "that case is inapplicable because it was decided under Bar procedural rules that were much more akin to rules of a criminal trial than the BRs in effect in recent decades." Ans. Brief 25, fn. 9. However, *Crum* is not a decision interpreting the rules in existence back then. In *Crum*, this Court found that the right to confront witnesses was a separate, independent component of due process. But even if this Court chose to ignore *Crum,* the decision it helped spawn, *Willner,* continues to apply to this Court and indeed every Court and administrative agency handling attorney discipline.

The Bar, of course, does not address *Willner,* choosing to hope that this Court pretends that the decision does not exist. However, *Willner* is the law, and it applies to bar proceedings.

The Bar's last argument is a throw-away—that any exclusion of the right to confront witnesses was "harmless error." A "harmless error" analysis is employed

as to violation of some constitutional rights, but not others. If the violation of the rights is deemed "structural", such as the right to counsel or the right to an impartial tribunal, then harmless error analysis does not apply. *US v. Gonzalez Lopez,* 548 U.S. 140, 148-151, 126 S.Ct. 2557 (2006). Under the plain language of BR 3.5(c)(1), the Accused is only required to show a due process error occurred, not that such error was harmless. In fact, the re-weighing of evidence necessary for a harmless error analysis is barred by BR 3.5(b).

A harmless error review requires a painstaking evidentiary analysis of the evidence. Moreover, a harmless error review requires the reviewing Court to assume that on cross-examination, the Accused or defendant would have obtained the admission desired. A harmless error analysis, at the end of the day, is simply a requirement of showing that if the challenged testimony were completely excluded or discredited, the result would have been different—in other words, it requires the reviewing Court to reweigh the evidence.

This Court's review standards in a reciprocal proceeding do not permit a harmless error analysis. Under BR 3.5(b), this Court assumes the facts are true, and then places the burden on the Accused to show that the proceeding violated due process. Nothing in the rules requires a Accused to show that the result would have been different if the constitutional processes had been respected.

There are very strong grounds for this Court to reject a harmless error analysis in reciprocal bar proceedings. If this Court were to require a harmless error analysis, then the underlying trial would not be devoted to eliciting facts about the due process sufficiency about the foreign proceedings, but would also require creation of an evidentiary record of what the facts would have been absent the challenged evidence. Creating such a counter-factual record for consideration by this Court would facially violate BR 3.5(b) and consume the resources required for a full trial.

In addition, the terms of reference of this Court's order and the interpretation of the scope of the proceedings by the panel did not allow the creation of such a record. Accused certainly had no notice that he would have to create the record for a harmless error analysis, and there is no case law suggesting that such an analysis applies in reciprocal proceedings. If this Court were to find that a harmless error analysis is required, then on basic due process grounds it must remand the case for a new trial to allow Accused a fair opportunity to build the record to show that.

One of the last arguments raised by the Bar is to state that "[t]he correctness of judicial rulings in the post-dissolution litigation was irrelevant to whether the Accused's conduct violated Washington's ethics rules. Sanai 2013, 302 P3d at 876." This is false. Virtually every supposed ground for disbarring plaintiff was that his conduct was frivolous—however, if his conduct and legal arguments were

legally correct, then the entire basis for his disbarment was wrongful. The correctness of the underlying rulings was the entire case against the Accused, and with the exclusion of the judicial rulings and opinions, there was literally nothing to answer.

Second Assignment of Error: the Right to be Meaningfully Heard

The Accused was denied his due process right to be meaningfully heard by the Washington State Supreme Court when it denied his motion to file an overlength brief. This gravely prejudiced the Accused's case, as the Washington Supreme Court then found he had waived many of his arguments, and disbarred him because of it. It was *physically impossible* for the Accused to challenge the Washington hearings officer's 56 page Findings of Fact and Conclusions of Law (FFCL) in the scant 50 pages he was allowed in his brief, as Justice Sanders explains:

> "By decisional law, an appellant who contends that a finding of fact in an FFCL is wrongly decided must, to properly present the challenge, do the following in the opening brief:
> a. Identify the finding of fact in a section of the brief entitled "assignment of error".
> b. Provide a verbatim quotation of the challenged finding of fact.
> c. Explain why the factual finding was wrongly decided.
> d. Explain what the correct factual finding should have been.
> Any challenge to a finding of fact that does not follow this procedure is waived....
>
> I am also of the opinion that the due process refusal was prejudicial to Fredric Sanai. The 2013 opinion finds that Fredric waived many, if not most, of his factual and legal arguments. Fredric won his due process arguments in 2009 before the Supreme Court. His arguments from my review of the briefs

were not frivolous. **The refusal to allow Fredric adequate space to meet technical pleading requirements meets the test of a structural due process error.** See *Arizonav. Fulminante* 499 U.S. 279 (1991)..... Accordingly the application of a rule which prevents Fredric from submitting his factual challenges to the Washington State Supreme Court is, from a due process point of view, the same as a ruling which prevents a criminal defendant from making an argument to a jury. Fredric was not allowed to present his factual and legal contentions to the ultimate fact-finder and decision-maker, the Washington State Supreme Court." *Justice Richard Sanders declaration, found at Rec. 181-196, and Opening Brief Appendix A. (bold emphasis supplied).*

The Trial Panel admitted the "Bar offers no evidence to dispute this conclusion, and simply argues, in substance, that exercise of the court's discretion to deny the motion was not a denial of due process." Opinion 10. The Bar's Answering Brief agrees it was not a violation, without explaining how the Accused could possibly have accomplished this impossible task. Ans. Brief 29.

The Bar Trial Panel did reject the evidence put forward by Justice Sanders with its own reading of the Supreme Court's opinion. The problem is that the opinion clearly states, as Justice Sanders said it did: "Fredric, however, did not preserve this claim for review for the vast majority of the admitted orders and rulings." 302 P.3d at 873. There is no substantial evidence whatsoever supporting the Trial Panel's conclusion that the denial of the extra space made it impossible for the Accused to fully set out all his assignments of error and arguments. Indeed, the indisputable evidence shows the opposite.

Third Assignment of Error: The Right to an Impartial Tribunal

In the Answering Brief, the Bar asserts that "prior review by the same judicial body does not impair the impartiality of the tribunal" and cites *State v. Belgarde* 119 Wn.2d 711, 837 P2d 599 (1992) in support. Ans. Brief 29-30. *Belgarde* is easily distinguished and wholly irrelevant.

First, *Belgarde* is a decision of the Washington State Supreme Court, the very same Court that rejected the argument made by the Accused. It is no independent authority on the decision of the Washington State Supreme Court justices at issue. Second, *Belgarde* is not a decision involving due process or lack of impartiality. *Belgarde* addresses a statutory right to recuse *one* trial court judge without cause. Such one-shot without-cause recusal statutes are a feature of several states' statutory law. *See, e.g.* Cal. Code Civ. Proc. §170.6. This is made clear in *Belgarde* itself:

> The issue he raises is one of first impression: when a judgment of a trial court is reversed on appeal and remanded for a new trial, is a party to the original trial entitled to disqualify the judge that presided over the first trial without cause? Based on the discussion that follows, we hold such a party may not disqualify the original trial judge from presiding over the retrial without cause.
>
> RCW 4.12.040 provides in part that no judge "shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney ...". RCW 4.12.040(1). Under RCW 4.12.050, any party or attorney may establish the requisite prejudice by filing a motion and an

> affidavit alleging the judge is prejudiced against him. See RCW 4.12.050.[2] This statutory timeliness requirement bars a change of judge without cause when, prior to a party's motion for a change of judge, the judge selected to preside over trial (1) has made a discretionary ruling after the party moving for disqualification has become a party to the action and (2) the ruling is one of which the party moving for a change of judge has been given adequate notice. RCW 4.12.050; *Marine Power & Equip. Co. v. Department of Transp.,* 102 Wn.2d 457, 460-61, 687 P.2d 202 (1984). If a party complies with the statutory provisions, prejudice is deemed established, and the judge no longer has authority to proceed further into the merits of the case.
>
> *Belgarde*, 837 P.2d at 603.

The restrictions on recusal addressed by the Bar are irrelevant, as they only apply to Washington State trial court judges, and do not require any kind of factual showing.

The standard for determining whether a judge must be disqualified under Constitutional *Caperton* analysis is whether the publicly known facts demonstrate a constitutionally intolerable probability of bias:

> the United State Supreme Court's due process case law focuses on actual bias. This does not mean that actual bias must be proven to establish a due process violation. Rather, consistent with its concern that due process guarantees an impartial adjudicator, the court has focused on those circumstances where, even if actual bias is not demonstrated, the probability of bias on the part of a judge is so great as to become " 'constitutionally intolerable.' " (Caperton v. A.T. Massey Coal Co., Inc., supra, --- U.S. at p. ----, 129 S.Ct. at p. 2262 (Caperton)). The standard is an objective one.
>
> *People v. Freeman,* 47 Cal.4th 993 (2010).

The Washington Supreme Court violated the Accused's due process right to a fair and impartial tribunal by allowing Justices who had pre-judged the case (in 2009, and signed the dissent) to hear the 2013 appeal even though the Accused repeatedly requested their recusal. As described by Justice Sanders:

> "In the 2009 opinion, four justices, in a dissent signed by Justice Chambers, contended that Fredric should not be granted a new trial because the underlying evidence presented to the hearing officer without Fredric's participation demonstrated that he should be disbarred....
>
> Washington State law follows United States Supreme Court precedent in holding that the transmission and consideration of ex parte information to a tribunal is a due process violation if it is considered by the tribunal. *In re Pers. Restraint of Boone*, 103 Wn.2d 224,234-35 (1984). If such information was considered by the tribunal, then the tribunal is required to recuse....
>
> *Sanders Decl.*, Rec 188, 192

The participation of Justice Chambers in the review and analysis of the record and the participation of Justices Fairhurst and Johnson in the ultimate decision would cause any objective observer to believe that there is a probability of bias meeting the *Caperton* threshold.

On February 29, 2016, the United States Supreme Court heard *Terrance Williams v. Commonwealth of Pennsylvania*, docket no. 15-5040, which will establish new binding precedent as to the application of the *Caperton* principles to a state Supreme Court justice who has prejudged the case.

In that case, Petitioner Terrance Williams was convicted of murder. In a subsequent appeal of this conviction, Pennsylvania Supreme Court Justice Ronald Castille ruled against Williams in a unanimous decision. Petitioner Williams argues Justice Castille should have recused himself from hearing Williams' post-conviction challenge as a member of the Pennsylvania Supreme Court because he had served as the local Philadelphia District Attorney at the time of the murder conviction and thus supervised the prosecution. The case focuses on a December 2014 Pennsylvania Supreme Court ruling that upheld Williams' conviction and sentence. Justice Castille had denied a recusal motion filed by Williams and was in the majority in the unanimous decision. The Petitioner is arguing that Justice Castille had already decided on Williams' guilt, back when he was the Philadelphia District Attorney, and thus should have recused himself from hearing the appeal. In addition, the grounds for seeking relief was a *Brady* violation by the prosecutors. The Petitioner is furthering arguing that the presence of even a **single** biased judge on a panel taints the entire tribunal, so it is immaterial that the decision denying Williams' appeal was unanimous.

Supreme Court commentators seem united in anticipating the US Supreme Court will decide the case in Petitioner Williams' favor. *See, e.g.* Tom Sherman,

The Associated Press, "U.S. Supreme Court Appears Likely to Side with Death-Row Inmate in Pennsylvania Judicial Bias Case," February 29, 2016.

It is widely acknowledged *Williams* is *the* major case that will establish the law of judicial bias and recusal for years to come. As a result of this importance, **eight** *amicus* briefs were filed in *Williams*, from organizations as diverse as the ACLU, the American Bar Association, the American Academy of Appellate Lawyers, and the Former Judges with Prosecutorial Experience.[1] Every one of these *amicus* briefs, without exception, support the Petitioner's position and argue he was denied the constitutional right to an impartial tribunal.

This is exactly the situation facing the Accused. Given the breadth and unanimity of the parties filing *amicus* briefs, it is clear the Accused's position is shared by legal experts across the nation. If the US Supreme Court rules in the Petitioner's favor in *Williams,* the decision will be binding on this Court and directly applicable to the Accused's case. Retired Washington State Supreme Court Justice Richard Sanders, who ruled in the majority for the Accused in 2009 and testified for the Accused in his Bar Trial Panel hearing, articulated the situation simply:

[1] List of *amici* taken from SCOTUSblog, http://www.scotusblog.com/case-files/cases/williams-v-pennsylvania/

> Fredric sought recusal of the four dissenting justices twice. Fredric argued that the four dissenting justices were actually biased against him. Fredric contended that the dissenting justices had prejudged his case through receipt of ex parte information, that is to say, the default trial record. There is no question that the four dissenting justices decided that Fredric should be disbarred based on the default trial; it is clearly articulated in the 2009 dissent... (*Sanders Declaration 11,* at Rec. 191)

Thus, these four Washington Justices had clearly previously decided the Accused should be disbarred in 2009, just as Pennsylvania Justice Castille had previously decided Williams was guilty, and they should have recused themselves in 2013 when the Accused timely requested they do so. Thus the Accused reserves the right to request additional briefing after the *Williams* decision is issued.

Fourth Assignment of Error: The Oregon Trial Panel Violated the Accused's Right to Counsel

This matter was heard before the Oregon State Bar Trial panel on February 2, 3, and 4, 2015. The Accused, under protest and after objecting, was forced to represent himself.

The Accused's attorney unexpectedly withdrew from the case on January 20, 2015, less than two weeks before the hearing. The Accused moved to briefly continue the hearing date to secure new counsel. This motion was denied. The Accused then moved to allow California attorney to represent Accused *pro hac vice.* This was also denied. A concerned friend engaged Portland attorney William Meyer who appeared at the hearing and stated he was willing to take Accused's case but needed a few days to prepare. This brief requested setover

(five days) was denied by the Trial Panel, even though it was well within the time limit required to being the Trial (before February 12) so Mr. Meyer said he had no choice but to decline. Thus the Accused was forced to represent himself at trial, under protest.

These denials to Accused's right to the counsel (Meyer, and/or violated the constitutional principles addressed by the United States Supreme Court in *United States v. Gonzalez Lopez,* 548 U.S. 140, 126 S.Ct. 2557 (2006) where the Court held that the right to defense counsel includes the right to have counsel *pro hac vice. Gonzolez-Lopez* involved a criminal trial. However, the same right to counsel of one's choice exists in non-criminal cases under the Fifth and Fourteenth Amendments. The Fifth Amendment's Due Process Clause guarantees civil litigants the right to retained counsel, which ordinarily includes the right to be represented by the counsel of their choice. *McCuin v. Tex. Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir.1983).

In its Answering brief, the Bar completely fails to mention or discuss *Gonzalez-Lopez,* and instead cites *Tahvili v. Washington Mutual Bank,* 224 Or App 96, 197 P3d 541 (2008) as support for the concept that "appearance as pro hac vice counsel is a privilege, not a right." Ans. Brief 34. *Tahvili* is completely distinguishable. In *Tahvili* out-of-state attorney had his *pro hac vice* status revoked

for good cause, and the attorney was associated with Oregon counsel who did not even bother to attend the trial, thus failing to "meaningfully participate" in the representation, as required by UTCR 3.170.

That is a wholly inapplicable comparison. There was no good cause to deny Accused *pro hac vice* admission of his attorney of choice, Here, out-of-state attorney sought admission, and UTCR 3.170(3) states:

> "The court or administrative body **shall** grant the application by order if the application satisfies the requirements of this rule, unless the court or administrative body determines for good cause shown that granting the application would not be in the best interest of the court or administrative body or the parties.

Here, there is no doubt that California attorney satisfied the requirements of UTCR 3.170. Nonetheless the Trial Panel denied Accused's motion. TR 154. The Trial Panel's reason for denying the motion, the vague and subjective "best interests of the parties," cannot trump the Accused's *Gonzalez-Lopez* right of assistance of counsel. TR 154.

Seventh Assignment of Error: the Improper Appointment of a Trial Panel Drawn from the Incorrect Pool of Panel Candidates

In its Answering Brief the Bar admits the Bar Trial Panel was appointed by the Region 4 chair, in violation of BR 3.5(g), and admits the trial pool candidates were drawn from Region 4. Ans. Brief 31-34. When this issue was first raised by the State Chair, the Accused timely objected. Rec. 1012. The Bar asserts this

"procedural error" did "not result in any prejudice to the Accused." Ans. Brief. 31. The error in the Bar's argument is simple: the improper appointment of the panel was *structural error*. In *In Re Hendrick,* 346 Ore. 98, 208 P.3d 488 (2009), the Oregon Supreme Court held that **no prejudice need be shown** (*i.e.* it is structural error) and ordered that the lawyer be given a new hearing:

> "As to that issue, we think that the party's right to a second trial before a different judge follows from the nature of the right itself. And, if the trial panel was not properly constituted, there is no way to know whether a properly constituted trial panel would have created the same record, made the same rulings, or construed the evidence in the same way, much less reached the same conclusions that this one did." *Hendrick*, at 107.

Hendrick makes clear that improper appointment of a trial panel automatically requires a new hearing. That is the relief Accused is requesting here.

CONCLUSION

For these reasons, the Accused respectfully requests the Oregon Supreme Court order the Bar complaint dismissed with no discipline imposed, or discipline less than disbarment. In the alternative, the Accused respectfully requests this Court order a new Trial Panel hearing before a properly chosen and appointed Trial Panel.

Dated this 16th day of March, 2016.

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Certificate of Filing and Service

I, Accused Fredric Sanai, hereby state I e-filed and e-served this Reply Brief with the State Trial Court Administrator via the Oregon Supreme Court's electronic filing system, and further e-served copies and mailed true paper copies via US mail to Oregon State Bar Counsel and Disciplinary Board Clerk at these addresses:

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