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COURT OF JUDICIAL DISCIPLINE
OF PENNSYLVANIA

April 15, 2019

David J. Barton, President Judge
Court of Judicial Discipline
Pennsylvania Judicial Center
601 Commonwealth Avenue
Suite 5500
P.O. Box 62595
Harrisburg, PA 17106-2595

Re: In re Michael Lowry, 6 JD 2015: Request for Reconsideration of Motion to Defer Proceedings and Letter Brief on the Merits with a Request for a Hearing

Dear Judge Barton,

Kindly be reminded that I, Michael Lowry, am proceeding *pro se* in this matter. Please accept this Letter as my Brief on the Merits as well as my request for a hearing in this matter (*see* Section III). Additionally, I am humbly asking this Court to reconsider its denial of my request to defer pending conclusion of the matter in the United States Supreme Court (*see* Section II).

I. Factual and Procedural History[1]

On January 29, 2013, a Grand Jury charged Lowry, along with five other Philadelphia Lowry, a Magisterial District Court judge, an employee of the traffic court, and two businessmen in a single indictment in connection with alleged "ticket fixing" in the Philadelphia Traffic Court. Lowry was charged with conspiracy to commit mail and wire fraud (18 U.S.C. 1349), five counts of wire fraud (18 U.S.C. 1343), and one count of making a false declaration (18 U.S.C. 1623). Although the Supreme Court initially suspended Lowry without pay on February 1, 2013, this Court suspended him with pay on October 25, 2013. *See In re Lowry*, 78 A.3d 1276 (Ct. Jud. Disc. 2013). After a 28-day trial, Lowry was acquitted of conspiracy and the wire fraud counts,

[1] I will refer to myself as "Lowry" for the remainder of this letter.

but he was convicted of making a false declaration before the grand jury. On January 14, 2015, Lowry was sentenced to twenty months imprisonment, which he has fully served.

On April 14, 2015, the Judicial Conduct Board ("the Board") filed a complaint against Lowry, alleging two counts alleging conduct in violation of Article V, § 18(d)(1) of the Pennsylvania Constitution. Count One alleges that Lowry's conviction in violation of 18 U.S.C. § 1623 violates Article V, § 18(d)(1) because the offense is classified as a felony under federal law. Count Two alleges that Lowry's conviction, and the conduct underlying it, "brings the judicial office into disrepute" in violation of the same section. After the complaint was filed, this Court postponed proceedings pending the conclusion of Lowry's direct appeal. On January 18, 2019, the Third Circuit Court of Appeals issued a final amended opinion affirming the convictions of Lowry and his co-Appellants. Currently the matter is pending before the United States Supreme Court, with the Petition for Writ of Certiorari due on May 18, 2019. *See Henry Alfano et al. v. United States*, No. 18A1048 (Docketed April 10, 2019).

On March 15, 2019, this Court denied Lowry's request for an additional deferral of this matter and ordered the parties to file their respective briefs by April 2, 2019. Following two extension requests to file the merits brief, this Court ultimately extended the deadline to April 15, 2019. Lowry is proceeding *pro se* in this matter.

II. Lowry's Request for Reconsideration of the Denial of His Motion to Defer Proceedings

Lowry submits that his conviction has not "achieved the requisite finality to warrant the imposition of discipline by this Court" because he (along with several co-Petitioners) are filing a Petition for a Writ of Certiorari, which is due on May 18, 2019. *Cf. In re Joyce*, 26 A.3d 577, 580 (Ct. Jud. Disc. 2011) (convictions final where time period for appealing to the Supreme

Court expired). Lowry's (and his co-Petitioners') Motion to Extend (Exhibit "A") previews the important questions of federal statutory law that Lowry and his co-Petitioners will argue in their Petition/s.

First, Lowry was gravely prejudiced by the spillover effect of evidence relating to the conspiracy and fraud counts. As this Court pointed out in *In re Lowry*, 78 A.3d 1276 (Ct. Jud. Disc. 2013), the government's theory that the City and Commonwealth had a "property right" in the fines and costs associated with unadjudicated traffic tickets was a "frivolous" theory. *See In re Lowry*, 78 A.3d at 1285-86, n.11. Although Lowry was acquitted of the fraud counts, the jury heard voluminous evidence over a two-month period involving other defendants and uncharged "co-conspirators" unrelated to his alleged false statement, resulting in a prejudicial spillover effect. *See* Exhibit A.

Second, Lowry's conviction is based on a fundamentally ambiguous question and answer and the Third Circuit did not properly apply Supreme Court precedent. *See* Exhibit A. An example of the ambiguity of the exchange is demonstrated in this Court's opinion in *In re Lowry*, 78 A.3d 1276 (Ct. Jud. Disc. 2013). This Court rationally concluded that the charged question posed to Lowry in the grand jury appeared to be limited "by the Indictment itself", i.e. only those "four adjudications specified in the Indictment." *Id.* at 1287. However, the government's theory at trial was much broader than those specific tickets and the Third Circuit's opinion affirming Lowry's conviction did not even mention specific citations. The Third Circuit's reasoning in affirming Lowry's conviction gravely contradicts Supreme Court precedent because it put the burden on the witness to clarify the scope and meaning of "special favors" at the time it was asked.

Based on the above, Lowry respectfully requests this Court to stay proceedings until the Supreme Court rules on the Petition for a Writ of Certiorari.

III. Arguments in Response to Complaint and Lowry's Request for a Hearing

A. Lowry's conviction under 18 U.S.C. 1623 should not be a *per se* basis for discipline.

The Board alleges that Lowry violated Article V, § 18(d)(1) by virtue of his conviction under 18 U.S.C. § 1623. The complaint specifically cites to the following phrase: "a justice, judge, or justice of the peace may be suspended, removed from office or otherwise disciplined for conviction of a felony." *See* JCB Complaint, at 6. Lowry respectfully requests the Court to reject Congress' classification of 18 U.S.C. §1623 as a felony, for purposes of the Pennsylvania Constitution, and find that his conviction is not a "per se basis for discipline."

Lowry was not convicted of the federal perjury statute, which is a violation of 18 U.S.C. § 1621. Rather, he was convicted of making a false declaration under 18 U.S.C. § 1623. Congress passed § 1623 in order to "facilitate Federal perjury prosecutions" by reducing the mens rea requirement, requiring only that the accused "knowingly" made a false declaration, as opposed to "willfully" which is required under section 1621. *See United States v. Gross*, 511 F.2d 910, 914-15 (3d Cir. 1975); *United States v. Sherman*, 150 F.3d 306, 311 (3d Cir. 1998). The Pennsylvania Commonwealth Court has drawn the same distinction between 18 U.S.C. 1623 and the federal and Pennsylvania perjury statutes. *See Roche v. State Employees' Retirement Bd.*, 731 A.2d 640 (Pa. Commonwealth Ct. 1999). Additionally, unlike the federal perjury statute (18 U.S.C. § 1621) and the Pennsylvania perjury statute (18 Pa.C.S. § 4902(a)), the federal government is not required to follow the "two-witness rule" to prove a violation under 18

U.S.C.1623. *See Gross*, at 511 F.2d at 915-16. In other words, the government may prove falsity of a statement under § 1623 with the uncorroborated testimony of one witness.

By contrast, the Pennsylvania statutes that criminalize "knowingly" making a false statement are graded as *misdemeanors*, not felonies. *See, e.g.*, 18 Pa.C.S.A. § 4903 (making a false statement under oath when the accused does not believe the statement to be true); 18 Pa.C.S.A. § 4904 (making a false statement the accused does not believe to be true with the intent to mislead a public servant); 18 Pa.C.S.A. § 4906 (knowingly gives false information to law enforcement with the intent to implicate); 18 Pa.C.S.A. § 4906.1 (intentionally or knowingly makes a false report of child abuse). The Pennsylvania General Assembly clearly intended offenses involving knowing false statements to be graded as misdemeanors unless the statutes require an enhanced mens rea. *See, e.g.*, 18 Pa.C.S.A. § 4911 (tampering with public records is graded as a misdemeanor "unless the intent of the actor is to defraud or injure anyone, in which case the offense is a felony of the third degree").

Based on the above, Lowry requests this Court to reject the federal classification of 18 U.S.C. § 1623 as a felony for purposes of the Pennsylvania Constitution and find that Lowry's conviction is comparable to a misdemeanor under Pennsylvania law, and therefore find that his conviction is not a per se basis for discipline.

B. Lowry's conduct did not bring the judicial office into disrepute.

The Board alleges that Lowry's conviction, and the underlying conduct, "brought the judicial office into disrepute" in violation of Art. V, § 18(d)(1). *See* JCB Complaint, at 6. The Board has the burden to prove this charge (as well as the first charge) "by clear and convincing evidence." *See* Pa. Const. Art. V., § 18(b)(5). In particular, the Board "must make a persuasive showing that

(1) the judicial officer has engaged in conduct which is so extreme that (2) it has resulted in bringing the judicial office into disrepute." *In re Smith*, 687 A.2d 1229 (1996). This inquiry "must be made on a case by case basis." *In re Cicchetti*, 697 A.2d 297, 312 (Pa. Ct. Jud. Disc. 1997).

The complaint appears to rely on the Indictment to support Count Two. The indictment alleged that Lowry "fixed" seven tickets issued to four ticket holders—one ticket issued to Diandra Salvatore; one ticket issued to Richard Holmes; four tickets issued to Camden Iron & Steel; and one ticket issued to Natisha Mathis. As this Court correctly noted in *In re Lowry*, 78 A.3d 1276 (2013), nothing in the indictment suggested "that those adjudications provided anything less than perfect justice." *In re Lowry*, 78 A.3d 1276, 1286-87 (2013). This Court also correctly noted that the indictment did not allege "that anyone spoke to Lowry about these four citations nor any allegation that he was asked by anyone to enter an adjudication of not guilty irrespective of the facts of the case." *Id.* at 1278.

Indeed, evidence at trial demonstrated that the adjudications were just, and the government did not offer a single piece of evidence that anyone spoke to Lowry about these citations, that anyone asked him to adjudicate them favorably "irrespective of the facts" of each case, or that he adjudicated those tickets because of some request. In general, the trial evidence demonstrated that Lowry never made any promises to adjudicate tickets "favorably" nor did the evidence demonstrate that he asked other judges to adjudicate tickets favorable irrespective of the facts of particular cases. Unlike Respondents in cases with similar allegations of ticket fixing, the Board cannot demonstrate by clear and convincing evidence that Lowry brought the judicial office into disrepute. *Cf. In re Joyce* (telephoned justices and employees of the court to influence pending traffic cases); *In re Terrick*, 712 A.2d 834 (1998) (same); *In re Trkula*, 699 A.2d 3

(Pa.Ct.Jud.Disc.1997) (called employee of the appellate court ex parte, asking court to impose a harsher sentence on defendant); *In re Ballentine*, 86 A.3d 958 (2013) (administratively dismissed three citations which had been issued to her); *In re Zupsic*, 893 A.2d 875 (Pa. Ct. Jud. Disc. 2005) (contacted state trooper several times to persuade him to drop or lower criminal charges against a defendant).

Based on the forgoing, Lowry respectfully requests this Honorable Court to discharge Counts One and Two. Additionally, Lowry respectfully requests a hearing in this matter. Alternatively, he requests the chance to submit documentation (for example, testimony from the trial) and supplemental argument if the Court declines to grant his request for a hearing.

Respectfully,

/s/ Michael Lowry
Michael Lowry

CC:
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Judicial Conduct Board
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EXHIBIT A

No. 18A

IN THE SUPREME COURT OF THE UNITED STATES

HENRY P. ALFANO, WILLIAM HIRD, MICHAEL LOWRY, ROBERT MULGREW and THOMASINE TYNES, Petitioners,

v.

UNITED STATES, Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION OR PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE SAMUEL A. ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Pursuant to this Court's Rules 13.5 and 30.2, applicant-petitioners Henry P. Alfano, William Hird, Michael Lowry, Robert Mulgrew, and Thomasine Tynes jointly pray for a 45-day extension of time to file their petition or petitions for a writ of certiorari in this Court to and including June 3, 2019 (as the 45th day, June 2, will be a Sunday).

1. Timeliness and Jurisdiction. On January 18, 2019, the United States Court of Appeals for the Third Circuit filed its amended opinion and judgment affirming the applicants' convictions. Appx. A. This opinion superseded an earlier-filed opinion, *see* 901 F.3d 196 (August 21, 2018, since withdrawn), following the granting, in part, of petitions for rehearing by certain of the applicants. On February 7, 2019, the Court of Appeals denied motions for leave to file further rehearing petitions. As a

result, pursuant to this Court's Rules 13.1 and 13.3, a petition for certiorari by any of the applicants would be due on or before April 18, 2019. This application is being filed at least ten days before that date. See Rule 30.2. The jurisdiction of this Court is to be invoked under 28 U.S.C. § 1254(1).

2. Opinions Below. The Third Circuit's precedential opinion (per Nygaard, J., with Greenaway & Fisher, JJ.), filed January 18, 2019, is attached as Appendix A. It is published at 913 F.3d 332, *sub nom. United States v. Hird*. The United States District Court for the Eastern District of Pennsylvania (Kelly, J.) wrote a memorandum opinion, filed July 1, 2013, *sub nom. United States v. Sullivan*, addressing the applicants' pretrial motion to dismiss the mail and wire fraud counts. That opinion is not published in the Federal Supplement but is available at 2013 WL 3305217; a copy is attached as Appx. B. The orders granting in part applicant Mulgrew's and Tynes's petitions for rehearing of the Court of Appeals' initial (since withdrawn) opinion (901 F.3d 196), filed concurrently with the amended opinion, are available at 913 F.3d 392 and 913 F.3d 393, respectively.

3. Reasons for Granting the Extension.

a. Applicants Lowry, Mulgrew and Tynes were judges of the Philadelphia Traffic Court. Applicant Hird was the Administrator of that since-disbanded court. Applicant Alfano was a private citizen who owned a towing company and had a friendly relationship with another Traffic Court judge. All were accused (along with several others) of engaging in a scheme to "fix" tickets that were within the jurisdiction of the Traffic Court for adjudication. Hird and Alfano pleaded guilty,

reserving their right to challenge on appeal the denial of the defendants' joint motion to dismiss the fraud counts. The other defendants stood trial before Judge Stengel (E.D.Pa.) and a jury. After some eight weeks of trial, all defendants were acquitted of all charges alleging the existence or execution of a scheme to defraud, as well as the related conspiracy, *see* 18 U.S.C. §§ 1341, 1343, 1349, but the defendants who were charged with perjury or making false statements (including Lowry, Mulgrew and Tynes) were convicted on those counts. In particular, applicants Mulgrew and Lowry were each convicted on one count of false declarations (perjury) before the grand jury, 18 U.S.C. § 1623; applicant Tynes was convicted on two such counts.

b. Alfano was sentenced to probation; each of the other applicants received a sentence of imprisonment, which they have since fully served, although they remain on supervised release.

c. On appeal, applicants Hird and Alfano pursued their preserved challenges to the legal validity of the mail and wire fraud (and related conspiracy) counts under this Court's decisions in *McNally v. United States*, 483 U.S. 350 (1987), and its progeny, including *Cleveland v. United States*, 531 U.S. 12 (2000). In the same consolidated appeal, applicants Lowry, Tynes and Mulgrew challenged the sufficiency of the evidence to establish perjury based on any of their charged responses, relying on this Court's decision in *Bronston v. United States*, 409 U.S. 352 (1973). They also argued that they were gravely prejudiced at trial by the spillover effect of a two-month trial focused almost exclusively on the government's failed attempt to prove the charged fraud scheme, which should have been dismissed on legal grounds

before trial. In a precedential opinion, the Third Circuit rejected those arguments and affirmed. Appx. A.

d. In undersigned counsel's professional opinion, these cases present two important questions of federal statutory law, concerning the proper interpretation and application of this Court's cases. Counsel anticipates that the applicants' petition or petitions will present at least the following questions:

> 1. Does the potential for collection of fines and costs which may become due to the state from unadjudicated traffic tickets, on which there has yet been no finding of guilt, constitute "property" which may be the object of a scheme to defraud under the mail- and wire-fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1349?
>
> 2. In *Bronston v. United States*, 409 U.S. 352 (1973), this Court declared that that "the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner – so long as the witness speaks the literal truth. The burden is on the questioner," emphasizing that "[p]recise questioning is imperative as a predicate for the offense of perjury." In this light:
>
> Can responses to fundamentally ambiguous questions – or literally truthful answers to unambiguous questions – constitute "false declarations" under 18 U.S.C. § 1623, on the basis that (a) forbidden imprecision in questioning is limited to "glaring instances of vagueness or double-speak ... that ... would mislead or confuse a witness"; or that (b) the grand jury witnesses should have understood, from the "thrust" of the line of questions, that the prosecutors meant something other than what they actually asked.

f. Following the Third Circuit's affirmance on rehearing of the applicants' convictions, undersigned counsel promptly advised their clients of their right to petition this Court, and of the attendant deadline. By pooling resources and cooperating, the defendants eventually agreed they could manage – and wished – to pursue their appeals in this Court. Each of the undersigned counsel has been paid either no fee or a substantially reduced fee to file a joint petition for their clients.

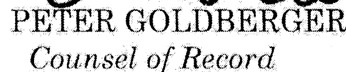
g. Undersigned counsel for Mulgrew is acting as lead counsel for the applicants. His two-lawyer practice, which focuses on federal criminal appeals, has filed six opening briefs, two reply briefs, and two amicus briefs in the last two months. Counsel for the other applicants have similarly busy schedules of trials and appeals; for example, counsel for Alfano is commencing a jury trial out of town today, which is expected to last up to four weeks. Counsel would not be able to prepare a proper petition or petitions for certiorari in the two weeks remaining before the petition would be due, in light of other pre-existing obligations and deadlines. As a result of these circumstances, counsel cannot manage to file the petition or petitions in these cases by the original April 18, 2019, due date and still satisfy their own or this Court's high standards.

h. The applicants have fully served their terms of incarceration arising out of the convictions at issue here. They do not seek delay for any tactical reason. For the same reason, the government would not be prejudiced by the requested extension.

WHEREFORE, the Applicant-Petitioners pray that the Circuit Justice enter an Order extending the time within which they may petition this Court for certiorari by 45 days, to and including June 3, 2019.

Dated: April 8, 2019

Respectfully submitted,



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