IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JERRY GIRLEY,

Respondent.

_____/

Supreme Court Case
No. SC22-860

The Florida Bar File Nos.
No. 2021-30,853(9B)

REPLY BRIEF OF JERRY GIRLEY
Appeal Seeking Review of Referee Report

BROOKE GIRLEY
The Girley Law Firm
117 East Marks Street, Ste A
Orlando, FL 32803
407) 540-9866 (phone)
(407) 540-9867 (fax)
brooke@thegirleylawfirm.com

JERRY GIRLEY
The Girley Law Firm
117 East Marks Street, St. A
Orlando, FL 32803
(407) 540-9866 (phone)
(407) 540-9867 (fax)
phyllis@thegirleylawfirm.com

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

SUMMARY OF ARGUMENTS IN REPLY

It is a troubling, and indeed dangerous world to live in when the warnings of a civil rights lawyer are seen as attempts to undermine the very system he hopes to improve. It is further chilling when that same lawyer draws upon his cases, experiences, and scholarship to undergird his concerns and is labeled unethical, misleading, and a liar simply because the Bar does not like the truth he speaks. Yet, if the Bar's prosecution is permitted, that is exactly the world this court will create. To speak metaphorically, the Bar is attempting to shoot the messenger.

As noted in his initial Brief, Respondent is a long-time civil rights advocate and scholar who regularly speaks out against systemic issues. What Respondent did in the summer of 2021 was no different than what he has always done. What was different is that the judge in the case, Kevin Weiss, filed a Bar complaint against the Respondent, and his daughter who was not a participant in the case, for speaking out as they always do. The judge later denied filing this Complaint, and the Bar and Referee called this about-face mere "semantics." This type of confusion and evolution has been part and

parcel of the prosecution against the Respondent. The Bar's Answer Brief is no different.

Despite how hard the Bar attempts in its Answer Brief to retreat from its prosecution of the Respondent based on his protected speech, the Bar cannot escape that reality. The gist of the Bar's argument amounts to nothing more than a violation of the Respondent's First Amendment Rights and Equal Protection.

The Bar tries to disguise it violation of the Respondent's First Amendment rights, by characterizing the his speech as impugning the integrity of the judge, the Fifth District, and a juror. The bar reaches this conclusion through gross mischaracterizations of the Respondent's words, the reworking of the Respondent's words that border on material misrepresentations, and implicitly denying the validity of his experience.

The Bar has labeled the uncomfortable truths he spoke as "misleading" because it calls attention to the troubling parts of our court system. In other words, the Bar simply does not like the content of the Respondent's speech because he has engaged in the core work of a civil rights attorney, which is to call out systemic injustice.

The Bar's effort to label that speech as impugning the integrity of the judiciary does not avoid this clear constitutional violation.

In short, the Bar has failed to substantiate the findings and recommendations of the Referee's report, and it has not rebutted the constitutional issues raised by the Respondent. Respondent now re-incorporates the positions in his Initial Brief and offers the following additional argument.

ARGUMENT

I. The Bar Is Attempting to Disguise Its Violation of Respondent's Constitutional Rights by Mischaracterizing His Comments as Untruthful.

A. The Bar Continues to Evolve Its Explanation Regarding Why It Prosecuted Respondent

In its Answer Brief the Bar retreats from the initial reason it gave for prosecuting the Respondent. Specifically, paragraph 12 of the Complaint states, "Respondent… suggested that the court system does not provide equal justice to all." (Rec. at 3).[1] The Referee in her report also concluded that, "[t]he overall message of Respondent's statements convey that the court system is unfair, biased and does not provide equal justice to everyone" (Rec. at 785; *See also*, Rec. at 790). Therefore, it is quite perplexing now that the Bar argues that

[1] Respondent made this same assertion when arguing before the probable cause hearing.

"this case has never been about whether Mr. Girley has an educated and informed opinion that racial bias exists," and that, "[t]he referee properly restricted Mr. Girley's efforts to expand this disciplinary proceeding into a discussion of equal justice rights throughout the country." (TFBA. at 46)[2]. The Bar's contradictory justifications for prosecuting the Respondent is deeply problematic.

The reason for the Bar's retreat may stem from the record evidence that clearly demonstrate the Respondent had a good faith basis for critiques of the system. Moreover, as the ACLU's brief highlights, prosecuting the Respondent for such critiques is a violation of his constitutional rights.

Unfortunately, instead of acknowledging this, the Bar has chosen to shift the theory of its case again and argues that it is prosecuting the Respondent because he "voiced statements as a broader message that African Americans should not put their trust in a 'sham' court system…[and] to use Judge Weiss's ruling as the latest example of this 'sham' court system." (TFBA at 21). In other words, they argue he accused the judge and the Fifth District of racial bias and corruption. (TFBA at 24).

[2] Citations to the Bar's Answer Brief: TFBA at #

Respondent vehemently denies accusing the judge or the Fifth District of racial bias or corruption, and as will be discussed below, the Respondent never mentioned the judge by name. More importantly, the Bar's shift in reasoning highlights the due process claims asserted in his Initial Brief. This is the first time the Respondent is being made aware that he accused the judge and the Fifth District of corruption and thievery. During his trial, he first learned of the specific comments the Bar found violated the rules because they refused to do so beforehand. The Bar has continued to present the Respondent with a case that is a moving target. He is left guessing. This shift also underscores his First Amendment claims as outlined further below.

B. The Bar Cannot Meet Its Initial Burden to Demonstrate That Respondent Violated the Rules.

The Bar acknowledges that a major hurdle in its prosecution of the Respondent is the fact that he never mentioned the judge's name. (*See* TFBA at 22, 23). As the Respondent argued in his Initial Brief, he did not mention the judge's name, but rather focused on larger systemic issues. This is significant, because the Bar cannot point to any explicit statements he made against the judge, but instead seeks to utilize the speech of others who are not Bar members.

Unfortunately for the Bar, it provided no precedent that allows a Bar member to be prosecuted for the free speech of others. More importantly, it is a dangerous slippery slope when a member of the Bar ties to be circumspect in his language but is nonetheless punished because others around him have chosen to exercise their free speech.

Not only does the Bar try to impute the words of others to the Respondent, but it also presents two weak reasons for finding that he made misleading statements. According to the Bar's Answer, the Respondent was misleading because: he insistent that the Dred Scott case had not been overturned by the US Supreme Court, and that procedural rules function as landmines. (TFBA at 35, 37). The Respondent must confess that the Bar's position here is truly baffling. *Dred Scott* has not been overturned by the US Supreme Court; this is a fact. Also, describing the procedural rules by using the metaphor of "landmines" is clearly his opinion based on his experiences and assessment. The US Supreme Court has expressly stated that lawyers are permitted to criticize the Court Rules. *In Re Sawyer*, 360 U.S. 622 (1959); *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). If the Bar is to be believed when it states that the Respondent is free

to critique the system, the use of the metaphor “landmines,” should fall within that purview. (See TFBA at 27).

However, what the Bar’s Answer demonstrates is that whenever the Respondent or his daughter critiqued the court system in a manner that did not cast the courts in the best light, the Bar labeled that speech as impugning the integrity of the judiciary. It did not matter if the statements were objectively true or based on experience. Every time the Respondent’s truthful statements pointed to flaws in the system, the Bar chose not to use that as an occasion to examine the system, but rather, it essentially chose to label the Respondent’s words as a lie.

This is demonstrated by the Bar’s discussion of the *Dred Scott* comment. Respondent’s accurate statement that *Dred Scott* has not been overturned by the US Supreme Court cannot be a basis for a misleading statement. That’s a fact. While the Bar may view Respondent’s focus on the lack of direct reversal by the Supreme Court as merely pedantry, it is not.

The reality is that *Dred Scott* continues surface in modern legal discourse.[3] That is why, for example, in 2016, Kansas solicitor general cited to that case when raising an anti-abortion claim.[4] The reference was later withdrawn after backlash. Also, the 90-year-old National Federation of Republican Assemblies (NFRA) cited the *Dred Scott* to argue that Vice President Kamala Harris cannot run for president per the Constitution of the United States.[5]

Thus, it is not pedantry nor is it misleading to note that this case has not been overturned considering that those who seek to undermine civil rights and civil liberties have recently inserted it into the public sphere as justification for their cause. At most, Respondent's comments about *Dred Scott* raises important political issues, which is precisely the type of speech protected by the First Amendment. The Bar's insistence on labeling it as misleading is

---

[3] "Will the U.S. Supreme Court ever get around to overruling the shame of Dred Scott?" available at < https://penncapital-star.com/commentary/we-dont-want-to-say-it-but-165-years-later-dred-scott-is-alive-and-well-michael-coard/>

[4] "Kansas cited the worst Supreme Court decision of all time to defend its anti-abortion law" available at < https://www.vox.com/identities/2016/10/19/13331320/kansas-abortion-dred-scott>

[5] "Republican Group Says Kamala Can't Be President Because This 170-Year-Old Supreme Court Decision Likens Her to a Slave." Available at < https://www.theroot.com/wait-republican-group-use-old-racist-law-to-label-kama-1851631264>; see also tweet of NFRA Document quoting *Dred Scott*. <https://x.com/ASFleischman/status/1827036555854409815>

nothing more than an attempt to foreclose the Respondent's free speech.

Without *Dred Scott* and the "landmines" metaphor, the Bar admits that it has not met the threshold to prosecute the Respondent for violations.

C. Respondent Never Made Statement Implying that the Judge and Fifth District were Corrupt and Racially Bias

The Respondent never said explicitly or implicitly that the judge and the Fifth District were corrupt and racially bias. This Court should take note of the fact that the Bar did not cite to portion of the record that contained such statements. Rather, he intentionally avoided mentioning the judge's name because he wanted to focus on the broader issues or racial bias in the system. His references like "cutting the money" and it making "financial sense" to uphold systemic racism, as he explained in his sworn statement, referred to the economic system as a whole, which include the courts. (Rec. at 537). The Bar now claims that Respondent is free to speak to racial bias in the system, but as stated above, that contradicts its overall arguments. (*See* TFBA at 30).

The reality is that when the Respondent spoke about how his experiences that highlighted these broader racial issues, like judges

reducing the award of damages for his clients, the Bar used those words as an indication that he was impugning the integrity of a particular judge and a particular appellate court. But this is the result of the Bar starting with a goal to limit the Respondent's speech, and stretching the evidence to fit that conclusion, rather than an objective reading of the evidence.

Had the Respondent said he's never had the judge's take away the money and that his experiences practicing civil rights have been easy, that would have been a lie and misleading. However, it is very doubtful the Bar would be seeking to prosecute him for such a misleading statement about the judiciary because it makes the judiciary look good. Therefore, the Bar's prosecution is not because the Respondent lied or was misleading; because that's objectively not true. Rather, it is because the Bar did not approve of how the Respondent's words made the court system appear in the public square. This is a very clear case of content restriction and such restriction is a violation of the Respondent's First Amendment right.

The same is true when the Bar interpreted the Respondent's accurate observation that all the judges on the Fifth District are White. the Bar read that as the Respondent calling the court racist. That is

incorrect. He said this to highlight the lack of diversity and implicit bias, which are important when dealing with complex issues of racial discrimination. (See Rec. 536-37). He underscores this by noting how courts are being proactive about this issue by offering training. *Id*. at 536.

How can the Respondent raise issues of racial bias within the system without mentioning the race of the players? As Justice Blackmun wrote in *Unv. Of Ca. v. Bakke*, “In order to get beyond racism, we must first take account of race. There is no other way.” 38 U.S. 265, 407 (1978). But we will never get past racism if we are afraid at the very mention of the word race.

II. Respondent is Not Time Barred from Raising His Religious Freedom and Equal Protection Claim

Respondent is not barred from Religious Freedom and Equal Protection Arguments. While courts generally will not consider an issue raised for the first time on appeal, this is not an absolute bar. As the court said in *Dean Witter Reynolds, Inc. v. Fernandez*, “This principle is not a jurisdictional limitation but merely a rule of practice, and "the decision whether to consider an argument first made on appeal . . . is 'left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.'" 741 F.2d

355, 360 (11th Cir. 1984)(quoting R*oofing & Sheet Metal Serv. v. La Quinta Motor Inns*, 689 F.2d 982, 989 (11th Cir.1982)).

The 11th Circuit has carved out five special circumstances when it will consider an issue first raised on appeal: “(1) when the issue "involves a pure question of law" and "refusal to consider it would result in a miscarriage of justice," (2) when "the appellant raises an objection to an order which he had no opportunity to raise at the [lower] court level," (3) when "the interest of substantial justice is at stake," (4) when "proper resolution is beyond any doubt," and (5) when the "issue presents significant questions of general impact or of great public concern." *Finnegan v. Comm'r*, 926 F.3d 1261, 1271-72; (11th Cir. 2019); *see also Cooper v. PHEAA*, 820 Fed.Appx. 861, 865 (11th Cir. 2020); *Hickman v. Fla. Dept. of Corr*, 2022 U.S. App. LEXIS 22733, *6 (11th Cir. 2022). Therefore, if the constitutional issue had not ripened before or falls within one of these exceptions, it may be raised for the first time on appeal.

Here, with respect to Respondent’s Equal Protection argument, special circumstances two, three, and five are undeniably present, and arguably number four. Respondent did not have a chance to raise at the hearing level because the comments were made four

months later. Also, Respondent's denial of equal protection causes an interest of substantial justice to be at stake and presents significant questions of general impact or of great public concern.

The Bar's contention that the politicians' comments are distinguishable because they had no financial incentive, and they were not a participant is without merit. (TFBA at 43-44). To begin, the Bar cites no case law that stands for that proposition that there must be a financial incentive for a Bar prosecution. Furthermore, the well-known politicians' comments are not divorced from personal incentive either.

The context of their comments is after the leader of their political party was convicted of thirty-four felonies. If their leader's conviction stands, it has the potential to disrupt their party's political power, which will in turn disrupt their power, both individually and collectively. Their comments, then, can be viewed as their attempt to hold on to personal political power.[6]

If the Bar believes the Republican lawyers can make their comments to millions of followers, then surely that protection must

[6] Respondent does not maintain that they do not have the right to make such comments. However, Respondent uses this rationale to highlight the double standard being enacted here.

also extend to the Respondent. Their harsh comments to their millions of followers and Fox News viewers that assailed against the system, prosecutors, and the government at large should not receive more protection than the Respondent's comments during a Facebook live interview and podcast.

If the fear is that the Respondent was spreading falsity to his congregation during his interviews, then surely that holds true when Senator Marco Rubio, for example, called a court proceeding a "sham" to his millions of followers, and liken the court to a communist show trial. Senator Rubio is a designated campaign surrogate for the Trump campaign. The Bar cannot deny the double standard. It can only try to avoid it. Such matters of national importance are ripe for review.

Likewise, the Respondent's Religious Freedom claims fit into the special circumstances outline by the 11th Circuit. Specifically, prosecuting the Respondent because he exercised his religious freedom indicate that substantial interest of justice are at stake. Moreover, such a prosecution presents significant questions of general impact or of great public concern.

The Bar further tries to undermine Respondent's religious freedom claim by asserting that his Black Love United (hereinafter BLU) conversation was not religious because he was not discussing the topic of marriages. This conclusion belies the facts. As noted in the Initial Brief, the conversation in question occurred during the pandemic, so most religious organizations met virtually. The program started with an opening hymn and prayer, and was hosted by two ministers.

More importantly, the danger of the Bar's argument is that it is attempting to proscribe the religious practices of the Respondent. This is an instantiation of the government, through the Bar, entering the religious sphere to regulate it and determine what is or is not religious. The Bar is simply not competent or permitted to do so. The Respondent appeared as Pastor Girley, as well as attorney Girley, while speaking to members of his congregation. That fact that this was online and not in church does not remove the religious nature of the conversation.

Furthermore, the Bar suggests that the use of the quote, "In the end this is only something God can…" was to point to the Respondent's critique of the Fifth District. (TFBA at 49). If this were

the case, then why include that line? The statement is undeniably a theological one and was offered within a religious context. The fact that it involves the political sphere does not make it less religious.

The Bar's argument appears to show a complete lack of understanding of the role religious institutions play in the black community, both historically and presently. We see this with figures like Dr. Martin Luther King, Jr. and Malcolm X, they were both religious leaders and political leaders. Black religious traditions that work from a social justice framework do not separate what one may call overtly religious content (e.g. sermons), from civic and political engagement. Therefore, the idea that because Respondent was discussing civic engagement and not marriages specifically, impermissibly attempts to limit the ways in which the Respondent is able to express his religious faith. (16; 49).Therefore, the Bar's prosecution of the Respondent is a violation of his religious freedom.

III. The Bar Failed to Refute Existing Precedent That Demonstrates a 30-Day Suspension Is Not Appropriate

The Bar's main argument is not that the Respondent did not present precedent indicating that a 30-day suspension is a great deviation from how the court traditionally handles such cases. Rather,

the Bar's main argument is that this court should deviate from precedent because it was strict in the *Jacobs* case, a case that is markedly different from this one. There, the respondent was the lawyer on record, filed documents with the court and engaged in conduct over the course of years.

Jacobs is not a case about two interviews, given in close temporal proximity, where the lawyer offered his opinion and analysis about the court system. The *Jacobs* case is inapposite, and is not enough for this Court to deviate from precedent.

On a final note, the Respondent is deeply concerned about the Bar's basis for the 30-day suspension. During its closing and in its Answer, the Bar maintains that this will protect the public from such behavior and deter others from engaging in similar conduct.

However, at the disciplinary hearing for both the Respondent and his daughter, there were numerous members of the public there in support. In April 2024, after the Respondent's public trial and the Referee's report, the Respondent received the Trail Blazer award from the Paul C. Perkins Bar Association, the local Bar Association. He was also appointed to Chair of the Orange County Civil Rights in

August 2024, and The Virgil Hawkins Bar Association has also filed a letter in support of the Respondent and his daughter.

In other words, the community stands with the Respondent and his daughter, and views the Bar's actions as an attempt to silence voices that speak up for marginalized communities. The Respondent is concerned about which members of the public is the Bar trying to protect? Every indication is that members of the Black and Brown community have expressed support for the Respondent.

What this prosecution says, then, is that if one speaks out against an injustice, especially one they believe their clients experiences, he or she may face baseless sanctions.

CONCLUSION

Wherefore, this court should not uphold the Referee's finding of guilty because there is a lack of record evidence to support guilt and a 30-day suspension, and the Bar's prosecution of the Respondent is unconstitutional.

Respectfully submitted,

/s/ Brooke Girley
Brooke Girley, Esq.
Florida Bar No: 85010
The Girley Law Firm, PA
117 E. Marks Street, Ste A
Orlando, FL 32803
Tel: (407) 540-9866

Respectfully submitted,

/s/ Jerry Girley
Jerry Girley, Esq.
Florida Bar No: 35771
The Girley Law Firm, PA
117 E. Marks Street, Ste A
Orlando, FL 32803
Tel: (407) 540-9866

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the Florida e-portal system on this the 11th day of September 2024 and that a copy was served via email upon Mark Lugo Mason mmason@floridabar.org, Ashley Taylor Morrison, Esq., Bar Counsel, amorrison@floridabar.org, Carrie Lee, Bar Counsel, clee@floridabar.org; and Patricia Ann Toro Savitz, Esq., Bar Counsel, The Florida Bar, psavitz@floridabar.org.

/s/ Brooke Girley
Brooke Girley, Esq.
Florida Bar No: 85010
The Girley Law Firm, PA
117 E. Marks Street, Ste A
Orlando, FL 32803
Tel: (407) 540-9866
Fax: (407) 540-9867

/s/Jerry Girley
Jerry Girley, Esq.
Florida Bar No: 35771
The Girley Law Firm, PA
117 E. Marks Street, Ste A
Orlando, FL 32803
Tel: (407) 540-9866
Fax: (407) 540-9867

CERTIFICATE OF COMPLIANCE WITH Fla. R. App. P. 9.210(a)(2)

I hereby certify that this brief complies with the type-volume limitation set forth in Florida Rules of Appellate Procedure 9.210(a)(2)(B) for a brief produced with a proportionally spaced font. This brief was prepared using Microsoft Word 2004 in Arial 14-point font. The length of this brief is 3609words.

/s/ Brooke Girley
Brooke Girley, Esq.
Florida Bar No: 85010
The Girley Law Firm, PA
117 E. Marks Street, Ste A
Orlando, FL 32803
Tel: (407) 540-9866
Fax: (407) 540-9867

/s/Jerry Girley
Jerry Girley, Esq.
Florida Bar No: 35771
The Girley Law Firm, PA
117 E. Marks Street, Ste A
Orlando, FL 32803
Tel: (407) 540-9866
Fax: (407) 540-9867