

BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed  
Oct 17 2018 02:16 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

NEVADA STATE BOARD OF )  
ARCHITECTURE, INTERIOR DESIGN )  
AND RESIDENTIAL DESIGN, )

Petitioner, )

vs. )

EIGHTH JUDICIAL DISTRICT COURT )  
OF THE STATE OF NEVADA, )  
DEPARTMENT 25, HONORABLE )  
KATHLEEN DELANEY, )

Respondent )

and )

DENNIS RUSK, )

Real Party in Interest. )

----- )

Case No. 76792

Eighth Jud'l District Court  
Case No. A-17-764562-J

PETITIONER'S SUPPLEMENTAL APPENDIX IN COMPLIANCE WITH  
ORDER DIRECTING ANSWER, DIRECTING SUPPLEMENTATION OF  
THE RECORD, AND GRANTING EMERGENCY MOTION FOR STAY

VOLUME 2

Petitioner Nevada State Board of Architecture, Interior Design and  
Residential Design, by and through its attorney Louis Ling, submits this

Supplemental Appendix in compliance with this Court's Order Directing Answer, Directing Supplementation of the Record, and Granting Emergency Motion for Stay issued October 12, 2018.

**TABLE OF CONTENTS FOR VOLUME 2**

CONTINUATION OF Appellant/Petitioners' Opposition to  
Motion to Dismiss (filed 1/29/18) ..... APPX75 - APPX124

Signed this 17<sup>th</sup> day of October, 2018.

*Louis Ling*

-----  
LOUIS LING  
Nevada Bar No. 3101  
933 Gear Street  
Reno, Nevada 89503  
T: (775) 233-9099

Attorney for Petitioner Nevada State Board  
of Architecture, Interior Design and  
Residential Design

**CERTIFICATE OF SERVICE**

I certify that I served on the below date a copy of the attached PETITIONER'S SUPPLEMENTAL APPENDIX IN COMPLIANCE WITH ORDER DIRECTING ANSWER, DIRECTING SUPPLEMENTATION OF THE RECORD, AND GRANTING EMERGENCY MOTION FOR STAY - VOLUME 2 filed herewith upon the following:

By U.S. Mail to the Respondent:

Judge Kathleen Delaney, Department 25  
Eighth Judicial District Court  
Regional Justice Center

200 Lewis Avenue  
Las Vegas, Nevada 89155

By the Court's e-filing and e-service system to the Real Party in Interest:

Robert Nersesian  
Nersesian & Sankiewicz  
528 S. Eighth Street  
Las Vegas, Nevada 89128

Counsel for Real Party in Interest Dennis Rusk

Dated this 17<sup>th</sup> day of October, 2018.

*Louis Ling*

---

LOUIS LING  
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T: (775) 233-9099

1 of note here, the relevant inquiry into the standard of care owed by Petitioner is that of the  
2 practice of an architect in the greater Las Vegas valley. See Shipley v. Williams, 350 S.W.3d  
3 527, 531 (Tenn. 2011) (Defining the locality applicable to assertions of professional malpractice  
4 under the locality rule as the “community” in which the action took place).

5       Apparently they were also irrelevant because the expert for the Board determined that  
6 there was no room for the structure guidelines defined in exhibit B because it did no more that  
7 allow for the construction of a “sculpture.” Record of Proceedings, vol. 4, p. 189. But exhibit B  
8 attached, shows that other jurisdictions proximate to the City of Las Vegas and within the area of  
9 practice of the architect being tried, clearly view a shell building meeting the requirements of  
10 exhibit B as something more than a sculpture. The cross examination off of this document in the  
11 manner of evident impeachment of Amor’s “sculpture” testimony, as well as the direct impact  
12 validating the standard of care met by Petitioner were both forwarded by admission, or at least  
13 allowable cross-examination, off of this document.  
14

15       But Ling said the document was irrelevant. Record of Proceedings, vol. 4, p. 174. And  
16 the Board listened to him. In light of the patent relevance, this argument by Ling violated NV  
17 ST RPC Rule 3.1, and deprived the Board and Petitioner of important information. Moreover,  
18 exhibit B, attached, is clearly developed under U.B.C. § 106.3.3 and § 104.11 which, as  
19 recognized in exhibit B, allows for phased construction. Ling, nonetheless, maintained that there  
20 was no such ability. See Record of Proceedings, Vol. 5, p. 128. The fact that exhibit B even  
21 exists clearly belies Ling’s contention, and in this sense is critical evidence of the propriety of  
22 Petitioner’s method of design and submission, an issue ultimately decided against Petitioner in  
23 the Decision.  
24  
25

26       In light of this, when Ling represented to the Board the specious claim of irrelevancy of  
27 Clark County Standards, he necessarily recognized the relevance and propriety of the submission  
28

1 of exhibit B, Record of Proceedings, vol. 2. In doing this, he violated his ethical obligation  
2 under NV ST RPC Rule 3.1. As he also made this representation to the Board, he misled his  
3 own client as to the law. And the fact that the Board was comprised of lay persons vis a vis legal  
4 matters, the Board necessarily looked to him for such answers to legal issues such as relevance.  
5 Thus, Ling's misstatement of the law, necessarily obvious to Ling as a misstatement, coupled  
6 with the Board's reliance on the misstatement, is all the more egregious. For a second  
7 independent reason premised on ethical misconduct of the prosecutor in this action, Petitioner's  
8 defense of the claims against him was severely prejudiced, and Petitioner was denied substantive  
9 due process.

#### 10 V. CONCLUSION

11 The entire definition of the American condition revolves around the sacrosanct and  
12 meticulous application of the rule of law and the protections provided by it. As noted by the  
13 authorities above, prosecutors working for the State hold great responsibilities to do justice and  
14 avoid injustice under this system. Their actions are circumscribed by both the Constitution and  
15 the rules of ethical conduct for attorneys. And above all, in the breach of these duties by a  
16 prosecutor, a conviction of person where the prosecutor violates these duties cannot stand.

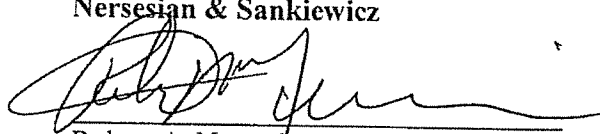
17 Here the prosecutor violated these duties, and did so repeatedly. He stated in court that  
18 exculpatory evidence did not exist while he is aware that it is in his possession. He constructed  
19 hired testimony by an expert for the state through omitting known and material facts from the  
20 experts review. He elicited testimony that he knew to be false. He failed to correct false  
21 evidence in the record when it came to his attention, and shouted all the louder that the false  
22 evidence was, in fact, true. And the very false evidence and lack of exculpatory evidence he  
23 created is then cited by the tribunal as a substantial and substantive body of proof upon which to  
24 convict the Petitioner. Before the Board is the very conviction that courts have repeatedly  
25 cautioned that cannot stand. The Decision, exhibit E, should be vacated or modified.

26 Petitioner's request is that the Petition be vacated in total, and considering the depth of  
27 the malfeasance by Ling, this entire matter be put at an end. Alternatively, as Petitioner has  
28 already gone years with his license suspended and an unjust monetary sanction remained

1 pending, that all sanctions and punishment be vacated, together with the findings on the Verge  
2 matter, with the injury to date being the sanction imposed. Lastly, the Board could vacate the  
3 Decision, and order a new hearing. If this is the decision, however, with the discovery of exhibit  
4 C it appears that this may, indeed, present an exercise in futility as Petitioner's conviction was  
5 clearly unwarranted under the true facts hidden by Ling.

6 Dated this 7<sup>th</sup> day of January, 2015.

7 **Nersesian & Sankiewicz**

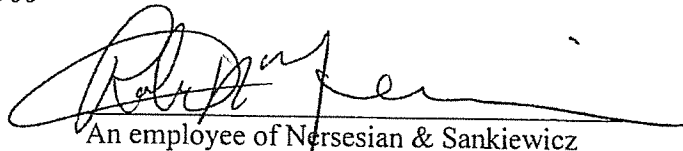
8 

9 Robert A. Nersesian  
10 Nev. Bar No. 2762  
11 528 S. 8<sup>th</sup> St.  
12 Las Vegas, NV 89101  
13 (702) 385-5454  
14 (702) 385-7667 (fax)  
15 vegaslegal@aol.com

16 **CERTIFICATE OF SERVICE**

17 I hereby certify that on the 7<sup>th</sup> day of January, 2016, the original hereof was hand  
18 delivered to the Nevada State Board of Architecture, et al, 2080 E. Flamingo Road, Suite 120,  
19 Las Vegas, NV 89119, together with a copy of the Record of Proceedings, for filing, and a copy  
20 of the same, absent the Record of Proceedings, also being hand delivered to:

21 Sophia G. Long  
22 Nev. Dep. Atty. General  
23 555 E. Washington Ave., # 3900  
24 Las Vegas, NV 89101

25   
26 An employee of Nersesian & Sankiewicz  
27  
28

# EXHIBIT 3

# EXHIBIT 3

BEFORE THE NEVADA STATE BOARD OF  
ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN

Monica Harrison, Executive Director )  
NEVADA STATE BOARD OF )  
ARCHITECTURE, INTERIOR DESIGN )  
AND RESIDENTIAL DESIGN )

Case No. 08-080R and  
11-019R

Complainant,

v.

DENNIS EUGENE RUSK,  
Registered Architect Number 1309  
Dennis E. Rusk, Architect LLC

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING  
PETITION/MOTION OF DENNIS EUGENE RUSK REQUESTING THAT THE FINAL  
DECISION OF THE BOARD BE VACATED OR MODIFIED, BROUGHT IN THE NATURE  
OF A PETITION FOR WRIT OF CORAM NOBIS OR OTHER RELIEF TO SET ASIDE  
ORDER OF DISCIPLINE OR ALTERNATIVELY, REMIT DISCIPLINE, AND  
REQUEST/MOTION FOR APPOINTMENT OF INDEPENDENT COUNSEL AND MOTION  
TO LIFT STAY OF PETITIONER/MOTION REQUESTING THAT THE FINAL DECISION OF  
THE BOARD BE VACATED OR MODIFIED, ETC., AND REQUEST FOR AN EVIDENTIARY  
HEARING

INTRODUCTION

The above-captioned matter having come before the Nevada State Board of Architecture, Interior Design and Residential Design ("Board") during a regular agenda on January 11, 2016, Robert Nersesian, Esq. appeared on behalf of Petitioner, Dennis Risk, who was also present; Louis Ling, Esq. appeared on behalf of the Board; and Sophia Long, Esq., Deputy Attorney General with the Nevada Attorney General's Office, appeared as Board Counsel for the Board. The parties having submitted briefs in the matter, the Board, having reviewed the papers and pleadings on file herein, and pursuant to the provisions of Chapter 623 of the Nevada Revised Statutes ("NRS") and Chapter 623 of the Nevada Administrative Code ("NAC") and Chapter 622A of the Nevada Revised Statutes, hereby makes the following findings of fact, conclusions of law, and order.



FINDINGS OF FACT

A. Background

1. Petitioner Dennis Rusk ("Rusk") was a licensed Architect in the State of Nevada, Registered Architect Number 1309.
2. On August 16 and September 11, 2011, the Board held a hearing on the Complaints (08-080R and 11-019R) against Rusk. The hearing resulted in disciplinary action against Rusk and the Board issued its final Order on September 27, 2011.
3. Subsequently, Rusk appealed this matter to the Clark County District Court and the Supreme Court of Nevada.

B. Rusk's Motions

4. On or about January 7, 2016, Rusk filed with the Board his Petition/Motion Of Dennis Eugene Rusk Requesting That The Final Decision Of The Board Be Vacated Or Modified, Brought In The Nature Of A Petition For Writ Of Coram Nobis Or Other Relief To Set Aside Order Of Discipline Or Alternatively, Remit Discipline, And Request/Motion For Appointment Of Independent Counsel ("Motion to Vacate").
5. Rusk's Motion to Vacate requests that the Board vacate its Order alleging prosecutorial misconduct during Rusk's hearing, specifically that Louis Ling, Esq., the Board's prosecuting attorney, withheld material facts and made affirmative misrepresentations to the Board resulting in "gaining a conviction of Petitioner." See Motion to Vacate, pp. 11-12, 15-16.
6. Rusk's Motion to Vacate further requests that the Board appoint independent counsel to review the Motion to Vacate, address the Motion to Vacate and to investigate prosecutor, Louis Ling's actions.

- 1 7. On January 28, 2016, the Board issued an Order staying the Motion because
- 2 Rusk alleged prosecutorial misconduct against the Board's prosecuting attorney,
- 3 Louis Ling, Esq., and in doing so, he also filed a Nevada state bar complaint
- 4 against Louis Ling, in this matter and involving this matter, therefore, the Board
- 5 "will stay the hearing of Respondent's motion until the state bar complaint has
- 6 been concluded."
- 7 8. On September 26, 2016, Rusk filed with the Board his Motion to Lift Stay of
- 8 Petitioner/Motion Requesting that the Final Decision of the Board be Vacated Or
- 9 Modified, Etc., and Request For An Evidentiary Hearing ("Motion to Lift Stay").
- 10 9. Rusk's Motion to Lift Stay asserts that the state bar complaint has been
- 11 concluded.
- 12 10. Rusk's Motion to Lift Stay further requests an evidentiary hearing regarding the
- 13 actions of Louis Ling, Esq., prosecuting attorney, George Garlock, Board
- 14 member, and Board staff regarding "how the denial of due process occurred."
- 15 See Motion to Lift Stay, pp. 2-3.
- 16 11. On or about October 10, 2016, Louis Ling filed his Opposition to both Motions.
- 17 12. If any of the foregoing Findings of Fact are deemed Conclusions of Law, they
- 18 shall so be construed.

#### 19 CONCLUSIONS OF LAW

- 20 13. Rusk's Motion to Vacate is brought pursuant to NRS 622A.390(1)(c), which
- 21 states: "After the close of the hearing, a party may file only the following motions:
- 22 (c) A motion requesting that the final decision of the regulatory body be vacated
- 23 or modified."
- 24 a. However, Rusk's Motion to Vacate is based on errors in the hearing such
- 25 that the Motion alleges the errors were grounds for a conviction. See Motion
- 26 to Vacate, p. 15;
- 27 b. Rusk's Motion to Vacate requests that the Order be vacated or modified, but
- 28 requests further inquiries, hearings and investigations into the same matter;

1 c. Rusk's Motion to Vacate requests, in part, for a new hearing. See Motion to  
2 Vacate, pp. 6, 27, Motion to Lift Stay, p. 3;

3 d. Pursuant to NRS 622A.390(5)(b), a motion for rehearing or reconsideration is  
4 appropriate if a petitioner is alleging errors in a hearing;

5 e. As such, the Board will treat Rusk's Motion to Vacate as a Motion for  
6 Rehearing pursuant to NRS 622A.390(1)(a).

7 14. Pursuant to NRS 622A.390(1)(a), which states "After the close of the hearing, a  
8 party may file only the following motions: (a) A motion requesting rehearing."  
9 Further, pursuant to NRS 622A.390(2)(b) states: "A motion requesting rehearing  
10 or reconsideration **must** be filed with: the regulatory body not later than 15 days  
11 after the date of service of the final decision of the regulatory body." (emphasis  
12 added). Rusk is time barred as he filed his Motion approximately five years after  
13 the date of service of the final decision of the regulatory body.

14 15. Regardless of the nature of motion brought by Rusk, Rusk previously filed a  
15 petition for judicial review in Clark County District Court alleging identical  
16 allegations and arguments. The District Court affirmed the Board's Order. Rusk  
17 then appealed to the Nevada Supreme Court, and the Nevada Supreme Court  
18 dismissed the appeal. In taking this matter to the District Court, Rusk has  
19 effectively admitted to exhausting his administrative remedies. *Allstate*  
20 *Insurance Company v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007).  
21 The Board does not have jurisdiction over the Motion.

22 16. Rusk's Motion includes that it is "Brought in the Nature of a Petition for Writ of  
23 Coram Nobis." Pursuant to *Trujillo v. State*, 310 P.3d 594 (2013), coram nobis  
24 was a step in the **criminal case**. In Nevada, district courts have continuing  
25 jurisdiction to correct mistakes of fact that would have prevented a **conviction**.  
26 *See Warden v. Peters*, 83 Nev. 298, 301, 429 P.2d 549, 551 (1967); Nev. Const.  
27 art. 6, § 6; NRS 171.010; *Walker v. State*, 78 Nev. 463, 472, 376 P.2d 137, 141  
28 (1962). The Board is not an appellate court nor a district court and the

underlying hearing was not a criminal proceeding, therefore, the Board does not have jurisdiction to decide and lacks the authority over a writ of coram nobis.

17. The Board is a state administrative agency created under NRS 623 and does not have general or common law powers, but only such powers as have been conferred by law expressly or by statute. *Andrews v. Nevada State Board of Cosmetology*, 86 Nev. 207, 467 P.2d 96 (2007). NRS 623 does not confer power on the Board to investigate an attorney. Therefore, the Board does not have authority to appoint independent counsel to investigate Louis Ling.<sup>1</sup> Further, the Motion to Vacate is not an administrative hearing requiring a prosecutor, therefore, none would need to be appointed. Last, the Board is already represented by independent Board Counsel in the post-decision proceedings.

18. As previously mentioned, the Board is a state administrative agency created under NRS 623 and does not have general or common law powers, but only such powers as have been conferred by law expressly or by statute. *Andrews v. Nevada State Board of Cosmetology*, 86 Nev. 207, 467 P.2d 96 (2007). Chapter 233B of NRS (Administrative Procedure Act) and Chapter 622A of NRS (Administrative Procedure Before Certain Regulatory Bodies) governs procedures regarding administrative hearings. Chapters 623, 622A and 233B of NRS do not confer power on the Board to use evidentiary hearings to investigate the conduct of its attorney, members or staff regarding evidence at a hearing. Therefore, the Board does not have authority to investigate its own staff about whether due process was violated during a hearing.

19. If any of the foregoing Conclusions of Law are deemed Findings of Fact, they shall so be construed.

<sup>1</sup> It should be noted that on or about January 7, 2016, Robert Nersesian, Esq. filed a state bar complaint against Louis Ling, Esq. alleging identical allegations and arguments based upon Mr. Ling's conduct at the hearing. The State Bar ultimately issued a finding that "no professional misconduct occurred in this matter." State Bar letter dated February 12, 2016. Robert Nersesian requested reconsideration of the dismissal and the State Bar reaffirmed the original decision. State Bar letter dated March 18, 2016. The administrative agency that has the authority to investigate attorneys decided that "no further action shall be taken" and to dismiss the complaint.

Attorney General's Office  
555 E. Washington, Suite 3900  
Las Vegas, NV 89101

ORDER

The Board, being fully apprised in the premises and good cause appearing to the Board, by a unanimous vote, ORDERS as follows:

IT IS HEREBY ORDERED that Petitioner Dennis Rusk's Motion to Lift Stay is GRANTED as to lifting the stay only;

IT IS HEREBY FURTHER ORDERED that Petitioner Dennis Rusk's Request for an Evidentiary Hearing is DENIED;

IT IS HEREBY FURTHER ORDERED that Petitioner Dennis Rusk's Motion to Vacate is DENIED.

DATED this 8th day of February, 2017.

NEVADA STATE BOARD OF  
ARCHITECTURE, INTERIOR DESIGN  
AND RESIDENTIAL DESIGN

By:

  
JAMES MICKEY, A.I.A.  
Presiding Chairman

Submitted by:

ADAM PAUL LAXALT  
Attorney General

By: /SGL/  
Sophia G. Long, Esq.  
Deputy Attorney General  
555 E. Washington Avenue, Suite 3900  
Las Vegas, Nevada 89101  
(702) 486-3420

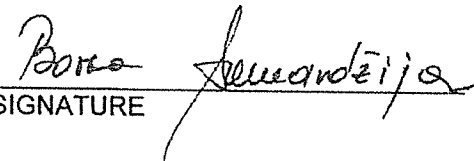
CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada State Board of Architecture,  
Interior Design and Residential Design and that on this day I mailed the attached  
document U.S. Mail postage prepaid addressed to the following:

ROBERT NERSESIAN  
Nersesian & Sankiewicz  
528 S. Eighth Street  
Las Vegas, Nevada 89101

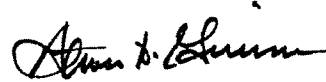
LOUIS LING  
933 Gear Street  
Reno, Nevada 89503

Dated this 09 day of February, 2017.

  
SIGNATURE

# EXHIBIT 4

# EXHIBIT 4



CLERK OF THE COURT

PMAN

Robert A. Nersesian

Nevada Bar No. 2762

**NERSESIAN & SANKIEWICZ**

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Las Vegas, Nevada 89101

Telephone: 702-385-5454

Facsimile: 702-385-7667

*Attorneys for Plaintiff*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Dennis Eugene Rusk, and Dennis Rusk, Architect, )  
LLC, )

PETITIONER/APPELLANT )

vs. )

Nevada State Board of Architecture, Interior )  
Design, and Residential Design, )

RESPONDENT. )

Case No.: A-17-750672-W

XXX

**PETITION OF DENNIS E. RUSK AND DENNIS E. RUSK, ARCHITECT, LLC, FOR  
ISSUANCE OF A WRIT OF MANDAMUS, OR ALTERNATIVELY, JUDICIAL  
REVIEW OF ACTION OF THE NEVADA STATE BOARD OF ARCHITECTURE,  
INTERIOR DESIGN, AND RESIDENTIAL DESIGN TAKEN IN REFERENCE TO A  
PETITION/MOTION FILED BY THE PETITIONERS AND AVOIDED/DETERMINED  
BEFORE SAID BOARD ON JANUARY 11, 2017**

NOW COME Dennis E. Rusk, and Dennis E. Rusk, Architect, LLC (hereafter  
collectively referred to as "Rusk"), and herewith petition that a writ of mandamus issue to the  
Nevada State Board of Architecture, Interior Design, and Residential Design ("Board")  
commanding and directing it to exercise its jurisdiction and hear and determine Petition/Motion  
of Dennis Eugene Rusk Requesting that the Final Decision of the Board Be Vacated or Modified,  
Brought in the Nature of a Petition for Writ of Coram Nobis or Other Relief to Set Aside Order  
of Discipline, or Alternatively, Remit Discipline, and Request/Motion for Appointment of  
Independent Counsel, ("Board Petition") filed on January 7, 2016, and for which a decision was



1 made by the Board to deny hearing and determination of this duly filed document on January 11,  
2 2017. See Board Petition, exhibit (“ex.”) 1.<sup>1</sup> Alternatively, Rusk requests that the Court hear this  
3 matter as a Petition for Judicial Review under NRS 233B.130(1)(b), in the event that the  
4 referenced motion was determined as opposed to avoided due to an asserted lack of jurisdiction.

5 No order on the Petition has been received, but, nonetheless, on January 11, 2017, at a  
6 meeting of the Board, the Board determined that it would not consider the Board Petition. The  
7 basis of this determination was an alleged lack of jurisdiction. Following the filing hereof, Rusk  
8 will lodge with this court an audio copy of the proceeding before the Board where this  
9 determination was made (hereafter, “lodged audio.”).

10 This Petition is based on the papers on file to date before the Board, the attachments  
11 hereto, the audio record of the Board’s determination, the following Memorandum of Points and  
12 Authorities, and any oral argument the Court deems pertinent. The reason for the alternative  
13 relief is due to an ambiguity in the law as to the proper format for putting the matter before the  
14 Court, and the scope of review considering the alternative formats.

## 15 MEMORANDUM OF POINTS AND AUTHORITIES

### 16 I. INTRODUCTION

17 The Petition now before this Court is a petition for writ of mandamus seeking to compel  
18 the Board to exercise its jurisdiction and hear and determine the Board Petition on its merits.  
19 Alternatively, relief is sought in the form of review pursuant to NRS 233B.130(1)(b). The Board  
20 Petition is attached as ex. 1.

21 Here, Rusk seeks mandamus directing the Board to consider his Board Petition to vacate  
22 prior discipline. Concerning mandamus, “The writ may be issued . . . by a judge of the district

23  
24  
25  
26  
27 <sup>1</sup> The exhibits to the Board Petition are unwieldy, and will be filed separately from this Petition  
28 following the filing hereof. Also, the record of the hearing on the Board’s prosecution of Rusk  
will be filed separately from this Petition following the filing hereof. This record will be referred  
to throughout this Memorandum as “ex. 3.”

1 court, to compel the performance of an act which the law especially enjoins as a duty resulting  
2 from an office, trust or station . . .” NRS 34.160. Rusk is statutorily authorized to move the  
3 Board to vacate prior discipline against him through a motion to vacate, and clearly, the Board  
4 holds a corollary duty to determine such motion. NRS 622A.390(1) (“After the close of the  
5 hearing, a party may file only the following motions: (d) A motion requesting that the final  
6 decision of the regulatory body be vacated or modified.”). As argued and demonstrated below,  
7 the Board, despite this direct statutory grant of authority and the right to file a motion granted to  
8 Rusk, determined that it was without jurisdiction to consider Rusk’s motion to vacate. Thusly  
9 presented is a matter squarely falling within the dictates of mandamus.  
10

11 The central premise of the Board Petition was to determine and address alleged  
12 prosecutorial misconduct in the conviction of Rusk. Ex. 1. While the occurrence of prosecutorial  
13 misconduct is rare, and often of the nature of likely inadvertent or unintentional improper  
14 commentary on evidence or overreaching in argument, presented here is a matter of prosecutorial  
15 misconduct of far greater gravity and impact. Here the prosecutor actively fabricated evidence,  
16 secreted evidence, and then argued the very absence of the evidence in his possession as the core  
17 premise requiring a finding of professional misconduct on the part of Rusk. Years after the  
18 hearing, conclusive proof of this action by the prosecutor was discovered, and Rusk sought to  
19 vacate the decision based on the then evident prosecutor’s misdeeds.  
20

21 On January 11, 2017, the Board determined that it would not hear or consider this motion  
22 filed by Rusk. Lodged Audio. In determining that it would not hear the merits of the Petition,  
23 nonetheless, some comments on the record seemed to indicate that it was denying the Petition. In  
24 either event, it is clear that the Board completely avoided the issues raised in the Petition. Rusk’s  
25 Petition is authorized by statute and under the common law. The writ sought is to compel the  
26 Board to exercise the jurisdiction the law mandates it exercise, and determine the motion on its  
27 merits. The alternative remedy (judicial review) is sought due to an ambiguity in NRS  
28

1 233B.130(1)(b) stating that “[a]ny preliminary, procedural or intermediate act or ruling by an  
2 agency in a contested case is reviewable if review of the final decision of the agency would  
3 not provide an adequate remedy.” Clearly, the catchall in this statute is for the purpose of  
4 addressing pre-final decision matters, but in the event that the statute is construed to encompass  
5 post-final decision procedural matters, and it is found that a petition to vacate falls within these  
6 strictures, Rusk forwards this alternative basis.

## 7 II. JURISDICTION

8  
9 Through mandamus, Rusk seeks to compel the Board to exercise jurisdiction over the  
10 Board Petition. Stating it lacks jurisdiction, the Board refused to exercise jurisdiction. This is  
11 clear from the lodged audio, wherein Asst. A.G. Sophia Long instructed the Board, “For  
12 clarification for the Board, the Board does not have jurisdiction to grant any of those motions.”  
13 Audio at 10:10. The Board then refused to consider the Petition. This Petition seeks to force the  
14 Board to consider the merits of, and exercise its jurisdiction over, Rusk’s Board Petition.

15  
16 A tribunal, including an administrative tribunal, has a duty to exercise jurisdiction over  
17 matters within its designated statutory jurisdiction. See, Gour v. Honsador Lumber, LLC, 134  
18 Haw. 99, 103, 332 P.3d 701, 705 (Ct. App. 2014); RES Inv. Co. v. Cty. of Dakota, 494 N.W.2d  
19 64, 67 (Minn. Ct. App. 1992)(A board must consider, on the merits, a matter brought before it  
20 within its jurisdiction, and in failing to do so, mandamus will compel the exercise of this duty).  
21 “Mandamus will lie to compel court to exercise lawful jurisdiction, where it refuses to do so . .  
22 ..” State v. Petteway, 96 Fla. 74, 117 So. 696 (1928); State ex rel. Rowe v. Ferguson, 165 W. Va.  
23 183, 193, 268 S.E.2d 45, 50 (1980)([W]here a statute confers jurisdiction on an inferior tribunal  
24 and that tribunal refuses to assume jurisdiction, mandamus is a proper remedy to compel it to  
25 exercise such jurisdiction.”); Austin v. Turrentine, 30 Cal. App. 2d 750, 759–60, 87 P.2d 72, 76  
26 (1939)(“Mandamus is the proper remedy to compel a court to assume or exercise jurisdiction in  
27  
28

1 such a proceeding where it has jurisdiction and has refused to proceed on the ground of lack of  
2 jurisdiction.”); Thompson v. Foote, 134 S.W.2d 11, 12 (Ark. 1939)([W]here a chancellor  
3 wrongfully refuses to exercise jurisdiction, mandamus will lie to compel him to exercise  
4 jurisdiction.”); State ex rel. Camillo v. Hess, 458 S.W.2d 721, 723 (Mo. App. 1970) (same);  
5 State v. Templeton, 130 N.W. 1009, 1010 (N.D. 1911)(holding that newly discovered evidence is  
6 precisely the area where the writ should issue); and State ex rel. Brecksville Edn. Assn. v. State  
7 Emp. Relations Bd., 660 N.E.2d 1199 (Ohio 1996)(same).

8 This is the proper court in which to bring a petition for mandamus against the Board. And  
9 the Board’s failure to consider Rusk’s Petition on the merits is a proper basis for mandamus to  
10 issue. Alternatively, in light of the facts stated below, and the clear incidents of prejudicial  
11 prosecutorial misconduct occurring in this case, judicial review of the functional denial of the  
12 Petition should occur, and the order of discipline against Rusk (ex. 2) vacated by this Court.

## 13 II. FACTS

### 14 A. BACKGROUND AND ORIGINAL HEARING

15 Petitioner, Dennis E. Rusk (“Rusk”) held a license as an architect in the State of Nevada.  
16 The Board charged Rusk with negligence in relation to an ultimately approved condominium  
17 project know as Verge. After a hearing, the Board suspended Rusk’s license, and imposed  
18 insurmountable fines and responsibilities upon him in order to remove the suspension. Decision,  
19 ex. 2. Rusk’s license remains suspended.

20 During the hearing, considering the Verge project, the primary thrust of the Board’s  
21 disciplinary action against Rusk concerned an alleged failure to consider or submit any fire/life  
22 safety documentation to the plan review process of the City of Las Vegas for the Verge project.  
23 Within the Decision, ex. 2, the following highlights this alleged failure: 1) Testimony by Mr.  
24 White that the first submittal by Rusk suffered from a “complete lack of FLS [fire/life safety]  
25 coordination;” 2) Testimony by the expert that “Rusk was grossly negligent, because the first set  
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1 completely lacked any FLS design and engineering . . .”; 3) “Rusk . . . claimed that he  
2 personally had filed Schirmer Engineering’s drawings with the City of Las Vegas, though he  
3 offered no evidence or proof either that Shcirmer Engineering had, in fact, ever created any  
4 drawings or that the drawings had ever been submitted to the City of Las Vegas;” and 4) “Rusk’s  
5 claim that he filed Schirmer Engineerings’ drawing appears untrue.” Decision, ex. 2. Clearly, in  
6 disciplining Rusk, the Board largely and materially relied upon a lack of fire/life safety plans  
7 allegedly missing from Rusk’s initial submittal of plans to the City of Las Vegas for review.

8 Rusk’s first submittal of Verge plans to the City of Las Vegas occurred on March 6-7,  
9 2007. See Record of Proceedings, ex. 3, vol. 2, ex. B, with the City of Las Vegas file stamps.<sup>2</sup>  
10 This submittal was represented by the prosecutor and his witnesses to the Board as the complete  
11 initial submittal of Rusk to the City of Las Vegas. Discussion, supra. This was false.  
12 Conspicuously absent from this submittal as presented by the prosecutor is any fire/life safety  
13 documentation. Clearly, in gaining the conviction of Rusk under ex. 2, this absence was harped  
14 on by the prosecutor and became an integral part of the basis for the conviction and the scope of  
15 the punishment of Rusk under the conviction. Accord ex. 2.

16 At this point, the conclusion of the facts is given in order that the Court understand the  
17 gravity of the prosecutorial misconduct occurring in this matter. The truth of the matter is that  
18 the prosecutor had, in his files, and the Board had, in its records, thorough fire/life safety  
19 documentation submitted with Rusk’s initial submission. These documents were fraudulently  
20 removed from the ex. B presented at the hearing [ex. 3, at Vol. 2, ex. B], and the prosecutor  
21 actively sought to convict Rusk on the basis of this false testimony and doctored evidence. The  
22 active secreting and convolution of the evidence by the prosecutor, however, was not discovered  
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28 <sup>2</sup> Ex. 3 is filed as a separately lodged DVD due to its volume. A courtesy copy of this exhibit is  
presented to the court with a courtesy copy of this petition.

1 until after all periods for appeal had lapsed. The facts below will establish the discovery of this  
2 misconduct and the truth of the misconduct.

3 The gravity of this false, yet alleged, failure of Rusk with respect to his licensure is  
4 abundantly clear through the testimony elicited by the prosecutor at the hearing. Rusk was even  
5 chided by the prosecutor because there was no fire/life safety documentation in the initial  
6 submittal. For example, in questioning Rusk, the prosecutor proceeded as follows (Ling is the  
7 prosecutor acting for the Board):

8 Ling: I just want to make sure the record is crystal clear on this -- to submit the  
9 first set of documents, which is Exhibit B,<sup>3</sup> and not to have addressed the fire  
10 life safety issues?

11 Rusk: I did.

12 Ling: They're not in Exhibit B; correct?<sup>4</sup>

13 Rusk: I did by submitting the fire life safety report and the fire life safety documents  
14 as part of my package.

15 Ling: But there's no proof here today. There's no evidence before the Board?

16 Rusk: And there's no proof that I didn't submit it. I did.

17 \* \* \*

18 Ling: If you don't satisfy him, you don't get a permit.[?]

19 Rusk: No, that is not correct because you're assuming that I did not make sure that  
20 the life safety drawings were submitted to the building department. They were.

21 Ling: They're not here.

22 Rusk: You did not review them.

23 Ling: They're not here.<sup>5</sup>

24 \* \* \*

25 Ling: [The fire/life/safety submission is] not before this board. They are not part  
26 of those documents [the plans submitted by Ling as the plans submitted by  
27 Rusk] . . .

28 Rusk: Are you asking me a question. No, that is not correct. If the Board decided  
not to pick up the life safety documents from the building department, of

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<sup>3</sup> Again, this ex. B from the hearing which appears Record of Proceedings, ex 3, at vol. 2. In context, Rusk understood that the evidence presented at the hearing would include his entire first submittal, and it is clear that he was surprised by the evidence submitted omitting any fire/life safety documentation.

<sup>5</sup> Note that this statement by Ling in failing to acknowledge that he had, in fact, reviewed the fire/life safety engineering appearing in ex. 3, at vol. 2, ex. B, had the effect of directly misleading the Board to the effect that they did not exist. In fact, Ling acknowledged in a later proceeding that he was aware of these plans submitted with Rusk's initial submittal to the City of Las Vegas Building Department. Ex. 4, p. 22.

1 course, they didn't review them.<sup>6</sup> But that doesn't mean that they didn't exist.  
2 ... They, in fact, did exist. And those life safety documents address the  
3 fire alarm system, the smoke alarm system and those issues.

4 \* \* \*

5 Ling: I'm talking at the early stages.

6 Rusk: At the very early stages, they were turned in. They were not reviewed, but  
7 they were there. They were at the building department. I physically turned  
8 them in. I put them in my package. They were there.

9 Ling: There's no evidence of that today, is there? All we have is your word. I  
10 don't have any more questions.

11 As to the gravity of this fire/life safety documentation and the alleged absence of the same  
12 relied upon by the prosecutor, in the original hearing before the Board, the closing argument of  
13 the prosecutor is determinative. The prosecutor proffers to the Board:

14 Here's what Staff sees in the evidence that's actually before you, and  
15 that is when you look at Exhibit B [ex. 3, vol. 2, ex. B] in this matter.  
16 What will you see, what we see as Staff, is a real problem here for Mr.  
17 Rusk. Either Mr. Rusk did not know that the documents he submitted on  
18 March 22 of 2007 of the plan review, he submitted the plan review.

19 Either he didn't know what he was submitting was grossly inadequate  
20 as Mr. White testified, in which case he is obviously incompetent.  
21 Because if he didn't know Exhibit B was inadequate, everybody in this  
22 room knew that. Or he did and submitted it anyway.

23 What we know, which in this case he's grossly negligent. What we  
24 know is that the documents admitted as Exhibit B, the packet he  
25 submitted on March 6<sup>th</sup> - - I don't want to be too pejorative here, but  
26 we know it couldn't have been built. And it couldn't have been built  
27 because it is a fire trap.

28 It was not designed to take into account the fire life safety issue that are  
so critical and so important to the job of an architect. It just wasn't. And  
you have nobody here except Mr. Rusk to tell you otherwise. \* \* \*

And without providing for any of that fire life safety he was putting  
even those people's lives in jeopardy. \* \* \*

If you believe Mr. Rusk, then somewhere, somehow there was a  
whole set of fire life safety documents that we haven't seen, that  
aren't part of the original submittal.

<sup>6</sup> This is obviously Rusk being surprised by the fact that the fire/life safety plans were not in ex. B as submitted by Ling as Petitioner's initial submittal. He was searching for an explanation as to why they would be absent, and clearly surmised that Ling had failed to retrieve them or that the reviewer had failed to see them. As shown below, Petitioner's perspective was in error, as was his inclination to provide a reasonable non-devious explanation for their absence. In fact, Ling had the plans and knew that the plans existed, but failed to disclose them to the Board.

1 (Emphasis added). That is, in making his closing argument, the prosecutor harped on and  
2 highlighted a perceived failure by Rusk to include any fire/life safety documentation in his  
3 original submittal, and thereby created a situation putting life and limb at risk. Most importantly,  
4 this prosecutor directly represented to the Board that “fire life safety documents . . . aren’t part of  
5 the original submittal.” Id.

6 And looking at the decision, the Board adopted this reasoning in its entirety. It is clear  
7 that the absence of fire/life safety documentation in ex 3, at vol. 2, ex. B provided the critical  
8 factor to the Board in its decision to discipline Rusk and invalidate his license. In the findings,  
9 the Board relied upon false testimony elicited by the prosecutor including 1) Testimony by Mr.  
10 White that the first submittal by Rusk suffered from a “complete lack of FLS [fire/life safety]  
11 coordination; 2) Testimony by the expert that “Rusk was grossly negligent, because the first set  
12 [ex. 3, at vol. 2, ex. B] completely lacked any FLS design and engineering . . .”; 3) “Rusk . . .  
13 claimed that he personally had filed Schirmer Engineering’s drawings with the City of Las  
14 Vegas, though he offered no evidence or proof either that Schirmer Engineering had, in fact, ever  
15 created any drawings or that the drawings had ever been submitted to the City of Las Vegas; and  
16 4) “Rusk’s claim that he filed Schirmer Engineering’s drawing appears untrue.” Decision, ex. 2.

17 In addition to the findings, other portions of the record of proceedings highlights how  
18 critical the alleged failure of Rusk to submit the fire/life safety documentation was to its decision  
19 to discipline Rusk. At another point in the proceedings, Petitioner sought to cross examine the  
20 Board’s expert on the contents of the fire/life safety documentation Rusk maintained he had, in  
21 fact, filed. During this cross, the prosecutor interjected as follows:

22 “Mr. Chairman, I need to object. Two grounds. First and foremost,  
23 we’re doing it again. We’re assuming a bunch of evidence or a bunch  
24 of facts that aren’t in evidence before you. . . . To the extent that he  
25 wanted to also get in a bunch of information that isn’t in fact  
26 evidence and isn’t likely to be in evidence in this case, I think that  
27 that question is objectionable.”  
28



1 Record of Proceedings, ex. 3, vol. 4, p. 188. What the prosecutor is referring to is fire/life safety  
2 documentation allegedly not submitted by Rusk with his initial submission.

3 Then there is the nature of the deliberations, and the proofs upon which these  
4 deliberations centered. The argument that Rusk failed to provide fire/life safety with his initial  
5 submittal was so forceful that during the deliberations the following was stated by Member Klai:

6 Member Klai: Is there room for any question at all? I find it [a] little bit  
7 baffling. If this matter has been before us for three years and if the fire  
8 and life safety drawings are that critical to the matter and seem they are  
9 the **culp of all our concerns with regard to negligence and**  
10 **competence and everything** else, that the Respondent<sup>7</sup> and/or our Staff  
11 didn't take it upon themselves to bring these drawings forward if they  
12 truly existed from the date of June of '07, and bring it forward again,  
13 beyond just the architecture drawings we've seen here today.

14 Record of Proceedings, ex. 3, vol. 5, p. 179: 7-18. (emphasis added). In short, as recognized in  
15 deliberations, the alleged lack of fire/life safety documentation in the initial submittal was "the  
16 culp of all our concerns with regard to negligence and competence and everything else . . ."  
17 Thus, Rusk was convicted in large part, if not entirely, upon a failure to submit fire/life safety  
18 documentation with his initial submittal.

19 Rusk tried in vain to argue to the District Court on appeal of the Decision, ex. 2, that he  
20 had, in fact, made such a submittal. In that submittal, Rusk located a copy of the fire/life safety  
21 documentation he claimed he submitted with his initial submission, but they were not file  
22 stamped (the only such evidence being in the exclusive possession of the Board and the  
23 prosecutor). The prosecutor, in response, doubled down on the assertion that they did not exist,  
24 and wrote. "[E]ven the copy of the Schirmer Engineering report attached as Exhibit B to Mr.  
25 Rusk's "Declaration" does not contain any evidence that it was filed with the City of Las

26  
27 <sup>7</sup> As to the alleged failure of Petitioner to bring them forward, the only file stamped copy was in  
28 the possession of Ling, never disclosed to Petitioner, and was assumed by Petitioner, as he had a  
right to assume, that the prosecutor [Ling] would fully disclose and submit his complete initial  
filing, rather than deviously tamper with Petitioner's initial submission.

1 Vegas.” Board’s District Court Brief, ex. 4, p. 21: 13-16. That is, the prosecutor is arguing, still,  
2 that Rusk cannot be believed because there is no file stamped copy of the fire/life safety  
3 documentation anywhere. Well, again, there was a file stamped copy, it was in the prosecutor’s  
4 pocket, and the prosecutor now continued to misrepresent and mislead multiple tribunals on the  
5 facts he was actively hiding from Plaintiff, from the Board, and from this court on the appeal.

#### 6 **B. POST-HEARING DISCOVERIES**

7 The crux of the issue in the Petition, ex. 1, is prosecutorial misconduct. After all appeal  
8 times passed, in other litigation not involving the Board, the deposition duces tecum of the Board  
9 was taken on August 29, 2014. The subpoena for that deposition requested, among other items,  
10 “The actual physical file maintained by the Board relative to the prosecution of Dennis E. Rusk  
11 as referenced in ¶ 1; and “The actual physical file maintained by Louis Ling relative to the  
12 prosecution of Dennis E. Rusk as referenced in ¶ 1. Exhibit 5. The undersigned and Dennis E.  
13 Rusk attended, and the Board produced, literally, a room full of documents including the plans  
14 and all items received by the Board from the City of Las Vegas. See e.g., ex. 3, vol. 2 and 3, at  
15 exhibits B and C, as voluminous items produced in the deposition.  
16

17 And this brings us to the basis for the Decision, ex. 2, and the basis for this petition.  
18 Within these documents, file stamped and present in the Board’s files, were the very documents  
19 which the prosecutor claimed, and the Board found, did not exist. That is, produced in the duces  
20 tecum production was fire/life safety documentation file stamped as of the date of the initial  
21 submission by Rusk to the City of Las Vegas. Declaration immediately following this  
22 memorandum. This document is attached as ex. 6. Of special note is the file stamp on the face of  
23 the document indicating that this was filed with the City of Las Vegas on March 6, 2007, the day  
24 of the initial submission. Compare ex 6, with exhibit 3, vol. 2, ex. B as to the dates for filing.  
25 With this, for the first time as of August 29, 2014, at the earliest, Rusk could discover and prove:  
26  
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28

- 1) Although prosecuted for failing to include fire/life safety documentation in his initial submittal, he did, in fact, provide the documentation to the City of Las Vegas with his initial submittal;
- 2) That the Board had in its files the very document, the existence of which the prosecutor claimed and argued Rusk had fabricated in the hearing where he was convicted;
- 3) That the Board's expert was provided, by the Board and the prosecutor, an incomplete copy of Rusk's initial submittal to the City of Las Vegas, and based his determination of the gross negligence of Rusk upon the absence of ex. 6, which the prosecutor withheld from the expert's review.;
- 4) In gaining Rusk's conviction, the prosecutor proffered testimony which he knew to be false, and indeed, fostered the false testimony through secreting the information from the expert and possibly<sup>8</sup> the hearing panel; and
- 5) Present at the hearing, in their files, the Board and the prosecutor held the very fire/life safety documents they claimed and determined did not exist in gaining the conviction of Rusk. See ex. 5 and ex. 6.

With evidence now available, it became glaringly evident that the prosecutor constructed a false show for the Board. Rusk then brought the Petition to Vacate, ex. 1, before the Board.

### C. HEARING/DISCUSSION BEFORE THE BOARD

The Board scheduled a public discussion of Rusk's petition. Board Order, ex. 7. There was no discussion as the order indicated. Rather, Board Chairman Mickey, commenced to render

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<sup>8</sup> The qualification of "possibly" here is based on the alternative, not presently provable, that the hearing panel was actually aware of the existence of the fire/life safety documentation, and the entire prosecution was a put-up job. Regardless, during the January 11, 2017 proceeding, the Board staff and the prosecutor knew, absolutely, of the falseness of the existence of the documentation and the falseness of the presentation.

1 preconceived conclusions regarding the petition. Lodged Audio.<sup>9</sup> He premised the scope of the  
2 proceedings on the Petition/Motion, ex. 1, as follows:

- 3 1. To discuss the rule on the motion which will not include the request for the  
4 evidentiary hearing;
- 5 2. Review, discussion, and possible action regarding Dennis Eugene Rusk requesting  
6 that the final decision of the Board be vacated or modified and/or the relief to set  
7 aside order or discipline, or alternatively remittance then the request motion for  
8 appointment of independent counsel.
- 9 3. Once again, for the benefit and background of the Board, treat the motion as a motion  
10 for rehearing under NRS 622A.390(1)(a) because that is the ultimate relief sought by  
11 Mr. Rusk.  
12

13 Mr. Mickey then ruled:

- 14 1. The writ of corum nobis is not appropriate because an administrative body is not an  
15 appeals court and that this is not a criminal proceeding;
- 16 2. Under NRS 622A.390(1)(c), there is no reason for the order to be modified as Mr.  
17 Rusk does not ask for modification;
- 18 3. Under NRS 622A.390(1)(a), requesting a new trial, . . . NRS 622A.390(2)(b) a  
19 motion requesting a rehearing must be filed not later than fifteen days after the date of  
20 service of the final decision . . .  
21
- 22 4. Request to appoint independent counsel, the Board has authority under NRS 623A,  
23 but does not include authority (sic) attorney's actions reviewed by another or an  
24 investigation of another attorney;  
25  
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- 1 5. Request for evidentiary hearing, . . . the Board has authority under NRS 623A, but  
2 does not include authority to review one's attorney's actions to be reviewed by  
3 another or investigation of another attorney; and  
4 6. The request to vacate is actually a motion for rehearing and time barred.

5 And then by Board counsel, Asst. AG Sophia Long, stated:

- 6 1. For clarification for the Board, the Board does not have jurisdiction to grant any of  
7 those motions.  
8

9 All this was done with no discussion by the Board whatsoever. Lodged Audio.

10 Indeed, in violation of Nevada's open meeting law, NRS 241.010, et. seq., when Rusk  
11 and his counsel arrived for the scheduled meeting, they were excluded from the meeting, and  
12 told that they could not enter the meeting room. Further, when allowed to enter, all the members  
13 of the Board were already present and in the meeting room, and none of the participating  
14 members had entered or exited the meeting while Rusk and his counsel were held outside the  
15 meeting room for upwards of fifteen minutes.<sup>10</sup> It was abundantly clear that the very discussion  
16 mandated by NRS 241.010, and scheduled in the order, ex. 7, was taking place in private prior to  
17 counsel and Rusk being allowed to oversee or participate publicly in the process. In light of the  
18 presentation by Mickey and Long, set forth above, it was, and is, obvious that the closed meeting  
19 was for the very purpose of prearranging the dog-and-pony show<sup>11</sup> put on during the alleged  
20 "discussion" (i.e., deliberations) referenced in the order, ex. 7.  
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25 <sup>10</sup> Member Garlock had exited the meeting room during this wait. Nonetheless, he was not a  
participating member as he recused himself from the consideration of the petition. .

26 <sup>11</sup> Indeed, the prearranged conclusions were read by Mickey from a script during the alleged  
27 actual meeting, and were obviously prearranged without any public meeting or discussion by the  
28 Board, and further, Ms. Long was, at least twice, consulted over the contents of the script, and  
silently (whispering) advised Mr. Mickey about apparent meanings and processes as he  
presented these prearranged conclusions.

1 Further, when this public meeting discussion took place, neither Rusk nor his attorney  
2 were given any opportunity for comment or input. Over objection to the process, Mickey's pre-  
3 ordained presentation was moved and adopted without a single question, concern, or even  
4 comment of support by any Board member.<sup>12</sup> I.e., whatever deliberations occurred with respect  
5 to Rusk's motion took place in private between the Board members.

### 6 III. ANALYSIS

7 The errors in the rulings of the Board on the Petition are legion. Moreover, the denial of  
8 even a semblance of consideration of the proffered prosecutorial misconduct bespeaks and  
9 agency devoted to protecting itself, and not acting as an impartial judicial body in any sense.  
10 Finally, the patent injustice of the entire process as applied to Rusk screams out for a remedy.  
11 That remedy exists at law, and it is the vacation of the order of discipline against Rusk. The  
12 Board singularly, and the State of Nevada generally, have an obligation at law, under due  
13 process, and under the unassailable facts to remove this burden and scar from Rusk's  
14 professional history.

#### 15 A. NATURE OF THE PROCEEDINGS AGAINST RUSK

16 In the appeal of the decision, as well as alluded to in the proceeding at issue of January  
17 11, 2017, the Board has maintained that the proceeding against Rusk was an adversarial  
18 proceeding, alluding that it was civil in nature. See ex. 4.<sup>13</sup> Nonetheless, there are substantial  
19 constitutional due process implications in the disciplinary action against Rusk.  
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23 <sup>12</sup> Further demonstrating, when Rusk's counsel attempted to participate or raise an objection to  
24 the lack of process and due process occurring in Mickey's presentation and the Board's pre-  
25 acquiescence, counsel was shut down by a Board member being told that he could not speak and  
26 that matters had to proceed because "we have more business to take care of . . ." Per the record,  
27 this was an outright lie, there was no further business to take care of, they had all afternoon to  
28 deliberate, discuss, and consider. Specifically, the first action taken by the Board after the Rusk  
dismissal was to adjourn the meeting.

<sup>13</sup> Although it is too late for an appeal on such an issue, Rusk's original attorneys never raised  
the issue of misapplication of the burden of proof. A disciplinary proceeding is a quasi-criminal

1 In fact, the proceedings against Rusk were “quasi-criminal,” not civil. Simply,  
2 “[d]isciplinary proceedings are quasi-criminal in nature . . .” Javits v. Stevens, 382 F. Supp. 131,  
3 138 (S.D.N.Y. 1974)); Matter of Johnston, 663 P.2d 457 (Wash. 1983); cf Flamingo Paradise  
4 Gaming, LLC v. Chanos, 217 P.3d 546, 557, n.2 (Nev. 2009). Further, like criminal proceedings,  
5 disciplinary proceedings impact interests of the charged professional at a constitutional level  
6 concerning both liberty and property. In this sense, like criminal proceedings, quasi-criminal  
7 proceedings must provide the person charged with both procedural and substantive due process.  
8 M.J.T. v. A.V.B., No. A-0997-12T1, 2013 WL 3744050, at \*8 (N.J. Super. Ct. App. Div. July  
9 18, 2013). As to administrative proceedings involving professional licensure, it has been held  
10 that due process rights owed a subject charged in a quasi-criminal proceeding includes the right  
11 to confront and impeach the witnesses against him. Rinaker v. Superior Court, 74 Cal. Rptr. 2d  
12 464, 469 (1998). Also included is the Fifth Amendment right against self-incrimination. Fowler  
13 v. Vincent, 366 F. Supp. 1224, 1226 (S.D.N.Y. 1973). Further, the due process requirement that  
14 conviction exceed proof beyond that of a preponderance of the evidence applies in quasi-  
15 criminal proceedings. Sealed Appellant 1 v. Sealed Appellee 1, 211 F.3d 252, 254 (5th Cir.  
16 2000).<sup>14</sup> Practically the full panoply of due process rights under criminal proceedings are  
17 extended to some degree to the quasi-criminal administrative proceedings against Rusk as well.  
18 In re B., 293 N.Y.S.2d 946, 947 (1968). (Quasi criminal proceedings must accord the accused  
19 “full compliance with due process requirements.”). This right to due process even reaches civil  
20 matters. Com. v. Johnson, 44 Pa. D. & C.3d 390, 394 (Pa. Com. Pl. 1987), aff’d sub nom. In  
21 Interest of McFall, 556 A.2d 1370 (Pa. Sup. 1989), aff’d, 617 A.2d 707 (Pa. 1992).

25 matter requiring the imposition of a burden of proof on the state exceeding that of a  
26 preponderance of the evidence. Sealed Appellant 1 v. Sealed Appellee 1, 211 F.3d 252, 254 (5th  
27 Cir. 2000)

28 <sup>14</sup> Note that while this is not the subject of this petition, all indications are that the Board and the  
prosecutor sought to erroneously apply the constitutionally infirm standard of a preponderance of  
the evidence against Rusk at all stages. Accord ex. 3 and ex. 4.

1                   **B. ERRORS IN THE RULINGS OF THE BOARD ON RUSK’S PETITION**

2                   The following addresses the serial errors by the Board evident on the lodged audio.

3                   **1. CONTRARY TO THE RULING, THE WRIT OF CORAM NOBIS IS**  
4                   **APPLICABLE TO THE PROCEEDING**

5                   The Board determined that it would not hear the motion because coram nobis cannot  
6                   apply to a non-appellate tribunal and because the proceedings against Rusk were not criminal.  
7                   Addressing the first alleged bar to hearing the petition, the Board erred, and erred grievously, in  
8                   holding that it was limited in consideration because it was not an appellate panel. “The essence  
9                   of coram nobis is that it is addressed to the very court which renders the judgment in which  
10                  injustice is alleged to have been done.” Coram nobis, Black’s Law Dictionary, 5<sup>th</sup> ed. (West  
11                  1979); and see Trujillo v. State, 129 Nev. Adv. Op. 75, 310 P.3d 594, 595 (2013), as modified  
12                  (Dec. 30, 2013). The writ of coram nobis, by its very nature and definition, is addressed to the  
13                  original tribunal, not an appellate tribunal. The ruling of the Board is the direct opposite of the  
14                  law. Clearly, this determination as read by Chairman Mickey is in error.

15                  The other statement made by the Board is that the relief requested is unavailable because  
16                  the proceedings against Rusk were not criminal. This is a distinction of no import whatsoever.  
17                  “The writ of error coram nobis was available at common law in both civil and criminal cases.”  
18                  Hallman v. State, 371 So. 2d 482, 484 (Fla. 1979) abrogated on unrelated grounds by Jones v.  
19                  State, 591 So. 2d 911 (Fla. 1991); Apple v. Apple, 157 Ind. App. 68, 71, 299 N.E.2d 239, 240  
20                  (1973)(“[C]oram nobis was a remedy equally effective in civil actions brought down from the  
21                  old English law.”). Nevada applies the common law, and accepts the common-law concepts of  
22                  coram nobis. Trujillo v. State, 310 P.3d 594, 595 (Nev. 2013), as modified (Dec. 30, 2013).<sup>15</sup>  
23  
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27                  <sup>15</sup> At issue is whether the common-law writ of coram nobis may be used in Nevada. We hold that  
28                  the common-law writ of coram nobis is available under Article 6, Section 6(1) of the Nevada  
                    Constitution, which grants district courts the power to issue writs that are proper and necessary to



Moreover, while Trujillo was a criminal case, nothing in the decision limited its application to criminal cases. Instead, by its express terms, Trujillo addressed a judgment of conviction. Reference to ex. 2 shows that Rusk challenges a conviction. Contrary to the ruling of the Board, coram nobis was a writ and remedy available to Rusk, and the Board presented the proper forum to request such relief.

2. THE BOARD ALSO ERRED IN FAILING TO RECOGNIZE ITS ABILITY TO “VACATE” RUSK’S CONVICTION

The ability of the Board to “vacate” its order, and the ability of Rusk to bring a motion to “vacate” are both expressly found within the enabling statutes of the Board. As stated in NRS 622A.390(1), “After the close of the hearing, a party may file only the following motions: . . . (d) A motion requesting that the final decision of the regulatory body be vacated or modified.” This is exactly the motion filed by Rusk. Clearly, it was expressly authorized by statute, and the failure of the Board to recognize this express statutory authority was error.

3. IT IS INCOMPREHENSIBLE THAT THE BOARD FOUND THAT RUSK DID NOT ASK FOR MODIFICATION OF THE DECISION

Looking to the Petition, ex 1, the title of the document includes “The Final Decision of the Board Be Vacated or Modified . . .” (Emphasis added). Of course Rusk requested that the Decision be modified. Other places within the motion where Rusk requested modification can be found in the Petition at pp. 7: 3; 15: 16; 26: 25. Also requested is that the punishment in the order be remitted, which is a form of modification. See Petition, title, and p. 1: 23-24. The Board either did not read the Petition, or did not comprehend the Petition, in issuing a ruling directly antithetical to the express language in the petition. Surely, as well, Rusk requested that the decision be vacated. That is, that the decision be determined null and void. How this is not a modification of the past conviction cannot be explained by the Board, and clearly, eradication is

the complete exercise of their jurisdiction, and NRS 1.030, which continues the common law under circumstances such as these.

1 modification. Clearly, the assertion that Rusk did not request modification is laughable in light of  
2 the moving papers, ex. 1, and Mickey erred (actually intentionally dissembled) in rendering his  
3 directives as Chairman during the procedure on January 11, 2017.

4 4. THERE WAS NO REQUEST FOR NEW TRIAL AND THE MOTION WAS NOT A  
5 REQUEST FOR NEW TRIAL

6 The petition can be examined high and low for “new hearing,” “new trial” or “retry,” and  
7 these terms do not appear within the petition. Of course, on vacation, the Board could seek a  
8 retrial, but that was not requested by Rusk. Still, Mickey, on behalf of the Board, dictates,  
9 “Under NRS 622A.390(1)(a), requesting a new trial, . . . NRS 622A.390(2)(b) a motion  
10 requesting a rehearing must be filed not later than fifteen days after the date of service of the  
11 final decision . . .” In short, the Board pretended that Rusk requested something that he did not  
12 request, and then refused to consider that which was filed based on a statute expressly barring  
13 different relief which Rusk never requested. This is a classic combination of a fallacious red-  
14 herring argument with a straw-man argument, and is of no import or application to the Petition.  
15 This ‘ruling’ presents no ruling whatsoever in the context of the Petition, ex. 1.

17 5. RUSK’S INDEPENDENT COUNSEL REQUEST

18 Chairman Mickey then informed the Board that, while it could appoint independent  
19 counsel, there was no authority to do so to investigate the prior prosecutor’s conduct. There  
20 appears to be a disconnect in the reasoning given at the hearing. First, the purpose of the  
21 independent counsel was not to investigate the prosecutor, while this may have occurred  
22 ancillary to any such appointment. The purpose was to have counsel, separate from the allegedly  
23 offending prosecutor, evaluate and address the Petition. It was brought to assure an objective  
24 review of Rusk’s contentions.  
25

26 It is always appropriate to challenge a prosecutor for a conflict of interest in a proceeding,  
27 and when an improper bias or patent conflict of interest is shown, the prosecutor must be  
28

1 removed from further action on the matter. Accord Hunt v. Houston, No. 4:98CV2354, 2008 WL  
2 822401 (D. Neb. Mar. 26, 2008); State v. Stenger, 760 P.2d 357 (Wash.. 1988).

3 Here, the conflict of interest is patent, and the prosecutor himself held a duty to remove himself  
4 from the case. Pointedly, “a lawyer shall not represent a client if the representation involves a  
5 concurrent conflict of interest. A concurrent conflict of interest exists if [t]here is a significant  
6 risk that the representation . . . will be materially limited by the lawyer's . . . personal interest . .  
7 ..” NV ST RPC Rule 1.7. Nonetheless, at the hearing before the Board on January 11, the  
8 prosecutor sat at counsel table and was the putative representative of the Board as the avoidance  
9 of a decision at issue was rendered. He also drafted the opposition to the Petition. See ex 9.

11 A prosecutor's duty is to fairly present cases, not just to obtain convictions.”; Anderson v.  
12 State, 118 P.3d 184, 188 (Nev. 2005). Further, his central responsibility in representing the state  
13 is to do justice. State v. Cooper, 708 S.W.2d 299, 304 (Mo. Ct. App. 1986); State v. Carlson, No.  
14 C2-99-1423, 2000 WL 943567, at \*2 (Minn. Ct. App. July 11, 2000); State v. Meier, No. A-  
15 1846-13T3, 2014 WL 1515884, at \*4 (N.J. Super. Ct. App. Div. Apr. 21, 2014). And doctoring  
16 evidence indisputably violates that duty. This included a duty to not convict the innocent.  
17 Rochester Police Dep't v. Bergin, 416 N.Y.S.2d 938, 941 (1979).

19 The prosecutor here continues to represent the State, and the Board in reference to Rusk's  
20 Petition directly challenging the propriety of his actions. See Response to Petition, ex. 9,  
21 signature. At issue in the Petition is the honesty and competence of this very prosecutor. This  
22 presents the very “direct interest” establishing a conflict of interest in this prosecutor, and  
23 foreclosing his continued representation of the Board in this matter.. Per the foregoing authority,  
24 the prosecutor's duty required him to recuse himself. Nonetheless, he persisted with ex. 9.

26 Perhaps more importantly, a tribunal, when faced with a conflict of interest held in a  
27 prosecutor, regardless of the Rules of Professional Conduct, has a responsibility to replace a  
28 prosecutor laboring under such conflict. The test is, “Under circumstances where it can

1 reasonably be inferred that the prosecuting attorney has an interest in the outcome of a criminal  
2 prosecution beyond ordinary dedication to his duty to see that justice is done, the prosecuting  
3 attorney should be disqualified from prosecuting the case . . .” Kutsch v. Broadwater, 404  
4 S.E.2d 249, 250 (W.V. 1991). Moreover, “[o]nce the misconduct occur[s],<sup>16</sup> the prosecutor[]  
5 operate[s] under an actual conflict of interest in prosecuting the case.” Hunt v. Houston, No.  
6 4:98CV2354, 2008 WL 822401, at \*33 (D. Neb. Mar. 26, 2008). The Board’s position is without  
7 authority, and, the Board was under a responsibility to remove the prosecutor from the case and  
8 appoint an independent prosecutor, or alternatively, vacate the judgment.

#### 9 10 6. EVIDENTIARY HEARING

11 Rusk’s Petition also requested an evidentiary hearing. The Board, again without any  
12 authority, and contrary to law, made up a rule where it cannot look into the propriety of its  
13 prosecutor’s actions in gaining a conviction. As shown elsewhere in this Petition, a tribunal  
14 obviously has the authority to determine whether or not prosecutorial misconduct occurred. It  
15 appears that the goal here is to prevent the examination of the prosecutor under oath, but that is  
16 how tribunals determine facts. This is, yet again, a fabricated rule with no basis in law or fact put  
17 up to prevent the prosecutor from addressing the reasons that he:

- 18
- 19 1) Failed to include ex. 6 within the ex. B he presented in the original proceeding;
  - 20 2) Why he doctored ex. B in the original proceeding omitting large swaths of its
  - 21 contents while representing it to be complete;
  - 22 3) Why he presented this doctored record to his expert as the entire submission of Rusk;
  - 23 4) Why he fostered and created an opinion by the Board’s expert he knew to be false and
  - 24 knew to be a creature of his own creation;
  - 25

26  
27 <sup>16</sup> Here the initial misconduct occurred well before commencement of the actual proceedings  
28 when the prosecutor submitted the documents at Record of Proceedings, ex. 3, at Vol. 2, ex. B, to  
his expert as the complete initial submission by Rusk to the City of Las Vegas while omitting the  
then submitted fire/life safety documentation which was part of Rusk’s submission.

- 1 5) Why he allowed the expert to provide known false testimony to the Board which he  
2 necessarily recognized as false;  
3 6) Why he has vociferously maintained that ex. 6, taken from his files in the Board  
4 proceeding, never existed when he knew it existed; and  
5 7) Why he ignored member Klai's entreaty that ex. 6, if it existed, would have been  
6 provided by Board staff (i.e., the prosecutor) at the hearing if it existed.

7 These are questions of extreme import,<sup>17</sup> each indicates a level of prosecutorial misconduct  
8 materially affecting the prosecution of Rusk in the original proceeding, and inquiry should not be  
9 denied over a rule fabricated by Chairman Mickey and his minion, Sophia Long (or perhaps  
10 these statuses are reversed). Indeed, in offering the testimony of the expert that the initial  
11 submittal by Rusk was devoid of fire/life safety documentation, and having constructed this  
12 belief through his own failure to provide the expert with the documentation in ex. 6, the  
13

14  
15 <sup>17</sup> Not only would these be of import to the proceeding before the Board, they also indicate a  
16 severe breach of attorney ethics by the prosecutor. Specifically,

17 "A lawyer shall not bring . . . a proceeding, or assert or controvert an issue therein,  
18 unless there is a basis in law **and fact** for doing so that is not frivolous . . . ." NV ST RPC  
19 Rule 3.1 (emphasis added);

20 "Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a  
21 witness called by the lawyer, has offered material evidence and the lawyer comes to know  
22 of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary,  
23 disclosure to the tribunal." NV ST RPC Rule 3.3

24 "[A lawyer shall not] [f]alsify evidence, counsel or assist a witness to testify falsely . .  
25 . ." NV ST RPC Rule 3.4

26 As a criminal prosecutor, "[m]ake timely disclosure to the defense of all evidence or  
27 information known to the prosecutor that tends to negate the guilt of the accused or  
28 mitigates the offense . . . ." NV ST RPC Rule 3.8

"Fail to disclose a material fact to a third person when disclosure is necessary to  
avoid assisting a criminal or fraudulent act by a client . . . ." NV ST RPC Rule 4.1

"Engage in conduct that is prejudicial to the administration of justice." NV ST RPC  
Rule 8.4

1 prosecutor here actually suborned perjury. See NRS 199.120(3) stating the violation as felonious,  
2 and United States v. Derrick, 163 F.3d 799, 828 (4th Cir. 1998), noting that when a prosecutor  
3 procures witness testimony knowing that it is false, the prosecutor suborns perjury.

4 Here, the expert was provided a set of documentation by the prosecutor which the  
5 prosecutor represented as Rusk's complete initial submission. The prosecutor omitted the  
6 documentation in ex. 6, even though he had it in his possession and it was part of Rusk's initial  
7 submittal. The prosecutor then procured the testimony from the expert that Rusk was grossly  
8 negligent in failing to submit the very documents which the prosecutor withheld from the  
9 testifying expert. Before this court is no mere misconduct by the prosecutor, but rather, the  
10 commission of a felony in gaining the conviction of Rusk before the Board. In truth, on review,  
11 this matter should also be referred to the Clark County district attorney because it is evident that  
12 the prosecutor criminally suborned perjury in gaining the conviction of Rusk.

#### 14 7. RULING ON JURISDICTION

15 The final ruling is a statement by Asst. Attorney General Sophia Long to the Board  
16 telling the members that it does not have jurisdiction over any of the matters. Under the common  
17 law, an original tribunal has jurisdiction over a petition for a writ of coram nobis. Trujillo v.  
18 State, 310 P.3d 594, 595 (Nev. 2013). By statute, jurisdiction over a motion to vacate is  
19 expressly granted the Board. NRS 622A.390(1). Clearly, the statement by Ms. Long to the Board  
20 that there is no jurisdiction is patently false.

22 In summation, the Order for Discussion, ex. 7, resulted in a denial of all the relief  
23 requested by Rusk. Seven reasons for this denial were presented, and each of them is either  
24 directly contrary to law or constructed of whole cloth by the Board. The one immutable fact is  
25 that the Board avoided addressing the merits in their entirety.

27 It is understandable that the Board, when faced with damning evidence that a member of  
28 their staff (their prosecutor) actively constructed false testimony through the alleged expert

1 witness, would seek to hide from such a fact. It is understandable that the Board would not want  
2 to take their prosecutor to task for ignoring the plea of Member Klei to show/disclose ex. 6 to the  
3 Board if it existed. Simply, it is understandable that the Board would not want to have their  
4 foundation shaken by the tawdry, illegal and immoral practices in which its prosecutor had been  
5 caught red-handed. Still, it is not the duty of the Board to hide such matters. Sweeping such  
6 corruption under the rug does not eradicate such corruption, but rather, provides a mechanism  
7 fostering such corruption. The Board had an absolute duty to ferret out these facts and hear the  
8 Petition. This Court should mandate that the Board hear the Petition of Rusk, and further direct  
9 that it be given proper consideration, perhaps through an evidentiary hearing, or considering the  
10 lack of a response on the merits before the Board, simply direct that under the now conclusive  
11 evidence, the order of discipline, ex. 2, must be vacated due to prosecutorial misconduct.  
12

### 13 **C. DUTY OF THE BOARD TO CONSIDER THE PETITION**

14 Mickey's determination, supported by the prosecutor and assistant attorney general  
15 Sophia Long, that the motion to vacate was a motion for rehearing presents patent error, if not an  
16 outright subterfuge. First, the motion was based on evidence discovered after the original  
17 hearing, and which proved that the prosecutor was hiding evidence. It is impossible to rehear a  
18 matter which was never heard in the first place. And without the critical evidence, the matter was  
19 never heard on the merits and was not a rehearing. From a different perspective, the relief sought  
20 challenges the decision, and retrial remains an option of the Board, but not at Rusk's request. See  
21 e.g. Hunt v. Houston, No. 4:98CV2354, 2008 WL 822401, at \*38 (D. Neb. Mar. 26, 2008).  
22

23 Second, no rehearing was requested, but rather, a motion to vacate seeks to invalidate the  
24 results of a hearing. No rehearing is necessary to grant the relief sought, as all that is sought is  
25 the overturning/vacation of the decision, or remittance of the penalty under the hearing. Vacation  
26 of the decision, not rehearing, is the proper relief on a motion to vacate. See In re Martin, 44 Cal.  
27 3d 1, 744 P.2d 374 (1987); People v. Kasim, 66 Cal. Rptr. 2d 494, 512 (1997). And when the  
28

1 prosecutorial misconduct is egregious, outright dismissal of the conviction with no further  
2 consequences is the proper remedy. Id. Obviously, if such relief is granted, there is no method or  
3 manner that in which Rusk's motion could be viewed as a rehearing. Accord Rinaldi v. United  
4 States, 434 U.S. 22 (1977); Com. v. Pabon, 24 N.E.3d 1062, review denied, 31 N.E.3d 587  
5 (Mass. 2015)(If prosecutorial misconduct presents a substantial risk of injustice, the conviction  
6 would be properly vacated). The offering of testimony known to be false is egregious  
7 prosecutorial misconduct warranting relief as a denial of due process. See Dinsio v. Donnelly,  
8 No. 9:03CV0779LEKVEB, 2007 WL 4029221, at \*7 (N.D.N.Y. Nov. 15, 2007); and Hunt v.  
9 Huston, supra.

11 Hunt v. Houston, is particularly instructive in this case. After two prior attempts to bring  
12 up the issues of prosecutorial misconduct extending all the way to the Nebraska Supreme Court  
13 in relation to a murder conviction in state court, the defendant sought review on constitutional  
14 grounds before a federal tribunal. From the record, it appears that the prosecutor created false  
15 evidence in the proceeding which he used offensively both before and during trial. The state  
16 courts, nonetheless, found alleged grounds such as harmless error, and confirmed the conviction.  
17 The federal court noted that the friendliness of the tribunal and the status of the offending  
18 prosecutor may well have affected the impartiality of the state tribunals. Most importantly they  
19 found the evident prosecutorial misconduct required a new trial from both a trial error and a  
20 structural error perspective. Id at \*27.<sup>18</sup>

21  
22  
23  
24 <sup>18</sup> Trial misconduct does not always require that a conviction be vacated, but does require  
25 vacation of the conviction if it is shown by the petitioner that the error "had substantial and  
26 injurious effect or influence in determining the . . . verdict." Hunt v. Houston at \*27, citing to  
27 Brecht v. Abrahamson, 507 U.S. 619, 638 (1993). A structural error, in contrast, shifts the  
28 burden to the state to show that the misconduct was harmless, and failing to do so, the conviction  
must be vacated. Id.



1 Here, the fabrication of false evidence (an incomplete initial submission by Rusk) is of  
2 such a nature to constitute a structural error in the proceeding mandating that the conviction be  
3 vacated. Further, Rusk has shown that, in the context of the deliberations and the Decision, ex. 2,  
4 the secreting of the fire/life safety documentation by the prosecutor presented the very cusp of  
5 the basis of the Board's decision to convict and discipline him. Moreover, the Board directly  
6 relied upon the false testimony by the prosecutor's expert, which testimony was made false by  
7 the prosecutor's devious presentation of the plans to the expert as complete and deficient while  
8 he held back large swaths of these very plans in order to foster the false conclusion of  
9 incompleteness by the expert. As shown above, this presents prosecutorial misconduct at its most  
10 base and damaging, and as in Hunt, the conclusion that Rusk was denied substantive and  
11 procedural due process through prosecutorial misconduct.

13 In this respect, an administrative board has a duty to exercise jurisdiction and hear  
14 matters duly placed before it. UMC Physicians' Bargaining Unit of Nevada Serv. Employees  
15 Union v. Nevada Serv. Employees Union/SEIU Local 1107, AFL-CIO, 178 P.3d 709 (Nev.  
16 2008); and see State, ex rel. Burger King Corp., v. Oakwood, 594 N.E.2d 116, 117 (Ohio App.  
17 1991); accord Boggs v. Peake, 520 F.3d 1330, 1336 (Fed. Cir. 2008)(A "[b]oard must exercise  
18 jurisdiction . . ."). Mandamus is a proper remedy to compel an inferior tribunal to assume and  
19 exercise jurisdiction when that tribunal refuses to exercise jurisdiction. State v. Superior Court of  
20 King Cty., 172 P. 257, 258 (Wash. 1918); State ex rel. Renick v. St. Louis Cty. Court, 38 Mo.  
21 402, 408 (1866). In failing to hear the motion to vacate, the Board refused to exercise its duty,  
22 and should be compelled to do so.

23 In sum, the hidden evidence and the state of the law with respect to post-hearing and  
24 post-appeal relief from a conviction is shown in glaring clarity. And the fact that the appropriate  
25  
26  
27  
28

1 relief is, also, vacation of the conviction is demonstrated under broad and deep authority. The  
2 Board held a duty to hear and consider Rusk's motion to vacate, and jettisoning that motion on  
3 the contrived basis that it was actually a motion for rehearing was inappropriate, and being  
4 generous to the Board, error.<sup>19</sup>

5 **D. SHOULD THE COURT CONSIDER THIS AS AN APPEAL FROM A RULING OF**  
6 **AN ADMINISTRATIVE BODY, THE CONVICTION OF RUSK SHOULD BE**  
7 **VACATED AND THE MATTER REMANDED**

8 A cogent test and explanation of one aspect of post-trial relief from a conviction due to  
9 prosecutorial misconduct was set forth in Fong v. Ryan, No. CV 04-68-TUC-DCB, 2011 WL  
10 3439237, at \*7 (D. Ariz. Aug. 5, 2011), aff'd sub nom. Soto v. Ryan, 760 F.3d 947 (9th Cir.  
11 2014), and aff'd, 583 F. App'x 782 (9th Cir. 2014). There the court stated:

12 Prosecutorial misconduct will rise to a constitutional violation warranting  
13 federal habeas relief only if such conduct "so infected the trial with  
14 unfairness as to make the resulting conviction a denial of due process."  
15 Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d  
16 144 (1986). In Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3  
17 L.Ed.2d 1217 (1959), the Supreme Court held "that a conviction obtained  
18 through the use of false evidence, known to be such by representatives of  
19 the State, must fall under the Fourteenth Amendment." **To prevail on a**  
20 **Napue claim, Petitioner must show that (1) the testimony was**  
21 **actually false, (2) the prosecution knew or should have known that**  
22 **the testimony was false, and (3) the false testimony was material.**  
23 Hayes v. Brown, 399 F.3d 972, 984 (9th Cir.2005) (en banc). False  
24 testimony is material if there is "any reasonable likelihood that [it] could  
25 have affected the judgment of the jury," in which case the conviction  
26 must be set aside. United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct.  
27 2392, 49 L.Ed.2d 342 (1976). "Under this materiality standard, [t]he  
28 question is not whether the defendant would more likely than not have  
received a different verdict with the evidence, but whether in its absence  
he received a fair trial, understood as a trial resulting in a verdict worthy  
of confidence." Hayes, 399 F.3d at 984 (quotation omitted).

19 In fact, the depth of the errors and contrivances forwarded to support the result indicates that the script read by Mickey, with the construction whispered by Long, together with the lack of any meaningful discussion and the absence of a public hearing support the conclusion that the errors were actually intentional and enlisted to flagrantly avoid the affirmative duties of the Board and avoid the embarrassment of the prior hearing now shown to have been a false show. Accord analysis, supra at pp. 13, 14, 17-23.

1 (Emphasis added); Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005). Applying this test, the  
2 conclusion is inescapable that Rusk is entitled to the vacation of the conviction under which he  
3 currently labors.

4 The expert testified that he was not provided with the portion of the submittal, ex. 6, for  
5 his review of the project in preparing his testimony. Ex 3, vol. 4, p. 150, and p. 176: 11-19 with  
6 reference to ex. 3, vol. 2, ex. B compared with ex. 6. That is, the expert testified that he was  
7 provided with no fire/life safety documentation from Rusk's initial submittal. He also opined at  
8 length that Rusk was grossly negligent due to the absence of fire/life safety documentation in  
9 Rusk's initial submittal. Ex. 3, vol. 4, 154-160. In short, the expert's opinion was largely based  
10 on the absence of anything resembling ex. 6 in the documentation he reviewed. In light of the  
11 demonstrated existence of ex. 6, clearly the expert's testimony was actually false, and fulfills the  
12 first element for prosecutorial misconduct.<sup>20</sup> Fong v. Ryan, *supra*.

14 The prosecutor had ex. 6 in his possession. He also alluded that he knew he had it in his  
15 possession, but it was Rusk's duty to submit it.<sup>21</sup> Ex. 4. With the existence of ex. 6, the  
16 possession of ex. 6 with the prosecutor and the Board, and the oblique acknowledgement by the  
17 prosecutor that he knew that ex. 6 existed, it is undisputable that the prosecutor absolutely knew,  
18 or should have known, that the testimony of the expert testifying against Rusk was false. This  
19 fulfills the second element for prosecutorial misconduct. Fong v. Ryan, *supra*.

20 Also note that the expert testified that the initial submittal by Rusk was that found in ex. 3, vol.  
2, ex. B, and consisted of seventy-two sheets. Record of Proceedings, vol. 4, p. 152: 12-15. This,  
too, is now demonstrably false testimony, and an additional twenty-five sheets had been  
submitted with the initial submission, and are included in ex. 6, which the prosecutor withheld  
from his expert. The prosecutor used this discrepancy to highlight an alleged deficiency in Rusks  
alleged initial submission as compared to his final submission. For the expert's testimony to have  
been true, the number would not have been seventy-two, but rather ninety-seven, a 35%  
understatement by the sworn testimony of the expert.

<sup>21</sup> Which was impossible, as the only file stamped copy in existence was in the possession of the  
Board and the prosecutor.

1 The third element prerequisite to vacating the conviction requires that the false evidence  
2 be material to the conviction. In the context of professional discipline, it is absolutely material to  
3 the conviction if the existence of the true facts as opposed to the false testimony is of a nature  
4 that gives rise to a conclusion that the guilt of the person convicted can no longer be supported at  
5 a level exceeding a preponderance of the evidence. See United States v. Agurs, 427 U.S. 97  
6 (1976) in conjunction with Sealed Appellant 1 v. Sealed Appellee 1, 211 F.3d 252, 254 (5th Cir.  
7 2000); ; accord United States v. Bagley, 473 U.S. 667, (1985). As shown in the facts above, the  
8 absence of ex. 6 in the hearing was the express material linchpin to the entire conviction of Rusk  
9 as stated in the deliberations. In the decision itself, the absence of any evidence resembling ex. 6  
10 is repeatedly cited as the core basis of the rationale supporting Rusk's conviction.<sup>22</sup> It is, in a  
11 word, impossible to conclude that the withholding of ex. 6 from consideration by the Board and  
12 by the expert materially affected the conviction, and that the prosecutor elicited and created the  
13 false testimony based on this absence caused and fostered by him.

14  
15 With the foregoing shown, under the authorities cited, Rusk is absolutely entitled to have  
16 his conviction vacated, both constitutionally under the United States Constitution, and under the  
17 Nevada authorities addressing prosecutorial misconduct and post-trial relief from a conviction.

#### 18 **E. OTHER CONSIDERATIONS**

19  
20 Rusk was entitled to due process in the proceeding leading to his conviction. Here, the  
21 acts of the prosecutor in absenting certain evidence in his possession from the record, and then  
22 relying upon that absence to gain a conviction, obviously violates due process concerns. As  
23 noted above, Rusk was entitled to certain due process. A prosecutor is "a quasi-judicial officer."  
24 He represents the state, and in the interest of justice must act impartially. State v. Huson, 440  
25

26  
27  
28 <sup>22</sup> See Decision excerpts, p. 6, supra.

1 P.2d 192 (Wash. 1968), cert. denied, 393 U.S. 1096 (1969). The prosecutor here grossly failed in  
2 this responsibility while keeping critical evidence in his pocket.

3 Further, can there be any doubt, regardless of the nature of a proceeding, that if the  
4 opposition acting for the State is in possession of evidence is so clearly supportive of a claim of  
5 innocence, that it cannot be hidden and must be produced? That, nonetheless, is another failure  
6 of the prosecutor here, and there was an absolute duty to produce the evidence. United States v.  
7 Agurs, 427 U.S. 97 (1976). Here the prosecutor went beyond this, and acted downright deviously  
8 when he allowed a member of the panel to continue to operate under the false impression that  
9 items analogous to ex. 6 did not exist despite a clear impression by that member that Board staff  
10 including the prosecutor would never allow such a circumstance to occur. Record of  
11 Proceedings, ex. 3, vol. 5, p. 179: 7-18.  
12

13 An evidentiary hearing was also appropriate. As evident Hunt v. Houston, supra, that is  
14 the proper method to assure that the failure occurred. Further, the propriety, and even  
15 constitutional necessity, of independent counsel to look into the defalcation and continue with  
16 the prosecution, are highlighted in Hunt v. Houston. The Board and its method of addressing  
17 Rusk's Motion to Vacate premised on prosecutorial misconduct fell short of constitutional  
18 requirements, fell short of legal requirements, and was a bastardization of the law in almost  
19 every respect. are also pertinent to this court's inquiry. The court highlighted the importance and  
20 propriety of both the appointment of a truly independent prosecutor. If the Decision, ex. 2, is not  
21 vacated in this proceeding, then, on remand, the further relief requested in ex. 1 (e.g.,  
22 appointment of an independent prosecutor and an evidentiary hearing) should also be mandated.  
23  
24

25 Finally, attached as ex. 10 is the reply to ex. 9 filed by Rusk. Noted therein is also the  
26 additional fact that throughout the original hearing, Record of Proceedings, vol. 2, ex. B was  
27 represented by the prosecutor as the "initial" submission of plans by Rusk to the City of Las  
28 Vegas for the Verge project. As indicated in ex. 10, supported by subsequently gained testimony

1 from the City of Las Vegas examiner addressing Rusk's submissions, this initial submission was  
2 not even a submission, but rather, a pre-submission. That is, as indicated, it was made to  
3 highlight areas of concern, and not for the purpose of approval. This would also explain why the  
4 file-stamped ex. 6 is correctly labeled a "DRAFT" and includes interlineations. In short, at a  
5 different level, and from a different perspective, the prosecutor misleads the Board as to Rusk's  
6 actions and responsibilities.

#### 7 IV. CONCLUSION

8  
9 This is, indeed and blessedly, an extremely rare circumstance. From the first day of law  
10 school, through graduation, upon hiring, and throughout a career through continuing legal  
11 education, lawyers are taught to not misrepresent facts to tribunals. There is even an oath to this  
12 effect. And this duty is especially heightened with concerns of constitutional magnitude when  
13 offensive activities of this ilk are undertaken by a prosecutor representing the State.

14 Here the prosecutor had in his possession the very document which established that large  
15 swaths of alleged negligence by Rusk did not exist. He never disclosed it to anyone. Indeed, he  
16 secreted the document from his expert, and then elicited testimony from the expert to the effect  
17 that Rusk's defalcation occurred because the very document in his possession purportedly did  
18 not exist. This is exactly the type of shenanigans which debases the judicial system, the rule of  
19 law, and justice at their cores, and the courts always guard against such activities with vigor.  
20 Here, the law mandates that that vigor be applied, and that the conviction of Rusk be vacated due  
21 to the prosecutorial misconduct permeating the prior hearing before the Board at the hands of the  
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28 ///

1 prosecutor in violation of his duty to do justice.

2 DATED this 4th day of February, 2017.

3 **Nersesian & Sankiewicz**

4 /s/ Robert A. Nersesian

5 Robert A. Nersesian

6 Nevada Bar No. 2762

7 528 S. Eighth Street

8 Las Vegas, Nevada 89101

9 Telephone: 702-385-5454

10 Facsimile: 702-385-7667

11 Email: vegaslegal@aol.com

12 Attorneys for Plaintiff

13 **DECLARATION OF ROBERT A. NERSESIAN**

- 14 1. I make this declaration of my own personal knowledge.
- 15 2. If called upon to testify to the facts herein stated, I am competent to do so.
- 16 3. In a different matter before this court, Rusk v. Attia, Case No. A-11-650222-C, on behalf
- 17 of Rusk, I took the deposition duces tecum of the Nevada State Board of Architecture,
- 18 Interior Design, and Residential Design ("Board"), exclusively for the production of
- 19 documents.
- 20 4. I appeared at the offices of the Board where the submissions of Rusk to the City of Las
- 21 Vegas relative to the Verge project were apparently kept and stored.
- 22 5. In reviewing the documents in the Board's possession, the document referenced as ex. 6
- 23 in the foregoing petition were found within the possession of the Board at the Board's
- 24 offices.
- 25 6. Said ex. 6 is a true and accurate copy of that which was produced by the Board under the
- 26 subpoena duces tecum, and the file stamp on the front of said ex. 6 was in place at the

27 ///

28 ///

1 time it was discovered.

2 I make this declaration under penalty of perjury.

/s/ Robert A. Nersesian

Robert A. Nersesian



# **EXHIBIT 5**

# **EXHIBIT 5**



ORDR

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*Attorneys for Petitioner/Appellant*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Dennis Eugene Rusk, and Dennis Rusk, Architect, )	
LLC, )	
PETITIONER/APPELLANT )	Case No.: A-17-750672-W
vs. )	Dept. No.: XXX
Nevada State Board of Architecture, Interior )	
Design, and Residential Design, )	
RESPONDENT. )	

**ORDER DETERMINING PETITIONER'S PETITION FOR WRIT ISSUANCE OF A  
WRIT OF MANDAMUS, OR ALTERNATIVELY, JUDICIAL REVIEW OF ACTION OF  
THE NEVADA STATE BOARD OF ARCHITECTURE**

Petitioner having filed a Petition for Writ of Mandamus or Judicial Review ("Petition for Writ") before this Court contesting the denial of a Petition/Motion of Petitioner to vacate an order of discipline by the Nevada State Board of Architecture, Interior Design, and Residential Design (hereafter "NSBAIDRD" and "NSBAIDRD Petition"), the Court having reviewed the Petition for Writ, the memoranda in support and opposition, having conducted and presided over an evidentiary hearing on May 22, 2017, and being otherwise fully advised in the premises,

NOW THEREFORE,

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**Nersesian & Sankiewicz**  
528 SOUTH EIGHTH STREET

IT IS HERBY FOUND, ORDERED, AND ADJUDGED AS FOLLOWS:

FINDINGS OF FACT

**PROCEDURAL/BACKGROUND FACTS**

1. On September 27, 2011, Petitioner was subjected to discipline by NSBAIDRD in a Findings of Fact, Conclusions of Law, and Order by NSBAIDRD;
2. Petitioner brought a Petition of Judicial Review of the NSBAIDRD decision of September 27, 2011;
3. The District Court denied Petitioner's Petition for Judicial Review of the NSBAIDRD decision of September 27, 2011;
4. Petitioner appealed the denial of his Petition of Judicial Review of the NSBAIDRD decision, and the Nevada Supreme Court dismissed Petitioner's appeal, thus concluding the matter as presented;
5. Subsequently, Petitioner filed with the NSBAIDRD a Petition to vacate or modify the NSBAIDRD's Findings of Fact, Conclusions of Law, and Order of September 27, 2011. In his Petition, Petitioner alleged as the basis for vacating the Findings of Fact, Conclusions of Law, and Order the denial of due process, the withholding of evidence, prosecutorial misconduct, and other irregularities in the original proceeding against him.
6. At a time scheduled for hearing on the NSBAIDRD Petition, NSBAIRD determined that the NSBAIDRD Petition was effectively a petition for rehearing and not a petition to vacate, and that, regardless, NSBAIDRD lacked jurisdiction to consider the NSBAIDRD Petition, indicating that NSBAIDRD did not have authority to grant the relief sought by Petitioner, and thereby denying an evidentiary hearing and denying Petitioner's NSBAIDRD Petition.

1 7. Through filing with this Court of his Petition for Writ on January 7, 2017, Petitioner

2 brought before this Court the denial of relief to Petitioner by NSBAIDRD of his  
3 NSBAIDRD Petition;

4 8. The Court conducted an evidentiary hearing concerning the Petition for Writ on May 22,  
5 2017.

6 **FINDINGS OF OPERATIVE FACT**

7 9. Among its relevant text, the NSBAIDRD Findings of Fact, Conclusions of Law, and  
8 Order of September 27, 2011, provides:

- 9
- 10 a. Mr. Rusk testified that he did not include Schirmer Engineering's report and  
11 engineering into his first set of design drawings because he did not receive the  
12 report until the day of the first submittal;
- 13 b. Mr. Rusk could not explain why he would submit design drawings that he knew at  
14 the time would be utterly deficient of FLS engineering and design;
- 15 c. Mr. Rusk did not explain why he did not incorporate Schirmer Engineering's FLS  
16 report into his second submittal, even though by his own chronology he had the  
17 report by the time of the second submittal;
- 18 d. Mr. Rusk testified that he personally had filed Schirmer Engineering drawings  
19 with the City of Las Vegas, though he offered no evidence or proof either that the  
20 Schirmer Engineering had, in fact, ever created any drawings or that the drawings  
21 had ever been submitted to the City of Las Vegas;
- 22 e. Mr. Rusk's claim that he filed Schirmer Engineering's drawings appears untrue;
- 23 f. Mr. Rusk's demeanor and answers under cross-examination and examination  
24 from the Board Members raised questions about his credibility;
- 25
- 26

27 10. At the hearing before the NSBAIDRD, Mr. Rusk was emphatic that he had submitted the  
28 Schirmer fire life safety documents including drawings with his initial submittal, but in

his closing argument, Mr. Ling stated, "There is no evidence of that today, is there? All

we have is your word. . . . If you believe Mr. Rusk, then somewhere, somehow there was a whole set of fire life safety documents that we haven't seen, that aren't part of his original submittal."

11. Although there was evidence submitted by NSBAIDRD at the evidentiary hearing before this Court that NSBAIDRD was aware of the Schirmer fire life safety documents, that such report was in the Board's file all along, that the Board was aware of it being in the file, and that it wasn't the existence of the report and drawings, but the failure to coordinate the fire life safety information into Mr. Rusk's documents, that resulted in the Findings of Fact, Conclusions of Law, and Order of September 27, 2011, the Findings of Fact, Conclusions of Law, and Order of September 27, 2011 seems to indicate otherwise;
12. There is evidence that in submission of the discipline matter against Petitioner to NSBAIDRD, the evidence did not include the Schirmer fire life safety documents;
13. The Schirmer fire life safety documents with a City of Las Vegas file stamp of March 6, 2007, were made available by NSBAIDRD to Petitioner's attorney and Petitioner in response to a subpoena duces tecum filed in an unrelated matter subsequent to the dismissal of Petitioner's Supreme Court appeal;
14. It appears that in the prosecution of Petitioner resulting in the Findings of Fact, Conclusions of Law, and Order of NSBAIDRD of September 27, 2011, that the Schirmer fire life safety documentation with attached drawings was apparently not before the NSBAIDRD at the disciplinary proceeding concerning Petitioner.
15. NSBAIDRD's determination on Petitioner's Petition/Motion to Vacate was clearly erroneous and arbitrary and capricious in the Board's refusal to consider the evidence of the fact that the March 6, 2007, Schirmer Report, with attached drawings, was apparently not before NSBAIDRD when it conducted its hearing in 2011.