

Filed August 14, 2024

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of) XX-C-XXXXX
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RESPONDENT EE,) OPINION ON SUMMARY REVIEW
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_____)

In December 2023, a hearing judge granted Respondent EE’s¹ September 2023 Motion to Vacate, Dismiss, and Seal in which the judge (1) vacated a 2019 public reproof order; (2) dismissed the proceeding without prejudice pursuant to rule 5.124(G) of the Rules of Procedure of the State Bar² and required any reference to this matter on his attorney profile page be removed pursuant to the clerk’s entry of dismissal; and (3) sealed the entire record of this proceeding pursuant to rule 5.12 (original order). The next day, the judge entered a public order stating that the record had been sealed (public sealing order).³ One week later, the judge issued an amended order (amended order) that restated the language as used in the original order, and clarified that three documents were not to be sealed and were to remain public, including our prior published Opinion (2023 Opinion). The amended order also referred the matter to the

¹ We do not identify respondent by name as the underlying case was dismissed.

² All further references to rules are to the Rules of Procedure of the State Bar of California unless otherwise noted.

³ The hearing judge issued this order because the original order was sealed and unavailable to the public.

Review Department to determine if our 2023 Opinion should be depublished and sealed. Because of the amended order, the judge filed an additional public order regarding sealing (amended public sealing order) that reflected the amended order’s provision for the public status of the three documents.

OCTC seeks summary review and requests that we reverse the hearing judge’s original order and amended order, declaring them void, and further order that respondent’s 2019 public reproval remain public and in full effect. It also requests that his records not be sealed in any manner. Respondent asks us to dismiss OCTC’s request regarding the judge’s original order and to deny its request for the amended order or, in the alternative, to affirm the judge’s original order and amended order. Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the judge’s original order and amended order, except as explained below.

I. PROCEDURAL HISTORY OF SUMMARY REVIEW

In January 2024, OCTC requested summary review of the hearing judge’s amended order pursuant to rule 5.157. The next day, respondent filed a response, contending that OCTC’s request for summary review was untimely regarding the original order or, alternatively, the appeal should be limited to only the amendments that were made to the amended order issued the following week. In February 2024, we designated the matter for summary review,⁴ and we also determined that OCTC’s request was timely filed based on rule 5.28.⁵ The parties subsequently filed their respective memoranda pursuant to rule 5.157(F)-(H).

⁴ In summary review proceedings pursuant to rule 5.157(B), the hearing judge’s material findings of fact are final and binding upon the parties, and, regarding this appeal and the parties’ arguments, the issues here will be limited to whether the facts support conclusions of law different from those reached by the judge or other questions of law. If the parties do not raise an issue or contention, it is waived. (Rule 5.157(C).))

⁵ In our February 2024 order, we noted that OCTC filed a request for summary review of the original order and that the hearing judge issued the amended order “clarifying the parameters of the sealing order and referring the matter to the Review Department.”

II. OCTC'S TIMELY SUMMARY REVIEW REQUEST ALLOWS REVIEW OF ALL LEGAL ISSUES RAISED IN ITS OPENING MEMORANDUM

We initially dispose of respondent's argument that OCTC "did not file a timely request for review of the [original order]," and thus summary review is inappropriate. Respondent argues OCTC did not state in its request for summary review that it was appealing the original order but only the amended order. He further posits that, because the amended order did not vacate the original order, the vacating of the stipulation, dismissing of the proceeding, and the sealing of the record all occurred at the time of the original order and was not done a second time in the amended order.⁶ He concludes that the amended order "merely unsealed three documents and referred the matter to the Review Department," and thus the issues that OCTC raises in its opening memorandum regarding the stipulation, dismissal, and sealing cannot be considered timely appealed. As a related and second argument, respondent contends we lacked authority when we made a statement that was "factually not accurate" in our February 2024 order and "spontaneously convert[ed]" OCTC's request to include the original order when it only requested review of the amended order, and that we will exceed our authority if we undertake a review of the original order. OCTC disputes his arguments as an attempt "to split hairs" regarding our February order, its request for review, and their relationship to the original order and amended order and argues no procedural fault exists in its appeal of the amended order because it relates back to and modifies the original order.

We reject respondent's arguments. At the outset, respondent presents no authority to support his arguments that OCTC failed to timely request review of any issue as raised in its

⁶ The original order and the amended order are identical in all respects, except for the additional language at the end of the amended order that clarified the documents that were to remain public after the record had been sealed and referred the matter to the Review Department to determine whether the 2023 Opinion should be depublished and sealed.

opening memorandum.⁷ In his arguments, respondent appears to concede that OCTC's January 2024 request was timely but contests the scope of the request that it made. Respondent states that OCTC filed its request for review in January 2024, and acknowledges that rule 5.28 extends OCTC's filing deadline by two days when orders are served electronically. Therefore, regarding both the original order and the amended order, OCTC's January 2024 filing was timely. (See rule 5.157(E)(1) [request for summary review must be filed within 30 days after hearing judge's decision is served].)

When one reads OCTC's request for review, it makes no mention of any issue in particular and simply requests that the amended order be summarily reviewed, and the amended order does, in fact, order the vacating of the stipulation, dismissing of the proceeding, and sealing of the record. We see no rule or precedent that would require OCTC to word its timely request for review to specifically reference the original order. (Cf. generally rules 5.157(A) [scope for summary review] & 5.157(E) [requests for summary review].)

Additionally, rule 5.157(F)(1) states that the opening memorandum must "concisely state the issues for review, including, if applicable, how the conclusions of law or disposition or both should be modified." At the beginning of its opening memorandum, OCTC makes clear that it is seeking to reverse and void both the original order and the amended order where the hearing judge vacated the stipulation, dismissed the proceeding, and sealed the record. In fact, OCTC's arguments regarding both orders and the judge's ruling are discussed in detail where relevant to the issues it raises. Given that OCTC stated the pertinent issues and identified both of the

⁷ Rule 5.151(A), which respondent uses to support his argument, is not germane as that rule is inapplicable to summary review proceedings, as stated in rule 5.157(D).

judge's orders in accordance with rule 5.157(F)(1), we reject respondent's attempts to dismiss OCTC's appeal on procedural grounds.⁸

III. THE HEARING JUDGE'S ORDERS GRANTING THE MOTION TO VACATE, DISMISS, AND SEAL WERE PROPERLY ISSUED

A. Pertinent Summary of Events Related to the Hearing Judge's Original Order and Amended Order

In 2018, respondent pleaded nolo contendere to a misdemeanor charge under Penal Code section 632, subdivision (a) (eavesdropping upon or recording confidential communications).⁹ All other charges against respondent were dismissed.¹⁰ His plea included his admission that he, in 2017, recorded three conversations with his then wife, which occurred in their home, and respondent did not have her consent to record any of the conversations. Respondent was sentenced to three years of informal probation.

⁸ As to respondent's argument that we lacked authority to issue our February 2024 order in a way that converted OCTC's request for review to include issues not raised in its request or that we lack authority to review the issues as raised by the original order, in light of our reasoning above, we consider this issue moot.

⁹ Penal Code section 632, subdivision (a), states, in relevant part, "A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication . . . shall be punished by a fine . . . or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment."

¹⁰ Respondent was initially charged in 2017, with violating Penal Code sections 273.5, subdivision (a) (corporal injury to spouse or cohabitant), and 136.1, subdivision (b)(2) (dissuading a witness from prosecuting a crime), which were later dismissed pursuant to his nolo contendere plea. The information was amended prior to his plea, adding the Penal Code section 632, subdivision (a), charge.

In 2018, OCTC transmitted to us the record of respondent's criminal conviction. In 2019, respondent filed a waiver of finality for his conviction (rule 5.344(B)),¹¹ and we referred the matter to the Hearing Department to determine whether the facts and circumstances surrounding the misdemeanor conviction involved moral turpitude or other misconduct warranting discipline. (Bus. & Prof. Code, § 6102, subd. (e);¹² rule 5.344(A).) In 2019, a hearing judge ordered respondent publicly reprovved based on a stipulation between him and OCTC, which, inter alia, reflected the misdemeanor eavesdropping conviction, the underlying factual basis for the conviction, and that, although the violation did not involve moral turpitude, it constituted other misconduct that warranted discipline.

Following the finality of the 2019 public reprovval order, respondent took steps to ameliorate his 2018 criminal conviction in state court. First, in January 2020, he obtained a Penal Code section 851.8 factual innocence finding regarding the dismissed counts in his criminal case. Next, in November 2020, respondent was allowed to withdraw his nolo contendere plea to the Penal Code section 632, subdivision (a), conviction and obtained dismissal of the conviction pursuant to Penal Code section 1203.4.¹³

¹¹ Respondent appealed the criminal conviction, which was later affirmed. In its opening brief, OCTC repeatedly raised respondent's waiver of finality for his conviction, though it never specified how his 2019 waiver affected the hearing judge's order or amended order that were issued in December 2023. Considering that a waiver of finality is merely one prerequisite to the Review Department referring a conviction matter to the Hearing Department, we see no relevance of the 2019 waiver to the December 2023 orders on appeal.

¹² All further references to sections are to the Business and Professions Code unless otherwise noted.

¹³ Penal Code section 1203.4 provides a form of post-conviction relief that is generally granted for the successful completion of criminal probation. As an expungement, such relief does not affect attorney discipline matters. (See *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813, 820, fn.7 [fact that conviction set aside under Pen. Code, § 1203.4 does not affect finality of conviction for purpose of disciplinary proceeding].)

In 2022, respondent filed a motion with the hearing judge to withdraw from the 2019 stipulation and vacate the public reproof order, which the judge denied.¹⁴ Respondent then sought review with us. In our 2023 Opinion, we upheld the judge's denial and rejected respondent's arguments as raised in his request for review, including his argument that the stipulation should be set aside and his public reproof order be vacated when he obtained a dismissal of his misdemeanor eavesdropping conviction pursuant to Penal Code section 1203.4 from superior court. Respondent then filed a petition for review in the California Supreme Court on April 5, making the same arguments that he raised with us regarding the effect of the Penal Code section 1203.4 dismissal from superior court.

Approximately two weeks after he filed his petition for review in the California Supreme Court, a San Joaquin County Superior Court judge issued the following orders in respondent's misdemeanor criminal matter upon unsealing the superior court file: the court (1) vacated the 2020 expungement obtained under Penal Code section 1203.4; (2) vacated respondent's Penal Code section 632, subdivision (a), 2018 misdemeanor conviction; and (3) dismissed respondent's

¹⁴ Prior to respondent's motion, he had earlier filed two motions in the Hearing Department that attempted to set aside the stipulation and public reproof order or remove the public reproof order from the State Bar's website. Both motions were ultimately denied by the Hearing Department. All three motions raised issues that are not related to his 2023 motion at issue and this appeal.

conviction pursuant to Penal Code sections 1385 and 1473.7.¹⁵ The judge also stated that he was making “a finding of factual innocence” and then ordered the file to be re-sealed.¹⁶

The State Bar filed its response to respondent’s petition in the California Supreme Court. The State Bar attached to its response a copy of the superior court order that dismissed respondent’s conviction pursuant to Penal Code sections 1385 and 1473.7. Nineteen days later, the Supreme Court issued a summary denial of respondent’s petition.

Three months later, respondent filed in the Hearing Department his Motion to Vacate, Dismiss, and Seal. OCTC filed an opposition. The hearing judge ordered two supplemental briefings from the parties. The judge issued the original order granting the motion; vacating the 2019 public reproof order based on the superior court’s dismissal of respondent’s Penal Code section 632, subdivision (a), conviction pursuant to Penal Code sections 1385 and 1473.7; dismissing the proceeding; and sealing the entire record. One week later, the judge issued the amended order that excluded three documents from the sealing order (our 2023 Opinion; a public

¹⁵ Penal Code section 1385 provides, in relevant part, that a judge may, upon “motion of the court . . . and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record.” Penal Code section 1473.7, subdivision (a), provides, in relevant part, that “[a] person who is no longer in criminal custody may file a motion to vacate a conviction or sentence [when] . . . [n]ewly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.” Subdivision (e)(4) of the statute requires the court to “specify the basis for its conclusion.”

¹⁶ OCTC contends that the superior court judge did not follow the requirements of Penal Code sections 1385, subdivision (a), or 1473.7, subdivision (e)(4), thus implying that the superior court order was improperly issued. To the extent this is OCTC’s argument, we disagree and point out that Penal Code section 1385, subdivision (a), only requires that the reasons for a dismissal be set forth in the order “if requested by either party or . . . [where] the proceedings are not being recorded . . . or reported” OCTC failed to note this requirement when it cited this subdivision to us and has not offered any evidence to demonstrate that either condition occurred. Additionally, Penal Code section 1473.7, subdivision (e)(4), requires only that “the court shall specify the basis for its conclusion.” The superior court judge appears to have done exactly that when he dismissed respondent’s conviction based on a factual innocence finding.

sealing order; and a second amended public sealing order) and referred the matter to us to determine if our 2023 Opinion should be depublished and sealed.

B. OCTC’s Arguments on Appeal are Rejected

1. Hearing Judge’s Authority or Jurisdiction to Consider Motion

OCTC contends that the hearing judge had no authority or jurisdiction to consider respondent’s motion following the summary denial by the California Supreme Court of his petition for review and that his discipline (i.e., the order of public reproof) became final at that point.¹⁷ OCTC makes two arguments to support its contention. First, it argues that the State Bar Court lost jurisdiction to further adjudicate the matter¹⁸ after the Supreme Court’s summary denial and that the State Bar Court cannot entertain respondent’s collateral attack on his now final discipline, citing to *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 83. This case does not support OCTC’s position when carefully considered. In *Peterson*, we determined that, until the record has been transmitted to the Supreme Court pursuant to section 6081, we retain jurisdiction over a disciplinary matter. (*Id.* at p. 85.) Further, under section 6081, only “[u]pon the making of any decision recommending the disbarment or suspension” of an attorney is the matter transmitted to the Supreme Court. Therefore, for a

¹⁷ We disagree with OCTC’s initial argument that the public reproof order was “final following a summary denial of review by the California Supreme Court” Pursuant to rule 5.127(A), the 2019 reproof order took effect when that order became final. Under section 6084, subdivision (a), “When no petition to review or to reverse or modify has been filed by either party within the time allowed therefor, or the petition has been denied, the decision or order of the State Bar Court shall be final and enforceable.” The public reproof order was not appealed to the California Supreme Court.

¹⁸ We, of course, have jurisdiction to consider jurisdictional issues that come before us. (*Rescue Army v. Municipal Court* (1946) 28 Cal.2d 460, 464; *In the Matter of Applicant B* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 731, 734.)

reproval matter¹⁹ that has been appealed by a petition for review to the Supreme Court, the matter remains under our jurisdiction, at least until the Supreme Court has granted review and ordered the file to be transmitted. Here, only a summary denial of respondent’s petition occurred, and thus, we conclude that the State Bar Court never lost jurisdiction in this matter. We likewise disagree with OCTC’s related point that respondent is attempting an impermissible collateral attack on an order of the California Supreme Court as occurred in *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. Bar Ct. Rptr. 480. In that case, an attorney was seeking to have his prior two-year suspension, which had been ordered by the Supreme Court, not considered as aggravation in a subsequent discipline matter where he claimed his prior suspension was based on one matter that would have been time-barred. (*Id.* at pp. 499-500.) Here, no discipline order has been issued by the Supreme Court; therefore, we see no collateral attack as OCTC claims.²⁰

OCTC’s second argument is that we are precluded from considering the effect of Penal Code sections 1385 and 1473.7 on respondent’s public reproval order because the California Supreme Court is presumed to have considered such issue in its 2023 summary denial of respondent’s petition for review. We also disagree with OCTC here for the reasons expressed below.

¹⁹ OCTC acknowledges that reprovals are issued by the State Bar Court under its own authority pursuant to section 6078. Because we have issued the final order of a public reproval under our own authority (see § 6084, discussed *ante*), we retain jurisdiction to vacate, reverse, or modify our own orders. (See *In re Marriage of Rassier* (2002) 96 Cal.App.4th 1431, 1435-1436 [“Once a court obtains jurisdiction over the parties in an action and enters an order in that action, the court retains jurisdiction to vacate, reverse, or modify that order even if there is no other basis for jurisdiction over the parties at that time [Citation.]”])

²⁰ We likewise reject OCTC’s citations to *In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929 and *In the Matter of Thomas* (Review Dept. 2022) 5 Cal. State Bar Ct. Rptr. 944 in supporting its collateral attack arguments as neither case involves a public reproval issued under our own authority.

OCTC argues that the summary denial of respondent’s petition constituted a final judicial determination of the merits by the California Supreme Court, which, it emphasizes, includes the factual innocence finding it presented in its response to respondent’s petition for review. (Cal. Rules of Court, rule 9.16(b); See *In re Rose* (2000) 22 Cal.4th 430, 446 [because of its original jurisdiction to discipline attorneys, summary denial of petition for review by Supreme Court “amounts to an exercise of [its] jurisdiction and a judicial determination on the merits”].) OCTC also claims that, because respondent’s factual innocence finding was presented to the Supreme Court in its response to the petition for review by attaching the superior court order to it, the Supreme Court “is properly presumed to have exercised its review process and powers” in review of the superior court order. Therefore, OCTC argues, we should conclude that the Supreme Court considered the superior court order and that it can have no further effect on respondent’s discipline—the summary denial has become the “law of the case,” and we are bound to follow that conclusion under *stare decisis*. In his responsive memorandum, respondent counters that the Supreme Court’s consideration of his petition for review could not have included the superior court order because (1) the superior court order did not exist at the time he filed his petition for review in the Supreme Court; (2) the superior court order was never judicially noticed by the Supreme Court, and, therefore, consideration of it would have violated the California Rules of Court; and (3) based on case law, the Supreme Court’s review could have only been regarding the merits of his petition as filed, and not the superior court order that was raised by OCTC in its response.

We agree with respondent’s points as set forth in his responsive memorandum. First, respondent’s petition for review was filed in the California Supreme Court more than two weeks before the superior court dismissed his conviction under Penal Code sections 1385 and 1473.7. Thus, respondent could not have raised it in his petition. Next, while the State Bar may have

attached the superior court order to its response filed in the Supreme Court, we see no evidence of a request to the Supreme Court for judicial notice of the superior court order prior to the Supreme Court issuing its summary denial. Without a request for judicial notice of the superior court order as required by rule 8.252 of the California Rules of Court or an indication in the summary denial that the Supreme Court took judicial notice on its own accord of the superior court order, we are reluctant to assume that the Supreme Court considered it as argued by OCTC. Finally, we agree with respondent that, for a summary denial to have a preclusive effect on us, an issue must have been raised in the petition itself to the Supreme Court²¹ and, more importantly, that the issue, here the effect of Penal Code sections 1385 and 1473.7 on respondent's public reproof order, must have been first considered by the State Bar Court prior to review by the Supreme Court. (See *In re Rose, supra*, 22 Cal.4th at pp. 442-443 [in attorney discipline matters, because Supreme Court utilizes State Bar Court "to conduct the preliminary investigation, hearing, and determination of complaints," Supreme Court's summary denial is based on review of State Bar Court proceedings].)²² Therefore, the summary denial was not an adjudication that dealt with the earlier superior court order or amounted to a final determination of discipline because respondent's petition appealed our 2023 Opinion denying his request to withdraw from his stipulation, which did not consider the superior court order.

²¹ As respondent has pointed out in his brief, case law indicates that a summary denial by the California Supreme Court reflects in this matter only a consideration of the merits *as presented in the petition*. (See *In re Rose, supra*, 22 Cal.4th at p. 445 ["[Supreme C]ourt's denial without written opinion of an application to review an order of the Railroad Commission constituted a determination on the merits of the questions *presented by the application*." (Italics added.)])

²² We recognize that the California Supreme Court "exercise[s] original jurisdiction over disciplinary proceedings . . . [and] the State Bar is subject to [its] expressly reserved, primary and inherent regulatory authority over attorney discipline [Citation.]" (*In re Rose, supra*, 22 Cal.4th at p. 442.)

2. Hearing Judge's Authority to Vacate the Public Reproval Order and Dismiss the Proceeding

OCTC argues that “nothing in Penal Code sections 1385 or 1473.7 suggests that a dismissal or vacation of a criminal conviction under those provisions also vacates professional discipline independently obtained. . . . This makes sense as attorney discipline is based upon the *conduct* committed by the attorney.” We disagree with OCTC’s legal analysis, at least in the context of this disciplinary proceeding.

At the outset, we agree case law requires, in a criminal conviction referral proceeding, that we look to an attorney’s misconduct and not the conviction when determining the appropriate discipline to recommend (*In re Gross* (1983) 33 Cal.3d 561, 566), but here we do not now have a criminal conviction that could be the basis of a proceeding under section 6101, subdivision (a).²³ As the hearing judge discussed in her order and amended order, expungement under Penal Code section 1203.4 is unlike a dismissal under Penal Code section 1385. As stated in *People v. Barro* (2001) 93 Cal.App.4th 62, the language of Penal Code section 1203.4 simply removes “all penalties and disabilities resulting from the offense of which he or she has been *convicted*” (*Id.* at p. 66, italics added.) Under Penal Code section 1203.4, the conviction remains and therefore respondent’s conviction referral matter was still procedurally proper, and the resulting discipline remained in place as discussed in our 2023 Opinion. Now, respondent has obtained something quite different. As discussed further in *Barro*, “decisional authority supports the conclusion that the effect of a dismissal under [Penal Code] section 1385 is *to wipe the slate clean* as if the defendant never suffered the prior conviction in the initial instance. In

²³ Section 6101, subdivision (a), states, “Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension. In any proceeding, whether under this article or otherwise, to disbar or suspend an attorney on account of that conviction, the record of conviction shall be conclusive evidence of guilt of the crime of which they have been convicted.”

other words, “[t]he defendant stands *as if he had never been prosecuted for the charged offense*. [Citation.]” (*Id.* at p. 67, italics added.) Now that no criminal conviction ever existed, the underlying authority under section 6101, subdivision (a), which is the sole basis of respondent’s discipline proceeding,²⁴ no longer exists as well. (See Cal. Rules of Court, rule 9.10(a) [State Bar Court’s delegated authority to hear conviction referral matters necessarily requires existence of criminal conviction].)

Notwithstanding OCTC’s assertion that standard 1.1 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct²⁵ fails to support the hearing judge’s actions, we conclude that *Barro*, in conjunction with section 6101, subdivision (a), requires us to uphold the judge’s conclusions, as expressed in both the original order and amended order, which were based “in the interests of justice.” Further quoting the judge, we too “fail to see how the purposes of attorney discipline are served by preserving this prior discipline based entirely on a now-voided conviction.” Contrary to OCTC’s argument, we find no sound policy reason to reverse the judge’s original order and amended order as OCTC has argued. Based upon our review of the record, we certainly do not subscribe to OCTC’s bald assertion that “this dramatic . . . action [will] open the floodgates for attorneys” We find unpersuasive OCTC’s arguments, as presented in its briefs, that the judge lacked authority to

²⁴ As the hearing judge noted, case law establishes that “the dismissal of criminal charges does not necessarily preclude the State Bar from basing disciplinary charges upon the same acts as charged in the criminal action.” (See *Emslie v. State Bar* (1974) 11 Cal.3d 210, 224 [dismissal of charges in Nevada for insufficient evidence did not preclude disciplinary proceedings upon same acts charged in criminal action]; *Wong v. State Bar* (1975) 15 Cal.3d 528, 531 [disciplinary proceedings after acquittal of charges may be maintained covering same facts].) In our review of both cases, neither was a conviction referral matter pursuant to section 6101.

²⁵ Standard 1.1 provides, in relevant part that, “The Standards for Attorney Sanction for Professional Misconduct . . . help fulfill the primary purposes of discipline, which include: (a) protection of the public, the courts and the legal profession; (b) maintenance of the highest professional standards; and (c) preservation of public confidence in the legal profession.”

consider respondent's 2023 motion or that she lacked authority to vacate the 2019 public reproof order and dismiss the proceeding.²⁶

3. Hearing Judge's Authority to Seal Records

The hearing judge ordered the court clerk to seal the entire record in this proceeding pursuant to rule 5.12, with the exception of three documents that would remain public: (1) the 2023 Opinion; (2) the public sealing order; and (3) the amended public sealing order. In both the original order and amended order, the judge specifically found that respondent's "constitutionally protected privacy interests outweigh the public interest in this proceeding" because his criminal conviction had been vacated, which "void[ed] the basis for this disciplinary proceeding."

OCTC argues that the hearing judge's sealing order must be voided because both the reproof order and the related proceedings were public. While generally citing to rule 5.12, which is our procedural rule that provides for the sealing of records, and also the definition of "confidential information" contained in rule 5.4(16), OCTC cites to rule 5.127(B), which states, "A public reproof is part of the attorney's official State Bar attorney records, is disclosed in response to public inquiries, and is reported as a record of public discipline on the State Bar's web page. The record of the proceeding in which the public reproof was imposed is also public." OCTC offers a number of additional points regarding why the judge had no authority to seal the records in this matter: our 2023 Opinion has referred to the associated record, exhibits, and pleadings; the California Supreme Court's summary denial refers to associated pleadings; and sealing the records would violate section 6092.5, subdivision (e), which requires the State Bar to expunge records at the direction of the Supreme Court.

²⁶ Any arguments raised on summary review, but not specifically addressed in this opinion, have been considered and rejected as meritless.

Outside of our need to follow rule 5.12, we do not find OCTC’s points germane²⁷ to the issue that we need to answer—namely, should records that have been duly created in a disciplinary proceeding that first imposed public discipline be sealed now that the discipline has been vacated and the proceeding itself has been dismissed? The hearing judge approached the issue correctly by considering if “specific facts [show] that a statutory privilege or constitutionally protected interest exists that outweighs the public interest in the proceeding.” (Rule 5.12(B).) The judge determined that the vacated criminal conviction, which voided the basis for this disciplinary proceeding, created a “constitutionally protected privacy [interest that] outweigh[ed] the public interest in this proceeding.” OCTC did not address, or even recognize, the judge’s analysis under rule 5.12. We find its silence on the judge’s application of rule 5.12 and her analysis telling.

In our search for some guidance on how to apply rule 5.12 to these facts, we believe that *Central Valley Ch. of the 7th Step Foundation, Inc. v. Younger* (1989) 214 Cal.App.3d 145 is useful. In *Central Valley*, the Court of Appeal concluded that the California Department of Justice violated a person’s state constitutional rights to privacy when it disseminated to nonexempt employers and licensing agencies arrest information not leading to a conviction because such dissemination was not justified by a compelling state interest. (*Id.* at p. 151.) The conclusion of *Central Valley* is sufficiently analogous with the requirements of rule 5.12(B) such that we apply it to find that respondent has a “constitutionally protected interest”—his right to

²⁷ Rule 5.127(B) is not relevant because, as we have discussed *ante*, we agree with the hearing judge that the 2019 public reproof order should be vacated. Besides its cite to rule 5.4(16), which is the definition of “confidential information,” OCTC fails to explain how this definition applies in this matter. Regarding our 2023 Opinion, we address this issue, *infra*. Regarding the California Supreme Court order and records, we offer no opinion on our superior tribunal’s operations. Finally, we do not see the relevancy of section 6092.5, subdivision (e), to this matter as the issue we consider here does not concern expungement.

privacy—in keeping his now dismissed disciplinary proceeding from dissemination by the State Bar to the public. Any interest that the public could have in his dismissed proceeding is outweighed by respondent’s protected privacy interest.

In conclusion, we affirm the original and amended orders of the hearing judge, except where noted:

1. The 2019 public reproof order is vacated.
2. The proceeding is dismissed without prejudice. (Rules Proc. of State Bar, rule 5.124(G).) The matter will remain absent from respondent’s attorney profile page.
3. Our 2023 Opinion is ordered sealed as we find that respondent’s privacy interests outweigh the right of public access to the opinion. (Rule 5.12.) Because the California Supreme Court denied respondent’s petition for review of our 2023 Opinion, we do not have authority to depublish the opinion. Respondent has a pending petition with the Supreme Court to seal the record and suppress his name on the Supreme Court’s public docket. The Supreme Court has requested that the State Bar serve our Opinion on Summary Review on it after filing. When the Supreme Court considers respondent’s petition, we request guidance from the Supreme Court as to depublishing of the 2023 Opinion and whether it can remain published if we remove names and other identifying information.
4. As this is a dismissed proceeding, we find that respondent’s privacy interests outweigh the right of public access to the record. (Rule 5.12.) Due to the confidential nature of these proceedings (rule 5.9), as of the date of this Opinion on Summary Review, we order the entire court record sealed, including the original public sealing order and the amended public sealing order. However, this anonymous version of the opinion is designated for publication and

available to the public.²⁸ In addition, we order the court case information sealed. Any future pleadings filed in the State Bar Court in this matter are ordered to be filed under seal. We further order that protected and sealed material will only be disclosed to (1) parties to the proceeding and counsel; (2) Supreme Court personnel, State Bar Court personnel, and independent audiotape transcribers; and (3) personnel of the State Bar's Office of Case Management and Supervision when necessary for their official duties. Protected and sealed material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosure. All persons to whom protected and sealed material is disclosed will be given a copy of this opinion sealing the record by the person making the disclosure. (Rule 5.12.)

McGILL, J.

WE CONCUR:

HONN, P. J.

RIBAS, J.

²⁸ A separate version of this opinion including identifying information is filed under seal.

XX-C-XXXXX

In the Matter of

Respondent EE

Hearing Judge

Hon. Manjari Chawla

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