No. 16-17798-EE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LEONARD ROWE, ROWE ENTERTAINMENT,
INC., LEE KING, AND LEE KING PRODUCTIONS, INC.,

Plaintiffs-Appellants,

v.

GARY, WILLIAMS, PARENTI, WATSON
& GARY P.L.L.C., WILLIE E. GARY, SEKOU M.
GARY, MARIA SPERANDO, AND LORENZO WILLIAMS,

Defendants-Appellees.

On Appeal from the United States
District Court for the Northern District of Georgia

APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LEONARD ROWE, ROWE ENTERTAINMENT, INC., LEE KING, and LEE KING PRODUCTIONS, INC.,	
Plaintiffs-Appellants,	Case No. 16-17798
-against -	
GARY, WILLIAMS, PARENTI, WATSON AND GARY, P.L.L.C., WILLIE E. GARY, SEKOU M. GARY, MARIA SPERANDO, and LORENZO WILLIAMS,	
Defendants-Appellees.	

PLAINTIFFS-APPELLANTS' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Leonard Rowe, Rowe Entertainment, Inc., Lee King, and Lee King Productions, Inc. submit pursuant to Fed.R.App.P. 26.1 and Eleventh Circuit Rule 26.1-1 this listing of the trial judge, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and any other identifiable legal entities related to the parties:

1. 462 Inc.
2. Adam Dana Mitzner, Esq.

3. Agency for the Performing Arts Incorporated
4. Alan C. Kessler, Esq.
5. Allyson D. Wenig, Esq.
6. Hon. Amy Totenberg
7. Artist Direct LLC
8. Artists & Audience Entertainment Corporation
9. BAB Productions, Inc.
10. Beaver Productions Inc.
11. Belkin Productions, Inc.
12. Bernard Bailey
13. Benesch, Friedlander, Coplan & Aronoff, LLP
14. Bill Graham Enterprises, Inc.
15. Black Promoters Association of America
16. Brian D. Buckstein, Esq.
17. Brian S. Fraser, Esq.
18. Buchanan Ingersoll & Rooney PC
19. C. Allen Garrett, Jr.
20. Carren Schulman, Esq.
21. Cellar Door Corporation

22. The Cellar Door Companies, Inc.

23. Cellar Door Concerts of the Carolinas Inc.

24. Cellular Door Entertainment, Inc.

25. Cellar Door Productions of D.C., Inc.

26. Cellar Door Concerts of Florida Inc.

27. Cellar Door Productions of Michigan Inc.

28. Christine Lepera, Esq.

29. Clear Channel Communications, Inc.

30. Concert/Southern Promotions Inc.

31. Contemporary Productions Inc.

32. Creative Artists Agency, Inc.

33. David D. Glass, Esq.

34. Delsener/Slater Enterprises, Ltd.

35. Dentons US LLP

36. Dicesare-Engler, Inc.

37. Don Law Company, Inc.

38. Douglas Lambert, Esq.

39. Edward Griffith, Esq.

40. Electric Factory Concerts, Inc.

41. Emmett, Cobb, Waits & Henning
42. Evening Star Productions, Inc.
43. Fantasma Productions of Florida, Inc.
44. The Ford Motor Company
45. Frankel & Abrams, Esq.
46. Fred Jones, Jr.
47. Gary, Williams, Parenti, Watson and Gary P.L.L.C.
48. George L. Grumley, Esq.
49. Gerald A. Margolis, Esq.
50. Gold, Farrell & Marks
51. Hanly Controy Bierstein Sheridan Fisher & Hayes, LLP
52. Helen Gavaris, Esq.
53. Howard Rose Agency Ltd.
54. Jam Productions Ltd.
55. Jam Productions Ltd. Inc.
56. James Francis Bogan III
57. James A. Cobb, Esq.
58. James Q. Walker, Esq.
59. Jeffrey H. Fisher, Esq.

60. Jeffrey A. Fuisz

61. Jeffrey S. Klein, Esq.

62. Jesse Boseman

63. Joseph S. Sayad, Esq.

64. Kaye Scholer LLP

65. Kristi Nicole Gamble, Esq.

66. Lee King

67. Lee King Productions, Inc.

68. Leonard Rowe

69. Linell Rowe, Esq.

70. Loeb & Loeb LLP

71. Lorenzo Williams

72. Madison B. McClellan, Esq.

73. Magicworks Concerts, Inc.

74. Manatt, Phelps & Phillips

75. Maria Sperando

76. Martin Roth Gold, Esq.

77. Matthew Francis Popp, Esq.

78. Melissa C. Rodriguez, Esq.

79. Michael Steven Barnett, Esq.

80. Monica Petraglia McCabe, Esq.

81. Monterey Peninsula Artists

82. Morgan, Lewis & Bockius LLP

83. Pace Concerts, Inc.

84. Piper Rudnick, Esq

85. Premier Talent Agency Inc.

86. QBQ Entertainment

87. Ray Heslin, Esq.

88. Renaissance Entertainment Inc.

89. Richard Primoff, Esq.

90. Robert Donnelly, Esq.

91. Hon. Robert P. Patterson

92. Rowe Entertainment, Inc.

93. RubinBaum

94. Rudolph & Beer

95. Sandor Frankel, Esq.

96. Sekou M. Gary

97. SFX Entertainment, Inc.

98. Sonnenschein Nath & Rosenthal

99. Spears & Imes LLP

100. Spectrum Arena Limited Partnership

101. Stephen D. Williger, Esq.

102. Steven Craig Beer, Esq.

103. Steven Michael Hayes, Esq.

104. Summitt Management Corporation

105. Sunshine Promotions Inc.

106. Sun Song Productions

107. Tal Efriam Dickstein, Esq.

108. Tricia P. Hoffler

109. United Concerts, Inc.

110. Universal Concerts, Inc.

111. Vanderberg & Geliu, LLP

112. Variety Artists International, Inc.

113. Vincent Anthony Sama, Esq.

114. Visteon Corporation

115. Weil, Gotshal & Manges LLP

116. Wendelynne J. Newton, Esq.

117. William C. Campbell

118. William Morris Endeavor Entertainment, LLC (formerly known as The William Morris Agency, Inc.)

119. Willie E. Gary

120. WJS III, Inc.

121. Wolf, Block, Schorr and Solis-Cohen, LLP

Plaintiffs-Appellants hereby certify that no party has a parent corporation or subsidiary, and that no publicly held corporation owns 10% or more of the stock of any party.

Submitted this 17th day of January, 2017

/s/ Edward Griffith

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STATEMENT
PURSUANT TO 11th CIR. R. 35-5

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

> Whether this circuit should adopt the "majority view" or the "minority view" as to personal jurisdiction over an out-of-state attorney who represents a state citizen in out-of-state litigation with foreseeable in-state consequences.

In reliance on a Tenth Circuit decision, the panel decision adopted the "majority view" that an out-of-state attorney is generally not subject to suit in the client's home state without additional state contacts. Panel Decision (Addendum) at 8 (citing *Newsome v. Gallacher*, 722 F.3d 1257, 1279-81 (10th Cir. 2013)).

Jurisdictions that follow the "minority view," which conflicts with the panel's decision, include Texas state and federal courts,[1] Colorado state courts,[2] and California state courts.[3]

Dated: February 28, 2018

/s/ Edward Griffith

EDWARD GRIFFITH,
Attorney of record for
Appellants

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[1] *See, e.g.*, *Cartlidge v. Hernandez*, 9 S.W.3d 241, 344 (Tex. App. [14th Dist.] 1999); *Schutze v. Springmeyer*, 989 F. Supp. 833, 836-838 (S.D. Tex. 1998).

[2] *See, e.g.*, *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1272-73 (Colo. 2002).

[3] *See*, *e.g*., *Brown v. Watson*, 255 Cal. Rptr. 507, 512-13 (Ct. App. 1989).

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Ira P. Robbins, "Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Decisions," 86 Tul. L. Rev. 1197 (2012) 5

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Ruth Bader Ginsberg, "Remarks on Writing Separately," 65 Wash. L. Rev. 133 (1990) 3, 6

PRELIMINARY STATEMENT

> *"The emerging consensus on jurisdiction over out-of-state law firms is undoubtedly a boon for lawyers who crisscross the country to represent clients."*
>
> -- *Reuters*, "Want of Jurisdiction saves Willie Gary from explosive malpractice suit," 2/1/18

This appeal raises the following issue of exceptional importance:

> Whether this circuit should adopt the "majority view" or the "minority view" as to personal jurisdiction over an out-of-state attorney who represents a state citizen in out-of-state litigation with foreseeable in-state consequences.

The panel adopted the "majority view" that an out-of-state attorney is generally not subject to suit in the client's home state. The panel relied on a Tenth Circuit decision that, while acknowledging "[c]ourts are split," rejected the "minority view" that out-of-state attorneys accepting work from state citizens have fair warning that they may be sued in their client's home state. Addendum (Panel Decision) at 8 (citing *Newsome v. Gallacher*, 722 F.3d 1257, 1279-81 (10th Cir. 2013)). Jurisdictions that conflict with the panel's decision include Texas state and federal courts,[1] Colorado state courts,[2] and California state courts.[3]

---

[1] *See, e.g.*, *Cartlidge v. Hernandez*, 9 S.W.3d 241, 344 (Tex. App. [14th Dist.] 1999); *Schutze v. Springmeyer*, 989 F. Supp. 833, 836-838 (S.D. Tex. 1998).

[2] *See*, *e.g*., *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1272-73 (Colo. 2002).

[3] *See*, *e.g*., *Brown v. Watson*, 255 Cal. Rptr. 507, 512-13 (Ct. App. 1989).

The "majority view" is poorly reasoned, inconsistent with Supreme Court jurisprudence, and ignores the strong state interest in protecting state citizens from incompetent or unscrupulous lawyers. Georgia's generous four-year statute of limitations for legal malpractice, for example, reflects a strong state interest to protect lifelong state citizens like Plaintiff Leonard Rowe from attorney misconduct. The "majority view" undermines that interest by subjecting Georgia citizens to the shorter statute of limitations of sister states, which would bar Rowe from any recovery and immunize Defendants for their misconduct.

The "majority view" is also based on a territorial approach to jurisdiction more appropriate to a bygone era when lawyers rarely ventured beyond their home states. Today, lawyers like Defendant Willie Gary practice, and market their services, nationwide. Gary, for example, has regularly appeared in Georgia courts for the past two decades. He solicited Plaintiff Leonard Rowe at the Fulton County Courthouse by representing that his private jets enable him to "meet with people in Atlanta, Chicago and Carolina the same day and still be home for dinner."

This case presents an opportunity for the Court to clarify a muddled area of the law by applying well-settled Supreme Court jurisprudence to the modern reality of nationwide legal practice. Such a decision would constitute an important precedent to protect clients from incompetent lawyers and give appropriate weight to the state interest of regulating legal services provided to its citizens.

STATEMENT REGARDING THE PANEL'S USE OF AN UNPUBLISHED PER CURIAM OPINION

> *"Judges generally do not labor over unpublished judgments, or even published per curiam opinions, with the same intensity they devote to signed opinions."*
>
> -- Ruth Bader Ginsberg, "Remarks on Writing Separately," 65 Wash. L. Rev. 133, 139 (1990)

This Court's workload mandates the use of unpublished opinions in most appeals. But this appeal was mistakenly placed on the nonargument calendar and relegated to resolution by an opinion that is not only unpublished but also per curiam. The reviewing staff attorney and the screening judge made two errors. First, they failed to recognize the exceptional issue of first impression raised by this appeal. *See*, *supra*, Preliminary Statement.

Second, they concluded that only a cursory analysis of the personal jurisdiction issue was warranted, perhaps because they mistakenly thought this action is time barred:

> More than ten years after [the underlying civil rights] case was dismissed,… Plaintiffs filed [this] suit....

Addendum at 2.

Yet in Plaintiffs' prior RICO case, Judge Totenberg found that Plaintiff Leonard Rowe's due diligence in investigating Willie Gary's fraudulent misrepresentations as to why the underlying civil rights action was dismissed raised issues of fact as to equitable tolling. *Rowe v. Gary, et al.*, 181 F. Supp. 3d

1161, 1178 (N.D. Ga. 2016) ("*Rowe I*"). Judge Totenberg also found that Gary's failure to obtain racially derogatory emails identified during e-discovery in the underlying civil rights action was "inexplicable." *Id*. at 1192.

Thus, this legal malpractice suit not only has merit and is timely in Georgia, but its prosecution is critical to hold Gary liable for misconduct that resulted in the loss of a potentially landmark civil rights action against the entertainment industry. Because this action is time barred under the shorter limitations periods of Florida (Gary's home) and New York (where the civil rights action was filed), this action is Plaintiffs' last chance to hold Gary liable.

This is not an attack on the Court's nonargument calendar or its use of unpublished opinions. By this Court's express standards, "Opinions that the panel believes to have no precedential value are not published." FRAP 36, 11th Cir. I.O.P. No. 6. The opinion decides an issue of first impression in this circuit. It therefore has precedential value and should have been published under the Court's standards.[4]

Standards for publishing are intended to maintain the quality of judicial opinions in cases, like this one, that require careful analysis. Richard A. Posner, *The Federal Courts: Challenge and Reform* (Harvard Univ. Press 1999) (hereafter "Posner") ("[U]npublished opinions are not as carefully prepared… nonpublication

[4] For these same reasons, this appeal does not fall within any of three categories for which the nonargument calendar is reserved. *See* 11th Cir. R. 34.3(b).

encourages judicial sloppiness. Or worse, the unpublished opinion provides a temptation for judges to shove difficult issues under the rug in cases where a one-liner would be too blatant an evasion of judicial duty.").[5]

The opinion also should have been signed by its author. Traditionally, the per curiam was used to signal that a case was uncontroversial, obvious, and did not require a substantial opinion. Prof. Ira P. Robbins, "Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Decisions," 86 Tul. L. Rev. 1197, 1200 (2012). This appeal does not fall within that category and the fact that it comprises 11 pages illustrates that point.

Like unpublished opinions, per curiam opinions result in a decline in the quality of judicial opinions when they are used for appeals that require substantial analysis. *See*, *e.g*., Posner ("Since a judge's identification with an opinion is greater when he is listed as the author than when he is one of three members of a panel none of whom is identified as the author, a judge's decision not to sign an opinion but to issue it as per curiam implies a lesser commitment to that opinion than to the opinions that he does sign. It implies, in other words, that the opinion,

[5] *Cf. Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) ("By any standard – and certainly by the Fourth Circuit's own – this decision should have been published.") (Thomas, J, dissenting); *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1986) ("Th[e] decision not to publish the opinion or permit it to be cited – like the decision to promulgate a rule spawning a body of secret law – was plainly wrong") (Stevens, J., dissenting).

for whatever reason, is not as carefully crafted, as reliable and in a sense authentic, as the judge's signed opinions."); Ginsberg, "Remarks on Writing Separately," 65 Wash. L. Rev. at 140 ("Public accountability through the disclosure of votes and opinion authors puts the judge's conscience and reputation on the line.").

This petition seeks both rehearing en banc and rehearing by the panel. That the panel decision is unpublished and per curiam should not deter either the Court or the panel from seriously considering this petition.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This diversity action asserts Georgia state-law legal malpractice and fraud claims against Willie E. Gary, his law firm Gary, Williams, Parenti, Watson, and Gary, P.L.L.C. (the "Gary Firm"), and three other firm lawyers (collectively with Gary, the "Gary Lawyers"). A-015-016.[6]

A. The Underlying Civil Rights Action.

The Gary Lawyers represented Plaintiffs Leonard Rowe, Rowe Entertainment, Inc., Lee King, and Lee King Production, Inc. (collectively, "Rowe") and other black concert promoters in a potentially landmark race discrimination and antitrust case against talent/booking agencies and white concert promoters, *Rowe Entertainment, Inc., et al. v. The William Morris Agency, Inc., et al.*, 98 Civ. 8272

[6] Citations to the Appendix are in the format "A-" followed by the page numbers.

(RPP) (S.D.N.Y.) (the "Civil Rights Action"). A-015-016. The defendants in the Civil Rights Action included the two largest and most powerful talent/booking agencies in the entertainment industry, The William Morris Agency, Inc. ("William Morris") and Creative Artists Agency, LLC ("CAA"). *Id*.

During discovery, the Gary Lawyers' e-discovery firm identified hundreds of racially derogatory emails sent by employees of William Morris and CAA and listed them in a memorandum. A-016 (the "E-Discovery Memorandum"). The Gary Lawyers never obtained those emails, however, and allowed their e-discovery firm to return the emails to William Morris and CAA. *Id*.

The Gary Lawyers also repeatedly failed to comply with court rules in opposing summary judgment, despite the district court giving them numerous opportunities to correct their deficient filings. A-017. Because of the Gary Lawyers' failure to obtain the racially derogatory emails and their violation of court rules, the summary judgment motions were granted, and the Civil Rights Action was dismissed. A-045-051.

But for the Gary Lawyer's inexplicable malpractice, the Civil Rights Action would have resulted in a landmark victory. Instead, the loss emboldened the entertainment industry to continue racially derogatory practices. A-017-018

B. The Prior RICO Action.

On March 13, 2015, Rowe commenced a prior action in the Northern District of Georgia asserting federal and state RICO claims as well as the same state-law claims asserted in this action, *Rowe I*. The premise of the RICO claim was that the only plausible explanation for the Gary Lawyers' gross malpractice was that they had engaged in a corrupt conspiracy with William Morris and CAA. A-072.

On March 31, 2016, Judge Totenberg dismissed *Rowe I*, finding that although the Gary Lawyers' alleged malpractice was "inexplicable," the bribery allegations, without direct evidence, did not meet the *Twombly*/*Iqbal* plausibility standard. *Rowe I*, 181 F. Supp. 3d at 1192.[7]

Judge Totenberg nevertheless found that Rowe's equitable tolling allegations raised issues of fact that precluded dismissal on timeliness grounds at

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[7] To support the plausibility of the RICO allegations, Rowe submitted evidence that Gary had misappropriated $51.5 million of a settlement in a Michigan case. In that case, the Michigan court determined:

> [The Gary Firm] may have used a common fraudulent settlement agreement scheme *in a variety of cases*, and that discussions [among the Gary Lawyers] about *the prospective structure of this scheme may have involved advice in furtherance of fraud…. There is probable cause to believe that a fraud has been attempted or committed.*

A-694-695) (emphasis added).

the pleading stage. *Rowe I*, 181 F. Supp. 3d at 1178. As to the merits of the legal malpractice allegations, Judge Totenberg also found:

> It is inexplicable why the Gary Firm failed to obtain the actual underlying emails…

Id. at 1178 (N.D. Ga. 2016). *See also* A-669-671 (presiding judge in the Civil Rights Action tells Rowe, "your lawyer was the Gary firm. They had had the power to [get the racially derogatory emails] … So the fault, if any, lies with the Gary firm.").

C. This Legal Malpractice Action.

After Judge Totenberg's ruling, Rowe commenced this action asserting the legal malpractice and fraud claims against the Gary Lawyers. A-001. The Gary Lawyers moved to dismiss based on lack of personal jurisdiction or, alternatively, transfer this action to New York. A-491. The district court granted the motion to dismiss without ruling on the transfer request. A-955. The panel affirmed. Add.

STATEMENT OF NECESSARY FACTS

The only fact necessary for this Court's consideration of this petition en banc is that the Gary Lawyers agreed to represent Rowe in the Civil Rights Action, thereby receiving "'fair warning' that they might be sued for malpractice in [Rowe's] forum [of Georgia]." *See, e.g., Keefe*, 40 P.3d at 1272.

With respect to this petition for rehearing by the panel, several undisputed facts were ignored or misunderstood by the panel decision:

First, even the "majority view," as described in *Newsome*, recognizes that personal jurisdiction exists over an out-of-state attorney who "reached out to the client's home forum to solicit the client's business." 722 F.3d at 1281. Here, although Rowe initially called Gary's office in Florida after seeing a *60 Minutes* segment on Gary, Gary met with Rowe in Atlanta, at the Fulton County Courthouse, and solicited his business by, among other things, bragging about his nationwide practice and his ability to travel to Georgia on his jet planes, the *Wings of Justice I* and the *Wings of Justice II*. A-645, 651-655.

Second, while the panel determined that "it was 'fortuitous' that Willie Gary happened to be in Atlanta [at the Fulton County Courthouse] at the time Rowe initiated contact with the Gary Firm," Add. at 8-9, the panel overlooked that Gary has practiced regularly in Georgia state and federal courts over the past two decades, and was repeatedly admitted *pro hac vice* in those cases. Some of his cases include:

(i) *Perry v. Fulton Co. School Dist.*, 1:16-cv-02596-AT (N.D. Ga.);

(ii) *Elliott v. Nissan North America, Inc.*, 1:16-cv-02400-LMM (N.D. Ga.);

(iii) *Smith v. City of Thomasville, Georgia*, 2016 U.S. Dist. LEXIS 135330 (M.D. Ga. 2016);

(iv) *Swoope v. Air Serv. Corp.*, 2013 Ga. State LEXIS 2761 (Sup. Ct. Fulton Co. 2013);

(v) *Jackson v. Worth County 911*, 1:11-cv-00049-WLS-TQL (M.D. Ga.);

(vi) *Jackson v. Cyberonics, Inc*., 1:10-cv-01890-HTW (N.D. Ga.);

(vii) *Keh v. Americus-Sumter Co. Hospital*, 2006 U.S. Dist. LEXIS 15668 (M.D. Ga. 2006);

(viii) *Walker v. Muscogee Co. Sheriff*, 4:04-cv-00024-CDL (M.D. Ga.);

(ix) *Mangum v*. Coca-Cola, 1:03-cv-00223-RWS (N.D. Ga.);

(x) *Marshal v. Americus-Sumter Co. Hospital*, 2002 U.S. Dist. LEXIS 26822 (M.D. Ga. 2002);

(xi) *Allen v*. Coca-Cola, 1:01-cv-02812-RWS (N.D. Ga.);

(xii) *Graham v*. Coca-Cola, 1:01-cv-02813 (N.D. Ga.);

(xiii) *Ingram v. Coca-Cola*, 200 F.R.D. 685 (N.D. Ga. 2001);

(xiv) *Abdallah v. Coca-Cola*, 133 F. Supp. 2d 1364 (N.D. Ga. 2001);

(xv) *Anderson v. Atlanta Comm*., 273 Ga. 113 (2000); and

(xvi) *Goodman v. Coca-Cola Company*, 1:00-cv-01774-RWS (N.D. Ga.).

Thus, the panel erred in its determination that Gary's presence in Atlanta was "fortuitous." Because Gary practices constantly in Georgia, it is not surprising that he was there when Rowe inquired about the possibility of retaining him for the Civil Rights Action.

Third, in soliciting Rowe at the Atlanta meeting, Gary explained that he maintained a national practice and was capable of handling complex litigation anywhere in the country. A-652 (¶22). He pointed out that even though he is based in Florida, he had been in Atlanta for a week at the trial of one of his Georgia matters, one of his close friends was Bill Campbell, the Mayor of Atlanta at that time, and that he practiced in Georgia courts regularly. *Id*. Gary told Rowe that he had successfully represented plaintiffs in the Coca-Cola race discrimination class-action in Atlanta and that he had recently litigated a case before the Georgia Supreme Court involving liability arising out of the terrorist bombing of the Atlanta Olympics in 1996. A-652 (¶23).

Gary also bragged to Mr. Rowe that to maintain a truly nationwide practice, his firm owned two private jets named *Wings of Justice I* and *Wings of Justice II*. A-652-653 (¶24). Gary said the planes enabled him and his firm's lawyers to "meet with people in Atlanta … still be home for dinner [in Florida]. *Id*.; A-676 (press release regarding Gary Firm's jet planes).

Fourth, Willie Gary has extensive personal connections with Georgia. Two of his children live in Atlanta with their mother and the Fulton County Superior Court ordered Gary to pay monthly child support of $28,000. A-667 (¶ 58), A-677 (Warren, Beth, "How Much is Too Much Child Support," *The Atlanta Constitution*

Journal, January 21, 2007). In reporting on Gary's child support payments, the legal media reported in 2005:

> *Gary is known in Georgia law circles* for his representation of race discrimination plaintiffs against The Coca-Cola Co., and Centennial Olympic Park bombing victims suing Atlanta Olympic organizers.

A-677 (quoting "Prominent Trial Lawyer Loses Support Fight," Law Journal Newsletters, *The Matrimonial Strategist*, July 28, 2005) (emphasis added).

In 2003, Gary hired former Atlanta Mayor Bill Campbell as a partner of Gary's firm. A-654. Gary was also the founder and CEO of a cable television network headquartered in Atlanta. A-687.[8] Because Gary did not submit evidence regarding his Georgia contacts and the District Court did not authorize discovery on the jurisdictional issues, the extent of Gary's other Georgia contacts is not known.

Finally, as set forth in more detail, *infra*, at Argument § II, the panel considered factors that may be appropriate for determining venue and forum nonconveniens but are inappropriate when considering whether a defendant is subject to the court' personal jurisdiction.

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[8] *See also* Wikipedia contributors, "Black Family Channel," *Wikipedia, The Free Encyclopedia*, last accessed Feb. 27, 2017.

ARGUMENT

I. EN BANC REHEARING SHOULD BE GRANTED BECAUSE THE "MAJORITY VIEW" ADOPTED BY THE PANEL IS WRONG.

The panel decision adopts the "majority view" that out-of-state lawyers are generally not subject to personal jurisdiction in their client's home state without independent analysis. Instead, this important holding is relegated to a footnote that defers to another circuit. Add. at 8 n.4 ("*At this point in time*, we see no reason to depart from the Tenth Circuit's well-reasoned analysis of this issues.") (emphasis added).[9]

But the Tenth Circuit's *Newsome* decision is not well reasoned. In fact, it does not set forth any analysis. After citing the "majority" and "minority" cases, *Newsome* merely asserts:

> We agree with the majority that an out-of-state attorney working from out-of-state on an out-of-state matter *does not purposefully avail himself of the client's home forum's laws and privileges*.

Newsome, 722 F.3d at 1280-81 (emphasis added).

Newsome also ignores the well-reasoned analyses of minority view cases, which focus on the out-of-state attorney's purposeful availment of the client

[9] By leaving open the possibility of a different holding "at [another] time," the decision suggests that its author recognized the flaws of the "majority view," but didn't believe this appeal warranted a full and careful consideration of the issue. If so, Appellants were unfairly deprived of the appellate review to which they were entitled.

forum's laws and privileges when he accepts work from an in-state client as well as the state's strong interests in protecting clients from negligent lawyers. *See*, *supra*, at 1 nn.1-3 (citing minority view cases). These cases correctly reason that because states carefully regulate, and impose serious fiduciary and ethical obligations, on the legal profession, lawyers who accept work from a client have fair notice that they may be haled into court in the client's home forum if they fail to represent the client competently. *Id*.

The majority also adheres to an outmoded view of the practice of law. The panel found that "the burden [of defending in Georgia] would be excessive on the Gary Defendants." Yet Gary has practiced constantly in Georgia for the past two decades and he bragged to Rowe that his private jets enable him to meet in Atlanta easily. The majority view that lawyers like Gary who canvass the country for clients would face significant burdens in defending malpractice actions in their client's home state is a throwback to long-gone era.

The majority view also devalues the state interest in providing a forum for citizens to sue their lawyers for malpractice. Georgia's interest is especially strong here since Georgia is the only jurisdiction in which this action is not time barred.

Finally, the majority view is inappropriate where, as here, the underlying litigation has potential consequences that affect the client's forum. Here, the Civil Rights Action sought reforms in the entertainment industry that would have had

nationwide consequences. And the fact that it was commenced in New York was fortuitous; it could have been brought in Atlanta or any other major urban center. *Cf.* Prof. Cassandra Robertson, "Personal Jurisdiction in Legal Malpractice Litigation," 6 St. Mary's J. Legal Mal. & Ethics 2, *30 ("courts should consider the foreseeable in-state effects of the attorney's out-of-state conduct").

II. PANEL REHEARING SHOULD BE GRANTED.

The panel overlooked or misinterpreted several undisputed facts establishing that the Gary Defendants are subject to personal jurisdiction in Georgia even under the "majority view." *See*, *supra*, at Statement of Necessary Facts, pp. 10-13.

The most glaring error is the panel's failure to recognize that Gary "reached out to [Rowe's] home forum to solicit the client's business," which even majority cases recognize may confer jurisdiction. *Newsome*, 722 F.3d at 1280-81. *Cf. McGee v. Int'l Life*, 355 U.S. 220 (1957) (insurance company's solicitation of client conferred jurisdiction in client's home state). The panel ignores Gary's solicitation of Rowe and mistakenly dismisses Gary's presence in Atlanta as "fortuitous." Yet it was not fortuitous because Gary regularly practices in Georgia and has been admitted pro hac vice in numerous cases over the past two decades. *See*, *supra*, at 10-11. These facts stand in stark contrast to *Newsome*, which

involved an out-of-state attorney who neither solicited nor had significant communications with the client.[10]

The panel may have overlooked these facts because, like many decisions adopting the "majority view," it confused the factors relevant to personal jurisdiction with factors relevant to venue or forum nonconveniens. For example, the panel decision begins with the following assertion:

> In short, Plaintiffs seek to use the Georgia federal courts to obtain civil liability over Florida defendants for actions that relate exclusively to representation in a New York case.

Id. at 2.

First, the actions of the Gary Defendants do not relate exclusively to a representation in a "New York" case. The Civil Rights Action challenged nationwide practices of major entertainment industry companies. It was commenced in New York because the plaintiffs' first set of lawyers happened to be based there. But for the Gary Defendants' gross malpractice and fraud, the Civil Rights Action would have had far ranging effects in Georgia and throughout the country.

Second, while out-of-state connections to a lawsuit are relevant to venue and forum nonconveniens, the defendants' in-state contacts that reflect "purposeful

[10] Willie Gary's exceptional connections with Georgia over two decades render him essentially "at home" there and thereby subject him to general personal jurisdiction. *Daimler v. Bauman*, 134 S. Ct. 746, 761 n.20 (2014). The panel ignored Gary's connections to Georgia and his consent to jurisdiction there in his applications for admission pro hac vice. Ga. Sup. Ct. Rule 4.4(F)(1).

availment" of the forum's laws are the only relevant factors for personal jurisdiction. And Gary's Georgia connections fall squarely within the Supreme Court's description of what constitutes "purposeful availment:"

> [W]here the defendant "deliberately" has … created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985) (citing *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 648 (1950)).

CONCLUSION

The Court should grant rehearing en banc. Alternatively, the panel should grant rehearing.

Dated: February 28, 2018

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CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation set forth in this Court's "Petitions for Rehearing and Rehearing En Banc Color/Quantity/Time Summary"[11] because it contains 3,894 words, excluding the parts of the petition exempted by Fed.R.App.P. 32(f).

2. This petition complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

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[11] http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FilingRehearingEnBancColorQuantityTime_DEC16.pdf

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing has been filed with the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system, which will automatically send email notifications to:

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ADDENDUM

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17798
Non-Argument Calendar

D.C. Docket No. 1:16-cv-01499-MHC

LEONARD ROWE,
ROWE ENTERTAINMENT, INC.,
LEE KING,
LEE KING PRODUCTIONS, INC.,

Plaintiffs - Appellants,

versus

GARY, WILLIAMS, PARTENI, WATSON AND GARY, P.L.L.C.,
WILLIE E. GARY,
SEKOU M. GARY,
MARIA SPERANDO,
LORENZO WILLIAMS,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(January 31, 2018)

Before MARCUS, JILL PRYOR, and DUBINA, Circuit Judges.

PER CURIAM:

Plaintiffs-Appellants Leonard Rowe, Rowe Entertainment, Inc., Lee King, and Lee King Productions, Inc. (collectively "Plaintiffs") appeal the district court's dismissal of their complaint for lack of personal jurisdiction over Defendants Gary, Williams, Parteni, Watson & Gary, P.L.L.C. (the "Gary Firm"), Willie E. Gary, Sekou M. Gary, Maria Sperando,[1] and Lorenzo Williams (collectively the "Gary Defendants").

Plaintiffs are two individuals, alleging Georgia citizenship, and two corporations. The complaint identifies Rowe Entertainment, Inc. as a Georgia corporation with its principal place of business in Georgia, while Lee King Productions, Inc. is a Mississippi corporation with its principal place of business in Mississippi. The Gary Firm is a Florida law firm with its principal place of business in Florida and whose members are all residents of Florida. The individually-named Defendants are also all identified as citizens of Florida.

I. BACKGROUND

This case comes before us with a complicated history: It originated in the District Court for the Southern District of New York, in which the Gary

[1] Defendant Sperando represents herself *pro se* in this matter, as she no longer is connected to the Gary Firm.

Defendants represented Plaintiffs in a widely-publicized civil action for racial discrimination in the entertainment industry. More than ten years after that case was dismissed,[2] upon the entry of summary judgment in favor of the entertainment industry defendants (who are not party to the instant action), Plaintiffs filed suit in the District Court for the Northern District of Georgia alleging legal malpractice and fraudulent misrepresentation by the Gary Defendants for, among other alleged wrongdoings, failing to obtain relevant e-mail evidence for the failed summary judgment response and for fraudulently inducing Plaintiffs to reject a settlement offer of $20 million. In short, Plaintiffs seek to use the Georgia federal courts to obtain civil liability over Florida defendants for actions that relate exclusively to representation in a New York case.[3]

In the complaint, Plaintiffs allege only the Gary Defendants' citizenship to demonstrate complete diversity. In response to Defendants' motion to dismiss, Plaintiff Rowe submitted a declaration that detailed the contacts various Defendants had with Georgia to establish personal jurisdiction. These contacts

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[2] *See Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272 (RPP), 2005 WL 22833 (S.D. N.Y. Jan. 5, 2005), *aff'd* 167 F. App'x 227 (2d Cir. 2005).

[3] This action is not Plaintiffs' first attempt to do so. On March 13, 2015, Plaintiffs filed an action in the Northern District of Georgia alleging federal and state RICO claims in addition to the malpractice and fraud claims. The district court dismissed those federal claims and declined to exercise supplemental jurisdiction over the remaining state claims for malpractice and fraud. *See Rowe v. Gary, Williams, Parenti, Watson & Gary, P.L.L.C.*, No. 1:15–CV–770–AT, 2016 WL 3390493 (N.D. Ga. Mar. 31, 2016) ("*Rowe I*"). Plaintiffs filed the instant action in the same court on May 9, 2016. [R. 1].

include: (1) Plaintiff Rowe's initial meeting with Willie Gary, which occurred in the Fulton County Courthouse in Atlanta, (2) approximately three meetings that took place in Atlanta, including one major case strategy meeting, (3) phone calls and emails between Plaintiff Rowe, who was located in Atlanta, and Gary Defendants to discuss the progress of the New York action, and (4) one deposition conducted by Defendant Sperando in Atlanta for the New York action. Upon the Gary Defendants' motion to dismiss, or in the alternative to transfer venue to the Southern District of New York, the district court found Plaintiffs did not present sufficient evidence to establish personal jurisdiction and dismissed the action. We review *de novo* the decision of the district court to dismiss a complaint for lack of personal jurisdiction. *Carmouche v. Tamborlee Management, Inc.*, 789 F.3d 1201, 1203 (11th Cir. 2015).

II. ANALYSIS

"A federal court sitting in diversity undertakes a two-step inquiry in determining whether personal jurisdiction exists: the exercise of jurisdiction must (1) be appropriate under the state long-arm statute and (2) not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). The district court found, and we do not disagree, that the Georgia long-arm statute, O.C.G.A. § 9–10–91, permitted the exercise of jurisdiction over the Gary Defendants. *See*

generally Diamond Crystal Brands, Inc. v. Food Movers Internat'l, Inc., 593 F.3d 1249, 1264–66 (11th Cir. 2010). The question before this Court, then, is whether the exercise of jurisdiction violates the Due Process Clause. In alleging personal jurisdiction exists, Plaintiffs contend the district court can exert jurisdiction on the basis of either general or specific jurisdiction. We will analyze each in turn.

A. General Jurisdiction

The Supreme Court recently reviewed the requirements for exercising general jurisdiction and, as should be the result in this case, found the basis for asserting jurisdiction to be lacking:

> *Goodyear* and *Daimler* clarified that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Daimler*, 571 U.S. at ___, 134 S.Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919, 131 S.Ct. at 2846). The "paradigm" forums in which a corporate defendant is "at home," we explained, are the corporation's place of incorporation and its principal place of business. *Daimler*, 571 U.S. at ___, 134 S.Ct. at 760; *Goodyear*, 564 U.S. at 924, 131 S.Ct. at 2846. The exercise of general jurisdiction is not limited to these forums; in an "exceptional case," a corporate defendant's operations in another forum "may by so substantial and of such a nature as to render the corporation at home in that State." *Daimler*, 571 U.S. at ___, 134 S. Ct at 761 n. 19. We suggested that *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 72 S. Ct. 413, 96 L.Ed. 485 (1952), exemplified such a case. *Daimler*, 571 U.S. at ____ n. 19, 134 S.Ct. at 761 n. 19. In *Perkins*, war had forced the defendant corporation's owner to temporarily relocate the enterprise from the Philippines to Ohio. 342 U.S. at 447–48, 72 S.Ct. at 413. Because Ohio then became "the

> center of the corporation's wartime activities," *Daimler*, 571 U.S. at ____ n. 8, 134 S. Ct. at 756 n. 8, suit was proper there, *Perkins*, 342 U.S. at 448, 72 S. Ct at 413. [. . .] In short, the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana. But in-state business, we clarified in *Daimler* and *Goodyear*, does not suffice to permit the assertion of general jurisdiction over claims like Nelson's and Tyrrell's that are unrelated to any activity occurring in Montana.

BNSF Ry. Co. v. Tyrrell, ___ U.S. ___, 137 S. Ct. 1549, 1558–59 (2017) (holding that because BNSF was "not incorporated in Montana and does not maintain its principal place of business there" or was otherwise "so heavily engaged in activity in Montana 'as to render [it] essentially at home' in that State," general jurisdiction was improper); *see also Carmouche*, 789 F.3d at 1204–05 (holding the district court did not have general personal jurisdiction).

Because the allegations in the complaint do not demonstrate any facts that indicate the Gary Defendants are "essentially at home" in the State of Georgia, general personal jurisdiction is improper. Thus, we agree with the district court's finding that it lacked general jurisdiction.

B. Specific Jurisdiction

"In specific jurisdiction cases, we apply the three-part due process test, which examines: (1) whether the plaintiff's claims 'arise out of or relate to' at least one of the defendant's contacts with the forum; (2) whether the nonresident defendant 'purposefully availed' himself of the privilege of conducting activities

within the forum state, thus invoking the benefit of the forum state's laws; and (3) whether the exercise of personal jurisdiction comports with 'traditional notions of fair play and substantial justice.'" *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1355 (11th Cir. 2013) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73, 474–75, 104 S. Ct. 1868, 1872 (1985); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945)) (other citations omitted). Plaintiff must prove the first two prongs and, if successful, the defendant must then make a "compelling case" that exercising jurisdiction would violate traditional notions of fair play and substantial justice. *Id.* (citing *Diamond Crystal Brands, Inc.*, 593 F.3d at 1267).

"In specific jurisdiction cases, the 'fair warning requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum . . . and the litigation results from alleged injuries that arise out of or relate to those activities.'" *Diamond Crystal Brands, Inc.*, 593 F.3d at 1267 (quoting *Burger King Corp.*, 471 U.S. at 471–72, 105 S. Ct. at 2182). As we have said, "the defendant must have 'purposefully availed' itself of the privilege of conducting activities—that is purposefully establishing contacts—in the forum state and there must be a sufficient nexus between those contacts and the litigation." *Id.*

1. Minimum Contacts Analysis

In entering this analysis, we are mindful that we must focus on the Gary Defendants' conduct to determine whether they "deliberately engaged in significant activities within [Georgia] or created continuing obligations with residents of that forum." *Diamond Crystal Brands, Inc.*, 593 F.3d at 1268. Stated otherwise, the contacts with Georgia cannot merely be "random," "fortuitous," or "attenuated." *See id.* (quoting *Burger King Corp.*, 471 U.S. at 475, 105 S. Ct. at 2183). Further, an out-of-state defendant's merely entering into a contract—such as one for legal representation—with a forum resident is insufficient to pass the minimum contacts test. *Id.*; *see also Newsome v. Gallacher*, 722 F.3d 1257, 1279–81 (10th Cir. 2013) (agreeing "with the majority that an out-of-state attorney working from out-of-state on an out-of-state matter does not purposefully avail himself of the client's home forum's laws and privileges . . . .").[4]

In the case at bar, the events and contacts giving rise to the litigation occurred, on the whole, in either New York or Florida. Plaintiffs point to few actual contacts that occurred in Georgia—mainly to the one litigation preparation meeting in December 2002, the taking of one deposition for the New York action, and the initial contact between Plaintiffs and the Gary Firm. As to the initial meeting, we find that it was "fortuitous" that Willie Gary happened to be in Atlanta

[4] The *Newsome* case from our sister-circuit does an excellent job analyzing the majority and minority cases that answer whether an out-of-state attorney's representation of a client is, in itself, enough to grant federal courts personal jurisdiction over the attorney. At this point in time, we see no reason to depart from the Tenth Circuit's well-reasoned analysis of this issue.

working on an unrelated case at the time Rowe initiated contact with the Gary Firm. Further, the Gary Firm engaged in only one official litigation strategy meeting in Atlanta[5] with Plaintiffs over the course of a multi-year representation in a case before another district court. While it might have been a matter of convenience, this one meeting is an attenuated contact at best. Finally, Plaintiffs argue the Gary Defendants regularly communicated with them via phone, e-mail, and even fax about the New York action, including the contested discovery e-mails and the offer of settlement. While Rowe might have been in Georgia for some of the discussions about the ongoing litigation, he clearly admits that he also spoke to the Gary Defendants about his case from New York and in the Gary Firm office in Florida. *Compare with Diamond Crystal Brands, Inc.*, 593 F.3d at 1269 (finding specific jurisdiction when the non-forum defendant "purposefully engag[ed] in fourteen such transactions in just six months," thus establishing "a substantial and ongoing relationship with a Georgia manufacturer"). Unlike the ongoing contacts that occurred in Georgia in *Diamond Crystal Brands, Inc.*, the contacts in this case demonstrate random or attenuated contacts within the State directly, all of which tie to ongoing litigation occurring in an out-of-state forum. For these reasons, we conclude that subjecting the Gary Defendants to jurisdiction in Georgia would

[5] Plaintiffs claim they met with Gary Defendants on two other occasions, but Rowe's declaration reveals that these two other meetings took place on the Gary Firm's private plane on the tarmac at the Atlanta airport en route to other meetings. [R. 26 at p. 21].

violate Due Process, and we thus affirm the district court's dismissal of the action for lack of personal jurisdiction.

2. *Fair Play and Substantial Justice*

Although unnecessary, we also conclude that the district court correctly ruled that exercising personal jurisdiction in this case would violate traditional notions of fair play and substantial justice. "In this analysis, we look to the burden of the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, and the shared interest of the several states in furthering fundamental substantive social policies." *Diamond Crystal Brands, Inc.*, 593 F.3d at 1274 (quotation marks and citation omitted). The district court correctly pointed out that Georgia has a limited interest in adjudicating this dispute because the lion's share of the conduct alleged occurred outside of Georgia; in fact, New York would have a significantly stronger interest in adjudicating a dispute regarding malpractice and fraud that occurred in its courts. *See Touchcom, Inc. v. Bereskin & Parr*, 547 F.3d 1403, 1417–18 (Fed. Cir. 2009) (finding that the U.S. courts generally have an interest in adjudicating disputes for claims of malpractice that occur before federal agencies). Overall, the factors supporting jurisdiction are few in this case, as Georgia has limited interest

and the burden would be excessive on the Gary Defendants.[6] We therefore affirm the district court's finding that exercising jurisdiction over the Gary Defendants would violate the Due Process Clause.

For the foregoing reasons, we affirm the judgment of dismissal.

AFFIRMED.[7]

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[6] Plaintiffs argue Georgia has a strong interest in this case—more so than New York—because the statute of limitations has run in New York. The Court does not find this argument persuasive when New York has an equal interest to Georgia's in protecting clients from fraud that occurred in its courts.

[7] We do not reach the issue of transfer Plaintiffs raise because they waived the argument below by actively opposing transfer to the Southern District of New York [*see* R. 28 at pp. 19–23]. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) ("[A]n issue not raised in the district court and raised for the first time in an appeal will not be considered[.]") (internal marks and citation omitted).