No.

IN THE
Supreme Court of the United States

KEITH SIMPSON

Petitioner,

v.

THE BANK OF NEW YORK MELLON, ET. AL.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Florida Supreme Court and the Third District Court of Appeal of Florida violated the due process protections of the 5th and 14th Amendments to the United States Constitution by ordering the equitable relief of foreclosure despite fraud on the court involving false and fictitious evidence, perjury by senior executives at the highest levels of Bank of America, defiance of court orders, and a purge of evidence in violation of a court ordered subpoena, all of which defrauded the courts, the federal regulators and the U.S. Department of Justice and violated the promise to stop using fraudulent evidence in foreclosures under the $25 Billion National Mortgage Settlement?

Whether the Florida Supreme Court and the Third District Court of Appeal of Florida violated the due process protections of the 5th and 14th amendments to the U.S. Constitution by refusing to grant disqualification when there are objective reasons to question its impartiality in foreclosure appeals raising this same fraudulent misconduct?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner, Keith Simpson, was the defendant in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County and the Appellant in the Third District Court of Appeal of Florida. Mr. Simpson is an individual. Thus, there are no disclosures to be made by him pursuant to Supreme Court Rule 29.6.

The Respondent is The Bank Of New York Mellon f/k/a The Bank Of New York. No publicly held corporation owns 10% or more of the Bank of New York Mellon Corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Keith Simpson respectfully petitions for a Writ of Certiorari to review the judgment of the District Court of Appeal of the State of Florida, Third District after the Florida Supreme Court declined to accept jurisdiction.

INTRODUCTION

In 2008, the United States suffered "the greatest economic meltdown since the Great Depression" and "[a]t the core of this crisis was the mortgage meltdown" caused by the securitization of subprime mortgages.[1] Securitization of mortgages was made possible largely through the expansive use of a private financial industry-created database system, Mortgage Electronic Registration Systems, Inc. ("MERS"), as a replacement for state recording laws. *See generally, In re MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 96, 861 N.E.2d 81, 828 N.Y.S.2d 266 (2006).

One of the nation's largest such originators was

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[1] Nelson, G.S., Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law, 37 PEPP. L. REV. 583, 583 (2010). *See generally* Lapidus, A.L., What Really Happened: Ibanez and the Case For Using the Actual Transfer of Documents, 41 Stetson L. Rev. 817, 817-18 (Spring 2012)(citations omitted).

Countrywide Financial Corp., through its subsidiary Countrywide Home Loans, Inc. ("Countrywide"). Between 2003-2009, Countrywide originated some $1.562 trillion in residential mortgages, a substantial portion of which were repackaged as securities and marketed to institutional investors. See Comment: ARMS, but No Legs to Stand On: "Subprime" Solutions Plague the Subprime Mortgage Crisis, 40 Tex Tech. L. Rev. 1089, 1101 (Summer 2008).

With the collapse of the housing market, the MERS system was exploited by the nation's large mortgage service providers for a different purpose - the mass production of false and fictitious mortgage assignments for use in foreclosures. One of these providers was Bank of America, N.A. ("BANA") - the successor in interest to Countrywide. BANA is the mortgage servicer for the Respondent and primarily responsible for this criminal foreclosure misconduct.

In March of 2011, the Office of the Comptroller of the Currency ("the OCC") forced BANA into a Consent Order finding it had also litigated cases without properly endorsed notes.[2] The Consent Order forced BANA into the "Independent Foreclosure Review" to disclose any case filed without a properly endorsed note pending in 2009 and 2010.

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[2]https://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47b.pdf R. 3 and 15.

As the Office of Inspector General found in 2012, BANA even financially rewarded employees to "robosign" documents needed to process foreclosures. R. 165-168. [3] The widespread misuse of MERS in this fashion eventually led to state and federal investigations, culminating in (1) a "Consent Order" between MERS and four federal agencies in 2011 and (2) a "Consent Judgement" between the five largest mortgage service companies in the United States and the U.S. Department of Justice ("the DOJ") and the Attorneys General of 49 states in 2012. See p. __ infra. Nonetheless, BANA bombarded state and federal courts with foreclosure actions based on similar fraudulent paperwork.[4]

There is now evidence that BANA defrauded the OCC and the DOJ by continuing to litigate foreclosures on behalf of Bank of New York Mellon (BONYM) and others with false and fictitious mortgage assignments and without properly endorsed notes. Moreover, BANA engaged in

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[3] See Office of the Inspector General, U.S. Department of Housing and Urban Development, Bank of American Corporation Foreclosure and Claims Process Review, Charlotte, NC, Memorandum No. 2012-FW-1802 (March 12, 2012), at pp. 5-12. R. 165-186. The OIG noted that "one notary testified that daily volume went from 60- to 200 documents per day to 20,000 documents per day...." Id. at page 6.

[4] In Miami-Dade County alone, 56,656 foreclosure cases were filed during 2008. See Nelson, 37 Pepp. L. Rev. at 586, n. 18.

systemic fraud by suborning perjury from senior executives to backdate endorsements affixed on notes as part of a fraudulent endorsement process.

The evidence shows BANA started that fraudulent endorsement process three days after the OCC Consent Order and kept that process secret through the $25 Billion National Mortgage Settlement. As judges ordered discovery into this fraudulent misconduct, BANA defied those orders, even ordering the destruction of 1.88 billion objects of data, metadata and encryption keys in a military grade purge of evidence in defiance of a court ordered subpoena.

Like many Americans, Mr. Simpson fell into foreclosure following the 2008 financial crisis and wanted a loan modification. His original foreclosure attorneys raised no meaningful defense to foreclosure never got him a loan modification. In November of 2013, Mr. Simpson accepted a consent judgment on the false belief that he might be offered a modification before the foreclosure sale, rather than proceed to trial.

Facing a writ of possession and eviction in October of 2014, Mr. Simpson retained undersigned counsel who recognized the fraudulent endorsement and assignment presented in the case. Undersigned counsel moved to disqualify the trial judge who granted the motion and recused himself from all cases with undersigned counsel.

Thereafter, undersigned counsel filed a motion to vacate judgement of foreclosure due to fraud on the court under Florida Rule of Civil Procedure 1.540(b) ("the Rule 1.540(b) Motion"). On September 28, 2016, the trial court granted the Rule 1.540(b) motion and vacated the consent final judgment.

BONYM then appealed to the Third District Court of Appeal who reversed and reinstated the judgment. The opinion misrepresented facts, ignored Florida Supreme Court law, and disregarded evidence showing the fraud. The Florida Supreme Court declined jurisdiction to address this factually and intellectually dishonest result.

There is a clear pattern of bias in the Third DCA which the Florida Supreme Court refuses to address. Thus, it is left to this Honorable Court to confront this documented fraud and bias that violated Mr. Simpson's due process rights under the 5th and 14th Amendments to the U.S. Constitution.

REPORTS OF OPINIONS BELOW

The opinion of the Third District Court of Appeal of Florida giving rise to this petition is the Bank of New York Mellon v. Keith Simpson. 227 So. 3d 669 (Fla. 3rd DCA 2017) and the decision of the Florida Supreme Court that declined to accept jurisdiction to review that opinion. *See* App. 1-10.

STATEMENT OF BASIS FOR JURISDICTION

The decision sought to be reviewed was entered by the Third District Court of Appeal of Florida on August 9, 2017. On March 12, 2018, the Florida Supreme Court determined it should decline to accept jurisdiction and denied a petition for certiorari review, rendering the Third DCA's opinion a decree from the highest court of the State of Florida. This Court has jurisdiction to review by certiorari the judgment in question pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be … deprived of life, liberty or property without due process of law…."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall … deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statute § 702.01 provides "All mortgages shall be foreclosed in equity…"

Florida Rule 1.540(b) provides: "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered

Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: … (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; … The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken."

STATEMENT OF THE CASE

A. Statement of the Facts:

Petitioner and his disabled wife fell into financial hardship after the housing crash and hired the Morris DuPont law firm to defend the foreclosure and apply for a loan modification. R. 0693. Instead of defending the foreclosure, on August 9, 2013, Morris Dupont and BONYM agreed to stop discovery and focus solely on the loan modification. R. 0723-24. This left Mr. Simpson defenseless when his case came up for trial with no modification offer. R. 0729-0731.

(1) The Hobson's Choice of Trial without Discovery or a Consent Judgment with a Possible Loan Modification

In the fall of 2013, believing a loan modification was

imminent, Mr. Simpson learned the trial court denied his motion for continuance of the trial. R. 0694. Morris Dupont told Mr. Simpson "there was just no way they could get ready for trial." R. 0694. On November 11, 2013, without discovery, Mr. Simpson signed a consent judgment to continue to discuss his loan modification. R. 0694. That modification was eventually denied. R. 0707.

(2) The Judgment is Vacated Due to Fraud on the Court

On August 21, 2014, undersigned counsel appeared in the case and filed a Motion to Vacate Final Judgment under Fla. R. Civ. P. 1.540(b). R. 0198-234. The Rule 1.540(b) Motion asserted BONYM had unclean hands and committed fraud on the court by using rubber-stamped endorsements backdated by perjury of senior BANA executives and a false MERS assignment representing a transaction that never happened to prove standing. R. 0198-234. BANA, as agent for BONYM, created this evidence after the fact on behalf of third parties knowing it was not competent, in violation of the National Mortgage Settlement.

On September 28, 2016, the trial court entered an order denying BONYM's Amended Motion to Enforce Order and Vacating the Consent Final Judgment. R. 0682. The trial court explained:

"This Court is concerned in searching for the

> truth, this is not a fishing expedition. Right now should this Court vacate the consent judgment, the Bank of New York would have the opportunity to pursue their case and Mr. Simpson would have an opportunity to defend his case. But, most importantly, we can search for the truth of what actually occurred here. ***Mr. Simpson's lawyer testified that she didn't even pursue developing all of the discovery. She came to an agreement with the plaintiff to stop discovery. I don't know why we aren't here on a motion about the competency of his prior counsel.*** … This Court hereby vacates the consent judgment. This Court sends this matter back in the posture where it was the day prior to the vacation, and this matter can be pursued. Mr. Simpson can pursue his defense. The plaintiff can pursue the foreclosure. R. 0737-38. (emphasis added).

B. Course of Proceedings and Dispositions:

BONYM appealed the order vacating the judgment to the Third DCA. Mr. Simpson argued a Florida Supreme Court case holding a consent judgment is treated the same as a judgment after litigation for Rule 1.540(b) purposes. *Arrieta-Gimenez v. Arrieta-Negron*, 551 So. 2d 1184, 1186 (Fla. 1989). BONYM argued a consent judgment is treated differently than a regular judgment for Rule 1.540(b) purposes, citing a Third DCA case from 16 years before *Arrieta*. *Smiles v. Young*, 271 So. 2d 798,

802-803 (Fla. 3rd DCA 1973).

At oral argument, the Third DCA suggested the Rule 1.540(b) Motion filed in 2014 lacked specificity. On July 24, 2017, undersigned counsel filed an Amended Motion to Vacate Judgment Due to Fraud and Newly Discovered Evidence pursuant to Rule 1.540(b) and asked the Third DCA to relinquish jurisdiction for the trial court to consider additional evidence of fraud discovered since the prior Rule 1.540(b) Motion was filed three years earlier.

(1) The Third DCA Misrepresented the Amended Rule 1.540(b) Motion to Reach a Pre-Determined Result - Foreclosure

That amended, updated Rule 1.540(b) motion noted that the Honorable U.S. District Court Judge Ursula Ungaro of the Southern District of Florida, Miami Division, refused to dismiss a false claims act case filed in Bruce Jacobs v. Bank of America Corporation in US District Court Case Number 1:15-cv-24585-UU about the same backdated rubberstamped endorsement and false MERS assignment presented herein.

From pages 19-21 of her omnibus order denying BANA's motion to dismiss this false claims act case, Judge Ungaro held "[u]sing rubber-stamped endorsements on promissory notes or relying on MERS transfers to foreclose on properties or obtain orders of sales falls within the scope of actions

barred by the [$25 Billion National Mortgage Settlement] Consent Judgment Servicing Standards….” Judge Ungaro also found the False Claims Act Complaint:

> alleges facts that give rise to a ‘reasonable inference’ that Defendants signed the Consent Judgment with the intent to ‘continue pursuing mortgage foreclosures by misleadingly filing copies of promissory notes bearing rubber-stamped endorsement signatures that were not legally authorized by the purported signatories (and therefore, were invalid), and by filing copies of purported assignments by MERS, which never owned any interest in the notes that purportedly were being assigned (and therefore, were ineffective).’”

The amended Rule 1.540(b) Motion further set forth that BANA and BONYM defied court orders and hid its process to backdate endorsements on original notes done to defraud the OCC, the DOJ and the Courts. It explained that BANA ordered its vendor, Sourcecorp, to conduct an “extensive purge” of all its records in defiance of a court ordered subpoena. Sourcecorp provided an email documenting its destruction of 1.88 billion objects of data, metadata and encryption keys at BANA’s direct order. This extensive purge of evidence began within days of BONYM and BANA producing a witness who committed perjury by denying any knowledge about Sourcecorp. Sourcecorp

continued this data purge for 90 days, even after receiving a court ordered subpoena for that data.

The Amended Rule 1.540(b) Motion set forth the history of fraudulent misconduct going back to 2005, when the Honorable Miami Dade Circuit Court Judge Jon Gordon struck all the MERS foreclosures as sham. It discussed the 2006 Baker Hostetler Report to Fannie Mae published by the New York Times in 2012, which concluded bank lawyers were routinely lying to judges in Florida and beyond. It also discussed the testimony in *Kemp v. Countrywide*, where a Bank of America senior team leader admitted she never saw an endorsed note between 2006 and 2009. At the time, the standard operating procedure was to create and endorse an allonge as needed.

The Amended Rule 1.540(b) motion discussed the two orders by the Honorable Miami-Dade Circuit Court Judge David Miller imposing sanctions under the inequitable conduct doctrine against BANA and its counsel for "outrageous" and "bad faith" misconduct to stonewall discovery into the creation of these backdated rubber stamped endorsements and false MERS assignments. Judge Miller asked for additional caselaw to determine whether there is support to impose sanctions beyond just attorney's fees, as those amounts are essentially meaningless to BANA and BONYM.

The Amended Rule 1.540(b) Motion discussed an

order to show cause why HSBC and Ocwen should not be held in indirect criminal contempt and sanctioned for fraud upon the court and finding of unclean hands by the Honorable Miami-Dade Circuit Court Judge Beatrice Butchko.

The Amended Motion discussed that MERS policies and procedures expressly prohibit BANA and BONYM from using a MERS assignment to assign both the mortgage "together with the note" as MERS has no rights to do anything with the note which Judge Gordon's order made clear.

(2) The Motion for Rehearing and Rehearing En Banc Discussing the Dishonesty of the Third DCA's Opinion

Two days after its filing, on July 26, 2017, the Third DCA summarily denied the motion to relinquish jurisdiction to consider the Amended Rule 1.540(b) motion. On August 9, 2017, the Third DCA reversed and reinstated the judgment of foreclosure.

Mr. Simpson then filed a timely Motion for Rehearing and/or Rehearing En Banc and argued the Third DCA violated Florida Supreme Court law that holds a consent judgment is not treated any differently from a regular judgment for Rule 1.540(b) motion purposes. *Arrieta-Gimenez v. Arrieta-Negron*, 551 So. 2d 1184, 1186 (Fla. 1989).

Although the Third DCA did not address *Arrietta*, the motion noted the Third DCA clearly read the opinion because it adopted its facts nearly verbatim. The trial judge found Mr. Simpson's counsel committed malpractice by their email agreeing to waive all discovery.

However, in footnote 2, the Third DCA said Mr. Simpson "***had full access to discovery (in fact, the record reveals that he made full use of his discovery rights*** until deciding to enter into the SRA), ***and he had every right to reject the settlement offer until he could adequately explore*** his defenses." (emphasis added).

Strikingly, the Florida Supreme Court in *Arrieta also* found "Appellant ***had full access to discovery (in fact, the record reveals that appellant made full use of her discovery rights), and she had every right to reject the settlement offer until she could adequately explore*** the extent of her father's holdings in Puerto Rico." Id. (emphasis added).

The Motion for Rehearing noted that Mr. Simpson's prior counsel admitted she "was not trying to legally defeat the complaint in foreclosure." R. 723-724. Mr. Simpson's lawyer clearly did not "make full use of his discovery rights" as *Arrieta's* lawyers did.

Finally, the Motion for Rehearing argued the Third DCA unfairly knocked down strawman arguments in its opinion. The Third DCA wrote that the Rule

1.540(b) only alleged "fraud in the mortgage banking industry" by "other banks" and that these "generalized allegations of fraudulent practices in the mortgage industry… were known… between 2011 and 2013. The Third DCA concluded these allegations "have no specific relation to the facts of this case… and are merely generalized complaints about the mortgage banking industry."

The Third DCA ignored the detailed account in the Rule 1.540(b) motion that BONYM "and its servicer, BANA, affixed the David Spector endorsement years after he left Countrywide and attached a MERS assignment which represented a transaction that could never legally occur ***in this case***, and systemically many others, to perpetrate a fraud on the court." (emphasis added). This was not general knowledge in 2011, or about other banks and the mortgage industry.

The Motion for Rehearing explained that undersigned counsel had repeatedly [5] and fully briefed to the Third DCA that BONYM and its servicer, BANA:

> have engaged in widespread fraud in foreclosures after the National Mortgage Settlement, where, such as this case, they: (1)

[5] *See, Paula Perez Rodriguez v. Bank of New York*, Third DCA case no. 3D12-3209; *Bank of New York v. Donny Marin*, Third DCA case nos. 3D15-1927 and 3D17-1730; *Carlisle v. U.S. Bank Nat. Assoc.*, Third DCA case no. 3D17-58; *Alton Bryan v. Citibank, NA*, Third DCA case no. 3D17-1058.

> affixed an undated endorsement of Mr. Spector, Laurie Meder and/or Michelle Sjolander years after they left the employment of Countrywide Home Loans, Inc.; (2) had Michelle Sjolander and other high level Senior Vice Presidents commit perjury to backdate the endorsement to a time when he worked for the Countrywide, and (3) created a false assignment where MERS sells the note and mortgage to the Appellee, which violates MERS' own policies that MERS can never assign the note and mortgage because MERS doesn't own either.

The Motion for Rehearing also explained that undersigned counsel repeatedly advised the Third DCA that BONYM is the same party as the Appellee in the *Pino v. Bank of New York, Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011). In *Pino*, the 4th DCA certified a question of great public importance to the Florida Supreme Court finding "many, many mortgage foreclosures appear tainted with suspect documents… [which] may dramatically affect the mortgage foreclosure crisis in State. *Id.* at 955.

Finally, the Motion for Rehearing argued the Third DCA's opinion is contrary to Florida Supreme Court law and "would negatively impact the public's perception of this Honorable Court's ability to render meaningful justice." The Third DCA denied all relief on September 26, 2017, and Mr. Simpson filed a petition for certiorari to the Florida Supreme Court on November 6, 2017.

(3) The Florida Supreme Court Refuses to Intervene to Protect the Constitutional Rights of Foreclosure Defendants to Defend Against Fraudulent Evidence

The Florida Supreme Court declined to accept jurisdiction and dismissed the petition on March 12, 2018. The Florida Supreme Court has repeatedly declined to act to protect the constitutional due process rights of foreclosure defendants.

Most recently, on August 7, 2018, the Florida Supreme Court declined to accept jurisdiction in the case of *Bank of America v. Jose Rodriguez* in case number SC18-1288. This is the same case that the Honorable Judge David Miller entered the two sanctions orders under the inequitable conduct doctrine, discussed *supra*., to block discovery into backdated endorsements and false MERS assignments by BANA.

BANA appealed Judge Miller and moved to disqualify him. Then BANA's counsel threw a fundraiser for the successor judge who promptly struck both sanction orders, struck all discovery, struck all pleadings alleging fraud, unclean hands or violations of Florida's RICO statute, and entered a summary final judgment of foreclosure. On appeal in case number 3D17-272, the Third DCA issued a per curiam affirmance. By refusing to write an opinion, the Third DCA knew the Florida Supreme Court could refuse accept jurisdiction under *R.J.*

Reynolds Tobacco Co. v. Kenyon, 882 So. 2d 986 (Fla. 2004).

On May 31, 2018, undersigned counsel filed a Motion for Rehearing and Rehearing En Banc in *Rodriguez* which argued constitutional due process does not permit a PCA on this record. On June 6, 2018, undersigned counsel filed a third Motion to Disqualify the Third DCA.

(4) The Florida Supreme Court Has Taken No Action as the Third DCA Repeatedly Denied Motions to Disqualify that Set Forth Objective Reasons to Question its Impartiality

The Third DCA has repeatedly refused to disqualify itself, despite patently obvious reasons to question its fairness in foreclosures. One of many objective reasons to question the Third DCA's impartiality is a recent front page Daily Business Review article entitled, Can He Say That? Frustrated Attorney Asks 'What's Wrong with the Third DCA.[6]

The front page article reported "***there is no question that the Third District is pro-business and couldn't care less about homeowners.***" (emphasis added). It further reported that the Third DCA "abuses per

6https://www.law.com/dailybusinessreview/sites/dailybusinessreview/2018/02/09/can-he-say-that-frustrated-attorney-asks-whats-wrong-with-the-third-dca/

curiam affirmances, or PCAs, to avoid explaining their rulings on lender standing, … [and] misuses the tool to strategically sidestep writing opinions that could provide grounds for rehearing. Instead, they say it uses the decisions to wipe out options for further review and avoid conflicts with other district courts." Instead of a reasoned opinion that would create conflict jurisdiction for further review, the Third DCA issues a PCA that says: you lose because we said so and there's nothing you can do about it.

Moreover, the front page article laid out statistical, empirical evidence that the Third DCA reversed on standing in favor of the banks 87% of the time, while over the same time period, the 1st, 2nd, 4th and 5th DCA's all reversed on standing in favor of the homeowners between 73%-84% of the time. This is not just an anomaly. The front page article attached a press release that set forth:

> … of its sixteen written opinions addressing standing in recent-era foreclosure cases, the Third District has only ruled for a property owner twice. *66 Team, LLC v. JPMorgan Chase Bank Nat. Ass'n*, 187 So. 3d 929 (Fla. 3rd DCA 2016) and *Riocabo v. Fed. Nat'l Mortgage Ass'n*, 230 So. 3d 579 (Fla. 3rd DCA 2017). (Consider that in 66 Team, the bank did not admit any documents or evidence at trial to prove its case. And in *Riocabo*, the bank confessed error - admitting that it must lose on appeal.)… The neighboring Fourth

> District has issued 120 written foreclosure opinions on standing, 87 (73%) have been in favor of property owners. On this same issue, the Second District has issued 43 written opinions, 36 (84%) have been for property owners; the First District has ruled for owners 83% of the time; and the Fifth District has found for owners 72% of the time.... But, the Third District has ruled for a property owner only twice (13%). It's also noteworthy that the Third has only issued sixteen written foreclosure opinions on standing – the fewest of any appellate court in the state.

Undersigned counsel has now filed three Motions to Disqualify the Third DCA citing this article and Canon 3 E(1) of the Code of Judicial Conduct which mandates that "a judge ***shall*** disqualify himself or herself in a proceeding in which the judge's impartiality ***might*** reasonably be questioned..." (emphasis added). Two of the three cases involve the same fraudulent conduct presented in this case.

All three Motions to Disqualify referenced over 36 foreclosure appeals undersigned counsel litigated before the Third DCA over the past decade. Virtually every appeal of a judgment of foreclosure ended with a PCA. It didn't matter whether the issue raised was due process violations, hearsay, fraud, perjury, lack of jurisdiction, bias, or whatever. The Third DCA refused to write an opinion, grant rehearing, or certify conflict, even if other DCA's or

the Florida Supreme Court reached the opposite result.

All three Motions to Disqualify explained how in virtually every appeal where the trial judge ruled in favor of undersigned counsel's client, including *Simpson*, the Third DCA reversed with intellectually and factually dishonest opinions. The Third DCA applied the wrong standard of review to evidentiary rulings and findings of unclean hands, made findings of fact in direct conflict with the actual record, and ignored law that could expose its result to further appellate review.

These objective reasons to question the Third DCA's impartiality all centered on its attempt to cover up, protect, and ignore well-documented fraud on the court in foreclosures. All to ensure a pre-determined result – foreclosure.

On August 7, 2018, the Florida Supreme Court cited *R.J. Reynolds Tobacco Co.* and dismissed the Petition for a Writ of Mandamus to compel the Third DCA to issue a written opinion in *Rodriguez*. That appeal will soon be filed with this Court along with other homeowners denied their constitutional rights to due process protected by the 5th and 14th Amendments to the U.S. Constitution.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO PROTECT DUE PROCESS RIGHTS GUARANTEED BY THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION THAT PREVENT FRAUD ON THE COURT OR BIASED APPELLATE JUDGES FROM GRANTING THE EQUITABLE RELIEF OF FORECLOSURE AND CONDONING THAT FRAUD

A. Introduction

Just over a week ago, on their 33rd wedding anniversary, Mr. Simpson and his disabled wife moved from their home after the appellate courts of Florida chose to protect a residential mortgage foreclosure system predicated on fraud, perjury, defiance of court orders, and the destruction of evidence under a court ordered subpoena, rather than protect their due process rights under of the U.S. Constitution. The Simpsons only wanted a fair loan modification that never came.

(1) Fraud on the Court Violates Due Process when it Deprives Any Person of Life, Liberty, or Property

It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct.

2252, 2259, 173 L. Ed. 2d 1208 (2009). Because fraud on the courts pollutes the process society relies on for dispute-resolution, subsequent courts reason that "a decision produced by fraud on the court is not in essence a decision at all, and never becomes final. Judgments … obtained by fraud or collusion are void, and confer no vested title." *League v. De Young*, 52 U.S. 185, 203, 13 L. Ed. 657 (1850). Due process does not permit fraud on the court to deprive any person of life, liberty or property. A biased court also violates constitutional due process guarantees by tolerating that fraud.

"As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court … by the presentation of known false evidence is incompatible with 'rudimentary demands of justice' … the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'" *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972). In *Mooney*, this Court held due process:

> is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to

> be perjured. Such a contrivance … is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action … may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a state, 'whether through its legislature, through its courts, or through its executive or administrative officers… Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution. *Mooney v. Holohan*, 294 U.S. 103, 113, 55 S. Ct. 340, 342, 79 L. Ed. 791 (1935).

If a state, whether by the active conduct or the connivance of the prosecution, obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law. *Hysler v. State of Fla.*, 315 U.S. 411, 413, 62 S. Ct. 688, 690, 86 L. Ed. 932 (1942). This holds true whether the deprival is of liberty or property without due process of law.

(2) The Growing Chorus of Federal and State Court Judges Calling Out this Fraud in Foreclosures

The Florida Legislature enacted Florida Statute §702.01 which provides, all mortgages shall be foreclosed in equity. Fla. Stat. Ann. § 702.01 (1987).

Almost two centuries ago, this Court pronounced: "equitable powers can ***never*** be exerted in behalf of one who has acted fraudulently, or who, by deceit or any unfair means, has gained an advantage." *Bein v. Heath*, 47 U.S. 228, 6 How. 228, 1848 WL 6464 (U.S.La.), 12 L.Ed. 416 (1848)(emphasis added).

Recently, the Chief Judge of the Second DCA, in a concurring opinion, noted, "[i]t appears that many foreclosure judgments are entered based on dubious proof by the banks due to an understandable lack of sympathy for defendants who are years behind on payments…" *Shaffer v. Deutsche Bank Nat. Trust.*, 2017 WL 1400592 at *8 (Fla. 2nd DCA) filed April 19, 2017. On June 10, 2017, the Honorable Broward County Circuit Court Judge William W. Haury, Jr. wrote:

> This is one of the few instances in the history of Florida jurisprudence where the Florida Supreme Court has deemed it necessary to subject an entire industry to special rule due to the industry's documented illegal behavior… a direct result of the robosigning scandal… Notwithstanding this, some of our courts appear to be conforming to the business practices of this industry rather than requiring the business practices to conform to the law." W*ells Fargo Bank N.A., as Trustee for the Structured Asset Mortgage Investments II Inc. Bear Stearns Mortgage Funding Trust 2007-AR1, Mortgage Pass*

> *Through Certificates Series 2007-AR1. v. Jerry Warren*, Broward County Case No. 13-010112(11), fn. 4.

In 2011, the Honorable Judge Gary M. Farmer retired from the Fourth DCA of Florida but wrote a dissent, through the Honorable Judge Mark Polen, following the robo-signing scandal that stated:

> Decision-making in our courts depends on genuine, reliable evidence. The system cannot tolerate even an attempted use of fraudulent documents and false evidence in our courts. The judicial branch long ago recognized its responsibility to deal with, and punish, the attempted use of false and fraudulent evidence. When such an attempt has been colorably raised by a party, courts must be most vigilant to address the issue and pursue it to a resolution. *Pino v. Bank of New York, Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011).

No other Florida appellate decisions discuss the robo-signing scandal although millions of false and fictitious mortgage assignments were recorded and presented to take homes in equitable actions of foreclosure in Florida and other states.

Only the Honorable U.S. District Court Judge Ursula Ungaro has expressly called out BANA for violating the $25 Billion National Mortgage Settlement ("NMS") by using rubberstamped

endorsements backdated by perjury by the highest senior BANA executives and false MERS assignments in the false claims act case brought by undersigned counsel discussed *supra*. It is intolerable for any appellate courts to misstate the facts and the law to protect a fraudulent foreclosure process rather than the constitutional rights of homeowners.

While BANA and BONYM suborned perjury and destroyed evidence to cover up their misconduct, Wells Fargo essentially admitted to the same misconduct before U.S. Bankruptcy Court Judge Robert N. Drain of the Southern District of New York. Wells Fargo, another party to the NMS, was also "improving its own position by creating new documents and indorsements from third parties to itself to ensure that it could enforce its claims." *In re Carssow-Franklin (Wells Fargo Bank, N.A. v. Carssow-Franklin)*, --- F. Supp. 3d ---, --- [2016 WL 5660325, *6-10] (S.D.N.Y. 2016).

In *Franklin*, the Honorable U.S. District Court Judge Kenneth M. Karas affirmed Judge Drain's findings, noting Wells Fargo engaged in a practice of creating "after-the-fact" documentation "on behalf of third parties" by in-house "assignment and indorsement teams" which Wells Fargo tried to cover-up with an invalid MERS assignment on June 12, 2012, two months after signing the $25 Billion National Mortgage Settlement. BONYM and BANA did the same thing and engaged in the most

egregious misconduct to cover it up.

No party, especially not a party to the $25 Billion NMS, "has a right to trifle with the courts." *Ramey v. Haverty Furniture Companies, Inc.*, 993 So. 2d 1014, 1018 (Fla. 2nd DCA 2008). The *Ramey* Court cited this Court's holding by Justice Black that:

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. *Id.* at 1020-21, *citing, Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250 (1944), receded from on other grounds by *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L. Ed.2d 21 (1976).

(3) <u>This Fraudulent Foreclosure is Not Due Process</u>

Petitioners' homestead is a protected property right which Respondent cannot foreclose on with unclean hands. The U.S. Supreme Court instructs that once it is determined that a protected property interest was taken, the next determination is whether the State's procedures comport with due process. *American Mfrs. Mutual Ins. Co., v.*

Sullivan, 526 U.S. 40, 59, 119 S.Ct. 977, 989 (1999). This Court must review these procedural and substantive due process violations of the U.S. Constitution. "It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972).

Once a state has established avenues of appellate review, they must be free of unreasoned distinctions to impede equal and open access to the courts. *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500 (1966). By writing an opinion that misstates the facts and ignores Florida law, the Third DCA denied Petitioner equal access to the Florida Supreme Court and due process of law. BONYM should not be afforded the protection of the law when Mr. Simpson is not.

It is "fundamental black letter law" that a District Court should write an opinion unless "the points of law raised are so well settled that a further writing would serve no useful purpose." *Elliot v. Elliot*, 648 So. 2d 137, 138 (Fla. 4th DCA 1994). The Third DCA has abused the PCA to deny appeals speaking out about the use of false endorsements and assignments, fraud on the court, perjury, and the destruction of evidence in defiance of a court ordered subpoena. This breakdown in due process reaches an arbitrary result that conflicts with well-settled

law and permits a party to the National Mortgage Settlement to continue to commit fraud on the court in foreclosures with the approval, *sub silencio*, of the Florida Court system.

Due Process protects against the arbitrary deprivation of property and reflects the value our constitutional and political history places on the right to enjoy prosperity, free of governmental interference. *Fuentes v. Shevin*, 407 U.S. 67, 80-1, 92 S.Ct. 1983, 1996 (1972).

Under the Magna Carta, the Due Process Clause limits the powers of all branches of government, including the judiciary. *Truax v. Corrigan*, 257, U.S. 312,333, 42 S.Ct. 124, 129 (1921). Chief Justice Taft wrote:

> "Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which Legislatures, executives and courts are expected to make, execute and apply laws." *Id.* The guaranty of due process "was aimed at undue favor and individual or class privilege…." *Id.*

This is why "Equal Justice Under Law" is etched in all caps across the front of the U.S. Supreme Court.

"The vague contours of the Due Process Clause do not leave judges at large." *Rochin v. People of California*, 342 U.S. 165, 170, 72 S.Ct. 205, 209 (1952). Judges have long been required to give a public reasoned opinion from the bench in support of their judgment. Id. at fn. 4. Arthur J. England Jr., Chief Justice Emeritus of the Florida Supreme Court recently noted: "[W]e expect judges, like no other public officials, to justify their decisions with reason." Arthur J. England Jr., Asking For a Written Opinion From a Court That Has Chosen Not To Write One, 78-Mar Fla. B. J. 10, 14 (March 2004).

Before his passing, Justice England concluded this amendment to Rule 9.330 is conceptually flawed and should be repealed, recognizing a procedural infirmity in that "asking a District Court to provide an opinion that will expose their rationale to Supreme Court review puts expressly in the hands of District Court judges the discretion to allow or not allow review." Cope at 80.

The reason given to support state action that takes property may not be so inadequate that it may be characterized as arbitrary. *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1, 4 (7th Cir. 1974). State action is "arbitrary" when it takes without reason or for merely pretextual reasons. *Decarion v. Monroe County*, 853 F. Supp 1415, 1421 (S.D. Fla. 1994).

The "arbitrary and capricious" standard requires a

state to examine the relevant data and to articulate a satisfactory explanation for its action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983) *citing Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245-246 (1962). As the Florida Supreme Court has held, "one of the best procedural protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." *Roberson v. Florida Parole and Probation Commission*, 444 So. 2d 917, 921 (Fla. 1983).

(4) The Third DCA's Opinion is Pretextual and Arbitrary

This Court is asked to review the Third DCA's opinion below which is clearly pretextual, arbitrary, and violates Petitioner's due process rights. The Third DCA ignored the trial court's findings "Mr. Simpson's lawyer testified that she didn't even pursue developing all of the discovery. She came to an agreement with the plaintiff to stop discovery." Instead, the Third DCA held Mr. Simpson "made full use of discovery" which is just patently untrue.

Moreover, the Third DCA plagiarized this fact verbatim from the Florida Supreme Court decision in *Arrieta*. It is evidence of bias and pretext that the Third DCA would plagiarize the facts of *Arrieta* without discussing the holding of *Arrieta*.

Especially when that holding directly and expressly conflicts with the Third DCA's opinion that treats a consent judgment differently from a regular judgment for the purposes of a Rule. 1.540(b) Motion. If the Florida Supreme Court won't speak out to correct this miscarriage of justice, this Honorable Court is all that is left to protect Mr. Simpson's due process rights enshrined in the 5th and 14th amendments to the U.S. Constitution. This Court instructs:

> Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930). at 681-682, 50 S. Ct., at 454-455.

This Court is called on to act because the Florida Supreme Court has taken no action to prevent the Third DCA from improperly ignoring fraudulent conduct in foreclosures.

The idea that appellate courts can order the equitable relief of foreclosure by misstating the facts and ignoring the law, in contradiction of the trial court and the Florida Supreme Court, is of course, simply not the law, nor should it be allowed to become the law. Such concepts are repugnant to

the Constitution of the United States. If allowed to stand, such a rule of law is in direct conflict with this Court's decision regarding fraud on the court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-47, 250-51 (1944) (emphasis added), overruled on other grounds *by Standard Oil v. United States*, 429 U.S. 17, 18, 50 L. Ed. 2d 21, 97 S. Ct. 31 (1976).

(5) Due Process Demands the Third DCA Disqualify Itself from Foreclosures as its Impartiality is Objectively Questioned

As Judge Cope recognized, there is an unconstitutional and inherent flaw in entrusting intermediate appellate court judges with the power to shield their pretextual decisions from further appellate review, merely by refusing to write an opinion. The same constitutional infirmity exists in Florida, wherein appellate court judges are entrusted to decide for themselves whether there is an objective reason to question their impartiality.

The Florida Supreme Court instructs that "the disqualification of an appellate judge is a matter which rests largely within the sound discretion of the individual involved." *Giuliano v. Wainwright*, 416 So. 2d 1180, 1181 (1982). "When a litigant seeks to disqualify … a judge of a district court of appeal, a different, more personal standard applies. The standard enunciated by the Florida Supreme Court is that 'each justice must determine for

himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances.'" *In re Carlton* 378 So. 2d 1212, 1216 (Fla.1979) (On Request for Disqualification). *Clarendon Nat. Ins. Co. v. Shogreen*, 990 So. 2d 1231, 1233 (Fla. 3rd DCA 2008). In *Shogreen*, this Court noted that the Florida Supreme Court "has approved the application of the Carlton standard when that court's appellate-level judges were faced with a court-wide motion for disqualification." *Id. citing, 5–H Corp. v. Padovano*, 708 So. 2d 244, 245–46 (Fla.1997).

This Court instructs "a multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1902, 195 L. Ed. 2d 132 (2016). "An unconstitutional failure to recuse constitutes structural error..." *Id.*

"The Due Process Clause may sometimes demand recusal even when a judge "'ha[s] no actual bias.'" (citations omitted) Recusal is required when, objectively speaking, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Rippo v. Baker*, 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017). As this Court has explained:

> The importance of public confidence in the

> integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse; ... neither force nor will but merely judgment.'" The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, "justice must satisfy the appearance of justice." (citations omitted). It follows that public perception of judicial integrity is "a state interest of the highest order." (citations omitted) *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666, 191 L. Ed. 2d 570 (2015).

"It is axiomatic that the Due Process Clause entitles a person to an impartial and disinterested tribunal in … civil … cases. This requirement of neutrality … preserves both the appearance and reality of fairness, … by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "Due process guarantees the right to a neutral, detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of

mistaken deprivations of protected interests." *Carey v. Piphus*, 425 U.S. 247, 262 (1978); *Taylor v. Hayes*, 418 U.S. 488, 501 (1974).

The Florida Supreme Court has held, "it is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice." *Crosby v. State*, 97 So. 2d 181, 184 (Fla. 1957). The Florida Supreme Court recognized that "prejudice of a judge is a delicate question to raise but …, if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompt to recuse himself." *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983). In *Livingston*, the Florida Supreme Court further instructed:

> it is a matter of no concern what judge presides in a particular cause, but it is a matter of grave concern that justice be administered with dispatch, without fear or favor or the suspicion of such attributes. The outstanding big factor in every lawsuit is the truth of the controversy. Judges, counsel, and rules of procedure are secondary factors designed by the law as instrumentalities to work out and arrive at the truth of the controversy. The judiciary cannot be too circumspect, neither should it be reluctant to

> retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised…. *Id.*

The rules regarding judicial disqualification "were established to ensure public confidence in the integrity of the judicial system…." *Livingston* at 1086.

The Third DCA has repeatedly denied Motions to Disqualify that set forth many objective reasons to question the court's impartiality. Most obvious is the front page article of the Daily Business Review that explained in great detail how the Third DCA has ruled for homeowners in only 2 cases on standing since 2010, while the other 4 DCAs have ruled for homeowners in hundreds of cases. These foreclosures are prosecuted using the same forms and evidence throughout Florida. As the Daily Business review correctly reported "There is no question that the Third District is pro-business and couldn't care less about homeowners."

On October 31, 2007, the Honorable Christopher A. Boyko, U.S. District Court Judge for the Eastern Division of the Northern District of Ohio dismissed over a dozen foreclosure cases with false mortgage assignments from his court in one opinion. *In re Foreclosure Cases*, No. 07CV2532, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007). Judge Boyko rejected banks that backlog his docket with robo-

signed, incompetent evidence, writing in footnote 3:

> "Plaintiff's, 'Judge, you just don't understand how things work,' argument reveals a condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process…. There is no doubt every decision made by a financial institution in the foreclosure process is driven by money…."Id. at 5-6, fn. 3.

Almost ten years later, on March 23, 2017, the Honorable U. S. Bankruptcy Judge Christopher M. Klein of the Eastern District of California sanctioned BANA $45 million for foreclosure misconduct involving BOA's Senior Management. *Sundquist v. Bank of America*, --B.R.--, 2017 WL 1102964 *46 (U.S. Bkrptcy, E.D. Cal. issued March 23, 2017).

Judge Klein directed the $45 Million to benefit the public good by being donated to five California Law Schools with consumer protection law programs. This ensured the borrower did not receive an undue windfall. The opinion "tells a story that smacks of cynical disregard for the law." Id. at *47. The Court noted:

> The high degree of reprehensibility, coupled with the significant involvement by the office of the Chief Executive Officer, calls for of an amount sufficient to have a deterrent effect on

Bank of America and not be laughed off in the boardroom as petty cash or "chump change…. It happens that Bank of America has a long rap sheet of fines and penalties in cases relating to its mortgage business. In March 2012, Bank of America agreed to pay $11.82 billion to settle litigation prosecuted by federal and state regulators regarding its foreclosure and mortgage servicing practices. In June 2013, Bank of America agreed to pay $100 million to settle litigation regarding mortgage loan origination issues. In December 2013, Bank of America agreed to pay $131.8 million to settle litigation with the Securities Exchange Commission regarding the structuring and sale of mortgage securities to institutional investors. In March 2014, Bank of America was fined $9.5 billion by the Federal Housing Finance Agency for defrauding Fannie Mae and Freddie Mac regarding mortgage-backed securities. In an environment in which Bank of America has been settling, i.e. terminating exposure to higher sums, for billions and hundreds of millions of dollars, a few million dollars awarded as §362(k)(1) punitive damages award in a real case involving real people, in which the human element of the consequences of Bank of America's behavior comes to the fore for the first time is appropriate and proportional." *39-40.

Judge Klein questioned "why should Bank of America be permitted to evade the appropriate measure of punitive damages for its conduct? Not being brought to book for bad behavior offensive to societal norms merely incentivizes future bad behavior." This federal judge noted BOA's "attitude of impunity" citing a failed governmental regulatory system.

In describing the Independent Foreclosure Review ordered by Office of the Comptroller of the Currency ("the OCC") which BANA and Wells Fargo defrauded, Judge Klein noted "that turned out to be a chimera." Id. at *43. Even investigations by the Consumer Financial Protection Bureau were "thwarted" with a "bald-faced lie" and a refusal to turn over documents.

In stark contrast to Florida, the Maine Supreme Court has taken a different approach to misconduct in foreclosures. *Bayview Loan Servicing, LLC v. Bartlett*, 87 A.3d 741, 749 (Maine S. Ct. 2014). In *Bartlett,* the Maine Supreme Court affirmed an involuntary dismissal with prejudice for Bayview's failure to attend a fourth court ordered mediation and awarded the borrower a free home. *Id.* The ultimate sanction was appropriate as Bayview had previously defied court orders that affected the borrower's ability to resolve their foreclosure.

Here, BONYM and BANA have repeatedly been warned against and sanctioned for using false

evidence of standing to foreclose. First by Judge Gordon, then by the Baker Hostetler Report to Fannie Mae, then by the OCC, then by the DOJ, then by the $25 Billion National Mortgage Settlement, and most recently by the Fourth DCA and other judges like Judge Butchko and Judge Hendon who have enforced the highest standards of conduct, even in foreclosures. Trial level judges are speaking out against continued misconduct in foreclosures, even if the Third DCA and the Florida Supreme Court are not. This Court should join those judges on the right side of history and grant certiorari.

CONCLUSION

The basis for the judicial power, which is referenced in Article V, Section 1 of the Florida Constitution, is found in Federalist Number 78, written by Alexander Hamilton as Publius. The Federalist Society warns that:

> The Constitution's promise of due process of law is, among other things, a promise of impartial adjudication in the courts—a promise that people challenging assertions of government power will have access to a neutral tribunal that is not only free from actual bias but free even from the appearance of bias. To the extent that private citizens cannot reasonably be confident that they will receive justice through litigation, they will be

tempted to seek extra-legal recourse.

This Court must act to save the integrity of the judiciary. It is the best hope to save our country from the perils Alexander Hamilton warned of when the people believe they cannot receive fair and impartial justice from this judiciary. Such a concern become more real as political events unfold, undermining the institutions of democracy.

The Third DCA violated Petitioner's due process rights and the judicial canons governing impartiality by writing an opinion that states facts that defy the record on appeal and conclusions of law that violate Florida Supreme Court precedent. It is objectively reasonable to fear the Third DCA acted to reach a predetermined outcome that favor banks over homeowners - foreclosure. If the Florida Supreme Court will not act, this Court must.

As this David v. Goliath battle involves misconduct by the most wealthy and powerful, this petition presents perhaps the most epic constitutional crisis in our lifetime. Democracy will not fall if financial institutions are held to the rule of law. To the contrary, democracy falls if the public is allowed to believe Courts are biased in favor of bad corporate citizens and a fraudulent foreclosure process.

WHEREFORE, this Court should grant the writ and consider the issue on the merits.

Respectfully submitted,

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The Bank of New York Mellon, etc.,
Appellant,
versus
Keith A. Simpson,
Defendant - Appellee.

No. 3D16-2445

District Court of Appeal of Florida
Third District

227 So.3d 669

Opinion filed August 9, 2017, Rehearing Denied September 26, 2017

PRIOR HISTORY: After mortgagor and mortgagee had entered into settlement and release agreement and consent final judgment was entered in foreclosure proceeding, mortgagor challenged judgment for mistake, inadvertence, or fraud. The Circuit Court, Miami–Dade County, No. 11–32903, Eric William Hendon, J., entered order vacating judgment. Mortgagee appealed. The District Court of Appeal, Suarez, J., held that vacation of consent final judgment was not warranted based on inadvertence, mistake, or fraud.

DISPOSITION: Reversed and Remanded.

COUNSEL: The Bank of New York Mellon, etc., Plaintiff-Appellant: Adam B. Leichtling and Janet

Hernandez Anderson, Lapin & Leichtling, LLP.

For Keith A. Simpson, Defendant-Appellee: Bruce Jacobs and Court Keeley, Jacobs Keeley, PLLC.

JUDGES: Before SUAREZ, EMAS and LOGUE, JJ, Circuit Judges.

OPINION
PER CURIAM:

I.

The Bank of New York Mellon ["BNYM"] appeals from the lower court's order vacating the December 6, 2013 Consent Final Judgment of Foreclosure, as well as the Settlement and Release Agreement between BNYM and homeowner Keith A. Simpson ["Simpson"]. We reverse and remand for reinstatement of the Final Judgment.

Simpson defaulted on his mortgage in 2011. In 2013 the parties entered into a Settlement and Release Agreement [SRA] by which the Simpsons agreed to enter into a Consent Final Judgment in exchange for an extended foreclosure sale date and BNYM's waiver of its right to seek a deficiency judgment. The SRA included **670* a full release of BNYM from any and all claims that could be asserted in the foreclosure action. The SRA required any modifications or amendments to be made within 30 days; none were.

At the time that BNYM and Simpson entered into

the SRA, the foreclosure trial was imminent, and Simpson's attorney at the time, Ms. Barrow, was attempting to renegotiate the loan with the Bank. The record clearly shows that Attorney Barrow advised Simpson that he would not prevail at the foreclosure trial, and that a reasonable legal strategy would be to "buy time" in between the final judgment and foreclosure sale date in order to negotiate new loan terms. Simpson entered into the Settlement and Release with the Bank, secured a delayed sale date and in return the Bank agreed it would not seek a deficiency judgment against him. The court rendered Final Consent Judgment in foreclosure.

Simpson subsequently sought to delay the sale date, to vacate the sale, then after many motions and a new attorney (his current attorney, Bruce Jacobs), sought to challenge the SRA and Final Consent Judgment via rule 1.540(b) for mistake, inadvertence or fraud. Simpson's counsel now alleges that, at the time Simpson entered into the mortgage and note with BNYM, there was ongoing fraud committed by other banks; if he could have engaged in discovery during the foreclosure, he argued, he could have provided evidence of this.[1] After hearing argument from both parties at the September 26, 2016 evidentiary hearing, the trial court agreed with Simpson's counsel that the general allegations of fraud in the mortgage banking industry warranted vacating the SRA and Final Consent Judgment in this case, putting the parties back into their pre-foreclosure status. This appeal

ensued.

12The standard of review of a 9.130(a)(5) appeal of a motion filed under Florida Rule of Civil Procedure 1.540(b) is usually abuse of discretion. However,

> The principles of law to be applied in an action to set aside a contract for unilateral mistake or fraud are more stringent than the standards that have so far been established for the setting aside of a judgment pursuant to Rule 1.540, when the judgment entered pursuant to that rule is not based on a settlement.

Smiles v. Young, 271 So. 2d 798, 801 (Fla. 3d DCA), cert. denied, 279 So. 2d 305 (Fla. 1973). The record in the case before us shows that Simpson entered into the valid SRA with BNYM well before Simpson's current counsel Jacobs was hired. Simpson argues on appeal that the SRA and Final Consent Judgment should be vacated because, if Simpson had known before he entered into the SRA about his current counsel's "investigations" into the general mortgage banking industry, he would never have signed it, but hired Jacobs instead. The generalized allegations of fraudulent practices in the mortgage industry now asserted by Simpson in his Rule 1.540 motion and here on appeal were known and could have been discovered by due diligence at the time the foreclosure suit was pending between 2011 and 2013. This Court has held to the principle that that Rule 1.540(b) does not have as its purpose or intent the reopening of lawsuits to allow parties to state new claims or offer new evidence omitted by oversight or inadvertence. See Miami Nat. Bank v. Sobel, 198 So.

2d 841, 842 (Fla. 3d DCA 1967).
Furthermore, at the Rule 1.540 hearing Simpson's counsel did not set forth any "clear and convincing" evidence that BNYM committed fraud in the underlying **671* mortgage and note documents—there is no evidence in the record that this mortgage and note were fraudulently rendered, or that the assignments were manufactured or robo-signed. E.g., McGill v. Boulevard & Bay Land & Development Co., 100 Fla. 906, 130 So. 460 (1930) ("Where fraud is asserted as a defense or ground for relief against a mortgage, the burden of proving it is upon the party asserting the same, and the proof thereof must be clear and convincing...."). Merely invoking current counsel's "investigations" into certain alleged fraudulent practices of the mortgage banking industry at that time does not meet the legal standards for evidence of fraud *in this case*. The record contains no specific allegations or any factual evidence that BNYM committed any fraud with regard to Simpson's mortgage. Additionally, Simpson did not present any evidence of duress in entering into the SRA. To establish duress, he must prove that the SRA was effected involuntarily and was not an exercise of free will, and that this condition of mind was caused by improper or coercive conduct by the other party. See City of Miami v. Kory, 394 So. 2d 494 (Fla. 3d DCA 1981). Simpson did not prove either element of duress. To the contrary, testimony from Simpson and his then-attorney Ms. Barrow shows that Simpson's decision to enter into the SRA and

Consent Final Judgment was a tactical litigation strategy to buy more time for an extended sale date in order to seek a loan modification.[2] Simpson did not argue that the SRA is ambiguous or unclear, and he did not ask to set the SRA aside. He did not file any affidavits; he has not preserved any argument regarding the SRA's validity or interpretation.

Simpson's motion to vacate the Final Judgment was based on allegations made by his current attorney that have no specific relation to the facts of this case, during a time when Simpson was not represented by that attorney, and are merely generalized complaints about the mortgage banking industry. The SRA was entered into by Simpson with full knowledge, and the releases therein are valid and effective to bar the claims he raised in the Motion to Vacate, including those generalized references to an "investigation of the mortgage banking industry" in which his current counsel is engaged. The issues Simpson now raises are not valid bases under Rule 1.540 to relieve him from the Consent Final Judgment or from his agreements in the SRA. He cannot use the rule to allow him to avoid the consequences of his decision to settle litigation, even if he regards it as a "bad" settlement in retrospect.

We therefore reverse the order on appeal and instruct the trial court on remand to deny Simpson's amended Motion to Vacate Final Judgment, direct the court to reinstate the SRA and Final Consent **672* Judgment in foreclosure and grant BNYM's Amended Motion to Enforce Order enforcing the parties' Settlement Agreement and

General Release of Claims.

REVERSED AND REMANDED.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI DADE COUNTY

Case no.: 11-32903-CA 01

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWALT, INC., ALTERNATIVE LOAN TRUST 2005-62 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-62
Plaintiff,

vs.

KEITH A. SIMPSON; ET. AL.,
Defendants.

ORDER ON PLAINTIFF'S AMENDED MOTION TO ENFORCE ORDER DATED MARCH 11, 2014 AND FOR ATTORNEYS' FEES AND RESPONSE IN OPPOSITION TO AMENDED MOTION TO VACATE FINAL JUDGMENT

THIS CAUSE having come before the Court upon Plaintiff's Amended Motion to Enforce Order Dated March 11, 2014 and for Attorneys' Fees and Response in Opposition to Amended Motion to Vacate Final Judgment, and this Court, being

otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that Plaintiff's Motion is DENIED. The consent Judgment is vacated. This case is back in posture prior to vacation. Defendant may pursue the defenses and Plaintiff may pursue Foreclosure.

DONE AND ORDERED in Chambers at the Miami-Dade County; Florida on September 28, 2016.

JUDGE ERIC Wm. HENDON
CIRCUIT COURT JUDGE

SUPREME COURT OF FLORIDA
MONDAY MARCH 12, 2018

CASE NO.: SC17-1911
Lower Tribunal No(s).:
3D16-2445; 132011CA032903000001

KEITH SIMPSON vs. THE BANK OF NEW YORK MELLON, ETC.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.
No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

LABARGA, C.J., and PARIENTE, LEWIS, CANASY, and LAWSON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court