18-9717

No. SC19-603

IN THE

SUPREME COURT OF THE UNITED STATES

Kenton G. Findlay — PETITIONER
(Your Name)

vs.

HSBC Bank, et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Florida Supreme Court.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kenton G. Findlay
(Your Name)

1270 NW 178 terr
(Address)

Miami. Fl, 33169
(City, State, Zip Code)

(305) 318 8728
(Phone Number)

QUESTIONS PRESENTED FOR REVIEW

Whether the Florida Supreme Court and the Third District Court of Appeal of Florida ("the Third DCA") violated the due process protection of the 5th and 14th Amendment to the U. S. Constitution by allowing the respondent LESLIE ESTATE HOMEOWNER ASSOSIATION NO. 3, (H. O. A.) commit fraud on the Court, and the fraud permeates the heart of the proceeding. See Kornblum vs. Schneider, 609 So.2d 138, 139 Fla. 4th DCA 1992). Long vs. Swofford, 805 So. 2d 882 (Fla. 3d DCA 2001). The Final Judgment of foreclosure procured using false evidence in an unconscionable scheme to defraud the courts. Whether the Florida Supreme Court and the Third District Court of Appeal of Florida violated the due process protection 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, Kenton G. Findlay was the defendant in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County and the Appellant in the Third District Court of Appeal of Florida. Mr. Findlay is an individual. Thus, there are no disclosures to be made by him pursuant to Supreme Court Rule 29.6.

The Respondent is LESLIE ESTATE HOMEOWNER ASSOCIATION NO. 3.

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PETITION FOR WRIT OF CERTIORARI

Kenton G. Findlay respectfully petition for a Writ of Certiorari to review the judgment of the Third DCA after the Florida Supreme Court decline to accept Jurisdiction.

INTRODUCTION

Petitioner brings this cause before this Court because The Florida Supreme Court lacks Jurisdiction to review.

On or about December 15, 2015 the Trial Court **Denied** without Prejudice the LESLIE ESTATE HOMEOWNER ASSOSIATION's Motion for Summary Final Judgment for Foreclosure of its Lien setting the case for trial on February 5, 2016. *See Case* No (2014-14163 CA-01).

On or about December 16, 2015 the Attorney for LESLIE ESTATE HOMEOWNER ASSOSIATION (H.O.A.) filed a Motion for Reconsideration after the Lower Court denied their Motion for Entry of Summary Final Judgment. During the filing the Attorney did not include the affidavit in question; thereby, causing the Honorable Judge to overlook without the knowledge of relevant information while also denying the Petitioner his due process right to the Trial that was scheduled for February 5, 2016. *See Exhibit* "I" Additional pertinent information is as follows:

1. On or about January 11, 2016 the Attorney for LESLIE ESTATE HOME-OWNER ASSOCIATION NO. 3, (H.O.A.) Case No: (2014-14163 CA-01) e-Filed a fraudulent affidavit taken from Barbara Henderson (former Treasurer) into the Court records the evening before the rehearing. The Attorney strategically chose this timeframe knowing that e-filed documents have a 48-hour window before being accessible to the public. This action was intended to deceive the Court, impede the Honorable Judge from hearing relevant testimony and deprive the Petitioner of his due process right to present his evidence at trial. Consequently, when the H.O.A.'s Attorney hand-delivered the fraudulent affidavit to the Honorable Judge, she deliberately caused the Honorable Judge to overlook without the knowledge of relevant information. *See Exhibit* "A"

   Specifically, the Treasurer, Ms. Henderson acknowledged that the Petitioner made payments to the H.O.A. for past dues, but she then proceeded to lie by stating that he returned a few days later and retrieved the payments. If the Honorable Judge had not ignored the right to due process and proceeded with the scheduled trial, she would not have overlooked the canceled check and other material facts to the case. *See Exhibit* "B"

2. On or about May 22, 2017 the Petitioner made a complaint with the Florida Bar regarding the right to due process that was overlooked by the Lower Court's Judge. The response from the Florida Bar was, because the presiding Judge did not sanction the H.O.A.'s Attorney, Ms. Hamilton or otherwise made findings critical of her conduct, they would not intervene. However, I was advised of my right to seek legal remedies to which I am entitled.
3. On or about February 26, 2018 the Respondent LESLIE ESTATE HOMEOWNERS ASSOCIATION NO 3, INC answered the foreclosure complaint filed by HSBC BANK USA, N.A as Trustee for the Registered holder of ACE Securities Corp. Home Equity Trust, Series 2005-HE2, Asset Backed Pass-Through Certificates. Their affirmative defenses were not addressed because all parties were not present, and the hearing was rescheduled.
4. On or about March 23, 2018 the Respondent JZC INVESTMENTS, LLC e-Filed Motion for extension of time which was granted.
5. On or about April 30, 2018 the Respondent JZC INVESTMENTS, LLC e-Filed Motion to dismiss was **Denied**.
6. On or about May 22, 2018 the Plaintiff HSBC USA, N.A. as Trustee for the registered holder of ACE Securities Corp. Home Equity Loan Trust, Series

2005-HE2, Asset Back Through Certificates, e-Filed a response to the JZC INVESTMENTS, LLC's (JZC, LLC.) Motion to Dismiss.

7. On or about June 5, 2018 the Petitioner's Motion to Vacate and Set-Aside Final Judgment /Motion to Dismiss for Lack of Standing/Fraud upon the court was Stricken. The Respondent JZC, LLC's Motion to dismiss filed on April 30, 2018 was set for hearing on June 12, 2018 at 8:00 A.M.
8. On or about June 12, 2018 Attorney T. Jimmy Edwards, FBN 81855 Representing Attorney for HSBC BANK USA. N.A. AS TRUSTEE FOR THE REGISTERED HOLDER OF ACE SECURITIES CORP. HOME EQUITY LOAN TRUST, SERIES BACKED PASS-THROUGH CERTIFICATE Agreed with the Motion to Dismiss the case. The Motion was **Denied**.
9. On or about July 10, 2018 HSBC Bank, N.A. as Trustee for the registered holder of ACE Securities Corp. Home Equity Loan Trust, Series 2005-HE2, Asset Backed Pass-Certificate e-Filed Respondent Motion to Dismiss Foreclosure Action, Release Lis Pender and Direct Clerk to close the case without due process. The Petitioner had no recourse to convince the Judge of any facts or material to the case.

10. On or about July 13, 2018 HSBC, N.A. as Trustee for the registered holder of ACE Securities Corp. Home Equity Loan Trust, Series 2005-HE2, Asset Back Pass-Certificate Order on Respondent Motion to Dismiss Foreclosure Action Release Lis Pender's and Direct Clerk to Close Case was **GRANTED**. The Petitioner due process right was violated because he was not given an opportunity to convince the Judge of any facts or material to the case.

11. On or about July 23, 2018 the Petitioner filed Motion for relief from Judgment.

12. On or about August 14, 2018 the Petitioner's Motion for relief from Judgment was not legally presented or allowed by the presiding Judge. Not only was his right to due process violated, he was not afforded the opportunity to convince the Judge of facts or material to the case.

STATEMENTS OF BASIS FOR JURISDICTION

The per curiam affirmance sought to be reviewed was entered by the Third DCA on January 18, 2019. On April 16, 2019, the Florida Supreme Court determined it should decline to accept jurisdiction and denied a petition for writ of certiorari rendering the Third DCA opinion a decree from the highest court of the State of Florida. See R.J. Reynold Tobacco Co. v. Kenyon, 882 So. 2d 986, 989-90 Fla.

2004). Therefore, the Third DCA was the state court of last resort from which Petitioner could seek review. See, e, g., Williams v. Florida, 399 U. S. 78,79 n.5 (1970) (where the Florida Supreme Court was without jurisdiction to entertain an appeal, "the District Court of Appeal became the highest court from which a decision could be had."). Florida Star v. B.J.F., 530 So. 2d 286, 288 n.3 (Fla. 1988). Therefore, the Court's jurisdiction is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS AND STATUE INVOLVED

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

The Fourteen Amendment to the United State 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 law."

Florida Statue § 702.01 provides "all mortgages shall be foreclosed in equity... "Florida Rule of Civil Procedure 1.115 (e) provides: "verification; When filing an action for foreclosure on a mortgage for residential real estate property the claim for relief shall be verified by the claimant seeking to foreclose the mortgage..."

Florida Rule of Civil Procedure 1.540 provides: "(b) Mistake: Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such term as are just, the court may relieve a party or a party's legal representative from a final judgment ... 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

Statement of the Facts

On January 12, 2016 the trial court below entered a final judgment of foreclosure in favor of LESLIE ESTATE HOMEOWNER ASSOCIATION NO. 3, (H.O.A.) Case No (2014- 14163 CA-01) (the Rule 1.540(b) motion") R.276-331. The Rule 1.540 (b) Motion asserted LESLIE ESTATE HOMEOWNER ASSOCIATION NO. 3, (H.O. A.) had committed fraud in this case by fabricating evidence of standing, namely on January 11, 2016.

Respondent LESLIE ESTATE HOMEOWNER ASSOCIATION NO. 3, (H.O.A) e-filed a fraudulent affidavit taken from Barbara Henderson (former Treasurer) of LESLIE ESTATE HOMEOWNERS ASSOCIATION NO. 3 INC.

stating that Mr. Findlay made a payment to the Homeowners Association and return a few days later and retrieved his payment. The fraudulent Affidavit was witness and notarized by attorney Hamilton herself. The petitioner later discovers that subsequent to the initial terms, the respondent engaged in systematically overcharging the petitioner by charging excessive and unusual fees on the alleged sum due. In addition; thereto, the respondent breached the agreement and because of the foregoing act, the petitioner suffered damages i.e. loss of property, loss of profit loss of development interest, lost of cost and fees. these damages are the direct result of exorbitant overcharging and usurious fees.

The case also involves Deception, False Evidence, Fraud and theft. The Petitioner, Kenton Findlay has stated from the beginning that he was never billed, saw any information that there was an active HOA, stated the Statue of Limitation applied because the Respondent, Leslie Estate Homeowner Association was reaching back some 20 years, stated the Billing Statements was incorrect and misleading, stated the Affidavit of indebtedness was inaccurate and deceptive, and stated the Lien for foreclosure was wrong and untrue.

The Petitioner filing in the trial court suggest that he met Barbara Henderson; Treasurer at her house/office on September 5, 2013 and gave her a "good faith" maintenance check (#2444), for the sum of $500.00 with the understanding that

she would contact him with proof of membership, the Bylaws, billing statements, and other pertinent information regarding the HOA because she stated that she did not have any records pertaining to the account. The maintenance check cleared the bank on September 13,2013 and petitioner did not hear from the HOA again despite the fact that he gave them nearly two years' worth of assessment dues and his personal contact information, Instead the Respondent placed a false Lien against the subjects property approximately 6 months later, March 24, 2014,and to add to injury began the foreclosure process on December 26, 2014.

Even further, the money paid is not recorded anywhere. It is not credited on the billing statements, within the lawyer's fee deducted from the Affidavit of Indebtedness or applied towards the interest, nowhere. Shockingly, there was continuous billing with late fees, interest, and lawyer's fees with no mention of the money. Again, what happen to the payment? Who is responsible for the "stolen Check?" The HOA and its representative are now claiming the check was returned, but that is an outright lie.

There is also the issue of the opening balance of $814.79 with no explanation; and additional $1000.00 fee with no explanation, a $450.00 foreclosure fee that is on the billing statement and duplicated on the attorney's billing fees, along with other problematic fees and penalties. The Association Declaration on Article V

states that delinquent assessments shall not pass to his successor in title unless expressly assumed, the petitioner never assumed responsibility for the existing debt.

ARGUMENTS

Pursuant to Florida Law, an action shall be dismissed with prejudice wherein it is Illustrated that the Respondent has committed fraud on the Court, and the fraud permeates the heart of the proceedings. See Kornblum vs. Schneider, 609 So.2d 138, 139 (Fla. 4th DCA 1992). Long vs. Swofford, 805 So. 2d 882 (Fla. 3d DCA 2001). As such, Florida Courts have the right and obligation to deter Fraudulent claims from proceeding in Court, by dismissing an entire action with prejudice, when a respondent lies about matters which go to the heart of the claim, or where Fabrications undermine the integrity of the entire action. Savino vs. Florida Drive in Theatre Management, Inc, 22 Fla. Law Weekly D 1930; Tri-Star Invs. Inc vs. Miele, 407 So. 2d 292 (Fla. 2d DCA 1981).

Moreover, when a respondent conducts amounts to a scheme calculated to interfere with the Court's ability to Impartially Adjudicate his claim, the claim shall be dismissed in its entirety with prejudice. See Savino, Supra. In Savino, the Fourth District Court of Appeal upheld the Trial Court dismissal of an action with prejudice based upon the defendant's Fraud. Likewise, in Kornblum, Supra, the

Court opined that a Trial Court has the inherent authority, the exercise of its sound Judicial discretion, to dismiss an action where the defendant has perpetrated a Fraud on the Court, and where the misconduct found to undermine the integrity of the Judicial process. Likewise, In Webber vs. State of Florida, 415 So. 2d 161 (Fla. 4th DCA 1982), The Fourth District of Appeal upheld the Trial Courts dismissal of the Complaint with Prejudice where the Plaintiff Attorney failed to comply with Courts Order compelling discovery.

The Respondent's conduct in the above litigation, "amounts to a scheme calculated to interfere with the Court's ability to impartially Adjudicate its claim. "See Savino, supra as stated by the Court in Tramel" inherent powers of the Court to perform efficiently its Judicial functions and to protect its dignity, independence, and integrity necessarily includes authority to impose appropriate sanctions, and here regarding matters which greatly traverse matters which undermine the integrity of the entire action, such a sanction is justified." This Trial Court certainly has the inherent discretion to dismiss an action of Fraud that has been perpetrated on the Court, and although the dismissal of the respondent claim which prejudice is drastic, "a drastic sanction that denies availability of the Court's process is appropriate for one who defiles the Judicial System by committing Fraud on the Court." See Tramel, Supra.

The untruth concerning the various questions and fabrications by the respondent constitute a Fraud on the Court which permeate the entire proceeding. In Hanono vs. Murphy, 723 So. 2d 892, 895, (Fla. 3 DCA 1998), the Court recognized the principle that a party who has been guilty of Fraud in the prosecution of defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve its ends. While in Cox vs. Burk, 706 So.2d 43 (Fla. 5th DCA 1998), the Court found that committing a Fraud on the Court, the Court was justified in exercising the extraordinary of dismissal of the respondent's claim where it can be demonstrated clearly and convincingly that the party has sentient set in motion some uncontrollable scheme calculated to interfere with the judicial system's ability to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering presentation of the opposing parties claim or defense. Babe Elias Builders vs. Pernick, 765So. 2d 119, (3rd DCA 2000), the District Court held that the Default Judgment entered by the Trial Court was warranted for action of the respondent's employees in preparing fraudulent receipt, invoices to defeat Lawsuit, supporting per jury regarding legitimacy of fraudulent invoices, and testifying falsely regarding those actions. In Hogan vs. Dollar Rent-A-Car System (Fla. 4th DCA 2001), Circuit Court Judge Herbert Moriarty dismiss the action with prejudice based upon Fraud upon the Court. The District Court held

that dismissal was warranted because the respondent lied in order to intentionally thwart defendant from conducting discovery. The District Court held that there was no abusive discretion in the Trial Court's dismissal of the case, since the Fraud permeated the entire proceeding.

CONCLUSION

On September 5, 2013 the Petitioner met with Barbara Henderson whom stated that she was Treasurer to the Leslie Estate Homeowner Association (HOA). The petitioner explained his predicament of being unaware of an existing HOA. During the conversation, Ms. Henderson requested a check for past maintenance fee made payable to Walton Jones and Browne in the amount of $500.00 under the pretense that she would follow up with HOA's Bylaws, meeting dates, proof of membership to the HOA.

In the Respondent Sworn Affidavit Statement taken by the HOA Treasurer, Barbara Henderson, stated that on September 15, 2013 Kenton Findlay (petitioner)came to her abode and requested the check (mentioned earlier) made payable to Walton Jones and Browne be returned and the check was returned. She also stated Mr. Findlay has not made any payments toward his maintenance account. That statement is a blatant lie. On September 13, 2013 that exact check was cashed by Walton Jones and Browne.

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 AND TO PREVENT FRAUD ON THE COURT OR BIASED APPPELLATE JUDGES FROM GRANTING THE EQUITABLE RELIEF OF FORECLOSURE BY CONDONING THAT FRAUD.

A. The Due Process Test

This Court has established what is essentially a two-tiered analysis for due process challenges to conduct which, like the one in this case, involves property rather than liberty interests. The first "tier" involves a two-fold inquiry: (1) an examination of whether there has been a significant deprivation or threat of

a deprivation of a property right, see Fuentes v.Shevin, 407 U.S. 67 (1972), and (2) an examination of whether there is sufficient state involvement of that deprivation to trigger the Due Process Clause,see Lugar v. Edmondson Oil Co., 457 U.S. 922(1982). If there is state action and if that action amounts to the deprivation or threat of a deprivation of a cognizable property interest, the Court proceeds to the second "tier" to then determine what procedural safeguards are required to protect that interest. Connecticut v. Doehr, 501 U.S. 1 (1991). The Court traditionally uses the three-factor test first discussed in Mathews v. Eldridge, 424 U.S. 319(1976), to assess what safeguards are

necessary to pass muster under the Due Process Clauses of the Fifth and Fourteenth Amendments. The Mathews analysis weighs (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335; see also Doehr, 501 U.S. at 26-28.

1. The Significance of the Deprivation There can be no serious question that Petitioner satisfied the first-tier requirement. This Court has been a steadfast guardian of due process rights when what is at stake is a person's right "to maintain control over [her] home" because loss of one's home is "a far greater deprivation than the loss of furniture." United States v. James Daniel Good Real Property, 510 U.S. 43, 53-54 (1993). Courts have held that even "a small bank account" is sufficient to trigger due process protections. See Nat'l Council of Resistance of Iran v. Dept. of State, 251 F.3d 192, 202-205 (D.C. Cir. 2001) (citing Russian Volunteer Fleet v. United States, 282 U.S. 481, 489-42 (1931)).

2. State Action Since foreclosures in Florida require judicial supervision from beginning to end, Petitioner also plainly satisfied the second tier. This

Court has set out two elements that must be met in order to establish state action under the Fourteenth Amendment: "First, the deprivation must be caused by the exercise of some right or privilege created by the State.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." Lugar v. Edmondson Oil Company, 457 U.S. 922, 937 (1982).

The first requirement was met in this case by the foreclosure process chosen by the Florida Legislature. Unlike some states which permit nonjudicial foreclosures, Florida has required that mortgage foreclosure actions be supervised by the judiciary for 190 years. See Daniels v. Henderson, 5 Fla. 452 (1854) (construing Fla. Acts of 1824). Today, foreclosures in Florida are regulated by Fla. R. Civ.P. Rule 1.115(e), which requires verification of foreclosure complaints. See p. __ supra. To meet the second requirement, a borrower must show that the "private actor operate[d] as a 'willful participant in joint activity with the State or its agents.'" Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 296 (2001) (quoting Lugar, 457 U.S. at 941). This means that the private actor must have received the "significant assistance of state officials." Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 486 (1988). In judicial-foreclosure states such as Florida, the use of the state's courts (and the use of all the state officials who

work for those courts) to pursue the foreclosure is mandatory; the foreclosing entity does not possess the right of self-help. This Court has recognized that prejudgment remedy statutes "are designed to enable one of the parties to 'make use of state procedures with the overt, significant assistance of state officials,' and they undoubtedly involve state action 'substantial enough to implicate the Due Process Clause.'" Doehr, 501 U.S. at 11 (quoting Tulsa Professional Collection Services, Inc.v. Pope, 485 U.S. 478, 486 (1988). See also Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930). For the same reason, Florida's requirement of strict supervision of Florida's foreclosure proceedings is enough "substantial" involvement to trigger state action. See Dieffenbach v. Attorney General, 604 F.2d 187, 194 (2d Cir. 1979) (finding that the use of Vermont's strict foreclosure statute, "directly engage[d] the state's judicial power in effectuating foreclosure," was enough to show that there was state action in the foreclosure process). See also New Destiny Dev. Corp. v. Piccione, 802 F. Supp. 692 (D. Conn. 1992).

3. The Matthews Test a. The Private Interest The "private interest" prong of the Matthews Test weighs heavily in Petitioner's favor. As Daniel Good again underscores, Petitioner had an enormous interest in retaining his home. b. The Risk of Erroneous Deprivation The risk of an erroneous deprivation when the

decision rests on fraudulent evidence manufactured by the opposing party should be selfevident. Using false or fraudulent evidence "involve[s] a corruption of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. 97, 107 (1976). See also Miller v. Pate, 386 U.S. 1 (1967) (finding that a deliberate misrepresentation of truth to a jury is a violation of due process); Caldwell v. Mississippi, 472 U.S. 320 (1985) (finding that an uncorrected, misleading statement of law to a jury violated due process); Darden v. Wainwright, 477 U.S. 168, 181-82 (1986) (improper argument and manipulation or misstatement of evidence violates Due Process). Cf. Mesarosh v. United States, 352 U.S. 1, 14 (1956) (reversing convictions based on Solicitor General's disclosure that an important government witness had committed perjury in other proceedings, stating that the Court had a duty "to see that the waters of justice are not polluted"). c. The governmental interest While requiring plaintiffs in foreclosure actions to prove standing to sue creates an administrative burden, it is a burden that is basic to all civil litigation. See Warth v. Seldin, 422 U.S. 490, 498 (1975) (standing "is [a] threshold question in every federal case, determining the power of the court to entertain the suit"). The same principle holds true in federal bankruptcy proceedings involving foreclosure disputes. As one district court bluntly put it: 'This Court possesses

the independent obligations to preserve the judicial integrity of the federal court and to jealously guard federal jurisdiction. Neither the fluidity of the secondary mortgage market, nor monetary or economic considerations of the parties, nor the convenience of litigants supersede these obligations." In re Foreclosure Cases I, Nos. I:07CV2282 et al., 2007 U.S. Dist. LEXIS 84011, at *6, 2007 WL 3232430, at *2 (N.D. Ohio Oct. 31, 2007). See generally RESTATEMENT (THIRD) OF PROP: MORTGS. § 5.4(c) (1997) ("A mortgage may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation the mortgage secures."). d. The Need for Supreme Court Intervention If this Court does not grant writ in this case, the corruption of foreclosure proceedings in Florida will effectively be rendered immune from challenge. By refusing to issue an opinion, the Third DCA insulated its views from challenge in the Florida Supreme Court, despite the fact that its holding is irreconcilable with one of its sister courts. See Pino v. Bank of New York Mellon, 57 So.3d 950 (Fla. 4 DCA 2011), the certified question answered, 121 So.3d 23 (Fla. 2013). Federal court review, in turn, is limited by Rooker-Feldman doctrine, which deprives "lower federal courts" of "subject matter jurisdiction" to review state court decisions on foreclosure matters, even as to due process/fraud claims similar to Petitioner's. See, e.g., Warriner v. Fink, 307 F.2d 933 (5 Cir. 1962);

Moncrief v. Chase Manhattan Mortgage Corp., 275 Fed. Appx. 149 (3d Cir. 2008); Pennington v. Equifirst Corp., No. 10- 1344-RDR, 2011 U.S. Dist. LEXIS 9226 (D. Kan. Jan. 31, 2011). Courts also held that borrowers lack standing to challenge violations of the 2012 Consent Judgment. See Conant v. Wells Fargo Bank, N.A., No. 13-572 (CKK), 2014 U.S. Dist. LEXIS 19154, at **37-39 (D. D.C. Feb. 14, 2014) (collecting cases). Thus, review of the Third DCA's conduct can only be accomplished by this Court through a Petition such as this one. (4) Fraud on the Court Violates Due Process when it Deprives 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 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). The same holds true when the deprival is of property without due process of law. (5) 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 [Fla.R. Civ. P. 1.115(e) 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." Wells 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. Farmerretired 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).

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 fraudulent foreclosures over the constitutional rights of homeowners. 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). 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 refusing to write an opinion, the Third DCA denied Petitioner equal access to the Florida Supreme Court and due process of law. In 1980, Article V of the Florida Constitution was amended to divest the Florida Supreme Court of jurisdiction to review a PCA without a written opinion.3 In 1993, the Honorable Judge Gerald B. Cope, Jr., of the Third District Court of Appeal, published an extensive article analyzing Florida's Appellate Procedure after the 1980 Amendment. Gerald B. Cope Jr., Discretionary Review of the Decisions of Intermediate Appellate Courts: Comparison of Florida's System with Those of the Other States and the Federal System, 45 Fla. L. Rev. 21 (Jan. 1993). Judge Cope concluded that Florida's written opinion requirement was enacted in a time of crisis and imposed "the most severe limitation on access to the State Supreme Court of any American jurisdiction." Id. at 93. Two decades after the 1980 amendment, the Florida Supreme Court commissioned a report to study

the use of PCA decisions. See, Comm. on Per Curiam Affirmed Dec., Final Report and Recommendations (May 2000). The majority reported that the PCA performs a useful function when used properly. Id. at 29. However, several practitioners cited a widespread PCA problem which appears arbitrary and undermines the quality of appellate justice in Florida. Id. The Florida Supreme Court adopted the PCA Committee's recommendation to amend Rule 9.330 of Florida's Appellate Procedure to allow litigants to request a written opinion from the Court effective January 2003. Former Florida Supreme Court Justice England also concluded this amendment to Rule 9.330 is conceptually flawed and should be repealed. Arthur J. England, Jr., Asking for Written Opinion from a Court That Has Chosen Not to Write One, 78- Mar Fla. B. J. 10, 16 (March 2004). Justice England saw the procedural infirmity in "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." Id. at 15. 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 parties to the National Mortgage Settlement to continue to defraud courts 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. 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 review judges to be rational." Roberson v. Florida Parole and Probation Commission, 444 So. 2d 917, 921 (Fla. 1983). (6) The Third DCA's Per Curiam Affirmance is Pretextual, Arbitrary and Capricious This Court is asked to review the Third DCA's opinion below which is clearly pretextual, arbitrary, and violates Petitioner's due process rights. 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 Petitioner'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. (7) Due Process Demands the Third DCA Disqualify Itself from Foreclosures as its Impartiality is Objectively Questioned Justice England recognized an unconstitutional and inherent flaw in entrusting intermediate appellate court judges with the power to shield an arbitrary decision from further appellate review merely by refusing to write an opinion. The same 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 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 I 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... *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

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). 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 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... 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." *39-40.

Judge Klein noted BANA's "attitude of impunity" citing failed governmental regulatory investigations "that turned out to be a chimera." Id. at *43. Even investigations by the Consumer Financial Protection Bureau were "thwarted" wita "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.

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 Florida 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 refusing to write an opinion that justifies the continued use of fraudulent evidence in an equitable action of foreclosure. 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.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kenton G. Findlay

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