19-5103

No. SC19-783

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Kenton G. Findlay — PETITIONER
(Your Name)

vs.

Star Lakes Association Inc, ETC — 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)

No. SC19-783

IN THE SUPREME COURT OF THE UNITED STATES

KENTON G. FINDLAY

Petitioner,

v.

STAR LAKES ASSOCIATION,
INC., ETC.

Respondent.

PETITION FOR WRIT OF CERTIORARI

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 STAR LAKES ASSOCIATION failure to serve the Petitioner with a Summons and Complaint in this matter voids the judgment entered and should be set-aside we must direct the conduct towards the Respondent Attorney in which occurred prior to the related foreclosure sale itself. Strict compliance with the statuary provisions governing service of process is required in order to obtain jurisdiction over a party in a law suit the major purpose of the constitutional provision which guarantee " Due Process" is to make certain that when a person is sued he has notice of the suit an opportunity to defend. 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 STAR LAKES ASSOCIATION, INC.,

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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 November 15, 2017 Star Lakes Association, Inc. (A Condominium Association) a Florida not -for profit Corporation scheduled a hearing in the above reference matter. The Petitioner was not given a prima facie proof because the petitioner name was not listed on the **Certified Certificate of Service** Florida Rule of Judicial Administration Rule 2.516 (f). The Court overlooked without knowledge or information of relevant information while also denying the Petitioner his due process right to a trial. The Petitioner never received a copy of Motion to amend Final Judgment. (Florida Rule of Civil Procedure 1.530). The Petitioner had no recourse to convince the Honorable Judge of any material facts to the case. The Petitioner never received a copy of the Notice of Sale. Florida Statue 698.03 states written notice of such sale shall be

given to the mortgagor and all persons claiming by, through or under him by instrument duly recorded, not less than fifteen days prior to such sale.

The Honorable Judge overlooked without the knowledge this material fact or information. The Petitioner was denied his due process right under the Florida Statue for Foreclosure and Judicial Sale. Article 1 Section Nine of the Florida Constitution provide that "no person shall be deprive of life, liberty of property without due process of law. The petitioner never received a copy of the amended Final Judgment (Florida Rule of Civil Procedure 1.530). The Petitioner had no recourse to convince the Judge of any material facts to the case while also denying the Petitioner his due process rights. The Petitioner is entitled to an evidentiary hearing on the issues raised. Florida Rule of Civil Procedure 1.50 mandate that if a party move and conduct an evidentiary hearing the purpose of such a hearing is to determine whether there are genuine issues to be tried.

In the instant case, the record does not reflect any effort to serve the Petitioner during the 120-days period provided for by the rule. Instead, the Respondent intentionally delayed service while he investigated the case. In Morales v. Sperry Rand Corp., 578 So. 2d 1143 (Fla. 4th DCA 1991), approved, 601 So. 2d 538 (Fla. 1992), this court noted that Florida Rule of Civil Procedure 1.070 (I) is patterned after for mere Federal Rule of Civil Procedure 4 (j). The court quoted Lovelace v.

Acme Market, Inc., 820 F. 2d 81 (3d (Cir.) court. Denied. 484 U.S. 965, 108 S. CT. 455, 98 C. Ed. 2d 395 (1987): the 120-days limit to effect service of process, established by Fed. R. Civ. P. 4 (J). is to be strictly applied, an if service of the Summons and the Complaint is not made in and the Respondent fails to demonstrate good cause for the delay "the court must dismiss the action as to the unserved Petitioner." Legislative history provides only one example where an extension for good cause would be permissible, specifically when a petitioner intentionally evades service of process.

The "half-hearted" effort by the Attorney to effect service of process prior to the deadline does not necessarily excuse a delay, even when dismissal results in the Respondent case being time barred due to the fact that the statue of Limitation on the Respondent's cause of action has run. *Morales, 578* So. *2d at 1145.* In Wei v. Hawaii, 763F. 2d 370 (9th Cir. 1998), the court held that an Appellant's desire to amend his complaint prior to its service was not good cause for failure to serve the complaint within the 120-days' time limit. Similarly, a Respondent's desire to investigate his case further prior to service is not good cause to delay service. Even if it were, the Respondent would have to show diligent effort to investigate the case during 120-days period, *See* Gitz v. St. Tammany Parish Hospital., 125 F. R. D. 138 (E. D. La. 1998). Also, an effort to serve the Petitioner within that

time, or at least a motion for extension of time to the expiration of the 120-days period. *See* Hodges v. Noel, 678 So. 2d 248 (Fla. 4th DCA 1996).

There is nothing in the record to show any attempt at service or at obtaining an extension of time for service until well past the expiration of the 120-days' time period. "Good cause" for failure to serve must require some showing as to why service could not be made within the 120 -days period. Thus, the good cause cited must explain an ability to make service, not why the Respondent or Respondent Attorney intentionally elected not to make service. Because the record does not demonstrate good cause for failure to serve the Petitioner within 120-days' time period of Rule 1. 070(I), the trial court erred in denying the Petitioner Objection to sale/Motion to Vacate and Set Aside Final Judgment.

STATEMENTS OF BASIS FOR JURISDICTION

The per curiam affirmance sought to be reviewed was entered by the Third DCA on April 30, 2019. On May 15, 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 December 6, 2017 the trial court Amended a final judgment of foreclosure in favor of STAK LAKES ASSOCIATION, INC. Case No (2014-12750-CA-01) (the Rule 1.540(b) motion") R.276-331. The Rule 1.540 (b) Motion asserted STAR LAKES ASSOCIATION, INC (H.O. A.) had committed fraud in this case by fabricating evidence of standing, namely on November 20, 2017.

Respondent STAR LAKES ASSOCIATION, INC. (H.O.A) e-filed a fraudulent CERTIFICATE OF SERVICE of STAR LAKES ASSOCIATION, INC. stating that a true and correct copy of the foregoing was furnished this 20th day of November, 2017 via email generated by the Florida Court Portal to all persons on the service list, and by first class U.S. mail to

Atlantic Credit & Finance, Inc 1201 Hays Street, Tallahassee, Fl 32301; and United States of America, 99 NE 4th street Miami Fl 33132.

ARGUMENTS

Petitioner brings this cause before this Court because Appellate Court denied Petitioner Motion for Rehearing. Petitioner Appeal an Order issued under Fla. R. Civ. P. 1-070 (j). Denying Defendant Objection to sale/ Motion to Vacate and set-Aside Amended Final Judgment.

The Respondent failure to serve the Petitioner with a Summon and Complaint in this matter voids the judgment entered and should be set-aside we must direct the conduct towards the Respondent Attorney in which occurred prior to the related foreclosure sale itself. Strict compliance with the statuary provisions governing service of process is required in order to obtain jurisdiction over a party in a law suit the major purpose of the constitutional provision which guarantee "Due Process" is to make certain that when a person is sued he has notice of the suit an opportunity to defend.

On or about November 15, 2017Star Lakes Association, Inc (A Condominium Association) a Florida not -for- profit Corporation scheduled a hearing in the above reference matter. The Petitioner was not given a prima facie proof because the petitioner name was not listed on the Certified "Certificate of Service". Florida

Rule of Judicial Administration Rule 2.516(f). The court overlooked without knowledge or information and misapprehended this material fact without legal proof presented at the hearing, which was intended to convince the judge of material facts to the case.

The petitioner never received a copy of the Notice of Sale. Florida Statue 698.03 states written notice of such sale shall be given to the mortgagor and all persons claiming by, through or under him by instrument duly recorded, not less than fifteen days prior to such sale. The Lower Court Honorable judge overlooked this material fact without knowledge or information.

The petitioner was denied his due process rights under the Florida Statue for Foreclosure and Judicial Sale. Article 1 Section nine of the Florida Constitution provide that "no person shall be deprive of life, liberty of property without due process of law. The petitioner never received a copy of the amended Final Judgment. (Florida Rule of Civil Procedure 1.530). The petitioner had no recourse to convince the judge of any material facts to the case.

The petitioner was entitled to an evidentiary hearing on the issues raised. Florida Rule of Civil Procedure 1.50 mandate that if a party move and conduct an evidentiary hearing the purpose of such a hearing is to determine whether there are genuine issues to be tried. In the instant case, the record does not reflect any effort

to serve the petitioner during the 120-days period provided for by the rule. Instead, the respondent attorney intentionally delayed service while he investigated the case.

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.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Third district court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Feb 20, 2019.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 30, 2019, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was May 15, 2019. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: April 30, 2019, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 6/27/2019