20-5260

No. SC18-627

IN THE SUPREME COURT OF THE UNITED STATES

KENTON G. FINDLAY

Petitioner,

v.

AMERIPORT, LTD., ET AL

Respondent.

PETITION FOR AN EXTRAORDINARY WRIT OF PROHIBITION

ORIGINAL

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 AMERIPORT, LTD., ET AL. Under Section 362 of the United States Bankruptcy Code, the stay begins at the moment the bankruptcy petition is filed. No action should be taken to obtain possession of property of the debtor. 11 U. S. C. 362(a)(3).

The question presented is as Follows:

Whether an entity that is willfully retaining possession of property that it seized after the bankruptcy petition was filed, and in which the debtor has an interest, violates 11 U. S. C. 362(a)(3) if it fails to return that property to the debtor immediately.

Under Rule 9.100 failure to resolve the issue of when a motion for rehearing is filed timely in the wrong court, it must be treated as timely filed. Recently, several courts have found that when a document is filed in the wrong court and the document is transferred to the proper court, the date of filing is the date the document was filed in the wrong court, not the date it was received by the proper court. As long as the Petitioner conforms to the rules adopted by the court in seeking a motion for rehearing, they should not lose their opportunity to present

what may be meritorious claims for relief simply because they have either sought the wrong form of relief or have sought the proper relief in the wrong court. even though it was filed in the wrong circuit court in which it has jurisdiction.

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 AMERIPORT, LTD., ET AL.

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PETITION FOR AN EXTRAORDINARY WRIT OF PROHIBITION

Kenton G. Findlay respectfully petition for an Extraordinary Writ to review the judgment of the Third DCA after the Florida Supreme Court decline to accept jurisdiction/ motion for rehearing.

INTRODUCTION

On or about August 24, 2018 the Supreme Court's decision was that the petitioner could not file a motion for rehearing. The petitioner never requested a motion for rehearing at that juncture; yet, he was deprived of the motion without a reason for the denial. The only option available to the petitioner at that time was for him to request a motion for clarification. The motion was requested but denied by the clerk, citing the court's order for the current case. The court's order did not specify or state that the petitioner could not request a motion for clarification, certification, or any written opinions to the above filed case. The petitioner is being denied a motion that is in accordance to the Florida Constitution and Florida Rule of appellate Procedure Rule 9.330.

Pursuant to Florida Rule of Appellate Procedure 9.330 (b) Motion for Clarification shall state with particularity the points of law or facts in the court's order or decision that in the opinion of the movant, are in need of clarification. A Motion for Rehearing, Clarification, Certification, Written Option may be filed

within 15 days of an order or decision of the court within such time set by the court. The Petitioner was unjustly denied the Fifth Amendment to the United State Constitution provides in relevant parts: "No person shall be... deprived of life, liberty of 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 person within its jurisdiction the equal protection of the law." The clerk of the Supreme Court has errored in treating the Petitioner timely filed motion for clarification as a motion for rehearing with no fault to the petitioner, therefore the petitioner should not be treated unjustly.

On or about September 21, 2018, approximately eleven days after the motion for clarification was filed, the petitioner received an email verifying the processing of a motion for rehearing by the office of the clerk of The Supreme Court of Florida. During that time the petitioner's motion for clarification was stricken for being unauthorized and treated as motion for rehearing. The petitioner obviously thought the clerk had a realized the error and decided to correct it. After months of waiting, the petitioner called the Supreme Court of Florida and was dismayed to discover the case was not on the court's docket.

STATEMENTS OF BASIS FOR JURISDICTION

The per curiam affirmance sought to be reviewed was entered by the Third DCA on April 13, 2018. On August 24, 2018/July 11,2019 the Florida Supreme Court determined it should decline to accept jurisdiction / motion for rehearing and denied a petition for writ of mandamus 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. § 1651 (a), 2241,2255, and Article III of the U.S. Constitution.

STATEMENT PURSUANT TO RULE 20.4 (A)AND 28 U.S.C. § 2242

Pursuant to Rule 20.4 (a), Petitioner states that he has not filed this Petition in "the district court of the district in which Petitioner is held, "Sup. Ct. R. 20.4(a) (Quoting 28 U.S. C. § 2242) because Petitioner has no avenue for doing so.

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 or about December 20, 2017 the Third District Court of Appeal filed an Opinion stating. "Not final until disposition of timely filed motion for rehearing." The Petitioner errored in thinking that timely filed motion for Rehearing was meant to be sent back before the circuit county judge for Rehearing. The Petitioner scheduled the notice of hearing for January 24, 2018 and sent a copy to the Respondent's Attorney. At the Rehearing the Petitioner was informed by the Circuit Court judge that the court lack jurisdiction to hear the motion for rehearing and that the motion was timely filed in the wrong court.

In the instant case, the Circuit Court of the 11th Judicial Circuit in and for Miami - Dade County Florida entered a Corrected Final Judgment of Foreclosure 8/14/2013. On or about August 12, 2010 the Petitioner filed Chapter 13 with the United States Bankruptcy Court. On or about August 13, 2013 the petitioner converted to Chapter 11 with the United States Bankruptcy Court. A Certificate of service was sent to all interesting parties on the attached service list. Please allow the record to reflect the fact that the Respondent did not obtain a Relief from Stay

in either Bankruptcy cases filed. On or about August 14, 2013 the Respondent moved for an Order and received a Corrected Final Judgment of Foreclosure against the petitioner's property. 11 U.S. C. 362(a)(3)

In the interest of Justice, On December 26, 2017 the Petitioner incorrectly filed his timely filed motion in the Miami- Dade Circuit court where the Third District Court has Jurisdiction. On or about January 25, 2018, the petitioner corrected his error and submitted the motion to the Third District Appellate Court of Appeal. On or about February 8, 2018 the petitioner's motion for rehearing was stricken as untimely. The Third District Court of Appeal should not have ruled the motion as "untimely filed" because under Florida Rule of Appellate Procedure 9.040(b), the motion must be treated as timely filed even though it was filed in the wrong circuit court in which it has jurisdiction.

In order to evaluate the correctness of the district court's decision. We must first examine Upshaw v. state, 641 So. 2 d 451 Fla. 1st DCA 1994. The petitioner in Upshaw filed a Motion for Writ of Mandamus" with the First District of Appeal, arguing that the district court was required to consider his appeal even though his notice of appeal was timely filed with the wrong circuit court. *See Id at 452.* The First District held that for Appellate Jurisdiction to be properly invoked, a notice of appeal must be timely filed either in the lower court that entered the order

to be reviewed, or in the appellate court where review is sought, *See id at 452*. Because the Petitioner in Upshaw filed his notice of appeal with the wrong circuit court, the First District concluded that it was without jurisdiction to hear the appeal and denied the motion. See Id 453. In so holding, the district court relied upon this Court opinion in Alfonso v. Department of Environmental Regulation, 616 So. 2d 44, 47 (Fla. 1993).

In Alfonso, the following question was certified to the Court:

Whether a district court of appeal has jurisdiction to entertain an appeal from a final judgment of a circuit court where, as here (1) petitioner erroneously files a notice of appeal with the district court, rather than the circuit court, and (2) the petitioner takes no corrective action to file the notice of appeal in the circuit court within thirty days of the rendition of the final judgment.

The Court answer the question affirmatively, holding that an appellate court has jurisdiction when the notice is filed "in either the lower court that issued the order to be reviewed or the appellate court which would have jurisdiction to review the order." Alfonso v. Department of Environmental Regulation, 616 So. 2d 44, 47 (Fla. 1993).

However, it was concluded that Upshaw applies the Court's holding in Alfonso too narrowly. In Alfonso, the certified question was expressly limited to the situation

that when a notice of appeal as erroneously filed with the appellate court rather than the trial court. Nowhere in Alfonso did the court explicitly hold that the only situation where a misfiled notice of appeal properly invokes the appellate court's jurisdiction is when the notice is erroneously filed with the appellate court.

To resolve this issue, the court turned to the Florida Constitution and the Rule of Appellate Procedure, both of which are the foundation of the opinion in Alfonso. Article Section 2 (a) of the Florida Constitution states that "no cause shall be dismissed because an improper remedy has been sought." That directive is implemented by Florida Rule of Appellate Procedure 9.040(b) and (c), which provides: (b) Forum. If a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court; (c) Remedy. If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy.

The use of the word "shall "under rule 9.040 (b) demonstrates that transfer of an improperly filed cause is mandatory, not discretionary. See Chaky v. State, 651 So. 2d 1169, 1172 Fla. 1995) (construing "shall" to be mandatory and "may "to be directory in a rule of procedure); See also Sternfield v. Jewish Introductions, Inc., 581 So. 2d 987,988 (Fla. 4th DCA 1991) (finding that the circuit court had

departed from essential requirements of law when it denied petitioner's request to transfer a petition for writ of certiorari erroneously filed with that court to the district court of appeal).

Further, the 1977 committee notes to rule 9.040 (b) provide that: A case will not be dismissed automatically because a party seeks an improper remedy or invokes the jurisdiction of the wrong court. The court must instead treat the case as if the proper remedy had been sought and transfer it to the court having jurisdiction. All filings in the case have the same legal effect as though originally filed in the court to which transfer made.

Although the committee notes to rule 9.040 (b) are only persuasive authority and are not part of the rule, see D. K. D. v. State, 470 So. 2d 1387, 1389 (Fla. 1985), this Court may look to the notes as a means of determining the clear intent of the rule. See, e.g., State v. Salzero, 714 So. 2d 445,447 (Fla. 1998) (finding that "strict adherence to the time requirement of the rule of criminal procedure would not comport with the clear intent of this section as evident from the committee notes to the 1984 amendment of the rule").

These committee notes indicate that while appellants must conform to the rules adopted by the Court in seeking an appeal, they should not lose their opportunity to present what may be meritorious claims for relief simply because

they have either sought the wrong form of relief or have sought the proper relief in the wrong court. Thus, both the language of the rule and the committee notes support an interpretation than under rule 9.040 (b) a notice of appeal timely filed in the wrong court must be transfer to the proper court and treated as timely filed in that court.

Further, the second District Court of Appeal has construed the rule similarly in the past by holding that when a document is filed in the wrong court and the document is transferred to the proper court, the date of filing is the date the document was filed in the wrong court, not the date it was received by the proper court. See Alfonso, 616 So. 2d at 47. For example, in Alfonso this court noted that pursuant to rule 9.040 (b), a notice of appeal erroneously filed with the district court "should be transferred to the appropriate court with the date of filing being the date the document was filed in the wrong court." 616 So. 2d at 47. More recently, in a slightly different context, several Courts have found that in cases where trial courts venue has been changed during the course of the proceedings, "the district court of appeal should liberally transfer their appellate jurisdiction when it appears that the motion for rehearing of petitioner has been timely filed but directed to the wrong appellate court." Vasilinda v. Lozano, 631 So. 2d 1082, 1087 n.3 (Fla. 1994) citing article Section 2 (a), Fla. Const.).

In closing, to be consistent with the intent of the Florida Constitution and the Florida Rule of Appellate Procedure, when a motion for rehearing is timely filed in the wrong court, and there is no indication that the misfiling was intentionally done for the purpose of convenience or delay, the motion for rehearing must be treated as timely filed in the appropriate court. See authority (Kaweblum v. Thornhill Estate Homeowner Association, Inc., 755 So. 2d 85, FL. 2000).

Since the Petitioner's motion for rehearing was not intentionally filed with the wrong court for the purpose of convenience or delay, the Third District Court of Appeal dismissal of the Petitioners motion for rehearing as stricken untimely was improper. Accordingly, the Third District Court of Appeal should have treated the Petitioner's motion for rehearing as timely filed and the court erred in dismissing the motion for rehearing as untimely filed.

ARGUMENT

Under Article V, Section 3 (b) (8) of the Florida Constitution, the Court has the Jurisdiction to issue Writ of Mandamus. In order to obtain a Writ of Mandamus petitioner must "have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available. All three elements are presented in this case.

1. **PETITIONER HAS A CLEAR LEGAL RIGHT AS A CITIZEN AND A TAXPAYER TO REQUEST MANDAMUS RELIEF**

   At the outset, petitioner has clear legal right as a Citizen and a Taxpayer who is a resident of Florida to request Mandamus relief.

11. **THE RESPONDENT HAS AN INDISPUTABLE LEGAL DUTY TO PERFORM THAT ACT**

111. **PETITIONER HAS NO OTHER ADEQUATE REMEDY**

Mandamus is the only adequate remedy available to petitioner

REASONS FOR GRANTING THE WRIT

This case presents exceptionally rare circumstances that warrant the exercise of this Court's original habeas jurisdiction.

This Court's Rule 20.4 (a) "delineates the standards under which" the Court will grant an original writ of habeas corpus. *Felker v. Turpin*,518 U.S. at 665. First, "the petitioner must show... that adequate relief cannot be obtain in any other form or from any other court." Sup. Ct. R. 20.4(a). Second, "the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary power." Id, (quoting 28 U.S.C. § 2242).

This case satisfies both requirements.

Exceptional Circumstances Warrant the Exercise of this Court's Habeas Jurisdiction.

This Case presents a rare confluence of circumstances warranting the exercise of this Court's habeas jurisdiction. The court of appeals are openly split on a question unique to the context of second or successive petitions. That question is of the utmost importance to thousands of citizens across the country. Finally, this question realistically can be resolved only through the exercise of this Court's original habeas jurisdiction. These exceptional circumstances warrant the exercise of this Court's habeas authority.

Rule 20. Petitioner seeking a Writ of Prohibition, a Writ of Mandamus, or both in the alternative shall State the Name and Function of every Person against whom relief is sought.

AMERIPORT, LTD, LERENA BLONSKY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT J. LEWISON, ET AL.

Petitioner Cannot Obtain Adequate Relief in Any Other Form or From Any Other Court.

AEDPA require that a petitioner seeking to file a successive petition for a writ of habeas corpus first request authorization in the appropriate court of appeals. 28

U.S.C. § 2244 (b)(3)(A); *see also id* § 2255(h) (incorporating the gatekeeper procedure of § 2244). Under § 2244(b)(3)(E), the denial of such authorization. This Court's rule also requires that the issuance of a writ "be in aid of the Court's appellate jurisdiction." Sup. Ct. R. 20.1. There is no question that Petitioner's request for a writ of habeas corpus would be in exercise of this Court's appellate jurisdiction. *See ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807) (the Court's statutory authority to issue a writ of habeas corpus is " clearly appellate "because it involves "the revision of a decision of an inferior court") ; *Ex Parte Hang*, 108 U.S. 552, 553 (1883).

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.

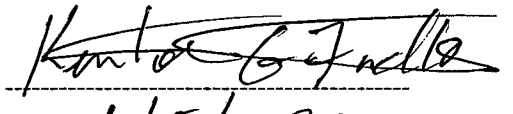
As this David v. Goliath battle involves misconduct by the most wealthy and powerful, this petition presents perhaps the most epic constitutional crisis in our lifetime. Democracy will not fall if financial institutions are held to the rule of law. To the contrary, democracy falls if the public is allowed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

For the foregoing reasons, this Court should issue an Extraordinary Writ.

CONCLUSION

The Petition for an Extraordinary Writ of Prohibition should be granted.

Respectfully Submitted,



Date : 6/5/2020