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No. 21-7142

**IN THE
SUPREME COURT OF THE UNITED STATES**

C. Holmes,
Petitioner,

v.

Blue Cross Blue Shield of South Carolina, et al.
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

C. Holmes
P.O. Box 187
Sullivans Island, SC 29482
843.883.3010
Petitioner

ORIGINAL

QUESTIONS PRESENTED

1. Whether this Court should grant writ of certiorari regarding denial of the timely request for the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters.
2. Whether denial of the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters, hereafter coerced R&R, on dispositive matters impermissibly denies/diminishes substantial rights including, but not limited to, judicial review through change in the standard of review and/or diminished time to file appeal of R&R.
3. Whether this Court should grant writ of certiorari regarding the propriety of and/or lack of jurisdiction for referring to a magistrate a motion for the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters.
4. Whether this Court should remand because the lower appellate court misapprehends appealability and/or overlooks the request and denial in the district court for certification of appeal and motion for stay pending appeal of denial of substantial rights incapable of vindication on appeal.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: Blue Cross Blue Shield of South Carolina, Scott McCartha, Ms. Shipman, J. Doe # 1 through J. Doe # X.

RELATED CASES

None

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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

The unpublished opinion of the United States court of appeals appears at
Appendix A to the petition.

The opinion of the United States district court appears at Appendix B to the
petition.

JURISDICTION

An extension of time to file the petition for a writ of certiorari was granted to
and including February 16, 2022, on January 26, 2022, in Application No. 21-A364.
Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I

Religion and Expression

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment V

From the Bill of Rights

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article III

Section 1

The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

STATE STATUTORY PROVISIONS AT ISSUE

SECTION 38-59-20. Improper Claim Practices.

Any of the following acts by an insurer doing accident and health insurance, property insurance, casualty insurance, surety insurance, marine insurance, or title insurance business, if committed without just cause and performed with such frequency as to indicate a general business practice, constitutes improper claim practices:

- (1) Knowingly misrepresenting to insureds or third-party claimants pertinent facts or policy provisions relating to coverages at issue or providing deceptive or misleading information with respect to coverages.
- (2) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies, including third-party claims arising under liability insurance policies.
- (3) Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims, including third-party liability claims,

arising under its policies.

(4) Not attempting in good faith to effect prompt, fair, and equitable settlement of claims, including third-party liability claims, submitted to it in which liability has become reasonably clear.

(5) Compelling policyholders or claimants, including third-party claimants under liability policies, to institute suits to recover amounts reasonably due or payable with respect to claims arising under its policies by offering substantially less than the amounts ultimately recovered through suits brought by the claimants or through settlements with their attorneys employed as the result of the inability of the claimants to effect reasonable settlements with the insurers.

(6) Offering to settle claims, including third-party liability claims, for an amount less than the amount otherwise reasonably due or payable based upon the possibility or probability that the policyholder or claimant would be required to incur attorneys' fees to recover the amount reasonably due or payable.

(7) Invoking or threatening to invoke policy defenses or to rescind the policy as of its inception, not in good faith and with a reasonable expectation of prevailing with respect to the policy defense or attempted rescission, but for the primary purpose of discouraging or reducing a claim, including a third-party liability claim.

(8) Any other practice which constitutes an unreasonable delay in paying or an unreasonable failure to pay or settle in full claims, including third-party liability claims, arising under coverages provided by its policies.

FACTS

The petitioner respectfully submits Petition for a Writ of Certiorari. The underlying case involves violations of state and Federal law, including S.C. Code § 38-59-20, *et seq.*, Improper Claim Practices. Defendants failed to even respond to multiple reasonable attempts to resolve repeated, ongoing wrongdoing. With no other recourse, the dispute was filed with the district court.

The following are facts pertinent to the petition herein. Petitioner timely filed motion for disposition by the district court requesting the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters, which was wrongfully referred to a magistrate who denied the motion citing a local rule as authority. Timely appeal to the district court, certification of appeal, and motion for stay pending appeal were denied. Thereafter, timely appeal to the court of appeals and petition for rehearing were denied. Petition for Writ of Certiorari is timely filed.

INTRODUCTION

The Great Statesman, Rep. Elijah Cummings, may he rest in peace, observed, "When we're dancing with the angels, the question will be asked, in 2022, what did we do to make sure we kept our democracy intact?" Emphasis supplied. Along with Rep. John Lewis, may God rest his soul, it is fitting to remember these lifetimes of steadfast bravery and unrelenting courage. It is fitting, as well, to remember the beginnings of that democracy. The framers of our State and Federal Constitutions risked life, limb, and liberty to escape abuses by the British government.

Both State and Federal Constitutions were deliberately crafted to foreclose those abuses here. The framers did not need computers, tablets, or cell phones to discern the basic tenets of fundamental fairness and due process. An impartial decision-maker was seen as a non-negotiable requirement for preventing such abuses. The letter and spirit of our cherished Constitution categorically prohibit deprivation of life, liberty, or property without due process of law, nor shall any person be denied equal protection of the laws. The right of trial by jury shall be preserved inviolate. As a corollary, another requirement, deemed mandatory and prohibitory, is that no single individual, whether British monarch or government official shall have absolute authority over a citizen's life, liberty, or property without being subject to the right of appeal with meaningful judicial review. Accordingly, non-consensual Report & Recommendation (R&R) cannot pass constitutional muster.

In the instant case, petitioner timely reserves, preserves, does not waive, and expressly requests fundamental fairness and substantial rights including but not limited to, meaningful opportunity to be heard at a meaningful time and full and fair trial by jury. There are examples of pro se filings subjected to a separate second-class system of so-called justice, where the Local Rules of Court, including L.C.R. 73.02(B)(2)(D.S.C.), are gleefully and cavalierly used as a trap for the unwary. Significantly and materially, there is an abundant body of law decisively declaring separate is never equal. The acknowledged systemic institutional biases against minorities and/or pro se litigants threaten our democracy and feed the appearance of the proverbial "rigged" system. In the pro se setting, this issue is of exceptional importance as it is capable of repetition, capable of evading judicial review, and incapable of adequate remedy on appeal. The following inscription is found at the Four Corners of Law: Where the rule of law ends, tyranny begins. The Judge J. Waties Waring Judicial Center is named for the renowned crafter of divine dissents lying in repose in Charleston, who must be turning over in his grave at the historically persistent lawlessness of the Four Corners of Law where his name is prominently displayed. As set forth more fully below, it is respectfully submitted our democracy depends on the basic tenets of fundamental fairness and due process just as much, if not more so, in this age of cell phones, tablets, computers, and extraordinary and unprecedented public health and affiliated economic emergencies ongoing and still unfolding.

To the extent pro se civil litigants are disproportionately affected and would have little or no access to attorneys, these important public issues involving

substantial rights are statistically less likely to come before this Honorable Court, which supports review.

REASONS FOR GRANTING THE PETITION

1. Whether this Court should grant writ of certiorari regarding denial of the timely request for the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. This petition is respectfully submitted regarding decisions of the court of appeals which fail to address conflicts with decisions of the United States Supreme Court and authoritative decisions of other United States Courts of Appeals. Review is therefore necessary to secure and maintain uniformity of the court's decisions. Moreover, the decisions involve one or more questions of exceptional importance which merit review and which are capable of repetition, capable of evading judicial review, and incapable of adequate remedy on appeal. Specifically, as set forth more fully below, one or more of the issues of exceptional importance involve denial of pro se litigants' timely request for substantial rights including but not limited to, the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters. These questions of exceptional importance have been repeated and have evaded judicial review in the pro se setting which supports review herein. But for the

magistrate's reliance on an inapplicable local rule, the outcome should have and would have been different. The petitioner is prejudiced thereby. Petitioner's substantial rights including but not limited to, judicial review on the merits are impermissibly diminished by Report & Recommendation (R&R) without consent on dispositive matters. "The Supreme Court has stated that the Constitution requires that the judicial power of the United States be vested in courts having judges with life tenure and undiminishable compensation in order to protect judicial acts from executive or legislative coercion. *O' Donoghue v. United States*, 289 U.S. 516, 531, 53 S.Ct. 740, 743, 77 L.Ed. 1356 (1933). The public perception of the proverbial rigged system is fed by the charade in South Carolina that magistrate R&R requires consent. In reality, the district court of South Carolina, Charleston Division, coerces magistrate R&R on pro se litigants by wrongfully denying the timely requested substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters. Relying on L.C.R. 73.02(B)(2)(D.S.C.), regarding "assignment" to a magistrate, the district court of South Carolina evades the merits, undercutting appearance of a disinterested court and bringing disrepute to, if not forwarding institutional bias in, the judicial system. It is respectfully submitted the overworked and underpaid district court judges, not to mention overworked and underpaid lower appellate court judges who subconsciously may not enjoy lack of discretionary review, may not be neutral decision-makers in the request for the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters, which invites review.

2. Whether denial of the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters, hereafter coerced R&R, on dispositive matters impermissibly denies/diminishes substantial rights including, but not limited to, judicial review through change in the standard of review and/or diminished time to file appeal of R&R.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Significantly and materially, the differences between an Article III Judicial Officer and a magistrate are evident, even to the casual observer. It is fair to say the differences between an Article III Judicial Officer and a magistrate are obvious to a reasonable District Court Judge. The Constitutional right to request Article III Judicial Officer without fear of retaliation is a substantial right akin to the right to a particular mode of trial. Reasonable men/women should and would have serious questions.

Without being disagreeable there is disagreement. The record should reflect there is no consent to a magistrate or to Report & Recommendation (R&R) on dispositive matters. The record also reflects timely denial of consent. The propriety of a magistrate ruling on request for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters is challenged. Additionally, the district court order on appeal should be reversed due to, including but not limited to, lack of adequate explanation for meaningful appellate review.

As a threshold matter, the petitioner had no access to the record due to

Covid closures and to the extent the record contains consent to a magistrate, that consent is falsified. The Constitutional right to request de novo determination by Article III Judicial Officer without R&R on dispositive matters without fear of retaliation is a substantial right akin to the right to a particular mode of trial. Plaintiff's timely motion for the substantial right to the Constitutional protection of de novo determination by an Article III Judicial Officer without R&R on dispositive matters was wrongfully referred to a magistrate. The magistrate herein issued evasive, non-responsive filing to plaintiff's motion for the substantial right to the Constitutional protection of de novo determination by an Article III Judicial Officer without R&R on dispositive matters. Petitioner respectfully timely appealed non-responsive, arbitrary, and/or capricious denial of that substantial right. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). There is no consent, much less express, voluntary consent to a magistrate. Jurisdiction cannot be waived. 28 U.S.C. § 636(b)(3). As such, without consent, there is no jurisdiction for R&R on dispositive matters. To the extent a litigant's right to an Article III Judicial Officer is thwarted/denied by wrongful referral, impermissible delegation, and/or unauthorized R&R, the interpretation and/or application of the statute and/or local rule cited as authority cannot pass constitutional muster.

The framers of the constitution intended litigants to be the beneficiaries of the substantial right of de novo determination by an Article III Judicial Officer without R&R on dispositive matters. Conflict between 28 U.S.C. § 636(b)(1) and 28 U.S.C. § 636(b)(3) is resolved in favor of the intended beneficiaries of that constitutionally protected substantial right. The substantial right of de novo

determination by an Article III Judicial Officer without R&R on dispositive matters is not forfeited nor voluntarily and expressly waived but is expressly reserved and not waived. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003). As set forth more fully below, there is conflict with decisions of other courts of appeal and the U.S. Supreme Court which calls for review herein.

Pursuant to 28 U.S.C. § 636(b)(3), a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. The denial of a litigant's timely express request for de novo determination by an Article III Judicial Officer without R&R on dispositive matters is inconsistent with the Constitution and laws of the United States. "The Supreme Court has stated that the Constitution requires that the judicial power of the United States be vested in courts having judges with life tenure and undiminishable compensation in order to protect judicial acts from executive or legislative coercion. *O' Donoghue v. United States*, 289 U.S. 516, 531, 53 S.Ct. 740, 743, 77 L.Ed. 1356 (1933). A decision without consent by a magistrate, a non-Article III judge, would undermine this objective of the Constitution and might violate the rights of the parties. *Willie James Glover, Plaintiff-Appellee Cross-Appellant, v. Alabama Board of Corrections, Et Al., Defendants, James Towns, Defendant-Appellant Cross-Appellee.*, 660 F.2d 120 (5th Cir. 1981). See *Wimmer v. Cook*, 774 F.2d 68 (4th Cir., 1985); *Roell v. Withrow*, 538 U.S. 580 (2003); *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995) (citing *Ex Parte United States*, 242 U.S. 27, 41, 37 S.Ct. 72, 61 L.Ed. 129 (1916)). "De novo review of a magistrate judge's determinations by an Article III judge is not only required by

statute, see *Orpiano v. Johnson*, 687 F.2d 44, 47-48 (4th Cir. 1982), but is indispensable to the constitutionality of the Magistrate Judge's Act. See *United States v. Raddatz*, 447 U.S. 667, 681-82 (1980)." *Walton v. Lindler*, 972 F.2d 344 (4th Cir., 1992) (unpublished). Petitioner is prejudiced thereby and asserts prejudicial error because the outcome should and would be different with de novo determination by Article III Judicial Officer without R&R on dispositive matters. Adequate explanation for adequate record is required for meaningful appellate review. The substantial right of de novo determination, as opposed to de novo review, by an Article III Judicial Officer without magistrate R&R on dispositive matters is respectfully requested.

Many of us agree, the workload for district court judges is burdensome and we sincerely appreciate the demands and the public service. To the extent a substantial right, including de novo determination by Article III Judicial Officer without R&R on dispositive matters and/or full and fair lower appellate court review, is diminished for pro se litigants by R&R, and the record reflects that it is, there can be no jurisdiction without consent. To the extent pro se litigants are subjected to a non-Article III judge and second class system of so-called justice without consent, separate is never equal. The dispositive factor is and should be: separate is never equal which is definitively decided by an abundant body of law. Reasonable men and women should and would have questions. The lower appellate court overlooks the petitioner's timely request, in the district court, for permission to appeal with stay pending appeal of, including but not limited to, the request for the substantial right of de novo determination by Article III Judicial

Officer without R&R on dispositive matters, incapable of vindication on appeal.

The district court opinion on appeal herein acknowledges plaintiff's motion for the substantial right of de novo determination by an Article III Judge without R&R on dispositive matters but fails to provide adequate explanation for meaningful appellate review. See, e.g., *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020). As set forth above, case law supports plaintiff's motion. Further, the record reflects there is express denial of consent for magistrate R&R on dispositive matters, therefore, there is no jurisdiction for magistrate R&R. The opinion misapprehends, overlooks, and/or fails to adequately address plaintiff's motion for the substantial right of de novo determination by an Article III Judge without R&R on dispositive matters. Accordingly, petitioner respectfully requests remand or reversal.

Denial of the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters, hereafter coerced R&R, on dispositive matters impermissibly denies/diminishes substantial rights including, but not limited to, judicial review through change in the standard of review and/or diminished time to file appeal without consent. To the extent a substantial right, including lower appellate court review and/or appeal rights, is diminished for pro se litigants by R&R, and the record reflects that it is, coerced R&R without consent cannot pass constitutional muster. The record, unavailable during Covid closures with no internet access, should reflect there is no consent. Accordingly, plaintiff's request for the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive

matters should have been granted.

Ambiguity, wrongful referral, and/or impermissible delegation regarding the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters which impermissibly diminishes the substantial right of judicial review without consent is reversible error. The legal standard on appeal of the magistrate order to the district court and beyond is different (less burdensome) than the standard applied to the denial by the district court. Application of the diminished legal standard on appeal of the magistrate's denial to the district court due to wrongful referral is reversible error. But for application of the improper legal standard due to wrongful referral, the outcome should and would be different in petitioner's favor and petitioner is prejudiced thereby.

In addition, the recent unpublished case of *Shiraz* addresses impermissible delegation. *United States v. Shiraz*, (4th Cir., filed August 13, 2019). From that case, "core judicial functions cannot be delegated....Such delegation violates Article III of the Constitution. *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995)." *Id.*, p.4. Similarly, ambiguity as to whether the district court impermissibly delegated authority is reversible error. *Id.*, p.5 (citing *United States v. Barber*, 865 F.3d 837, 840 (5th Cir. 2017). Moreover, the 9th Circuit has ruled that without the party's consent, the magistrate lacked jurisdiction. *Branch v. Umphenour*, 936 F.3d 994 (9th Cir. 2019). See *Coleman v. Labor & Indus. Review Comm'n*, 860 F.3d 461, 475 (7th Cir. 2017) (holding that a magistrate judge cannot "resolve the case finally" "unless all parties to the action have consented

to the magistrate judge's authority." The Seventh Circuit remanded: A plaintiff's consent alone cannot give a magistrate the necessary authority to resolve a case on the basis that the complaint fails to state a claim upon which relief can be granted, in a case that otherwise requires an Article III judge. The lesson we draw is that **something as important as the choice** between a state court and a federal court, or **between an Article I and an Article III judge**, cannot be resolved against a party without bringing the party into the case through formal service of process (emphasis supplied)). To the extent a litigant's right to an Article III Judicial Officer is thwarted/denied by impermissible delegation, wrongful referral, and/or coerced R&R without consent, the interpretation and/or application of the statute and/or local rule cited as authority cannot pass constitutional muster. Magistrate R&R without consent jeopardizes/impairs litigants' substantial rights including but not limited to, diminished judicial review and appeal rights. To the extent a substantial right, including judicial review, is diminished for pro se litigants by coerced R&R, and the record reflects that it is, magistrate R&R without consent cannot pass constitutional muster. Without Constitutional and/or statutory authority, the magistrate order lacks jurisdiction and, therefore, is null and void. The substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters is respectfully requested.

Accordingly, there is conflict with decisions of other courts and the United States Supreme Court which supports review. This issue is of exceptional importance, it is capable of being and has been repeated, it is capable of evading and has evaded judicial review, and it is incapable of vindication on appeal.

3. Whether this Court should grant writ of certiorari regarding the propriety of and/or lack of jurisdiction for referring to a magistrate a motion for the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. This Court should grant writ of certiorari regarding the propriety of and/or lack of jurisdiction for referring to a magistrate a motion for the substantial right of de novo determination by Article III Judicial Officer without Report and Recommendation (R&R) on dispositive matters. Reliance on a local rule to deny the substantial right of de novo determination by an Article III Judge without R&R on dispositive matters is clear error. The local rule, L.C.R. 73.02(B)(2) (D.S.C.), cited as authority involves assignment for pretrial, not wrongful referral, impermissible delegation, or coerced R&R on dispositive, or essentially dispositive, matters, and is inapplicable. As such, there is no authority for magistrate R&R and/or no jurisdiction. Pursuant to 28 U.S.C. § 636, a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. It is respectfully submitted the denial of a litigant's timely express request for de novo determination by an Article III Judicial Officer without R&R on dispositive matters is inconsistent with the Constitution and laws of the United States.

The propriety of referring a motion for de novo determination by an Article III Judicial Officer without R&R on dispositive matters to a magistrate is

challenged. As a threshold matter, the magistrate would have no authority over the district court judge and the Local Rule cited does not authorize such referral for disposition to a magistrate. Further, the district court judge thereby refuses to grant the meritorious and protected substantial right, prejudicing and signaling the matter for a second class so-called system of justice dispensed by a non-Article III judge with diminished standard of review on appeal and/or diminished appeal rights without consent. Moreover, by wrongful referral to a magistrate the district court judge predetermines the outcome of denial or else why wouldn't she grant it? The wrongful referral to a magistrate smacks of retaliation for requesting a substantial right akin to the right to a particular mode of trial. The alleged wrongful referral to a magistrate results in the outcome, predetermined by the district court judge, of denial of the motion for de novo determination by an Article III Judicial Officer without R&R on dispositive matters. The appeal of the magistrate's denial is to the district court judge who predetermined that outcome of denial by alleged wrongful referral to the magistrate. That appeal of the magistrate's denial is subject to a less burdensome standard of review than appeal of the district court judge's denial of motion for de novo determination by an Article III Judicial Officer without R&R on dispositive matters. Ambiguity as to the proper legal standard is prejudicial error. The appeal of that predetermined outcome herein was followed by the district court judge's lack of adequate explanation for meaningful review. See, e.g., *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020)(lack of adequate explanation for meaningful review). Predetermined outcome and/or lack of de novo determination, such as, e.g.,

wrongful referral and/or impermissible delegation, is corroborated further by a pattern and practice herein of the district court judge addressing and/or citing little, if any, case law on the merits. Petitioner asserts prejudicial error and requests reversal or remand for adequate explanation in order to provide adequate record for meaningful review.

In even-handedness, transparency, and fundamental fairness a neutral decision-maker should decide the appeal of the magistrate's denial, not the district court judge who wrongfully referred to the magistrate, thereby predetermining the outcome of denial. By analogy, occasionally, a recently appointed appellate court judge will find him or herself in the position of potentially reviewing a decision that he or she made while in the court below. In these cases, the Judge or Justice will recuse him or herself from reviewing his or her own decision. A judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Rule 3(E)(1), CJC, Rule 501, SCACR*. Disqualification is required if a reasonable factual basis exists for doubting the judge's impartiality. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978). In the *Rice* case, then Chief Judge Haynsworth further ruled that, "For many years a federal judge has been prohibited from sitting to hear or determine an appeal in a case or issue tried by him. 28 U.S.C.A. § 47. To say the least, it would be unbecoming for a judge to sit in a United States Court of Appeals to participate in the determination of the correctness, propriety and appropriateness of what he did in the trial of the case. After rendering decisions, some judges remain open minded, and some are unreluctant to confess previous error, but a reasonable

person has a reasonable basis to question the impartiality of a judge who sits in a United States Court of Appeals to review his own decision as a trial judge." *Id.* at 1117. The inquiry is whether a reasonable person would have a reasonable basis for questioning the judge's impartiality, not whether the judge is in fact impartial. *Id.* at 1116. This oft-cited case is well stated, sound, and universally accepted as logical and fair. "There is another way to look at the case, however: as one in which the losing litigant appeals from a ruling by Judge X to an appellate panel that includes Judge X; and it is considered *improper*--indeed is an express ground for recusal, see 28 U.S.C. Sec. 47--in modern American law for a judge to sit on the appeal from his own case. On this ground the Fourth Circuit held in *Rice* that section 455(a) required the district judge to recuse himself. [*Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).] We agree with this result." *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989) (emphasis supplied). Accordingly, appeal of the magistrate's denial of the substantial right of de novo determination by Article III Judicial Officer without R&R in dispositive matters should be heard by a neutral decision-maker, not the district court judge who allegedly wrongfully referred.

4. Whether this Court should remand because the lower appellate court misapprehends appealability and/or overlooks the request and denial in the district court for certification of appeal and motion for stay pending appeal of denial of substantial rights incapable of vindication on appeal.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. This Court should remand because the lower appellate court misapprehends appealability and/or overlooks the request and denial in the district court for certification of appeal and motion for stay pending appeal of denial of substantial rights incapable of vindication on appeal. To the extent a district court could or would take advantage of the lower appellate court's lack of a formal record on appeal (ROA) in the court of appeals, any consent to magistrate R&R contained in that ROA is falsified. To the extent imprecise district court docketing could or would mislead a lower appellate court, and the record reflects it can, the timely request is filed January 22, 2021, for certification of appeal with stay pending resolution of the appeal of denial of substantial rights incapable of vindication on appeal. The lower appellate court decision is inconsistent.

The lower appellate court misapprehends petitioner's appeal based on 28 U.S.C. § 1292(b). It is respectfully submitted that under 28 U.S.C. § 1292(b), the order is appealable because certification by the district court is untenable, unreasonable, and/or futile when a basis for the appeal is that the overworked and underpaid district court judge is not a neutral decision-maker in the request for the substantial right of de novo determination by Article III Judicial Officer without


Report & Recommendation (R&R) on dispositive matters, for the substantial right of judicial review which is not impermissibly diminished by R&R without consent, and/or other questions of exceptional importance. Accordingly, reversal or remand to the lower appellate court is respectfully requested.

The lower appellate court misapprehends the case of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), which recognizes the collateral order doctrine. The collateral order doctrine states an appellate court will treat a prejudgment order as essentially "final" if it conclusively resolves an important issue independent of the merits of the case, and the order is effectively unreviewable on appeal due to the irreversible effects of the decision. *Id.* Specifically, the unpublished opinion herein overlooks the material fact that the petitioner petitions under the collateral order doctrine regarding the request for the substantial right of de novo determination by Article III Judicial Officer without R&R, for the substantial right of judicial review which is not impermissibly diminished by R&R without consent, and/or other questions of exceptional importance. In addition, certain important questions involving substantial rights must be appealed immediately or be waived. Further, this petition raises novel issues of great public importance which support jurisdiction and review. Accordingly, the case of *Cohen, supra*, the collateral order doctrine, discretionary review, inherent authority, original, and/or other jurisdiction support remand.

CONCLUSION

WHEREFORE petitioner respectfully requests this Court grant the petition for a writ of certiorari.

Respectfully submitted,

 2/7/2022
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