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No. **21-7629**

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

C. Holmes,
Petitioner,

v.

Granuaile, LLC, 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

- I. Whether this Court should grant writ of certiorari on appealability.
- II. Whether the district court should provide complete record on appeal (ROA) for full, fair, and/or meaningful review.
- III. Whether summary dismissal before service based on affirmative defense, which defendants have the burden of raising, is reversible as a matter of law.
- IV. Whether the Report and Recommendation (R&R) is nearly identical to the former magistrate's summary dismissal R&R in *Beeson v. South Carolina* (D. S.C. 2016).
- V. Whether the district court erred in failing to address governing State Law cited in this case of complete diversity jurisdiction.
- VI. 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.
- VII. Whether denial of the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters, hereafter coerced R&R, impermissibly denies/diminishes substantial rights including, but not limited to, Article III Judicial Officer, full and fair appeal rights, change in the standard of review regarding R&R, and/or diminished time to file appeal/objections for R&R without consent.
- VIII. 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 R&R on dispositive, or essentially dispositive, matters.

LIST OF PARTIES

The district court summarily dismissed before service based on affirmative defense required to be raised by defendants, if at all. 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: J.P. Walsh, individually and as related to Granuaile, LLC; L. Walsh, individually and as related to Granuaile, LLC, and Granuaile, LLC.

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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 April 22, 2022, on February 9, 2022, in Application No. 21-A405.
Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL 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.

FACTS

The petitioner respectfully submits Petition for a Writ of Certiorari. The underlying case is based on complete diversity jurisdiction. The following are facts pertinent to the petition herein. Defendants' wrongdoing has directly and proximately caused continuous, on-going, and abatable injuries to petitioner's neighboring property. Pursuant to governing state law, defendants are liable for the recurring injuries and each injury marks the commencement of a new time period. 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. The petitioner timely entered objections. The district court case has been pending without service. The district court wrongfully summarily dismissed based on affirmative defense required to be raised by defendants, if at all. 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 in Charleston, SC: 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. 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 may

have little or no access to attorneys, these important public issues involving substantial rights are less likely to come before this Honorable Court, which supports review. Institutional bias including but not limited to, institutional bias in the form of coerced R&R on dispositive matters which denies/impairs substantial rights, supports review.

REASONS FOR GRANTING THE WRIT

I. Whether this Court should grant writ of certiorari on appealability.

This petition is based on appealability in the lower appellate court under 28 U.S.C. § 1292(b), the collateral order doctrine, discretionary review, inherent authority, original, and/or other jurisdiction. Moreover, 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 meaningful judicial review, which is impermissibly diminished by R&R without consent on dispositive matters, and/or other questions of exceptional importance. Moreover, the record herein reflects the only stakeholder on the other side, the district court judge, is not a neutral

decision-maker. Accordingly, petitioner respectfully requests this Court grant the petition for a writ of certiorari.

The case of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), 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 lower appellate court 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 on dispositive matters, for the substantial right of meaningful judicial review, which is impermissibly diminished by R&R without consent on dispositive matters, and/or other questions of exceptional importance. In addition, certain important questions involving substantial rights must be appealed immediately or be waived. Further, the petition raises novel issues of great public importance which support jurisdiction and review. Accordingly, the case of *Cohen, supra*, the collateral order doctrine, and/or other jurisdiction support appealability.

II. Whether the district court should provide complete record on appeal (ROA) for full, fair, and/or meaningful review.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. There is

no accurate record on appeal (ROA). Manifest errors in the purported ROA require correction which is hereby requested. In particular, Entry #35 dated 03.25.21 (notice of denial of Rule 59e motion on wrongful R&R summary dismissal before service) contains the erroneous statement that the case is closed as of 08.27.20. Thereafter, timely notice was provided to the Clerk's Office regarding the error without response. The petitioner had no access to the record while the clerk's office was closed due to Covid. The purported ROA is patently false containing multiple irregularities, deletions, and/or errors. Accordingly, meaningful review requires correction of the ROA which is respectfully requested.

Specifically, as set forth more fully below, the ROA reflects:

- a) multiple irregularities,
- b) failure to timely file petitioner's objections timely placed in the drop box during Covid closures,
- c) internal inconsistencies, and/or
- d) apparently unauthorized documents.

a) Multiple irregularities include missing Docket Entries #5, 6, 7, 8, 12, 13, 15, 25, and 27. Petitioner respectfully requests direction on remand to correct the ROA to include missing entries or sufficient explanation for specific omissions;

b) Failure to timely file petitioner's objections to R&R timely placed in the drop box on 08.21.20 during Covid-19 when the Clerk's Office was closed to the

public, wrongfully causing the case to be dismissed;

c) Internal inconsistencies in the ROA including but not limited to, the ROA fails to contain the copy of the envelope, X-rayed by security, in which the objections were delivered on 08.21.20. The ROA consistently includes copies of other X-rayed envelopes herein which corroborate timely filing. This fact demonstrates mishandling and/or irregularities which support request for corrected ROA. Someone caused the disappearance of that envelope, X-rayed, initialed, and dated 8.21.20, documenting timely filing on 08.21.20, and its contents which caused wrongful dismissal. Likely, the same person in the district court who would take advantage of pro se litigants unable to access the Clerk's office during Covid closures. The district court order on appeal herein termed the disappearance "inadvertent oversight." Perhaps Federal Court security can discover the whereabouts. Unbeknownst to the evildoer, the Clerk immediately had placed the file-marked copy in the enclosed stamped, self-addressed envelope and promptly returned it. But for that file-marked copy, pro se litigants are unable to prove timely filing during Covid closures. Other hapless pro se litigants may be and likely have been subjected to the same or similar wrongdoing. In any case, it is unclear who in the district court is responsible and this Honorable Court is prejudiced thereby.

d) The R&R, Entry #17 dated 08.05.20, is nearly identical to the former Magistrate Bristow Marchant's summary dismissal R&R in *Beeson v. South Carolina* (D. S.C.

2016). Significantly and materially, wrongful R&R summary dismissal before service is predicated on former Magistrate Marchant's meritless R&R finding of frivolity. The record reflects the brand-new magistrate is NOT the author of the R&R at Entry #17 dated and filed 08.05.20, long after the former Magistrate Marchant's departure. That document is unauthorized and should be vacated, stricken, dismissed, or disregarded. Moreover, the R&R caption with Case No. 2:20-01748-BHH-BM indicates Former Magistrate Bristow Marchant wrongfully authored, but did not sign, the R&R herein. Petitioner is prejudiced thereby. The record in the previous matter with Granuaile, LLC *et al* in Case No. 2:16-03969 reflects appearance of impropriety, if not impropriety in fact, with impermissible ex parte contact by and through the former magistrate. Moreover, that former magistrate wrongfully denied petitioner's reasonable requests for subpoena to depose the other side's expert, thereby wrongfully denying a party their day in court as he has done extrajudicially herein. Entry #20, Judgment, is patently false. Entry #19, wrongfully adopting R&R, was vacated in Entry #24. Entry #20, Judgment, based on Entry #19, should have been vacated as well. Missing Entry No. 25 should have vacated Entry No. 20, the wrongful judgment. Entry #20 Judgment is based on clear error and is patently false because the district court wrongfully acted as defense attorney and advocate for foreign defendant corporation by summarily dismissing before service based on affirmative defense which defendant bears the burden of raising and/or which is inapplicable under governing state law in this complete diversity case. Even assuming res judicata(rj) were applicable, which is denied, the requirements for rj have not been met.

Improper procedural default occurred in the previous case. A different, less burdensome, legal standard applies herein. Clear error due to procedural default was applied in the prior action, which is not applicable herein. There is no identity of issues adjudicated in the prior action, Granuaile, LLC *et al* in Case No. 2:16-03969. Accordingly, the R&R herein should be vacated, stricken, dismissed, or disregarded which is hereby requested.

III. Whether summary dismissal before service based on affirmative defense, which defendants have the burden of raising, is reversible as a matter of law.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Summary dismissal before service based on affirmative defense is clear error and reversible as a matter of law. *Brown v. Felsen*, 442 U.S. 127,131 (1979); *Brockington v. Boykins*, 637 F.3d 503, 506 (4th Cir. 2011) (noting that motions to dismiss (*and summary dismissals*) generally do not permit inquiry into the merits of affirmative defenses (emphasis supplied)). "The determination of whether two suits arise out of the same cause of action... **does not turn on whether the claims asserted are identical.**" *Pueschel v. United States*, 369 F.3d 345, 355 (4th Cir. 2004) (emphasis supplied). Courts ordinarily do not "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses" summarily. *Panghat v. Balt. Veterans Affairs Med. Ctr.* (D. Md. 2019)(citations omitted). Res judicata is an affirmative defense, not a limit on subject-matter jurisdiction. A district court should not sua sponte consider an affirmative defense

that the defendant has the burden of raising. See Fed.R.Civ.P. 8(c). *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 209 (4th Cir. 2013). "Because claim preclusion would not bar litigation of events arising after the first amended complaint was filed in Curtis I, it was an abuse of the district court's discretion to dismiss those claims as duplicative." *Curtis v. Citibank*, 226 F.3d 133 (2nd Cir. 1999). The propriety of the district court acting as defendants' advocate without consent and before service is challenged. Objection is also timely entered because the magistrate is not authorized to and the defendants have not consented to the magistrate's wrongful advocacy for and/or representation of the defendants. The defendants herein were denied the opportunity to resolve the dispute, to comply with the mitigation plan which they represented they would install, and/or to be a good neighbor and responsible member of the community. 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)). Moreover, it undercuts appearance of a disinterested court. As one example, defendants may

want to consider mediation or otherwise resolve the matter prior to plaintiff retaining counsel of record in order to have an opportunity to do the right thing. The appearance of impropriety, if not impropriety in fact, by a brand-new magistrate on behalf of the district court is breathtaking. Accordingly, summary dismissal before service based on affirmative defense that the defendant has the burden of raising is clear error and reversible as a matter of law. See Fed.R.Civ.P. 8(c).

IV. Whether the R&R is nearly identical to the former magistrate's summary dismissal R&R in *Beeson v. South Carolina* (D. S.C. 2016).

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The R&R is nearly identical to the former magistrate's summary dismissal R&R in *Beeson v. South Carolina* (D. S.C. 2016) as reported but is not signed by its author, the former magistrate, and is dated well after his departure. Moreover, the R&R caption herein with Case No. 2:20-01748-BHH-BM (Former Magistrate Bristow Marchant) indicates and the record reflects the R&R herein is authored by the former magistrate and, therefore, should be signed by its author, the former magistrate. Moreover, because the local rule cited as authority for referral to a magistrate is inapplicable, the former magistrate's R&R lacks jurisdiction, is null and void, and should be vacated or disregarded. L.C.R. 73.02(B)(2)(d) (D.S.C.) (42 U.S.C § 1983 prisoner petitions). To the extent a brand-new magistrate signed-off on someone else's wrongful R&R, the magistrate is respectfully requested to

indicate for the record the former magistrate authored it, in whole or in part. Accordingly, the former magistrate's summary dismissal R&R herein under C/A No. 2:20-01748-BHH-BM should be held in abeyance, vacated, disregarded, and/or withdrawn. Petitioner respectfully requests the substantial right of de novo determination by neutral Article III Judicial Officer without R&R on dispositive matters.

Of note, though the former magistrate's summary dismissal R&R acknowledges state law governs this case with complete diversity, not one South Carolina state court case regarding governing state law is cited. Accordingly, the R&R overlooks or misapprehends governing law and controlling precedent.

Moreover, the former magistrate's *Beeson v. South Carolina* (D. S.C. 2016) summary dismissal R&R provides:

"Although Plaintiff is not proceeding *in forma pauperis*, this filing is subject to review pursuant to the inherent authority of this Court to ensure that a plaintiff has standing; that subject matter jurisdiction exists; and that a case is not frivolous. 2 See *Ross v. Baron*, 493 F. App'x 405, 406 (4th Cir. August 22, 2012)." *Beeson v. South Carolina* (D. S.C. 2016).

With respect to case law cited as authority, the *Ross* case states, "See *Neitzke v. Williams*, 490 U.S. 319, 328 (1989) ('When a complaint raises an arguable question of law, which the court ultimately finds is correctly resolved against the plaintiff,' the complaint fails to state a claim but is not frivolous.)." *Ross v. Baron*, 493 F. App'x 405, 406 (4th Cir. August 22, 2012). In the instant matter, because there is an arguable basis in governing state law as set forth herein, it is respectfully submitted, the action is not frivolous. Because petitioner has cited

governing state law as well as South Carolina District Court case law authorizing the claims, the matter is not frivolous as a matter of law. A district court should not sua sponte consider an affirmative defense that the defendant has the burden of raising. See Fed.R.Civ.P. 8(c). *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 209 (4th Cir. 2013). "Because claim preclusion would not bar litigation of events arising after the first amended complaint was filed in Curtis I, it was an abuse of the district court's discretion to dismiss those claims as duplicative." *Curtis v. Citibank*, 226 F.3d 133 (2nd Cir. 1999).

Because there is no frivolity, summary dismissal before service is an abuse of discretion and reversible as a matter of law.

V. Whether the district court erred in failing to address governing State Law cited in this case of complete diversity jurisdiction.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. *The South Carolina Law of Torts* under Chapter 3 on Strict Liability describes the cause of action in nuisance as follows: "Where a series of recurring injuries are involved, each injury marks the commencement of a new time period for that time period. Similarly, where the injury is continuous and abatable, a landowner may recover for injury which occurred within the statutory period." Hubbard and Felix, *The South Carolina Law of Torts*, 4th Ed. (2011), p. 269. See, e.g., *McCurley v. S.C. Hwy. Dept.*, 256 S.C. 332, 335, 182 S.E.2d 299, 300 (1971)("If the injury to neighboring lands is caused by negligence, or if the cause is abatable, then there arises a

continuous cause of action, and while limitations begin to run at the occurrence of the first actual damage, the landowner may at **any time** recover for injury to his land which occurred within the statutory period." (emphasis supplied)); *Glenn v. Sch. Dist. No. Five of Anderson Cnty.*, 294 S.C. 530, 366 S.E.2d 47 (Ct.App.1988). Moreover, "a landowner may not use his land in a manner to create a nuisance," and "he may not discharge water in concentrated form upon his neighbor's land." *Home & Indus. Mech. Supplies, Inc. v. CSX Transp., Inc.* (D. S.C. 2019)(citing *Glenn v. Sch. Dist. No. Five of Anderson Cnty.*, 294 S.C. 530, 366 S.E.2d 47, 49 (Ct.App.1988)). "A nuisance presupposes negligence in many instances, if not in most, and the two torts may be coexisting and practicably inseparable if the acts or omissions constituting negligence create a nuisance." *Home & Indus. Mech. Supplies, Inc. v. CSX Transp., Inc.* (D. S.C. 2019) (citing *Ravan v. Greenville Cty.*, 434 S.E.2d 296, 306 (S.C. Ct. App. 1993)). The common enemy rule is subject to the law of nuisance and an individual may not obstruct or alter the flow of water to create a nuisance per se. *Lucas v. Rawl Family Ltd. Partnership*, 359 S.C. 505, 598 S.E.2d 712 (S.C. 2004) (citing *Johnson v. Phillips*, 315 S.C. 407, 414, 433 S.E.2d 895, 899 (Ct.App.1993)). Accordingly, pursuant to governing state law, the cause of action is abatable, on-going, and continuing and, therefore, not subject to summary dismissal.

An analogous 2020 case provides further support for the new cause of action herein occurring after conclusion of the prior case:

The conduct in the 2011 suit occurred after the conclusion of the 2005 suit; there can be no claim preclusion... claim preclusion "describes the rules formerly known as 'merger' and 'bar.'" *Taylor v. Sturgell*, 553 U. S. 880, 892, n. 5 (2008). "If the second lawsuit involves a new claim or cause of action, the parties may raise

assertions or defenses that were omitted from the first lawsuit even though they were equally relevant to the first cause of action." Ibid. *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.* (U.S. Sup. Ct. May 14, 2020).

That 2020 case ruled that plaintiff was not precluded from filing a new cause of action for continuing wrongful conduct occurring after the conclusion of the prior case. It is respectfully submitted that to rule otherwise leads to the absurd result of encouraging wrongdoing for which the wrongdoer is unaccountable.

Accordingly, the district court opinion overlooks or misapprehends governing state law and controlling precedent in this complete diversity case.

VI. 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 United States courts of appeals. Review is therefore necessary to secure and maintain uniformity of the courts' 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. L.C.R. 73.02(B)(2)(d) (D.S.C.) (42 U.S.C § 1983 prisoner petitions). The petitioner is prejudiced thereby. Petitioner's substantial rights including but not limited to, full and fair 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 the district court of South Carolina that magistrate R&R requires consent. In reality, the district court of South Carolina, Charleston Division, coerces 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 R&R on dispositive matters, which invites review.

VII. Whether denial of the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters, hereafter coerced R&R, impermissibly denies/diminishes substantial rights including, but not limited to, Article III Judicial Officer, full and fair appeal rights, change in the standard of review for R&R, and/or diminished time to file appeal/objections for R&R without consent.

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 magistrate 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 ROA 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 R&R on dispositive matters. 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 de novo determination by 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 courts of appeal and the United States 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 agree, the workload for district court judges is burdensome and the demands and public service are sincerely appreciated. 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 coerced R&R subjects pro se litigants 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 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 R&R on dispositive matters, hereafter coerced R&R, impermissibly denies/diminishes substantial rights including, but not limited to, Article III Judicial Officer, full and fair appeal rights through change in the standard of review for R&R, and/or diminished time to file appeal/exceptions for R&R 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 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, application of the improper legal standard, and/or impermissible delegation regarding the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters, which impermissibly diminishes the substantial right of full and fair 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 that of the district court. Application of the diminished legal standard for appeal under these facts is reversible error. But for application of the improper legal standard to appeal of the coerced R&R, 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, Article III Judicial Officer, diminished appellate rights to full and fair review, and/or diminished time to appeal R&R. To the extent a substantial right, including appellate 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 lower appellate courts and this 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.

VIII. 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 R&R on dispositive, or essentially 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 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, or potentially dispositive, matters is clear error. The local rule, L.C.R. 73.02(B)(2) (D.S.C.), cited as authority involves pre-trial assignment, not wrongful referral, impermissible delegation, or coerced R&R on dispositive, or potentially dispositive, matters. 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 in the R&R does not authorize such referral for disposition by a magistrate. Further, the district court judge thereby refuses to grant the meritorious and protected substantial right to an Article III Judicial Officer, prejudicing and/or signaling the matter for a second class system of so-called justice dispensed by a non-Article III judge with diminished standard of review on appeal, diminished appeal rights, and/or diminished time to appeal the R&R 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. 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 to provide adequate explanation with 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 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. *Ríce v. McKenzíe*, 581 F.2d 1114, 1116 (4th Cir. 1978). In the *Ríce* 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 on dispositive matters should be heard by a neutral decision-maker, not the district court judge who allegedly wrongfully referred and/or predetermined the outcome.

CONCLUSION

For the reasons stated and for substantial justice affecting substantial rights, petitioner respectfully requests reversal. In the alternative, based on the totality of circumstances, petitioner respectfully requests remand with direction to grant the substantial right of de novo determination by Article III Judicial Officer without R&R on dispositive matters, with direction to correct the district court's deletions, omissions, and/or irregularities in the ROA, and with direction to remand to a neutral Article III Judicial Officer. Accordingly, petitioner respectfully requests this Court grant the petition for a writ of certiorari.

Respectfully submitted,

 3/31/22
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