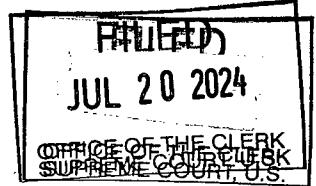


ORIGINAL

No. 24-175

In the
Supreme Court of the United States



KATHLEEN M. BONCZYK,

Petitioner,

v.

JOHN WARDLE, RICHARD ENGLAND,
AND CADIZ MUSIC AND DIGITAL LTD.,

Respondents.

On Petition for a Writ of Certiorari to the
Florida Sixth District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

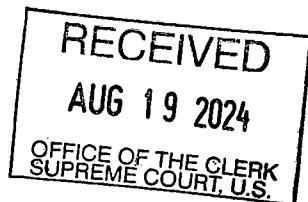
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August 14, 2024

SUPREME COURT PRESS

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BOSTON, MASSACHUSETTS



QUESTIONS PRESENTED

This case presents the following questions:

1. Whether violations of the Due Process Clause occur when a state judicial policy authorizes exceptions to the proscription against *ex parte* communications but does not apply the state's own required procedural safeguards for the party excluded from them and where deprivations of protected interests follow.
2. Whether the reporting of *ex parte* communications to a successor court resulting in an admonishment to the reporting party where a state judicial policy requires a judge to take appropriate action when receiving information a substantial likelihood exists another judge violated that policy constitutes a violation of the Due Process Clause.

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Kathleen M. Bonczyk, Petitioner Pro Se

Respondents and Defendants-Appellees below

- John Wardle
- Richard England
- Cadiz Music and Digital, Ltd.

Note: Defendant Julian Keith Levene passed away on November 11, 2022.

LIST OF PROCEEDINGS

Supreme Court of Florida

Bonczyk v. Levene, et al., Case No. SC2024-0958 (Fla. 2024) *Bonczyk v. Levene, et al.*, Case No. SC2024-0959 (Fla. 2024);

Final Order: July 1, 2024

Only Petitioner and Respondents were involved in the Supreme Court proceedings, which was dismissed upon a finding of lack of jurisdiction due to the appellate court's unelaborated opinion with a ruling that no motion for rehearing or reinstatement will be entertained by the Court.

Florida Sixth District Court of Appeals

Bonczyk v. Levene, et al., Case No. 6D2024-0147 (Fla. 6th DCA 2024) *Bonczyk v. Levene, et al.*, Case No. 6D2024-0641 (Fla. 6th DCA 2024)

Order Denying Motion to Consolidate: June 21, 2024

Combined Order for both cases; Only Petitioner and Respondents are active parties in the appellate proceedings, which are continuing.

Florida Ninth Judicial Circuit, Orange County

Bonczyk v. Levene, et al., Case No. 2018-CA-010630-01

Final Order: February 27, 2024

Although other parties were previously involved in the case, Petitioner and Respondents are the sole active parties in the proceeding, which is continuing over Petitioner's objections.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
LIST OF PROCEEDINGS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE AND FACTS	2
A. Legal Background	3
B. Factual Background	8
1. Trial Court Proceedings	8
2. Appellate Court Proceedings	13
C. Florida Supreme Court Proceedings	15
REASONS FOR GRANTING THE PETITION	15
CONCLUSION	18

TABLE OF CONTENTS – Continued

	Page
APPENDIX TABLE OF CONTENTS	
OPINIONS AND ORDERS	
Order Denying Discretionary Review, Supreme Court of Florida, SC2024-0959 (July 1, 2024)	1a
Order Denying Discretionary Review, Supreme Court of Florida, SC2024-0958 (July 1, 2024)	3a
Order Denying Motion to Consolidate, District Court of Appeal of the State of Florida Sixth District, (June 21, 2024).....	5a
Order Denying Motion To Strike and for Sanctions, Circuit Court of the Ninth Judicial Circuit in and for Orange County Florida (January 17, 2024).....	7a
Order, Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida (February 27, 2024)	9a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Allstate Ins. Co. v. Kaklamanos</i> , 843 So.2d 885 (Fla. 2003).....	8
<i>Caperton v. A. T. Massey Coal Co.</i> , 556 U.S. 868 (2009).....	4
<i>Carey v. Piphus</i> , 435 U.S. 247 (1978).....	7
<i>In re Amendment to Code of Judicial Conduct</i> , 918 So.2d 949 (Fla. 2006).....	4, 5
<i>In re Murchison</i> , 349 U.S. 133 (1955).....	8
<i>Joint Anti-Fascist Committee v. McGrath</i> , 341 U.S. 123 (1951).....	7
<i>Marshall v. Jerrico</i> , 446 U.S. 238 (1980).....	7
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	7
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950).....	3
<i>Offutt v. United States</i> , 348 U.S. 11 (1954).....	8
<i>Rose v. State</i> , 601 So.2d 1181 (Fla. 1992).....	4, 5
<i>Taylor v. Hayes</i> , 418 U.S. 488 (1974).....	8
<i>United States v. James Daniel Good Real Property</i> , 510 U.S. 43 (1993)	4

TABLE OF AUTHORITIES – Continued

	Page
CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. XIV, § 1	i, 2, 3, 7
STATUTES	
28 U.S.C. § 1257(a)	1
28 U.S.C. § 2101(c).....	1
Canon 3B(7) of the Florida Code of Judicial Conduct.....	4, 5, 6, 15
Canon 3D(1) of the Florida Code of Judicial Conduct.....	6, 15
Canon 3D(3) of the Florida Code of Judicial Conduct.....	6
JUDICIAL RULES	
Fla. R. App. P. 9.300	14
Sup. Ct. R. 12.7	8
OTHER AUTHORITIES	
<i>Code of Conduct for Justices of the Supreme Court of the United States</i> at Canon 3.A. https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf (last visited August 10, 2024)	7



OPINIONS BELOW

Opinions of the Florida Supreme Court dismissing Petitioner's appeal on the basis of a lack of jurisdiction due to an unelaborated appellate court opinion with a ruling that no motion for rehearing or reinstatement will be entertained by the Court unreported at *Bonczyk v. Levene, et al.*, Case No. SC2024-0959 (Fla. July 1, 2024) (App.1a-App.2a); *Bonczyk v. Levene, et al.*, Case No. SC2024-0958 (Fla. July 1, 2024) (App.3a-App.4a).

Opinions (combined) of Florida's Sixth District Court of Appeal unreported at *Bonczyk v. Levene, et al.*, Case No. 6D2024-0147 (Fla. 6th DCA July 1, 2024) *Bonczyk v. Levene, et al.*, Case No. 6D2024-0641 (Fla. 6th DCA July 1, 2024) (App.5a-App.6a). Opinions of Florida's Ninth Judicial Circuit unreported at *Bonczyk v. Levene, et al.*, Case No. 2018-CA-010630-01 dated January 17, 2024 See (App.7a-App.8a) and February 28, 2024. (App.9a-11a).



JURISDICTION

The Supreme Court of Florida denied a petition for review on July 1, 2024. (App.1a). This Court has jurisdiction per 28 U.S.C. § 1257(a), as this petition is filed within 90 days of the decree of Florida's highest court in the state proceedings. Per 28 U.S.C. § 2101(c), this action is brought within 90 days of the decree of Florida's Supreme Court determining it lacked jurisdiction. Finally, this petition invokes a

federal question, being on of Due Process under the U.S. Const. amend. XIV § 1.



CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend XIV, § 1

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the



STATEMENT OF THE CASE AND FACTS

Petitioner respectfully asks this Court to cure ills arising from authorized *ex parte* communications where the state judicial policy allowing them is not applied as written. Florida judges are permitted to engage in certain *ex parte* contacts however with prompt notice of their substance and a right for non-participants to respond. Petitioner was the intended beneficiary of these procedural safeguards associated with *ex parte* communications occurring 18 months ago. She received none. Her reports of the *ex parte* contacts went uninvestigated and her protected interests were and continue to be detrimentally impacted resulting from them.

Petitioner reported her knowledge of the *ex parte* communications to the court involved and his successor court, the latter of whom was required by another policy defining as part of his judicial duties he was to take appropriate action when receiving information a substantial likelihood of a violation of the policy by another judge occurred. Even after the Respondents admitted to the successor court directly the *ex parte* contacts with the predecessor court had occurred, no action was taken to address them and Petitioner was threatened with sanctions after reporting them.

Strict compliance with procedural safeguards the state created to protect those excluded from authorized *ex parte* communications is required to ensure impartiality, notice and a right to be heard as due process requires.

A. Legal Background

The Fourteenth Amendment guarantees:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

See U.S. Const. amend. XIV § 1.

Procedural due process requires notice, an opportunity to be heard, and an impartial tribunal. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). This Court's "precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *United States v. James Daniel Good Real*

Property, 510 U.S. 43, 48 (1993). This Court has also held that circumstances may exist where the probability of actual bias by the decisionmaker is too great to be constitutionally tolerable. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). Furthermore, according to the Florida Supreme Court “*Ex parte* communications with a judge, even when related to such matters as scheduling, can often damage the perception of fairness and should be avoided where at all possible.” *Rose v. State*, 601 So.2d 1181, 1184 (Fla. 1992) (concurring opinion). The *Rose* Court at 1183 added:

We are not here concerned with whether an *ex parte* communication *actually* prejudices one party at the expense of the other. The most insidious result of *ex parte* communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question . . . without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side’s case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.

Canon 3 of the Florida *Code of Judicial Conduct* is entitled *A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently. See In re Amendment to Code of Judicial Conduct*, 918 So.2d 949, 954 (Fla. 2006). Canon 3B(7) reads:

A judge shall accord to every person who has a legal interest in a proceeding, or that

person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that: (a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond. *See In re Amendment to Code of Judicial Conduct*, 918 So.2d 949, 954-55 (Fla. 2006).

The Rose Court *Supra*. at 1184 explained that Canon 3 implements a fundamental requirement for all judicial proceedings under our form of government. Canon 3B(7) is further discussed in its "Commentary" section at *In re Amendment to Code of Judicial Conduct*, 918 So.2d 949, 957 (Fla. 2006), stating:

COMMENTARY – Canon 3B(7).

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. To the extent reasonably possible, all parties or their lawyers shall be included in

communications with a judge. Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party who is to be present or to whom notice is to be given. A judge must disclose to all parties all *ex parte* communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge . . . Certain *ex parte* communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all *ex parte* communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

Additionally, Canon 3D(1) requires that:

A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action." *See Id.* at 956.

Canon 3D(3) states that "Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) . . . are part of a judge's judicial duties . . ." *See Id.*

This Court has instituted a *Code of Conduct* which requires that if a Justice receives *ex parte* communications that prompt notice and an opportunity

to respond is to be provided. *See Code of Conduct for Justices of the Supreme Court of the United States* at Canon 3.A. https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf (last visited August 10, 2024).

Moreover, this Court in the case of *Marshall v. Jerrico*, 446 U.S. 238, 242-243 (1980) stated the following regarding impartiality and due process:

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. *See Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, “generating the feeling, so important to a popular government, that justice has been done,” *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), 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. The requirement of neutrality has been jealously guarded by this Court. . . . We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure. Indeed, “justice must satisfy the appearance of justice,” *Offutt v. United States*, 348 U.S. 11, 14 (1954), and this “stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,” *In re Murchison*, 349 U.S. 133, 136 (1955). *See also Taylor v. Hayes*, 418 U.S. 488 (1974)

...

The Florida Supreme Court has held that certiorari review is limited to those instances where a lower court did not afford procedural due process or departed from the essential requirements of law for reasons that include incorrect interpretation or application of a constitutional provision or of a similar issue of law. *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 889-890 (Fla. 2003).

B. Factual Background

As authorized by Sup.Ct.R.12.7 stating in pertinent part “. . . In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court . . .” Petitioner cites to the Florida state court record:

1. Trial Court Proceedings.

1. On February 13, 2023, Petitioner filed her Motion to Dismiss the Respondents’ Enforcement Action

of an attorney's fee judgment with Prejudice and for Sanctions for fraud supported by her declaration. That day, Judge Vincent S. Chiu who entered the judgment in favor of Respondents rendered a decree stating:

THIS MATTER came on before the Court, and the Court, after reviewing the file, and being otherwise informed in the premises, it is hereby ORDERED AND ADJUDGED as follows: This case is scheduled for a hearing on Plaintiff's Motion to Dismiss Enforcement Action with Prejudice and for Sanctions filed 2/13/23 on March 31, 2023, at 9:00 a.m. Time reserved 45 minutes. Parties to appear via Zoom . . .

2. On February 20, 2023, a court notice cancelling Petitioner's hearing on another motion for sanctions against Respondents, scheduled to occur on February 21, 2023, was entered. Also on February 20, 2023, Petitioner wrote to Respondents' attorney Richard C. Wolfe ("Wolfe") concerning the attendance of one Respondent at her March 31, 2023 hearing. Wolfe replied:

I had today's hearing cancelled because my jury trial is running over and I will be in closing arguments tomorrow we need to reset the motion to have you held in criminal contempt before any of your motions are heard.

Both correspondences were published by Petitioner on the docket on February 21, 2023. Respondents did not dispute the validity or contents of either.

3. In another correspondence, Wolfe clarified that Judge Jordan asked Judge Chiu to excuse me from your hearing because at the same time we are in closing arguments in this case.

4. This correspondence was also published on the docket by Petitioner Respondents did not dispute its validity or contents.

5. Additionally, Respondents in an April 5, 2024 filing stated:

Bonczyk complains about an alleged ex parte communication between undersigned counsel, and Judge John Jordan, during a jury trial having nothing to do with Bonczyk. Bonczyk had scheduled a hearing before Judge Chiu, while undersigned counsel was then to be attending closing arguments before the jury in Judge Jordan's courtroom, which ran over thus creating a scheduling conflict . . . As would any judge facing such a scheduling conflict, Judge Jordan's staff advised Judge Chiu that undersigned counsel could not attend the hearing on Bonczyk's motion. Judge Chiu cancelled the hearing . . .

6. Judge Jordan was the administrative judge who appointed Judge Chiu to serve the judicial officer in the case and whose name appears on the docket as "judge."

7. On February 21, 2023, Wolfe "added on" Respondents' motion referenced by him on February 20, 2023 to Petitioner's court-ordered hearing, setting it

for the same date and time of March 31, 2023 at 9:00 a.m.

8. Petitioner notified Judge Chiu of Wolfe's disclosures of *ex parte* communications:

- a) In February 21, 2023 correspondence in care of Judge Chiu's judicial assistant, copying Wolfe;
- b) In a February 21, 2023 motion to strike Respondents' add-on March 31, 2023 hearing notice. Petitioner set her motion for hearing. On February 28, 2023, Judge Chiu denied the motion on the papers and cancelled Petitioner's hearing allowing the "add on" motion to proceed toward hearing;
- c) In a May 17, 2023 motion which Judge Chiu denied on the papers on May 24, 2023.

9. Judge Chiu did not rule that the reported *ex parte* communications had not occurred, that an investigation into Petitioner's complaints of *ex parte* contacts had occurred and also did not admonish Wolfe for reporting false *ex parte* contacts.

10. On March 7, 2023 at 2:13 p.m., Respondents filed an opposition to Petitioner's Motion to Dismiss with the Clerk of Court, admitting to the conduct described in Petitioner's motion.

11. On March 7, 2023 at 2:58 p.m., Judge Chiu entered an order denying Petitioner's Motion to Dismiss with prejudice and for sanctions on the papers, cancelling the court-ordered hearing on the papers, denying another of Petitioner's motions a discovery motion and cancelling the hearing she scheduled on that motion.

12. The effect of this order was that Respondents' "add on" motion was now the sole matter pending before the Court on March 31, 2023 at 9:00 am.

13. On May 25, 2023, one day after denying Petitioner's motion again reporting the *ex parte* contacts, Judge Chiu entered an order directing the Clerk of Court to close the case;

14. After a period of several months inactivity, on December 21, 2023 Respondents began filing papers to again enforce the attorney's fee judgment and Petitioner filed a motion seeking relief. On January 17, 2024, the successor court Judge Brian S. Sandor entered an order denying all relief Petitioner sought and ruled Respondents' enforcement action would proceed within the case. (App.7a-App,8a).

15. On February 27, 2024, Petitioner filed a motion, citing to Canon 3, and pointing to specific record evidence regarding the February 2023 *ex parte* contacts and their impact on her protected interests.

16. On February 27, 2024, Judge Sandor denied the motion. No mention of the *ex parte* communications, of the deprivation of Petitioner's protected interests or of Canon 3 was rendered here, nor did the court rule that the *ex parte* communications did not occur, admonish Wolfe for reporting *ex parte* communications or find that Petitioner's reports of *ex parte* contacts to Judge Chiu had been investigated. (App.9a-11a).

17. In addition, Judge Sandor admonished Petitioner and threatened her with the imposition of possible sanctions including contempt of court. (App.11a)

18. After Petitioner on April 2, 2024 asked Judge Sandor to take judicial notice of Respondents' admission of these *ex parte* contact to the appellate court (which will be addressed more fully below), Respondents through Wolfe on April 5, 2024 stated:

... Bonczyk complains about an alleged *ex parte* communication between undersigned counsel, and Judge John Jordan, during a jury trial having nothing to do with Bonczyk ... while undersigned counsel was then to be attending closing arguments before the jury in Judge Jordan's courtroom, which ran over thus creating a scheduling conflict ... As would any judge facing such a scheduling conflict, Judge Jordan's staff advised Judge Chiu that undersigned counsel could not attend the hearing on Bonczyk's motion. Judge Chiu cancelled the hearing ...

2. Appellate Court Proceedings.

1. Petitioner initiated two actions for certiorari relief in Florida's Sixth District Court of Appeal, bearing Case Nos. 6D2024-0147 and 6D2024-0641 for review of Judge Sandor's orders of January 17, 2024 and February 27, 2024.

2. On March 29, 2024, Petitioner moved to consolidate the cases on the grounds both dealt with the same or similar facts and law concerning due process.

3. Respondents opposed consolidation in their April 2, 2024 filing of a response/counter-motion, the latter of which sought Petitioner's removal as a Pro Se

litigant and stated the following regarding the *ex parte* communications:

Appellant . . . asks this appellate court to act as an initial factfinder to determine if an improper *ex parte* communication occurred in March, 2023, between two judges concerning a scheduling conflict . . . Appellant complains about a communication between Judge Jordan, who was then presiding in a wholly unrelated case with Judge Chiu and only regarding a scheduling conflict a year ago, as undersigned counsel was in a trial before Judge Jordan, when Appellant set a hearing before Judge Chiu.

4. On April 2, 2024, Petitioner filed a motion to strike Respondents' response/counter-motion on the grounds that it violated Fla. R. App. P. 9.300 allowing for one response to a motion only, with no counter-filings contemplated, and again referencing the *ex parte* communications.

5. She also argued Rule 9.300 required Respondents to file an initiating motion which would then per the rule afford Petitioner a right to be heard.

6. On June 21, 2024, the appellate court denied Petitioner's motion to consolidate and to strike, authorized the counter-motion to proceed to the merits panel for final disposition, and offered Petitioner no opportunity to be heard on that counter-motion. The *ex parte* communications and their continuing effect on the state court case was not addressed with no remedy rendered regarding the same provided. (App.5a-6a).

C. Florida Supreme Court Proceedings

On July 1, 2024, Petitioner's two appeals requesting review of the appellate court's June 21, 2024 decree were dismissed on the grounds that the Florida Supreme Court found it lacked jurisdiction over an unelaborated district court of appeal opinion. Here the Court also ruled that no motion for rehearing or reinstatement would be entertained. (App.1a-2a; App.3a-4a).¹



REASONS FOR GRANTING THE PETITION

A Florida court has two options when faced with an *ex parte* contact from an interested person, whether party or non-party, concerning scheduling, administrative matters or emergency situations: Fully comport with mandates set forth within Canon 3(B)(7) or do not entertain the *ex parte* communications. Judges who receive information that a substantial likelihood exists another judge violated a provision of the Code of Judicial Conduct is required to take appropriate action as part of their judicial duties: Had Canon 3(B)(7) been applied as written, Petitioner's due process privileges would have been preserved. Because it was not, unremedied due process violations followed. Had Canon 3(D)1 been applied as written, Petitioner's continuing damage would have been mitigated.

¹ Note: The Court in Case No. 6D2024-0641 entered an order directing Petitioner to show cause why the appeal should not be dismissed for lack of jurisdiction on August 6, 2024.

There is no question Petitioner's protected interests were involved here. For instance, the court-ordered hearing on the motion Judge Chiu deemed Petitioner had a right to be heard a week before the *ex parte* contacts was a motion to dismiss the attorney's fee enforcement action with prejudice and for sanctions. It unquestionably related to Petitioner's protected interests, her property and specifically her money.

For 1.5 years, Petitioner has been denied the right to be heard on her dispositive motion to dismiss, to receive notice of the substance of the *ex parte* contacts and to respond. Replacing the cancelled court-ordered hearing on that motion with the very motion Wolfe declared when he disclosed the *ex parte* contacts was heard before any of Petitioner's were, a matter that soon came to pass, projected the impression Wolfe was privy to "inside information" from *ex parte* communications and also had undue influence on a court that must be disinterested. Wolfe's proclamation he was responsible for the court's cancellation of Petitioner's hearing(s) did the same. Both incidents projected an impression of partiality. Another impression of partiality occurred when Judge Sandor did not take appropriate action even after Respondents admitted the *ex parte* contacts occurred directly to him as they did on April 5, 2024.

The prejudice Petitioner suffered due to the lack of *prompt* notice and opportunity to respond cannot be fully cured after-the-fact. It is not possible for her to be placed back in time to February 2023 to obtain the procedural safeguards she was required to have received by the very judicial policy authorizing these *ex parte* contacts or to early 2024 when Judge Sandor received information that a violation of Canon 3 had

likely occurred, and where appropriate action in response to this notification was mandatory and constituted part of his judicial duties.

The admonishment Petitioner received projected the impression of retaliation and operated to “chill” the reporting of *ex parte* contacts by one judge to another judge. Remedies of *delayed* notice and an opportunity to respond along with mitigation of the harm to protected interests are possible. Petitioner unsuccessfully sought relief from the trial court involved, from his successor court and from Florida’s court of last resort in this case up to and including April 2-5, 2024 without success. Despite Petitioner’s reports of these *ex parte* contacts and Respondents admissions to both the trial and appellate courts they in fact occurred, these matters have not even been investigated. She respectfully requests this Court exercise discretionary jurisdiction to prevent a manifest injustice from continuing.



CONCLUSION

A Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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August 14, 2024