

ORIGINAL

No. 24-431

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SUPREME COURT, U.S.

In the
Supreme Court of the United States

DANNY RAY DUNN,
Petitioner,

v.

LAWRENCE ALAN STAGG, and
CARYN ALISSA DUNN,
Respondents.

On Petition for Writ of Certiorari to the Supreme
Court of the State of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED #1

The Georgia Court of Appeals violated codified laws, court rules, case precedent and ethical canons to bypass the petitioner's recusal motion. The court denied the merits of a discretionary review, a motion for reconsideration and a motion to cure filing defects without ruling on the merits of the petitioner's recusal motion. Due to a lack of an adequate and timely enforcement mechanism, the petitioner asked the Georgia Supreme Court to create a mechanism to enforce ethical compliance and review the court of appeals for an abuse of discretion. The Georgia Supreme Court denied the request.

Is a lack of an adequate recusal enforcement mechanism, as evidenced by the Georgia Court of Appeal's ignoring the recusal motion and by the Georgia Supreme Court denial of relief sought, a violation of the Due Process Clause of the Fourteenth Amendment?

QUESTIONS PRESENTED #2

The petitioner raised a federal constitutional issue on appeal in the state court. The Georgia Court of Appeals ignored Georgia Supreme Court precedent by utilizing the jurisdictional compliance with Georgia's discretionary review requirements of OCGA § 5-6-35 to validate the lifetime appointment of an unelected senior judge (e.g. *Dunn v. Dunn*, A24D0325 (Ga. Ct. App. May 10, 2024)). However, the case precedent utilized by the Georgia Court of Appeals to support its discretion to deny an exception to jurisdictional requirements was not "appropriate law as applied to the relevant facts" (e.g. *Estate of Tomlinson v. Houston Healthcare*, A24A0704 (Ga. Ct. App. Aug. 13, 2024)). However, the Supreme Court denied a request to review if the appellate court decision that rests on a state law justification that is independent of the federal question was adequate to support the judgment under the Adequate State Ground Doctrine. (e.g. *Beard v. Kindler*, 558 U.S. 53, 130 S. Ct. 612, 175 L. Ed. 2d 417 (2009).)

Do the procedural timeframe rules in the State of Georgia's discretionary review statutes render the code section unconstitutional because such requirements deny citizens access to federal constitutional rights on an arbitrary basis as demonstrated by the Georgia appellate courts denying a request to firmly establish judicial procedural rules?

Rule 14(B) Statement Related Proceedings

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Dunn v. Dunn*, No. 19CV00163 (Georgia Superior Court, Dade County) – Final Order pending reservation of certain explicit issues by assigned judge.
- *Dunn v. Dunn*, No. 21CV00004 (Georgia Superior Court, Dade County) – Jury Trial Pending
- *Dunn & Stagg v. Dunn*, No. 21CV00088 (Georgia Superior Court, Dade County) – Jury Trial Pending
- *State v. Dunn*, No. 22CR00107 (Georgia Superior Court, Dade County) – Judicial Assignment Pending
- *Dunn v. Dunn*, No. 24CV00104 (Georgia Superior Court, Dade County) – Judicial Assignment Pending
- *Dunn v. Dunn*, A24D0325 (Ga. Ct. App. May 10, 2024) – Georgia Court of Appeals, refused to rule on the motion to recuse, continued to rule on the merits of the case while under a motion to recuse, and arbitrarily denied a request to excuse compliance with statutory requirements to cure a constitutional rights violation.
- *Dunn v. Dunn*, S24C1148 (Georgia Supreme Court Application September 17, 2024) – Georgia Supreme Court denied a request to review the Georgia Court of Appeals for an abuse of discretion.

Table of Contents

QUESTIONS PRESENTED #1.....	i
QUESTIONS PRESENTED #2.....	ii
Rule 14(B) Statement Related Proceedings.....	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Relevant Constitutional Provisions	1
Statement of the Case	1
Reasons to Grant Writ.....	3
Question #1 Discussion.....	3
Question #2 Discussion.....	8
Conclusion	14

Table of Authorities

Cases

<i>Barrett v. Hamby</i> ,	
219 S.E.2d 399, 235 Ga. 262 (1975)	12
<i>Beard v. Kindler</i> ,	
558 U.S. 53, 130 S. Ct. 612, 175 L. Ed. 2d 417	
(2009)	11
<i>Boyle v. State</i> ,	
190 Ga. App. 734 (380 SE2d 57) (1989)	13
<i>Brumby v. State</i> ,	
264 Ga. 215, 443 S.E.2d 613 (1994)	10
<i>Caperton v. AT Massey Coal Co., Inc.</i> ,	
556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208	
(2009)	8
<i>Corbin v. First Nat'l Bank</i> ,	
151 Ga. App. 33, 258 S.E.2d 697 (1979)	10
<i>Dunn v. Dunn</i> , A24D0325	9
<i>Dunn v. Dunn</i> , S24C1148	1
<i>Estate of Tomlinson v. Houston Healthcare</i> ,	
A24A0704 (Ga. Ct. App. Aug. 13, 2024).	13
<i>Ford v. Georgia</i> ,	
498 U.S. 411, 111 S. Ct. 850, 112 L. Ed. 2d 935	
(1991)	7
<i>Gable v. State</i> ,	
720 S.E.2d 170, 290 Ga. 81 (2011)	10-11
<i>Gilland v. Leathers</i> ,	
141 Ga. App. 680, 234 S.E.2d 338 (1977)	10
<i>Henderson v. Glen Oak, Inc.</i> ,	
179 Ga.App. 380, 346 S.E.2d 842 (1986)	9
<i>Henderson v. McVay</i> ,	
269 Ga. 7, 494 S.E.2d 653 (1998)	4
<i>Howlett v. Rose</i> ,	
496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332	
(1990)	7, 9

<i>In the Interest Of SS,</i>	
No. A21D0292 (Ga. Ct. App. May 5, 2021).....	11
<i>Johnson v. Daniel,</i>	
135 Ga. App. 926, 219 S.E.2d 579 (1975)	10
<i>Lathrop v. Deal,</i>	
801 S.E.2d 867, 301 Ga. 408 (2017)	12
<i>Liteky v. United States,</i>	
510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474	
(1994)	8
<i>Miner v. Harrison,</i>	
205 Ga. App. 523, 422 S.E.2d 899, <i>cert. denied</i> ,	
205 Ga. App. 900, 422 S.E.2d 899 (1992)	4
<i>Napier v. Poe,</i>	
12 Ga. 170 (1852)	6
<i>Pearce v. Bembry,</i>	
174 Ga. 86, 162 S.E. 125 (1932)	6
<i>Rippo v. Baker,</i>	
580 U.S. 285, 137 S. Ct. 905, 197 L. Ed. 2d 167	
(2017)	8
<i>Schwarz v. Georgia Medical Board,</i>	
No. A15D0526 (Ga. Ct. App. Sept. 1, 2015).....	10
<i>Shoemake v. Woodland Equities,</i>	
252 Ga. 389 (313 SE2d 689) (1984).....	8
<i>State v. Kelley,</i>	
302 Ga. App. 850, 691 S.E.2d 890 (Ga. Ct. App.	
2010).....	9
<i>Staub v. City of Baxley,</i>	
355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302	
(1958)	7
<i>Voyles v. Voyles,</i>	
301 Ga. 44 (799 SE2d 160) (2017).....	10
<i>Williams v. Pennsylvania,</i>	
579 U.S. 1, 136 S. Ct. 1899, 195 L. Ed. 2d 132	
(2016)	8

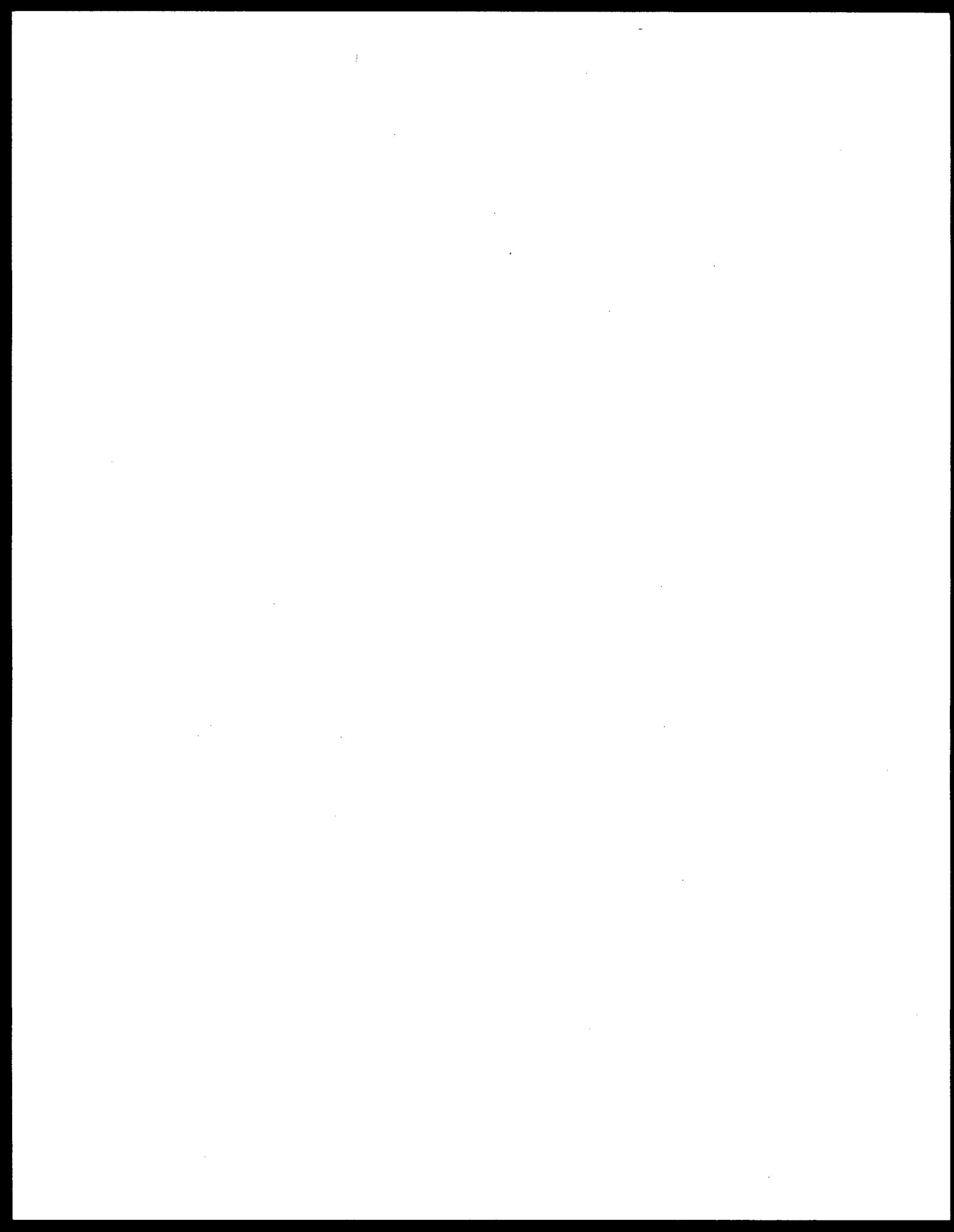
<i>Young v. Morrison,</i>	
137 S.E.2d 456, 220 Ga. 127, 220 Ga. App. 127	
(1964)	9

Constitutional Provisions and Statutes

Article I, Section I, Paragraph I Georgia	
Constitution	8
Article VI, Section VII, Paragraph VI Georgia	
Constitution	6
Article VI, Section VII, Paragraph VII Georgia	
Constitution	6
Article VI, Section IX, Paragraph II Georgia	
Constitution	5
O.C.G.A. § 15-1-9.1	9
O.C.G.A. § 5-6-7	3
O.C.G.A. § 5-6-8	5
O.C.G.A. § 5-6-31	4, 5, 6
O.C.G.A. § 15-5-5 (2).....	8
O.C.G.A. § 47-8-64	9
O.C.G.A. § 5-6-35	9, 11, 12
O.C.G.A. § 5-6-48	10
U.S Constitution Due Process Clause of the	
Fourteenth Amendment	8, 9
U.S Constitution Supremacy Clause	7

Rules

Adequate State Ground Doctrine.....	11
Code of Conduct for Justices of the Supreme Court of	
the United States.....	3
Georgia Court of Appeals Rule 37(g)	2
Georgia Court of Appeals Rule 44.....	4, 5
Georgia Rules of the Superior Court 25.3.....	4
Rule 2.9 of the Georgia Code of Judicial Conduct	4



Opinions Below

The decision of the Georgia Supreme Court is not designated for publication. See Appendix F for *Dunn v. Dunn*, S24C1148 (Georgia Supreme Court Application September 17, 2024).

Jurisdiction

The Georgia Supreme Court entered its judgment on September 17, 2024. The opinion is reported at *Dunn v. Dunn*, S24C1148 (Georgia Supreme Court Application September 17, 2024). The petition for certiorari is therefore timely.

The court has jurisdiction under 28 U.S.C. § 1257(a).

Relevant Constitutional Provisions

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.

U.S. Const. Amend. XIV, § 1

Statement of the Case

On August 19, 2021, all superior court judges of the Lookout Mountain Judicial Circuit signed an “Order of Recusal” from the underlying cases (See Appendix E). On September 14, 2021, the district administrative judge appointed Senior Judge Walter Matthews under an “Order of Appointment” (See 1

Appendix D). On March 31, 2022, the court of appeals remittitur was returned to the trial court for a remanded appeal. (See Appendix C). To date, no action has been taken on the remittitur due to the inability of the senior judge to take jurisdiction.

On April 23, 2024, the petitioner filed a discretionary review application in the Court of Appeals in the State of Georgia to void the Order of Appointment. On May 8, 2024, the petitioner filed a motion to disqualify Georgia Court of Appeals Judge E. Trenton Brown within the timeframe prescribed by the rules of the court. On May 10, 2024, the Court of Appeals dismissed the discretionary application (See Appendix B). The unsigned order was decided by Judge Stephen Dillard, Judge E. Trenton Brown, and Judge J. Wade Padgett. On May 10, 2024, the petitioner filed a motion for reconsideration (See Appendix G), which was denied on June 5, 2024 (See Appendix A). The motion for reconsideration was voted on only by the judges who voted on the original decision pursuant to Georgia Court of Appeals Rule 37(g). An order was never entered on the motion to recuse.

On June 7, 2024, the petitioner filed a petition for certiorari to the Supreme Court of the State of Georgia within ten days of the entry of the denial of the motion for reconsideration asking for an enforcement mechanism of the Motion to Recuse and for a review for abuse of discretion for denial of the petitioner's request for an exception to rectify a constitutional rights violation. The Georgia Supreme Court denied the petition on September 17, 2024 (See Appendix F).

Reasons to Grant Writ

Two primary reasons exist to grant a writ of certiorari: it is the usual course of business for the court to intervene when a state court infringes upon constitutional rights by undermining federal statutes, and it is the inherent intent of the petition process to allow the court to bring ethical clarity across the judicial spectrum where previously resided ambiguity.

It is further meaningful that the writ is an opportunity for the court to reconcile the publication of a Code of Conduct for Justices of the Supreme Court of the United States with inherent correlations that the US Supreme Court also has no documented mechanism for ethics enforcement.

Question #1 Discussion

The Georgia Court of Appeals violated codified laws, court rules, case precedent and ethical cannons to bypass the petitioner's recusal motion.

- *Codified Laws* - The Official Code of Georgia Annotated ("O.C.G.A.") § 5-6-7 states "no decision shall be rendered *ore tenus*." Nevertheless, the Georgia Court of Appeals violated appellate court legislation by verbally announcing via a court-initiated action that the petitioner's Motion for Recusal was "Moot." There was never a written order entered by the court that grants the petitioner the right to appeal the decision as the Georgia Supreme Court will only review those decisions ruled upon by the lower court. Verbal pronouncements not reduced to judgment are

not appealable because the judgment will never be considered entered by the court as defined under O.C.G.A. §5-6-31. (e.g. *Miner v. Harrison*, 205 Ga. App. 523, 422 S.E.2d 899, *cert. denied*, 205 Ga. App. 900, 422 S.E.2d 899 (1992)).

- *Court Rules & Case Precedent* - Rule 44(d) of the Georgia Court of Appeals states “the criteria for disqualification are set forth in statutory law, case law, and the Code of Judicial Conduct.” Georgia Rules of the Superior Court 25.3 state “when a judge is presented with a motion to recuse, or disqualify, accompanied by an affidavit, the judge shall temporarily cease to act upon the merits of the matter...” Case precedent is the petitioner’s motion to recuse accompanied by an affidavit should have triggered the Georgia Court of Appeals to make a threshold determination of the motion’s merits. (e.g. *Henderson v. McVay*, 269 Ga. 7 (2), 494 S.E.2d 653 (1998)). Nevertheless, the Georgia Court of Appeals continued to act on the merits of the appeal, on the motion for reconsideration and on the motion to amend the record while refusing to write out an order on the motion to recuse.
- *Ethical Canons* - The Motion to Recuse filed by petitioner detailed *ex parte* communications and instances of judicial bias that wasn’t part of the record. Rule 2.9 of the Georgia Code of Judicial Conduct explicitly prohibit the conduct outlined in the petitioner’s Motion to Recuse. Nevertheless, there is no mechanism to timely, if ever, enforce the Georgia Code of Judicial Conduct as evidenced by the record of the

underlying cases, especially when there is a refusal to rule on the merits.

There is an inherent lack of a timely and adequate enforcement mechanism to safeguard citizen's constitutional liberties with respect to recusal motions, specifically the right to due process.

- Court Rules – The Georgia Court of Appeals Rule 44 outlines the requirements and timelines for a satisfactory Motion to Recuse. Regardless, there is nothing explicit in the rules mandating the court rule on the merits of the motion. As in the petitioner's underlying cases, the Georgia Court of Appeals may choose to ignore the motion and eventually verbally inform the petitioner the recusal motion is deemed "moot," leaving no other judicial recourse from an appellate standpoint.
- Legislative Laws – O.C.G.A. § 5-6-8 mandates that "the decision in each case shall be entered on the minutes." Article VI, Section IX, Paragraph II of the Georgia Constitution provides that [t]he Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court's docket for hearing or at the next term. There is no law that provides that the Court of Appeals shall decide all motions in an appealable manner before a case is considered dispositive or that provides that a recusal decision must be entered by the court within a given timeframe as defined under O.C.G.A. §5-6-31.
- Mandamus Relief - The right to invoke the aid of a court to compel by mandamus the

performance of an official duty cannot, as a general rule, arise until the officer is in actual default. (e.g. *Pearce v. Bembry*, 174 Ga. 86, 162 S.E. 125 (1932)) Mandamus lies at the instance of a citizen who has a clear specific legal right and no legal remedy for its enforcement. (e.g. *Napier v. Poe*, 12 Ga. 170 (1852)) There is no existing legal enforcement remedy whenever the Georgia Court of Appeals ignores a recusal motion and refuses to enter a judgment as defined under O.C.G.A. §5-6-31.

- Constitutional Oversight - Article VI, Section VII, Paragraph VI of the Georgia Constitution provides that “the power to discipline, remove, and cause involuntary retirement of judges shall be vested in the Judicial Qualifications Commission.” Article VI, Section VII, Paragraph VII Georgia Constitution provides that “any judge may be removed, suspended, or otherwise disciplined for willful misconduct in office, or for willful and persistent failure to perform the duties of office, or for habitual intemperance, or for conviction of a crime involving moral turpitude, or for conduct prejudicial to the administration of justice which brings the judicial office into disrepute....The Supreme Court shall adopt rules of implementation.” However, there is no constitutional oversight or implemented Georgia Supreme Court rule that creates a legal remedy for enforcement of a recusal motion by the Georgia Court of Appeals. At best, there “may be” optional enforcement by the Judicial Qualifications Commission as explicitly stated in the Georgia Constitution.

Even then, any optional enforcement will not be timely to meet the appeal deadlines imposed by statutory codifications.

There has been a foundational progression by the court on the topic of ethical obligations with regards to recusal motions, but all have been implicit on the premise the underlying court rule on the merits of the motion to recuse.

- *Transparent Applicability* – In the 1950s, the Warren Supreme Court held that laws and ordinances which permit uncontrolled discretion to withhold federal constitutional rights are themselves unconstitutional. (e.g. *Staub v. City of Baxley*, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958).)
- *Supremacy of Federal Jurisdiction* – Jumping to the early 1990s, the Supreme Court held the position that the Supremacy Clause, which requires States to uphold constitutional rights engrained in federal laws, does not provide a court an excuse to avoid the obligation to enforce federal law based on jurisdictional claims. (e.g. *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990).)
- *Procedural Accountability* – In continuance, the Supreme Court held that inconsistent application of procedural rules cannot bar access to federal rights. (e.g. *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991).)
- *Mandatory Federal Recusal Codification* – In the mid-1990s, the U.S. Supreme Court discussed the federal codification that a judge

shall cease from acting on the merits of a case if presented with a timely and sufficient motion to recuse. [See generally *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).]

- *Constitutional Rights* - The right to due process is guaranteed by Article I, Section I, Paragraph I of the Georgia Constitution. Over the last several years, the US Supreme Court has addressed various circumstances where a refusal to recuse is a violation of the Due Process Clause of the Fourteenth Amendment. [See generally *Rippo v. Baker*, 580 U.S. 285, 137 S. Ct. 905, 197 L. Ed. 2d 167 (2017), *Caperton v. AT Massey Coal Co., Inc.*, 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009), and *Williams v. Pennsylvania*, 579 U.S. 1, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016)].

The US Supreme Court can continue to build the ethical framework of the last fifty years by leading the conceptualization of how enforcement mechanisms should safeguard the court's ethical framework and address adequate and timely recusal considerations, specifically in the instant case with respect to the inherent due process violations created by the refusal to rule on a motion to recuse.

Question #2 Discussion

In *Shoemake v. Woodland Equities*, 252 Ga. 389, 393-394 (3) (313 SE2d 689) (1984), the Georgia Supreme Court held that under OCGA § 15-5-5 (2) a district administrative judge may obtain the services of a senior judge from outside the administrative district

because superior court judges, including senior judges, have jurisdiction to act in any circuit other than their own when the resident judge cannot serve. However, the record must reflect that the senior judge acted within the defined timeframe and scope of assignment pursuant to standard requirements outlined in OCGA §§ 47-8-64 and 15-1-9.1. See generally *Henderson v. Glen Oak, Inc.*, 179 Ga.App. 380, 382(4), 346 S.E.2d 842 (1986). Because the order of appointment of a senior judge in the petitioner's case failed to define a timeframe and scope of assignment, the order violated the standards required to obtain temporary judicial assistance and is void for lack of jurisdiction. (e.g. *State v. Kelley*, 302 Ga. App. 850, 691 S.E.2d 890 (Ga. Ct. App. 2010)). A court cannot enter judgment when it lacks jurisdiction without violating the Fourteenth Amendment of the United States Constitution and deny due process. (e.g. *Young v. Morrison*, 137 S.E.2d 456, 220 Ga. 127, 220 Ga. App. 127 (1964)).

State courts may not deny a federal right in the absence of a valid excuse, and an excuse that is inconsistent with or violates federal laws is not a valid excuse. (e.g. *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990)). Precedent aside, the State of Georgia denied the petitioner his constitutional due process rights to appeal a void order that lacked jurisdiction in violation of federal laws because the petitioner's appeal, which was provided in the State of Georgia's discretionary appeal codification OCGA § 5-6-35 et. set, was not considered timely as defined by the statutory procedural rules. (See *Dunn v. Dunn*, A24D0325 (Ga. Ct. App. May 10, 2024)).

"Generally, appeals from orders entered in domestic relations cases must be pursued by discretionary application... this Court has generally followed a rule that looks at the issue raised on appeal to determine the proper procedure for seeking appellate review in domestic relations cases... to follow the "issue-raised-on-appeal" rule...." *Voyles v. Voyles*, 301 Ga. 44, 45-47 (799 SE2d 160) (2017).

"OCGA § 5-6-48 furthers 'the policy of both appellate courts in Georgia is to attempt to avoid dismissing appeals and to try to reach the merits of every case when it can be done consistent with the mandate of the law'." *Brumby v. State*, 264 Ga. 215, 443 S.E.2d 613 (1994). *Johnson v. Daniel*, 135 Ga. App. 926, 219 S.E.2d 579 (1975); *Gilland v. Leathers*, 141 Ga. App. 680, 234 S.E.2d 338 (1977); *Corbin v. First Nat'l Bank*, 151 Ga. App. 33, 258 S.E.2d 697 (1979). Accordingly, the intent of the judicial is to increase resolution of appeals based on substantive issues rather than preempt constitutional rights based on conflicting procedural grounds.

On a discretionary basis, there exists case precedent to grant a procedural rules exception to the discretionary appeal codification timeframes to remedy constitutional due process violations and allow the appellate courts to avoid dismissing untimely appeals of void orders that lack jurisdiction. The issue raised on appeal by petitioner was a constitutional due process of law violation. "Georgia courts may excuse compliance with a statutory requirement for appeal only where necessary to avoid or remedy a constitutional violation concerning the appeal." (*Schwarz v. Georgia Medical Board*, No. A15D0526 (Ga. Ct. App. Sept. 1, 2015) citing *Gable v.*

State, 720 S.E.2d 170, 290 Ga. 81 (2011). See also *In the Interest Of SS*, No. A21D0292 (Ga. Ct. App. May 5, 2021)).

Nevertheless, there is no consistent application or established guidelines for granting exemptions from the statutory procedural rules as the Georgia appellate courts arbitrarily refused to excuse the petitioner from complying with the statutory requirements of OCGA § 5-6-35 to appeal and remedy an undeniable constitutional due rights violation which has been settled by the Georgia Supreme Court as a right of the petitioner. The only existence of the exemption is by case precedent, and no right is firmly established in writing or independent of judicial opinion.

Under the adequate state ground doctrine, a federal court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment. Though, the federal court should frame the adequacy inquiry by asking whether the state rule was firmly established and regularly followed by the state court. A discretionary state procedural rule can serve as an adequate state ground to bar federal review if the appellate court is further willing to review the merits of a claim. (e.g. *Beard v. Kindler*, 558 U.S. 53, 130 S. Ct. 612, 175 L. Ed. 2d 417 (2009)).

The underlying case should not leave the federal courts satisfied the State of Georgia is sound under the adequate state ground doctrine.

Do the procedural timeframe rules in the State of Georgia's discretionary appeal statutes render the entire code section unconstitutional because such requirements deny citizens access to federal constitutional rights?

It is settled Georgia Supreme Court precedent the petitioner is suffering from a due process rights violation as previously outlined in the petition. The Georgia Supreme Court has upheld that the constitution is superior to any ordinary act of the Georgia Legislature. (e.g. *Lathrop v. Deal*, 801 S.E.2d 867, 301 Ga. 408 (2017)).

As such, there is no basis to uphold the constitutionality of Georgia's discretionary appeal statute OCGA § 5-6-35 et seq.

Should the Georgia appellate courts create procedural rules in the absence of statutory codifications to rectify the legislature codifying unconstitutional statutes?

The Georgia appellate courts are aware of the unconstitutional requirements of the state's discretionary appeal statutes as evidenced by the creation of a case precedent declaring exemptions from the statutory timeframe requirements. On the contrary, the Georgia Constitution provides: "Legislative acts in violation of this Constitution, or the Constitution of the United States, are void, and the Judiciary shall so declare them." *Barrett v. Hamby*, 219 S.E.2d 399, 235 Ga. 262 (1975).

As such, the Georgia appellate courts are acting contrary to the state constitution by creating discretionary procedural rules to rectify

unconstitutional requirements codified by the state's legislature.

Have the Georgia appellate courts firmly established adequate judicial procedural rules that are regularly followed by the courts?

The judicial procedural rules created by the court are not firmly established case precedent because there are no established guidelines and exemptions are granted on a discretionary basis with no consideration to the merits of the case.

In the underlying case, a presiding judge, while under a motion to recuse, justified the arbitrary denial of petitioner's constitutional rights through the precedent of *Boyle v. State*, 190 Ga. App. 734, 734 (380 SE2d 57) (1989), which dealt with the appeal of a valid order and which was not a relevant discussion of the appropriate law as applied to the relevant facts in the underlying case (e.g. *Estate of Tomlinson v. Houston Healthcare*, A24A0704 (Ga. Ct. App. Aug. 13, 2024)). The underlying case dealt with the appeal of a void order.

Because the lack of firmly established review standards allowed the appellate judge to refuse to rule on the merits of a recusal motion and rely on irrelevant case precedent, the judicial procedural rules are not adequate under the state ground test.

In summation, the position of the petitioner is the discretionary appeals code is unconstitutional owing to the due process rights violations it creates when petitioners appeal void orders, the Georgia appellate courts should have followed precedent and declared unconstitutional laws as such, and the Georgia

appellate courts attempt to create judicial procedural rules has not been an adequate remedy under the state ground test to rectify the constitutional rights violations.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted.

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