THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Ninth Circuit Court Judge

COA Case No. 2022-1146

J. K. Holmes,

Respondent,

v.

C.E. Holmes,

Petitioner.

Petition for a Writ of Certiorari

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CERTIFICATION

A petition for rehearing was made and finally ruled upon by the Court of Appeals.

ISSUES PRESENTED

I. The Question of Jurisdiction is a Question of Law.

II. Denial of Substantial Rights Including Due Process.

III. The Lower Appellate Court Opinion is Internally Inconsistent.

IV. Unequal Treatment.

V. "All courts shall be public." South Carolina Constitution in article 1, section 9.

VI. Uniform Application of the SCACR in the Lower Appellate Court.

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FACTS

Another action is pending in the Family Court between the same parties for the same claim. The family court has exclusive original jurisdiction over domestic matters pursuant to S.C. Code § § 63-3-510 to 530. The petitioner timely appeals impermissible ex parte hearing in the trial court without required notice and without meaningful opportunity to be heard at a meaningful time. The petitioner timely made three or more requests for transcript from the South Carolina Court Administration (SCCA). Without benefit of transcript for the impermissible ex parte trial court hearing, a single individual judge entered sua sponte dismissal before jointly filed Record on Appeal (ROA) is due, without notice, and without meaningful opportunity to respond at a meaningful time. After the petitioner filed motion herein for SCCA to respond to the transcript requests, the SCCA's out-of-time response stated, without explanation, that the SCCA's audio for transcripts has a critical gap in the recording of the impermissible ex parte hearing despite finding recordings for essentially all other hearings on that day, one of many unexplained irregularities in this matter. The petitioner timely filed motion to reconstruct the record in the trial court. *See Clements v. Young*, 310 S.C. 73, 425 S.E.2d 63 (Ct. App. 1992) (appellant moved for reconstruction of the record on remand to the lower court where the hearing was unrecorded); Toal *et al.*, *Appellate Practice in South Carolina*, 3rd Ed. (2016), p. 378. The petitioner filed Rule 240(j), SCACR, appeal of wrongful sua sponte dismissal by a single individual. The improper, less burdensome legal standard was wrongfully applied. Pursuant to S.C. Code § 14-8-220, *de novo* review is the standard of review at Rule 240(j), SCACR, appeal. The lower appellate court opinions are reversible as a matter of law. Petition for a writ of certiorari is timely served and filed. These are matters of great public importance including but not limited to, uniformity in application of the SCACR and/or Covid interruptions in normal court operations which deny substantial rights to traditional filers. But for impermissible ex parte hearing in the trial court with

unexplained critical gap in the audio preventing transcript, preventing Record on Appeal, and preventing adequate record for meaningful judicial review, the outcome should and would be in petitioner's favor. The petitioner is prejudiced thereby. The petitioner timely appeals lack of jurisdiction/authority in the trial court to provide clear title to real estate thereby arbitrarily and capriciously reducing market value. Accordingly, the trial court order is void/voidable as a matter of law.

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 *2023*, 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 unremitting 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 smart phones, tablets, or computers 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.

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 unrepresented parties and/or traditional filers subjected to a separate second-class system of so-called justice, where the South Carolina Rules of Court 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. Systemic institutional biases are acknowledged, including but not limited to, prejudice against minorities along with favoritism under Alex Murdaugh's "rules of law." Unequal treatment and the like threaten our democracy and feed the appearance of the proverbial "rigged" system. 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 smart phones, tablets, computers, and extraordinary and unprecedented public health and affiliated economic emergencies ongoing and still unfolding.

DISCUSSION

By way of introduction and without being disagreeable, there is disagreement. For the reasons stated and for good cause, the petitioner respectfully submits the lower appellate court order is reversible as a matter of law.

I. The Question of Jurisdiction is a Question of Law.

To the extent there is no inconsistency, the petitioner incorporates in full by reference the contents of this document in this section. The question of jurisdiction is a question of law. Jurisdiction can be raised at any time and jurisdiction cannot be waived. *Knight v. Kelly,* 289 S.C. 318, 345 S.E.2d 490 (1986); *Martin v. Skinner*, 286 S.C. 527, 335 S.E.2d 252 (Ct. App. 1985). When deciding a jurisdictional question based on facts, a reviewing court has the power and duty to review the entire record, find the jurisdictional facts within the record, and decide the jurisdictional question in accord with the preponderance of the evidence. *Canady v. Chas. Cnty. Sch. Dist.*, 265 S.C. 21, 216 S.E.2d 755 (1975); Toal *et al., Appellate Practice in South Carolina*, Third Ed. (2016), p. 276. Another action is pending in the Family Court between the same parties for the same claim including retirement and marital property. The Family Court attorney defendant herein filed this duplicitous and duplicative action in the circuit court to make an end run around the jurisdiction of the Family Court. The Family Court attorney defendant has unclean hands. The Family Court matter is subject to Family Court confidentiality and privacy which is hereby requested. Accordingly, there is no jurisdiction or authority in the circuit court which can form the basis for clear title to real estate thereby arbitrarily and capriciously reducing market value. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural

due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

This matter involves the attached copy of the certified Decree of Divorce, after almost 30 years and three children of the marriage, to which the Family Court attorney defendant, with decades of experience, agreed on the record, into which that agreement was incorporated, from which defendant never appealed, and which is now the law of the case. Another action is pending in the Family Court between the same parties for the same claim. See Rule 16, SCRFC ("The family court has jurisdiction of the parties and control of all subsequent proceedings from the time of service of the summons and complaint...." *Wazney v. Wazney* (S.C. App. 2019). The family court matter including retirement and marital property is currently pending and is subject to family court confidentiality and privacy which is hereby requested. The family court has exclusive original jurisdiction over domestic matters pursuant to S.C. Code § § 63-3-510 to 530, therefore, the Family Court has jurisdiction herein. Jurisdiction can be raised at any time. The petitioner respectfully requests reversal of the sua sponte December 9, 2022, dismissal by an individual judge, at the impermissible direct or indirect ex parte behest of untrustworthy attorney defendant, officer of the court. That order is based on error of material fact and law as well as internal inconsistencies. The petitioner also makes motion for reconstruction of the record in the lower court where, without explanation, the South Carolina Court Administration's (SCCA's) audio for transcripts has a critical gap in the recording for this hearing despite finding recordings for essentially all other hearings on that day, one of many unexplained irregularities in this

matter. See attached SCCA correspondence. Assuming the SCCA correspondence is true, why is there unexplained delay wherein SCCA's correspondence is sent only after dismissal? Why does unreasonable delay at SCCA cause wrongful sua sponte dismissal by a single individual at the same address? With regard to untrustworthy insider attorney defendant gaming the system, if it can be done, it will be done. That lower court hearing was wrongfully held ex parte without required notice to the adversely affected party, who on appeal is told that the South Carolina judicial system has a critical gap in the audio of that hearing which cannot be located and which cannot be transcribed. To the extent Covid interruptions in normal court operations resulted in impermissible ex parte hearing and/or denial of substantial rights, the petitioner respectfully objects. The South Carolina Constitution in article 1, section 9 provides that "[a]ll courts shall be public." The United States Supreme Court has interpreted the guarantees of freedom of speech found in the First Amendment to the United States Constitution to include a guarantee of open and public courts. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). It is respectfully submitted that State and federal statutory and constitutional rights are implicated and the adversely affected litigant has a State and federal statutory and constitutional right to reconstruct the record in the trial court which is hereby requested. Remand is respectfully requested to reconstruct the record. Without the reconstructed record, there is no authorized determination of the facts, no lawful decision without the reconstructed record, and any purported ruling is based on arbitrary and capricious, pure speculation with inadequate basis or explanation for meaningful appellate review. Accordingly, the lower appellate court order is reversible based on error of material fact and law. *See, e.g., Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020) (remanded for lack of adequate explanation for meaningful review: "(T)he court disposed of the substance of the issue in a single sentence. See J.A. 252. We need more explanation to conduct meaningful appellate review of the court's disposition of the motion.").

In sum, the lower appellate court order misapprehends and/or overlooks material fact and law.

Petitioner respectfully objects. This matter is of great public importance. This matter involves the attached copy of the Decree of Divorce to which the attorney defendant, with decades of experience, agreed on the record, into which that agreement was incorporated, from which defendant never appealed, and which is now the law of the case. The family court has exclusive original jurisdiction over the domestic matters herein pursuant to S.C. Code § § 63-3-510 to 530. Subject to confidentiality and privacy, this matter is currently pending in the Family Court. It is undisputed that the family court can order child support to continue beyond eighteen years. *SCDSS Child Support v. Mangle*, 633 S.E.2d 903 (S.C. App. 2006). See S.C. Code § 20-7-420(A)(17). Defendant's tax returns confirm support payments made by him pursuant to written agreement and subject to S.C. Code § § 63-3-510 to 530. Legislative intent, exclusive original jurisdiction pursuant to S.C. Code § § 63-3-510 to 530, and the plain language of the Decree (copy attached) to which the Family Court attorney defendant agreed and which is now the law of the case all provide exclusive jurisdiction, including but not limited to, retirement, marital property, and the family home in the Family Court. The Family Court is the proper forum to provide clear title for real estate and other transactions. As the adversely affected party appealing the wrongful ex parte hearing, petitioner respectfully requests reconstruction of the record in matters adversely affecting the petitioner and respectfully submits dismissal is premature pending reconstruction of the record in the trial court. To the extent there is ambiguity, the rule of lenity supports the petitioner's position. Accordingly, the lower appellate court order is reversible as a matter of law.

II. Denial of Substantial Rights Including Due Process

To the extent there is no inconsistency, the petitioner incorporates in full by reference the contents of this document in this section. The petitioner respectfully submits this petition. The lower

appellate court decision is reversible based on prejudicial error of material fact and law and is internally inconsistent. In addition, without adequate record, i.e., without reconstructing the lower court record, there can be no factual determination, and therefore, no factual support for the lower appellate court decision. Without factual support or Record on Appeal jointly filed by the parties, the lower appellate court decision is reversible abuse of discretion. The record reflects there is no lawful notice of the hearing in the trial court. Under these facts, there is no authorization/jurisdiction for impermissible ex parte hearings. Without any record, there is inadequate record for meaningful review requiring reconstruction of the record in the trial court. This Honorable Court as well as adversely affected litigants have a right to an adequate record of the impermissible ex parte proceedings below. The intended beneficiaries of the requirement for a record of the proceedings are adversely affected litigants including the petitioner. But for wrongful lack of a recording of the impermissible ex parte hearing for transcription by the court reporter, the outcome should and would be in petitioner's favor. To the extent there is ambiguity, the rule of lenity supports petitioner's position. Accordingly, petitioner requests reconstruction of the trial court record on remand for adequate record for disposition herein as well as adequate record for meaningful appellate review. *See Clements v. Young*, 310 S.C. 73, 425 S.E.2d 63 (Ct. App. 1992) (appellant moved for reconstruction of the record on remand to the lower court where the hearing was unrecorded).

Further, review is indicated where a single individual judge sua sponte researched outside the jointly filed ROA, which is not yet due, and failed to provide the adversely affected party, a traditional filer, with the information/documentation relied upon and referenced in the outside-the-record decision. There are multiple apparent inaccuracies/irregularities in the trial court. The propriety of relying on a public index with inaccuracies/errors without notice and opportunity to respond is challenged. The petitioner, as a traditional filer, respectfully requests a printed copy of the information outside the record expressly referenced and relied upon due to multiple inaccuracies/irregularities in the trial court

as well as date of access. Furthermore, the propriety of failing to copy traditional filers with printed copy of electronic communication and research outside the record which the court expressly relied on herein is challenged and cannot pass constitutional muster. Printed copies, for example, of emails from counsel of record should be provided to litigants who are traditional filers and who may not be computer literate. As just one example of the misrepresentations and/or irregularities in the trial court, there was no required notice to the adversely affected party, the petitioner, of that hearing and no recording of that hearing for transcription can be found. Pursuant to Rule 207, SCACR, petitioner timely requested the transcript from SCCA multiple times, however, there was no timely response from SCCA. On or about October 17, 2022, petitioner timely made another request for transcript, again without response from SCCA. Only after filing a motion for a response herein and paying $50.00 filing fees did the SCCA respond stating SCCA was unable to locate the audio of the hearing in the trial court. In contrast, the SCCA's ex parte email response to the Family Court attorney defendant's impermissible ex parte email shows SCCA'a immediate response when untrustworthy Family Court attorney defendant requested the transcript without timely copying the other side. Despite locating recordings for essentially all other hearings that day, there is a critical gap in the recording for this matter without explanation. The petitioner respectfully submits denial of substantial rights including mode of trial and those akin to mode of trial are timely raised and are requested requiring reconstruction of the record in the trial court for that impermissible ex parte hearing. The record reflects unequal treatment and irregularities in this matter supporting review. Petitioner is prejudiced thereby. But for SCCA's unexplained gap in the recording for the transcript of hearing, the outcome should and would be in petitioner's favor. Decades-long insider Family Court attorney defendant, so-called officer of the court, has unclean hands. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the

procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

Further, in violation of the SCACR, dismissal is not properly before the court: The SCACR do not allow dismissal based on issues that have not been raised by the parties. These are matters of great public importance. The SCACR do not allow judges to act as counsel of record for the Family Court attorney defendant as in this case. The SCACR do not allow sua sponte dismissal by a single government employee based on pure speculation regarding issues that have yet to be presented. There is no jointly filed ROA, affidavit, or factual basis in support of the opinion herein which requires reconstruction of the record. There is inadequate explanation for meaningful appellate review. *See, e.g., Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020) (remanded for lack of adequate explanation for meaningful review: "(T)he court disposed of the substance of the issue in a single sentence. See J.A. 252. We need more explanation to conduct meaningful appellate review of the court's disposition of the motion."). Without factual support, the order is reversible abuse of discretion. To the extent there is wrongful direct or indirect ex parte consolidation of a 2022 appeal with a 2020 appeal, Rule 214, SCACR, provides, "A party may move to consolidate two or more appeals…" Toal *et al., Appellate Practice in South Carolina*, 3rd Ed. (2016), p. 370. Untrustworthy Family Court attorney defendant failed and refused his professional responsibility to move for consolidation by filing a motion, paying the filing fee every other attorney is required to pay, serving the other side, and providing meaningful opportunity to be heard at a meaningful time. Petitioner is prejudiced thereby.

Accordingly, the lower appellate court order herein is reversible as a matter of law, judicial overreach, and/or abuse of discretion.

III. The Lower Appellate Court Opinion is Internally Inconsistent.

To the extent there is no inconsistency, the petitioner incorporates in full by reference the contents of this document in this section. The lower appellate court opinion apparently relies word-for-word on Chief Justice Toal's Second Edition of *Appellate Practice in South Carolina* which is now updated in the Third Edition with new precedent. Toal *et al., Appellate Practice in South Carolina*, 2d Ed. (2002), p. 94. The first case cited in that opinion is inapposite because it applies to mortgage foreclosures. *No. Carolina Fed. S. & L. Ass'n. v. Twin States Dev. Corp.*, 289 S.C. 480, 347 S.E.2d 97 (1986). There is no mortgage foreclosure in the instant case and mortgages include agreement to referral. Referral can also be entered on consent. There is no consent in this case. In fact, the record reflects timely counterclaims at law with jury demand and timely Rule 38, SCRCP, notice requiring transfer to the jury docket. Rule 39, SCRCP. The second case cited supports petitioner's position because petitioner appeals deprivation of a party's right to trial by jury which must be immediately appealed. *Williford v. Downs*, 265 S.C. 319, 218 S.E.2d 242 (1975); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985).

Former Chief Justice Toal's Third Edition provides updated controlling precedent which the lower appellate court overlooked and failed to consider. Toal *et al., Appellate Practice in South Carolina*, 3rd Ed. (2016), p. 155-157. At issue is denial of the petitioner's right to trial by jury in a law case. *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E. 2d 81 (2008). "[S]ome minimal inquiry will always be necessary on the part of the appellate court considering the appealability of an order which is alleged to have deprived a party of a mode of trial." *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). "These cases not only permit, but indeed **require, immediate appeal**." *Id.*

(emphasis supplied). The matter herein includes counterclaims at law with jury demand. Accordingly, the case requires immediate appeal.

Moreover, pursuant to Rule 203, SCACR, petitioner appeals entry of judgment herein including there is no jurisdiction/authority for entry of that judgment. As such, the trial court entry of judgment on appeal is reversible as a matter of law. Unlawful entry of judgment as in this case is appealable because there is no jurisdiction for such unauthorized entry and because petitioner is denied substantial rights including but not limited to, mode of trial as well as substantial rights akin to mode of trial which must be appealed immediately. The lower appellate court opinion itself recognizes appealability including mode of trial issues and then enters inconsistent, unsubstantiated dismissal without jointly filed ROA, which is not yet filed, or affidavit and before the issues to be presented are due to be presented. Unauthorized entry of judgment in the trial court is challenged. Jurisdiction can be raised at any time. Accordingly, the wrongful entry of judgment in the trial court is void/voidable for lack of jurisdiction/authority and should be vacated and/or reversed.

The lower appellate court ruled before the ROA (Record on Appeal) is jointly filed based on pure speculation regarding issues to be presented which have not yet been raised and are not yet due to be raised. Without the reconstructed record, there can be no authorized determination of the facts, no lawful decision without the reconstructed record, and any purported ruling is based on arbitrary and capricious speculation with inadequate basis or explanation for meaningful appellate review. Accordingly, the lower appellate court order is reversible based on error of material fact and law. *See, e.g., Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020) (remanded for lack of adequate explanation for meaningful review: "(T)he court disposed of the substance of the issue in a single sentence. See J.A. 252. We need more explanation to conduct meaningful appellate review of the court's disposition of the motion.").

IV. Unequal Treatment

To the extent there is no inconsistency, the petitioner incorporates in full by reference the contents of this document in this section. Pursuant to SCACR Rules, dismissal is not properly before the court. Sua sponte dismissal by a single individual without ROA, affidavit, or factual support and without notice and meaningful opportunity to respond at a meaningful time is challenged. But for untrustworthy Family Court attorney defendant failing to file and pay the filing fee for a motion to dismiss which every other attorney must pay, the outcome should and would be in petitioner's favor. Petitioner is prejudiced thereby. Due process requires including but not limited to, notice and meaningful opportunity to be heard at a meaningful time before disposition. The record reflects there was no required notice and meaningful opportunity to be heard at a meaningful time in the trial court and no required notice and meaningful opportunity to be heard at a meaningful time before disposition herein. These are matters of great public importance. Further, State and Federal statutory and Constitutional laws provide guarantees, protections, and rights under the circumstances. Petitioner is prejudiced thereby. The lower appellate court order is a violation of Legislative intent and the letter and spirit of S.C. Code § 14-8-220 requiring a panel of judges, not a single individual, to finally determine an appeal in whole or in part to protect individual judges, to protect against favoritism, bias, prejudice or other unconstitutional factors, to protect the lower appellate court, and to protect the judicial system. See Rule 240(j), SCACR. Accordingly, the lower appellate court order should be reversed. See Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 251 n.16 (2002).

Significantly and materially, the lower appellate court order is a violation of the party presentation rule. The American judicial system is an adversary system, not based on inquisitors: **In order to ensure the integrity of the judicial system, the norms of that adversarial system prohibit ex parte communications and outside factual research which undercut the appearance of a**

disinterested court. In both civil and criminal cases, in the first instance and on appeal, the principle of party presentation is followed: The parties frame the issues for decision and the courts have the role of **neutral arbiter** of matters the parties present. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (emphasis supplied). In this case, the record reflects the single individual who authored the wrongful sua sponte lower appellate court opinion operates as if he is the advocate for the Family Court attorney defendant, not a neutral arbiter. As such, the record reflects the sua sponte order is reversible abuse of discretion. Alex Murdaugh's "the rules don't apply to me" standard-operating-procedure (SOP) was used to entice the judiciary to rubber-stamp wrongdoing. Similarly, untrustworthy officer of the court entices sua sponte wrongdoing thereby denying the other party an opportunity to be heard at a meaningful time. Sua sponte disposition requires, at a minimum, briefing prior to dispositional decision and the lower appellate court order is reversible error for this reason alone. Accordingly, the lower appellate court order should be reversed with instruction for reconstruction of the record in the trial court. *See Clements v. Young*, 310 S.C. 73, 425 S.E.2d 63 (Ct. App. 1992) (appellant moved for reconstruction of the record on remand to the lower court where the hearing was unrecorded).

The record reflects further unequal treatment by the proverbial decades-long insider Family Court attorney defendant who engaged in direct or indirect impermissible ex parte contacts with the court and the SCCA while breaching professional responsibilities to, including but not limited to, timely copy the other side. The Family Court attorney defendant should and would insist on being copied himself and he is hereby requested to timely copy the petitioner on all contacts herein whether electronic, written, oral, text, or other and to provide those printed copies from the date the case was filed, up to and including the present, and going forward. The courts as well as the litigants are prejudiced when one side fails to copy the other.

In addition, the record reflects unequal treatment regarding request for transcript. Despite three or more timely requests for transcript by the petitioner, there was no response. At the same time,

with lack of transparency and while being hidden from the other party, the decades-long insider untrustworthy Family Court attorney defendant failed to timely copy the petitioner on his transcript request which received immediate response unlike the petitioner's multiple transcript requests. Moreover, petitioner had to file a motion and pay a filing fee just to get a delayed response to three or more timely transcript requests while SCCA's unexplained delays led to wrongful dismissal. The record reflects direct or indirect impermissible ex parte contacts with the court by untrustworthy Family Court attorney defendant without filing the required motion to dismiss and without paying the filing fees required of other attorneys thereby denying the petitioner, including but not limited to, notice and meaningful opportunity to be heard at a meaningful time. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin,* 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis,* 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore,* 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock,* 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

V. "All courts shall be public." South Carolina Constitution in article 1, section 9.

To the extent there is no inconsistency, the petitioner incorporates in full by reference the contents of this document in this section. The opinion's reliance on outside research is misplaced and the petitioner, as a traditional filer, respectfully requests a printed copy of what the lower appellate

court referenced and relied upon in its opinion. It is respectfully submitted that when there is no jointly filed ROA as in this case, the parties are entitled to a printed copy of the document(s) the lower appellate court expressly referenced and relied upon including its date of access. As just one example of the misrepresentations and/or irregularities in the trial court, the trial court order on appeal states it was heard on April 20, 2022, however, there was no required notice to the adversely affected party, the petitioner, of that hearing and no recording of that hearing for transcription can be located. Pursuant to Rule 207, SCACR, petitioner timely requested the transcript from SCCA, however, there was no response from SCCA. On or about October 17, 2022, petitioner timely made another request for transcript, again without response from SCCA. Only after filing a motion herein and paying $50.00 filing fees did the SCCA respond (copy attached) stating SCCA was unable to locate a recording of any hearing in the case that day. In contrast, SCCA's response to the Family Court attorney defendant shows SCCA'a immediate response when he requested the transcript without timely copying the other side. Despite locating recordings for essentially all other hearings in the other cases that day, there is a critical gap in the recording for this matter without explanation. The petitioner respectfully submits motion for reconstruction of the record in the trial court. The record reflects unequal treatment and irregularities in this matter inviting review. Petitioner is prejudiced thereby. But for SCCA's unexplained inability to locate the audio for the transcript of hearing, the outcome should and would be in petitioner's favor. Decades-long insider Family Court attorney defendant, officer of the court, has unclean hands.

Further, pursuant to Rule 242(b), SCACR, and generally, review is indicated where a single government employee researched outside the record without benefit of a jointly filed ROA, which is not yet due, and failed to provide the adversely affected party with the information/documentation expressly referenced and relied upon in that opinion. There are multiple apparent inaccuracies/irregularities in the trial court. Reliance on a public index with inaccuracies/errors without

notice and opportunity to respond is challenged and the petitioner, as a traditional filer, respectfully requests a printed copy of the purported document and information researched outside the record, referenced, and relied upon due to multiple inaccuracies/irregularities in the trial court herein. Furthermore, the propriety of failing to copy traditional filers, who may not have a smart phone or be computer literate, with a printed copy of electronic research outside the record which the court expressly relied on herein is challenged and cannot pass constitutional muster. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

VI. Uniform Application of the SCACR in the Lower Appellate Court.

To the extent there is no inconsistency, the petitioner incorporates in full by reference the contents of this document in this section. Pursuant to S.C. Code § 14-8-220, *de novo* review is the standard of review at Rule 240(j), SCACR, appeal, which is different than the standard of review for Rule 221, SCACR, rehearing. The record reflects application by the lower appellate court of the improper, less burdensome legal standard and failure to specify *de novo* as the legal standard. Ambiguity regarding the proper legal standard pursuant to Rule 240(j), SCACR, appeal is a denial of

substantial rights, including but not limited to, due process. Rule 240(j), SCACR, appeal is a S.C. Code § 14-8-220 appeal of an order by a single individual judge and the proper legal standard is *de novo*. S.C. Code § 14-8-220. To the extent there is ambiguity, the rule of lenity supports petitioner's position.

S.C. Code § 14-8-220 provides as follows:

SECTION 14-8-220. Power of Court and judges to administer oaths and writs; appeal.
The Court and each of the judges thereof shall have the same power at chambers or in open court to administer oaths, and to issue such remedial writs as are necessary to give effect to its jurisdiction. An appeal shall be allowed from decision of any one judge to a panel of the Court.

HISTORY: 1979 Act No. 164 Part IV-A Section 1, eff July 1, 1979; 1979 Act No. 194 Part III Section 5, apparently effective Aug. 8, 1979; 1983 Act No. 89 Section 1, eff June 2, 1983; 1983 Act No. 90 Section 2, eff July 1, 1985.

It is well established that the Federal Rules of Appellate Procedure (FRAP), upon which the SCACR are based, have long been interpreted to provide for review of decisions by a single judge. See Rule 27(c), FRAP. Pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR, the case stands before the appellate court as if it had never been decided. See *Griffin v. State,* 763 N.E.2d 450 (Ind.2002) (citing 5 Arch N. Bobbitt & Frederic C. Sipe, *Bobbitt's Revision, Works' Indiana Practice* § 111.3 (5th ed.1979)). See *Ex parte Northern Pacific Railway Co.*, 280 U.S. 142, 144, 50 S.Ct. 70, 74 L.Ed. 233; *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15, 51 S.Ct. 8, 75 L.Ed. 135 (The District Judge recognized the rule that if the court was warranted in taking jurisdiction and the case fell within section 266 of the Judicial Code (28 USCA § 380), a single judge was not authorized to dismiss the complaint on the merits, whatever his opinion of the merits might be). "The prior denial of the transfer motion was the order of a single judge. Federal Rule of Appellate Procedure 27(c) provides that 'an action of a single judge may be reviewed by the court.' That order is thus not binding on us as law of the case." *Thompson v. Merit Sys. Protection Bd.*, 772 F.2d 879, 882 (Fed. Cir. 1985). Accordingly, the legal standard of review under these circumstances for Rule 240(j), SCACR, panel appeal is *de novo*.

Significantly and materially, the lower appellate court order is a violation of Legislative intent that a panel of judges, not a single individual, finally determine an appeal (Rule 240(j), SCACR). In addition, pursuant to S.C. Code § 14-8-220, the petitioner respectfully submits Rule 240(j), SCACR, petition for rehearing herein is *de novo* review which does not include direct or indirect participation by the individual judge who signed the order that is the subject of the Rule 240(j), SCACR, review. Petitioner filed the appeal pursuant to Rule 240(j), SCACR, for appeal of a single judge's order. S.C. Code § 14-8-220 provides statutory authority for Rule 240(j), SCACR, and provides for **appeal** of the order of a single judge. S.C. Code § 14-8-220. Meaningful review requires that a judge not directly or indirectly participate in appeal of his or her own order. Occasionally, a recently appointed Appellate Court Judge or recent Supreme Court Justice will find him or herself in the position of potentially reviewing an Order that he or she authored. In these cases, the Judge or Justice will recuse him or herself from the position of potentially reviewing an order that he or she authored. A judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Rule 3(E)(1), CJC, Rule 501, SCACR.* Disqualification is required if a reasonable factual basis exists for doubting the judge's impartiality. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978) (emphasis supplied). Petitioner reasonably questions impartiality. In the *Rice* case, then Chief Judge Haynsworth further ruled that, "For many years a federal judge has been prohibited from sitting to hear or determine an appeal in a case or issue tried by him. 28 U.S.C.A. § 47. To say the least, it would be unbecoming for a judge to sit in a United States Court of Appeals to participate in the determination of the correctness, propriety and appropriateness of what he did in the trial of the case. After rendering decisions, some judges remain open minded, and some are unreluctant to confess previous error, but **a reasonable person has a reasonable basis to question the impartiality** of a judge who sits in a United States Court of Appeals to review his own decision as a trial judge." *Id.* At 1117 (emphasis supplied). 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. Granted, this is a Fourth Circuit case, but the principle from 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 it 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. [*Ríce v. McKenzíe*, 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). Similarly, in this case, "(t)o say the least, it would be unbecoming for a judge" to participate directly or indirectly on the Rule 240(j), SCACR, appeal of his own decision. *Ríce v. McKenzíe*, 581 F.2d 1114, 1117 (4th Cir. 1978). Moreover, in consideration of Legislative intent and the overarching principles incorporated in the State and Federal Constitutions by the framers, due process requires that the appellate court judge who individually signed the dismissal order not participate, directly or indirectly, on appeal of the decision which is the subject of the Rule 240(j), SCACR, *de novo* appeal. Ambiguity regarding the requirement of no direct or indirect participation on Rule 240(j), SCACR, appeal is a denial of due process. To the extent there is ambiguity, the rule of lenity supports petitioner's position. Accordingly, Rule 240(j), SCACR, *de novo* appeal and due process require no direct or indirect participation by the individual judge who signed the wrongful sua sponte dismissal.

Former Justice Sandra Day O'Connor warned the public about the importance of judicial independence. She wrote "... many Americans today do not see the need for independent judges. Many prefer a judiciary that acts merely as a reflex of popular will." *Judicial Independence and 21st Century Challenges*, Sandra Day O'Connor, The Bencher, July/August 2012. As she explained, "The reason why judicial independence is so important is because **there has to be a safe place** where being right is more important than being popular; where fairness triumphs strength. That place, in our country, is the

courtroom. It can only survive so long as we keep out political influences." *Id.* (emphasis supplied). Public policy, legislative intent, statutory authority, governing case law, State and Federal statutory and Constitutional law, the Rules of Court, the SCACR, and fundamental fairness support Rule 240(j), SCACR, *de novo* appeal herein.

VII. The Rule of Lenity Supports Petitioner's Position.

To the extent there is no inconsistency, the petitioner incorporates in full by reference the contents of this document in this section. The rule of lenity supports petitioner's position. For the foregoing reasons, for good cause, and for substantial justice affecting substantial rights, the petitioner respectfully requests this Honorable Court grant this petition regarding matters of great public importance. The petitioner also makes motion for reconstruction of the record in the trial court where, without explanation, the SCCA's audio for transcripts has a critical gap in the recording for the hearing below, one of many unexplained irregularities in this matter. As the adversely affected party appealing the wrongful ex parte hearing, petitioner respectfully requests reconstruction of the record in matters adversely affecting the petitioner and respectfully submits dismissal is premature pending reconstruction of the record in the trial court. *See Clements v. Young*, 310 S.C. 73, 425 S.E.2d 63 (Ct. App. 1992) (appellant moved for reconstruction of the record on remand to the lower court where the hearing was unrecorded); Toal *et al., Appellate Practice in South Carolina*, 3rd Ed. (2016), p. 378. Accordingly, the lower appellate court order should be reversed and motion for remand should be granted with instruction to reconstruct the record in the trial court. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*,

376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

CONCLUSION

Matters of great public importance invite review. For the foregoing reasons, for good cause, and for substantial justice affecting substantial rights, the undersigned respectfully requests this Court grant petition for a writ of certiorari.

Respectfully submitted,

Dated 4/19/23

_____

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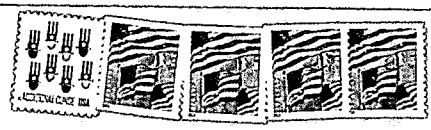

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