

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

**RECEIVED**

JUL 27 2018

Benjamin H. Culbertson, Circuit Court Judge

**SC Court of Appeals**

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Case Number 2009-CP-26-3596  
Consolidated With  
Case Number 2010-CP-26-11320

Appeal No. 2016-001063

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Ronald Jarmuth..... Pro Se Appellant,

v.

The International Club Homeowners  
Association, Inc., Rosemary Toth, and  
K. A. Diehl & Associates, Inc..... Respondents.

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APPELLANT'S REPLY TO  
RESPONDENT'S RETURN TO  
PETITION FOR REHEARING

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Ronald Jarmuth  
249 Pickering Drive  
Murrells Inlet, SC 29576  
843-314-4355  
Appellant, Pro Se  
July 26, 2018

**Petitioner / Appellant Ronald Jarmuth replies to Respondent's  
Return to the Petition for Rehearing.**

**I. Panel's Failure to Conduct De Novo Review of Motion to Dismiss  
Is Clear Abuse of Judicial Discretion  
Meriting Rehearing**

The motion below to dismiss per SCRCP Rule 60 stated that the Final Order (as to attorney fees and fines) was void as a matter of law. Appellate review of trial court interpretations / application of law is subject to de novo review to determine what the correct applicable law is and whether it was correctly applied, not an abuse of discretion standard.

A de novo review is mandated when the law / contract terms are clear and when applied to a set of facts, only one outcome is possible. The hearing judge and the Panel committed an abuse of discretion.

**"An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." Rabkin v. Oregon Health Sciences Univ., 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted); see also In re Korean Air Lines Co., Ltd., 642 F.3d 685, 698 n.11 (9th Cir. 2011).**

**A trial court abuses its discretion when:**

**court does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. See Jeff D. v. Otter, 643 f.3d 278 (9th Cir. 2011) (citing Casey v. Albertson's Inc., 362 F.3d 1254, 1257 (9th Cir. 2004)).**

court rules in an irrational manner. See Chang v. United States, 327 F.3d 911, 925 (9th Cir. 2003); see also Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California, 618 F.3d 1066, 1084 (9th Cir. 2010) (concluding district court did not rule in an irrational manner).

court makes an error of law. See Koon v. United States, 518 U.S. 81, 100 (1996); Strauss v. Comm'r of the Soc. Sec. Admin., 635 F.3d 1135, 1137 (9th Cir. 2011) (citing Koon); Forest Grove School Dist. v. T.A., 523 F.3d 1078, 1085 (9th Cir. 2008) (applying Koon); United States v. Martin, 278 F.3d 988, 1001 (9th Cir. 2002) (applying Koon). Thus, the court abuses its discretion by erroneously interpreting a law, United States v. Beltran-Gutierrez, 19 F.3d 1287, 1289 (9th Cir. 1994), or by resting its decision on an inaccurate view of the law, Richard S. v. Dep't of Dev. Servs., 317 F.3d 1080, 1085-86 (9th Cir. 2003). See also Fox v. Vice, 131 S. Ct. 2205, 2211 (2011) (recognizing trial court has wide discretion “but only when, it calls the game by the right rules”).

## II. “Attorney Fee Facts” The HOA Told The Panel In Their Brief Which Implicate Abuse of Discretion

On p.15 of the HOA Response Brief to the Panel the HOA told the Panel that the two attorney fee checks were paid to “defend” the FHA matter and to “defend” Jarmuth’s civil complaint filed against the HOA.

Those fees were paid in the form of two \$2,500.00 deductibles to the undersigned counsel, the attorneys retained to defend the Association in the various matters filed by Jarmuth under the Association's director's and officer's insurance policy. (R. pp. 274-290). The first amount was paid after the 2009 Case was filed and the second amount was paid after SCHAC matter was initiated. (Id.) No separate deductible was required for the 2010 Case, because it was related to the previous matters filed. (Id.)

The HOA told the panel they paid nothing to “enforce” anything. The

abuse of discretion at the trial and appellate levels is that there is no statute, rule, or contract provision allowing reimbursement of “defense” costs and this is settled law.

The applicable law or contract provisions (all of which were ignored by the hearing judge and the panel) are:

a. FHA Attorney Fees. Is there any statute or rule which permits a respondent to Fair Housing Discrimination Investigation to recover the costs of legal representation concerning that investigation?

The clear answer is NO. Not only that, only a prevailing Complainant in a Fair Housing Discrimination ACTUAL COURT CASE (not a prevailing Defendant) may have an award of attorney fees (black letter law). There never was a discrimination court case at all and if there was, the HOA would have been a defendant ineligible for attorney fees whether it prevailed or not. Not only that, as a matter of federal law, demanding reimbursement of attorney fees is the crime of FHA retaliation and federal courts routinely reverse state court orders with the effect of enabling retaliation. Clearly there was and is no law permitting the trial court to award FHA attorney fees to a respondent to an investigation. This is a matter of clear law and thus mandated de novo review and is a clear abuse of discretion at the trial court level.

b. Civil Case Attorney Fees.

(1) There is no statute or common law provision permitting a defendant to recover attorney fees in a civil case. This is settled law.

The Form 4 Order 1 was obviously silent on this. This being the only valid order flowing from the hearing, a de novo review is mandated. A court speaks through its orders and the Panel has no way of discerning how the hearing judge considered this issue. The Long Order [2] was silent on this controlling legal issue meaning the hearing judge failed to determine the controlling law.

(2) There is no contract provision permitting the award of attorney fees to DEFEND a case brought against the HOA.

In the HOA's Response Brief to the Panel the HOA stated that the only provision for the HOA to recover attorney fees and costs is if the HOA has to pay additional fees / costs specifically to enforce the covenants after an actual covenant usage violation. Whether there was such a violation is immaterial because the HOA has admitted it paid nothing to undo a violation (if there was one). On page 1 of their brief,

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1 April 27, 2016  
2 June 6, 2016

footnote 1, they stated that the recovery provision applies to enforcement, not defense:

Section 8.9 provides that the Association is entitled to attorneys' fees incurred in enforcing the Declaration: "[s]hould any person employ counsel to enforce ... all costs incurred in the enforcement, ... shall be paid by the Owner ... ." (R. p. 124). Moreover, the Bylaws of the Association, § 13.4, echoes § 8.9 of the Declaration: "[s]hould the Developer or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, including court costs and reasonable attorneys' fees, shall be paid by the Owner." (R. p. 130).

c. HOA Fines.

(1) Exclusive authority to grant fines is in Bylaws Section 13.3.

In paragraph 14 page 5 of the "Long Order"<sup>3</sup> the hearing judge acknowledged that the only authority for the Court to grant fines to the HOA is in paragraph 13.3 of the Bylaws. That provision was before the Court as Jarmuth's Exhibit #9. On page 6 paragraph 1 of the "long order" the judge declared that the final order conformed to the legal provisions of the contract (bylaws). An erroneous application of the clear terms of the contract is an error of law, thus an abuse of discretion, and is subject to de novo review.

Also before the hearing judge and the Panel was Jarmuth's

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<sup>3</sup> But the "long order" does not legally exist and can not be affirmed by the Panel, which, lacking any findings of fact or conclusions of law in a valid order following the hearing, must conduct its own de novo review.

hearing Exhibit #10, the minutes of the HOA Board's May 5, 2010 Board Meeting in which the HOA Board clarified any ambiguity which might attach to the procedures of Bylaws Section 13.3, Enforcement – Procedures. In Section VI “New Business” Paragraph C “New Violation Policy” the HOA Board declared that final step in enforcement “shall be a hearing scheduled” as is required by Bylaws Section 13.3. This document was before the court at the trial but was ignored.

Also before the hearing judge was Jarmuth's hearing Exhibit #11, the minutes of the November 10, 2011 meeting of the HOA Board of Directors. Jarmuth's hearing pleadings, hearing testimony, and appellate brief pointed out that per the minutes the HOA board never determined that a violation occurred nor imposed a fine.

(2) The Bylaws As Exclusive Authority for Fines. It is uncontroverted that the only authority for the court to award fines to the HOA arises from Section 13.3 of the Bylaws.

The issue of law before the court(s) is whether there is authority for the HOA to impose a fine on a member without holding a hearing to which the putative offender is invited. Imposing a fine is an official act of the non-profit home owners association and is governed by the Non-

**Profit Corporation Act.**

**Section 33-31-821 of the Act provide that no action taken by the Board without a meeting is effective unless the HOA Board's Meeting Minutes reflects a consent "on the record to the action taken without a meeting. Thus there is no official act of a non-profit corporation's board unless it can be found in the minutes, whether the action is taken in or out of a board meeting. There is no record of Board action of any kind taken against Jarmuth.**

**Section 33-31-1601 of The Act provides that the HOA's permanent records must include a record of all actions taken by the Board, with or without a meeting, and by Committees of the Board. Per the trial and hearing courts and per the HOA, the imposition of fines was an "official act" performed specifically per its Bylaws Section 13.3. Yet such an alleged act does not legally exist when it is not found in the official records of the HOA. The absence of such a record has been asserted by Jarmuth in the hearing and in this appeal. The HOA has never controverted that there is no record of the HOA Board ever taking any action against Jarmuth. Instead, the HOA and the hearing judge argued that official actions is "optional" that the HOA Board could conduct an official and binding act "off the record". This is an**

abuse of discretion because it violates the letter of the Non-Profit Corporation Act and Section 13.3 of the Bylaws.

(3) The Misuse of the phrase “may” in the Bylaws.

First, the Panel must know that at the trial the HOA President, William Freiboth - in direct examination from the same attorneys representing the HOA in this appeal - testified that the HOA did in fact hold a hearing at which time the HOA imposed a fine. The minutes of the November 10, 2011 meeting at which the fines were supposedly imposed were unavailable to Jarmuth (at trial) because they were never produced in discovery and were in fact also hidden from the members at large. Per Jarmuth’s motion pleadings, they became available four years later when Jarmuth tricked a management company employee into providing it (in 2016).

The “long order” following the hearing reflects that the hearing judge refused to consider the language of Bylaws Section 13.3.

In para 14 page 5 of the “long order” the court wrote that

The Special Referee also found in the Final Order that "the Defendant HOA 'may' provide the Owner with a hearing" under Section 13.3 of the Bylaws, but that a hearing was not required before fines were levied.

The court then added it would not see if this was an “error of law”

holding that re-interpretation of controlling law is barred by the “law of the case” (long order p.6 para 11) meaning that there is no review if a court misapplies or makes up a law.

In considering the import of “may” the Panel should look to the analog of a criminal trial. A Prosecutor “may” bring someone to trial but unless he does so and obtains a conviction, he can not impose a penalty without prevailing in a trial. The trial is optional but it is a mandatory predicate to a penalty. There is the exact same parallel in Section 13.3 of the Bylaws. The board “may” hold a hearing but unless it does it can not impose a penalty. At the HOA Boards May 5, 2011 meeting, hearing Exhibit #10, the HOA Board clarified that the correct interpretation of Bylaws Section 13.3 is that no sanction can be imposed without a hearing and the Board mandated such a hearing (it determined such a meeting is not “may / optional”).

### **Bylaws Section 13.3**

**13.3 Procedure. ... the Board shall not impose a fine, ... unless and until the following procedure is followed. ...**

**13.3.1 Written demand to cease and desist ... .**

**13.3.2 Within two (2) months of such demand, ... the Board may serve such Owner with written notice of a hearing to be held ... .**

**13.3.3 The hearing shall be held in executive session of the Board of Directors pursuant to the notice and shall afford the alleged violator a reasonable opportunity to be heard. ...**

**Prior to the effectiveness of any sanction here under, proof of notice and the invitation to be heard shall be placed in the minutes of the meeting. ... . The minutes of the meeting shall**

contain a written statement of the results of the hearing and the sanction imposed, if any.

While there is a clear procedure to impose a fine WITH a hearing, there is no alternative provided to impose fines without a hearing. The language “Board shall not impose a fine, ... unless and until” and “Prior to the effectiveness of any sanction here under” is meaningless if the entire mechanism of the hearing on notice and on the record could be skipped. There is also the legal contradiction of the HOA Board’s May 5, 2011 prior official determination that a hearing is always required and the requirement of the Non-Profit Corporation Act for a record of official decisions.

Clearly the hearing judge abused his discretion by failing to consider what the contract actually provides, and likewise the trial judge committed an abuse of discretion by misapplying the contract language which is clear and unambiguous. The Panel likewise committed an abuse of discretion by not considering the interplay of the Covenants, the Non-Profit Corporation Act, and the lack of a record of an HOA official act in determining whether all the legal predicates had been satisfied to provide the Court authority to grant fines.

It is significant that no first hand witness or photographic

evidence was ever produced to prove that a covenant usage violation had occurred. There was only hearsay testimony that a wall had been built, opposed by first hand testimony by Jarmuth that he had not built a wall or a fence. This has always been a clearly erroneous conclusion of fact. No admissible evidence.

### **III. Return is Not Permitted and is thus Invalid.**

SCRAP Rule 221(a) (revised May 1, 2018) provides that

**“No return to a petition for rehearing may be filed unless requested by the appellate court.”**

The HOA’s return is thus void and must be treated as “lodged, not filed” and must be ignored. Respondent is represented by a major law firm, McNair Law, with many offices and many attorneys. The Return was mailed / filed July 10, 2018. This was more than seventy (70) days after the rule revision came into effect. There is a presumption that McNair Law knew about the rule change, and that the filing of the Return in spite of the rule was not an oversight but intentional. If Respondent desired to file a Return the proper procedure would have been to file a motion, which they did not do. The proper burden is not for Petitioner to request (by motion) that the Court enforce the rule, nor for the Court to “stand in the shoes of the Respondent” to determine whether the prohibited Return is

meritorious, but rather for the Respondent as the non-conforming party to file a separate motion explaining why the circumstances are so exceptional that the rule prohibiting returns should be ignored.

**IV. The only valid Lower Court Order had no findings of fact nor conclusions of law  
- Panel Abused its' Discretion By Looking Beyond What Was Written in the Lower Court Order -**

The Return is silent on and thus concedes that the only valid order before the Panel is the April 27, 2016 Form 4 Order which the Panel ignored, and that the June 6, 2016 "Formal Order" which the Panel affirmed is void on its' face.

In the Petition Jarmuth pointed out that the only valid lower court order before the Panel was the April 27, 2016 "Form 4 Order" (Exhibit 1).<sup>4</sup> The Form 4 Order was immediately appealable even though the Form 4 Order anticipated a "formal order" within ten (10) days. May 7, 2016 came and went without a formal order. Jarmuth timely appealed the April 27, 2016 Form 4 Order on May 17, 2016. The Form 4 Order was an immediately appealable order. Thereafter the lower court lost jurisdiction to enter a formal order. This is settled law.

A writing signed by the judge and filed with the clerk is a final judgment even if it is anticipated that a more complete order will be substituted in the future. - Buckingham v. Buckingham, 134 NC App 82 (1999)

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<sup>4</sup> "Plaintiff's Motion to Dismiss is Denied. A formal order to follow ... within 10 days.

**V. The Panel's Affirmation of the Hearing Order is an Exceptionally Grievous Determination in that the Panel has affirmed that all notions of constitutional due process are irrelevant – and thus merits Appellate Reconsideration.**

**On its' face the Order following the hearing holds that –**

**a. Due process and the rules do not require that a litigant file a claim, put the opponent on notice of a claim, afford discovery, or produce evidence in order to obtain a decision on a matter.**

**b. Due process, the rules, and the law are not violated if a court makes a determination which lacks a statute, contract, or provision of common law providing authority for such a decision.**

**c. Due process is not offended if a decision is contrary to the law relating to the matter.**

**d. SCRCP Rule 60 motions to void a judgment because there was no legal authority for the judgment are not to be reviewed by appellate courts because the panel will always defer to rulings of law by a trial court without the panel needing to look at the asserted authority – if any – to determine if it was correctly applied.**

**e. In South Carolina pre-litigation clauses are no longer enforceable so long as a litigant brings a matter to a court of general jurisdiction.**

**f. In South Carolina it is now fair game to retaliate against an**

**FHA complainant.**

**The panel's decision does not reflect any attempt to examine the law and the facts to determine what decision is merited as a matter of applying the correct law to the facts.**

**The lack of a claim was amply briefed and it is part and parcel, of a lack of due process and the lack of authority to even consider the HOA claims.**

**The panel did not do it's job and did not consider whether the law was ignored at the trial court level - that it had not satisfied the Constitutional and procedural predicate necessary to be able to assert authority to act on the SCHAs and Attorney Cost matters.**

### **Void Judgments**

**The U.S. Supreme Court has put all courts – including appellate – that it is a judicial function for every court to take note of a lack of authority. A void order is void not because a court ultimately finds it erred but because it notices that it was void from its' inception.**

**As Hon. Justice Scalia has explained**

**"it is a Court's obligation to dismiss a case whenever it becomes convinced that it has no proper jurisdiction, no matter how late that wisdom may arrive" Wyoming v Oklahoma, 502 U.S.437, 462 (1991).**

In Hammer v Hammer, S.C. Court of Appeals #4980, June 6, 2012, the Court wrote "Subject matter jurisdiction can be raised at any time and by any means." This was reiterated in Hallums v. Bowens, 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct. App. 1993). In Hammer the court noted that there had not been an actual contested subject matter jurisdiction motion at the trial level and held the Appellate Court could address subject matter jurisdiction anew even if there had been such a contest. In Normandy Corp. v. S.C. DOT, 380 S.C. 393, 688 S.E.2d 136 (Ct.App. 2010) the Court wrote "Issues involving subject matter jurisdiction may be raised at any time".

**Law of the Case Not Applicable When Question of Underlying Authority is Raised**

The Panel erred in holding that Jarmuth could only raise a Rule 12(b) objection when the HOA filed its counter - claim in 2011.

In Crane C. v American Standard, Inc., 603 F.2d 244, 249 the court held that law of case did not preclude reconsideration of whether a plaintiff had a cause of action when reexamination made good sense.

In Gould Electronics Inc et al v United States of America, USDC-ED-PA, No.99-1130 the Court held

Rule 12(g) does not prevent the government from asserting a second challenge to subject matter jurisdiction" and that "Rule 12(g). Fed. R. Civ. P. 1966 Amendment advisory committee's note

**states: ‘It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver, ... the more substantial defenses of ...lack of jurisdiction over the subject matter are expressly preserved against waiver by amendment subdivision (h)(2) and (3).’”**

**As a Matter of Law, without an enabling statute or contract the determination could not be “on the merits”. Without first finding a cause of action based on enabling predicate authority (all of it) the court can not get to factual issues. The law invoked determines what facts are needed to satisfy the necessary prongs – the relevant facts to prove that relief is merited.**

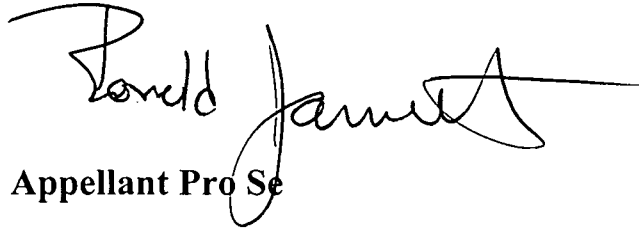
### **Conclusion**

**1. Both orders following the hearing on the Motion to Dismiss are void on procedural grounds. For the “long order” (the second) the court lacked case jurisdiction at the time that order was entered.**

**Because the entire panel review was predicated on having a valid “long order” before them – the panel did not review the matter “de novo” – the panel’s decision is likewise void.**

**2. As a matter of law the aspects of the trial court’s final order granting attorney fees and fines was legally void at its inception and must be reversed.**

**WHEREFORE Appellant, for just cause shown, Petitions the  
Court of Appeals to Rehear this Case and to Reverse its Affirmation on  
the issues presented.**

A handwritten signature in black ink, appearing to read "Ronald Jarmuth". The signature is written in a cursive style with a long horizontal stroke extending to the right.

**Ronald Jarmuth, Petitioner, Appellant Pro Se  
249 Pickering Drive  
Murrells Inlet, SC 29576  
843-314-4355  
July 26, 2018**

## EXHIBITS

None added.

## AUTHORITIES

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IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
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Benjamin Culbertson, Circuit Court Judge

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Appellate No. 2016- 001063

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Ronald Jarmuth, Appellant,

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The International Club Homeowners  
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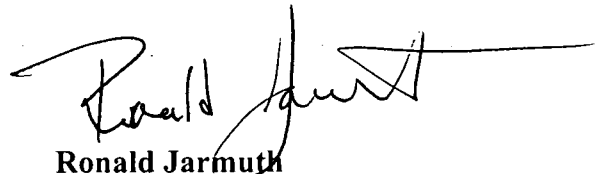
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**PROOF OF SERVICE**

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I certify that on July 26, 2018 I served Appellant's "Reply to Appellant's Petition / Motion for Rehearing En Banc / Rehearing" by depositing a copy of same in the United States Mail, postage prepaid, addressed to Respondent's common counsel, Henrietta Golding and Alicia Thompson; McNair Law Firm, P.A.; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164

July 26, 2018



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JUL 27 2018

SC Court of Appeals

Ronald Jarmuth  
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July 26, 2018

The Honorable Jenny Abbott Kitchings, Clerk  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211-1629  
803-734-1890

Re: Reply to Petition For Rehearing / Rehearing En Banc  
Jarmuth v International Club HOA et al  
2009CP263596 in the Court of Common Pleas, Horry County  
Appellate No. 2016- 001063

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JUL 27 2018  
SC Court of Appeals

Dear Madam Clerk:

Please file the attached Appellant's Reply to Respondents' Return to Petition / Motion for Rehearing En Banc / Panel Rehearing.

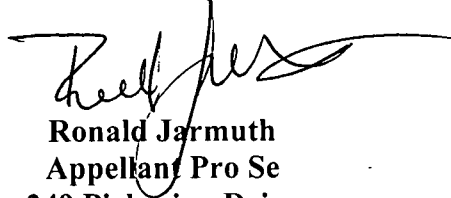
The Petition for Rehearing was received by the Court and filed on July 11, 2018 (Mailed July 10, 2018).

The Return was mailed to the Court on July 20, 2018. Per SCRAP Rule 240(f) Petitioner has five (5) days to file a Return. However, since the five days traverses a weekend, Per SCRAP Rule 263 (a) Time Petitioner has seven days from the date of filing to file this Reply (must be mailed no later than July 27, 2018. This reply is thus timely filed.

The Reply is provided as one unbound plus six bound copies.

Thank you for your attention to this matter.

Sincerely,



Ronald Jarmuth  
Appellant Pro Se  
249 Pickering Drive  
Murrells Inlet, SC 29576

1 Enc: as

Cf: Henrietta Golding and Alicia Thompson, Attorneys for Respondents

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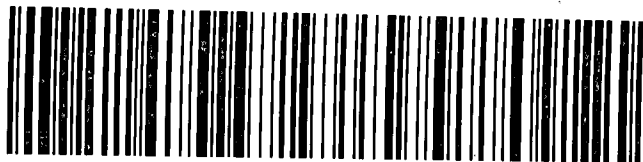
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