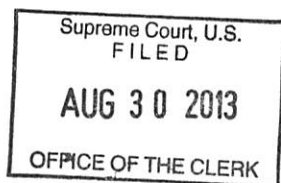


13_{No:} 294



IN THE
Supreme Court of the United States

RANDALL L. LESHIN, et al.

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD G. ELIE, ESQ.

Attorney for Petitioners

712 East McNab Rd.

Pompano Beach, Florida 33060

(954) 941-9711 (Telephone)

(954) 941-9750 (Facsimile)

richardgelie@yahoo.com

QUESTIONS PRESENTED

I. WHETHER A COURT MAY PROCEED WITH AN INDIRECT CIVIL CONTEMPT TRIAL WITHOUT ISSUING A SUFFICIENT SHOW CAUSE ORDER, AND IS A FAILURE TO GIVE ADEQUATE NOTICE AND OPPORTUNITY TO PREPARE A DENIAL OF A MEANINGFUL OPPORTUNITY TO BE HEARD?

II. WHETHER THIS COURT SHOULD REASSESS THE PROCEDURES USED FOR CONTEMPT PROCEEDINGS INVOLVING LENGTHY, COMPLEX AND CONFUSING CONSENT DECREES, WHERE INADVERTANT TECHNICAL VIOLATIONS ARE UNAVOIDABLE.

III. WHETHER A TRIAL COURT MAY CONVERT A CONTEMPT SANCTION TO A MONEY JUDGMENT WITH THE IMPLICATION OF SERIAL RECONVERSION TO CONTEMPT IF NOT PAID AND WHETHER CONVERTING A CONTEMPT SANCTION TO A MONEY JUDGMENT WITHOUT A JURY TRIAL IS A DENIAL OF THE 7TH AMENDMENT RIGHT TO JURY TRIAL?

IV. WHETHER, FOR ANY OF THE FOREGOING GROUNDS, THE COURTS BELOW VIOLATED DUE PROCESS AND DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONED SUCH A DEPARTURE, AS TO WARRANT CERTIORARI?

PARTIES TO THE PROCEEDING AND RULE
29.6 CORPORATE DISCLOSURE
STATEMENT

The parties to the proceeding in the Eleventh Circuit, whose judgment is sought to be reviewed, are:

- Randall Leshin, Esq., defendant, appellant below, and petitioner here.
- Randall L. Leshin, P.A., defendant, appellant below, and petitioner here.
- Express Consolidation, Inc., defendant, appellant below, and petitioner here.
- Charles Ferdon, defendant, appellant below, and petitioner here.
- Debt Management Counseling Center, Inc., Appellant below, and petitioner here.
- Federal Trade Commission, plaintiff, appellee below, and respondent here.

The corporate petitioners herein have no parent companies and there is no publicly held company that owns 10% or more of any of the corporations' stock.

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OPINIONS BELOW

The opinions in chronological order below are reported as follows: *FTC v. Leshin*, 618 F.3d 1221 (11th Cir., 2010), App. B. *FTC v. Leshin*, Case 12-12811, opinion dated June 5, 2013 (no F.3d cite as of this writing). App. A.

JURISDICTION

The Order of the United States Court of Appeals for the Eleventh Circuit was entered on June 5th, 2013. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) and Sup. Ct. Rule 10(a).

NOTA BENE

This case has its genesis in an un-noticed indirect civil contempt trial commenced during a status conference. The trial court below held the trial without any notice, without complying with the Federal Rules of Civil Procedure, and without complying with the Fifth Amendment to the Constitution of the United States of America.

This Court has defined procedural due process in the following terms: The hearing must be held "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U. S. 545, 380 U. S. 552 (1965). "In the present context, these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed [action], and an effective opportunity to defend by confronting any adverse witnesses and

by presenting his own arguments and evidence orally." *Goldberg v Kelly* 397 US 254, 267-8 (1970). "The protection afforded by the constitutional guarantee of due process of law extends, of course, into every type of legal proceeding. In observing due process of law, the opportunity to be heard must be full and fair, not merely colorable or illusive." *Tomayko v. Thomas*, 143 So.2d 227 (Fla. 3rd DCA 1962).

In several lower court decisions, trial courts have found that the Rules of Civil Procedure apply to civil contempts. See i.e. *Consolidation Coal Company v. Local Union No. 1784*, 514 F.2d 763 (6th Cir. 1975) ("Unfortunately, what procedures due process requires for a finding of civil, rather than criminal, contempt may be less clear." See *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444, 31 S.Ct. 492, 55 L.Ed. 797 (1911); *Philippe v. Window Glass Cutters League*, 99 F.Supp. 369, 374 (W.D.Ark.1951). "Like any civil litigant, a civil contemnor is . . . clearly entitled to those due process rights, applicable to every judicial proceeding, of proper notice and an impartial hearing with an opportunity to present a defense") cf *Rodgers v Webster*, 776 F.2d 607 (6th Cir. 1975). In *United Mine Workers v Bagwell*, 512 U.S. 821(1993) the state trial court permitted the parties months of preparation and discovery. See *Bagwell*, at 824. Unlike in *Bagwell*, the Federal Rules of Civil Procedure were not followed below. The rules exist to preclude "trial by ambush". See, i.e, Fed.R.Civ.P. 16 and 26; *Macaulay v. Anas*, 321

F.3d 45, 50 (1st Cir. 2003) (pretrial discovery rules exist to prevent trial by ambush); *Taylor v. Woods*, 241 F.R.D. 421, 424 (D.R.I. 2006) (“The Federal Rules of Civil Procedure prevent trial by ambush, and so does this Court.”).

The Fifth Amendment Due Process provisions exist to mandate basic fairness in any court proceeding, regardless of the objective of the parties or the trial judge. Trial by ambush violates that basic fairness.

Within this framework, the basis for the insertion of this *Nota Bene*, *Certiorari* becomes warranted in cases where the lower tribunal(s) “has [or have] so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.” Sup.Ct. Rule 10(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to

be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Seventh Amendment provides as follows:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

1. In 2006, the Federal Trade Commission (FTC) brought suit against Petitioners, alleging

violations of, inter alia, the Federal Telephone Consumer Protection Act. Petitioner Express Consolidation, Inc. was a §501(c)(3) tax exempt organization which administered debt consolidation agreements for individuals seeking relief from crushing debt. Mr. Leshin served as its executive director, and Mr. Ferdon served as its vice president.

2. The litigation concluded with a consent decree entered on May 5, 2008. The consent decree, which had no findings of liability and no admissions of wrongdoing, was 76 pages long, and included a 40 million dollar judgment, which was *suspended* based on Petitioners ability to pay. Only one percent of the 40 million, or \$400,000.00, was paid to settle the case, although this important fact escaped the lower appellate court, despite a motion for clarification after the initial opinion below (which motion was simply denied without explanation).

3. Some nine months after the consent decree was entered the court set a *status conference* for February 13, 2009. That status conference was not set by written order; it was done at a brief telephonic hearing on January 16, 2009. App. H. Subsequent to the verbal order setting the status conference, the FTC filed a 22 page motion on January 28, 2009, seeking an order to show cause why Petitioners should not be held in contempt for violations of the consent decree.

4. After the FTC filed their motion, the trial court entered a written order, App. G, shortening the time allowed by the local rules for the Petitioners to respond, allowing only a few days to respond to the 22 page motion for order to show cause. This written order shortening time is what the lower appellate court was apparently calling the Order to Show Cause. It clearly was not. Unknown to Petitioners by this order or any notice or warning, they were actually "responding" to what eventually turned out to be a contempt "trial."

5. There was never any real Order to Show Cause entered. There was no pre-trial order giving notice of what was going to be heard. There was no order setting trial. All there was was a verbal order setting a *status conference*. There was no order or notice that the contempt "trial" might result in a money judgment against the Petitioners, jointly and severally. There was no compliance with Fed.R.Civ.P. 16 or 26. There was no opportunity to engage in meaningful discovery. In short, Petitioners were required by the trial judge to try a contempt trial for which no Order to Show Cause was *ever* entered, which was *never* noticed as a trial (for contempt or for a money judgment), and which was only verbally noticed - *as a status conference* - with no opportunity to take discovery or adequately prepare prior to trial. No actual, real notice was given of what was to be heard, nor was any real, meaningful opportunity given to prepare for what was to be heard, which itself was never made clear until the day "trial" was commenced in the guise of

a status conference.

6. The court found the Petitioners in contempt for violating certain technical terms of the consent decree, despite Petitioners good faith *belief* that they were compliant. After the trial, the district court judge was explicit in her statements that the contempt proceedings were intended to “...vindicat[e] the court’s order” App. F at 97a, and that at least part of the funds would go directly to the Treasury, App. F at 84a, 93a, not the consumers, so they didn’t get a “windfall.” App. F at 84a, 87a, 89a. These statements leave no room for doubt what the trial judge’s true intent was; it was to *punish* the Petitioners by indirect criminal contempt for violating her order. However, to temper the procedural flaws in the proceedings, and “bullet-proof” the order, the judge entered what she claimed to be a “compensatory damages” sanction. That sanction was an order for the Petitioners to disgorge *all fees* they had collected on certain contracts, regardless of the fact that the contract services had been provided, and regardless of the fact that Petitioners had to pay for the operation of the business in order to provide them. The total of the contempt sanction of disgorgement was over \$594,000.00, App. E, or almost one and a half times *more* than the *entire settlement* paid to satisfy the underlying consent decree. *In addition*, Petitioners were required to *transfer* those contracts to another provider (selected by the FTC) that *continued providing those contract services*, while charging the *same* (or greater) fees.

7. The problem with this so-called compensatory sanction was that by requiring the very contracts at issue to continue in place, only through a different provider, the consumers continued paying the same fees for a service they wanted, contracted for, and paid for. So it would be *impossible* for the *Petitioners* collection of fees for those services to be compensatory harm or damages to the consumers, if *someone else's* collection of the *same fees on the same contracts was not*. There was *no actual harm or damage sustained by the consumers*. Instead, the sanction was clearly *punishment* for the *Petitioners'* *alleged technical violations* of the consent decree. This is how the trial court "vindicated the Court's authority." App. F, p. 97a. In other words, the sanction was not compensatory at all, *and by definition couldn't be*, but was, rather, punitive in nature, *particularly where a portion of the sanction was to be paid to the U.S. Treasury and not the consumers*. App. F, p. 84a, 90a and 93a.

8. *Petitioners* sought review in the Eleventh Circuit Court of Appeals which, under the abuse of discretion standard, affirmed the trial court's orders. App. B, *FTC v. Leshin*, 618 F.3d 1221 (11th Cir., 2010). However, the Eleventh Circuit did not adequately address how the "compensatory" sanction actually constituted "damages" sustained by the consumers, other than to say the consumers would not have paid *Petitioners* had they been in compliance. That does not address how consumers

were actually harmed, if they subsequently continued receiving the same services for the same fees, only provided by someone else. In fact, continuing the contracts militates in favor of finding the sanction to be punitive as opposed to compensatory. If this was a true compensatory award, then had the consumers been harmed by *Petitioners* collection of fees, how could they *not* be harmed when another provider collected those fees? The appellate court also would not address the provision in the trial court's sanction orders that allowed the FTC to move to "convert" the "compensatory" contempt sanction to a money judgment if it was not paid in full, saying that issue was not ripe. App. B, at 52a, *Leshin*, at 1239.

9. After the case was returned to the trial court, further proceedings were held in which the court determined that the entire sanction amount had not been paid, and also determining that the *Petitioners* only had the ability to pay a limited amount towards that sanction, which limited amount was, in fact, paid. After the payment, the trial court sent the matter to the Magistrate judge, who recommended, though admitting there was no precedent for it, that the balance "owed" on the "compensatory contempt sanction" be *converted* to a final money judgment, *along with the implied possibility of having it converted back to a contempt sanction if the final money judgment was not satisfied.* In other words, the Magistrate judge suggested that a failure to pay the execution on a money judgment could result in the

Petitioners being serially held in contempt, again, *for the same actions*:

“The FTC undoubtedly recognizes that the Court may negatively consider any later effort to reopen contempt proceedings, if the money judgment is not executable following the grant of this motion. Though there is no legal merit to Defendants’ ping-pong argument now, the Court’s exercise of equitable jurisdiction is fully within its discretion and may be reassessed where appropriate.” App. D, at 74a.

10. The trial court adopted the Magistrate’s recommendation and “converted” the contempt sanction to a final money judgment. App. C. The Petitioners again appealed to the Eleventh Circuit Court of Appeal. The Eleventh Circuit again reviewed the case, and though agreeing that this was a case of first impression, *and that no precedent supported the “conversion,”* it nevertheless affirmed the trial judge’s order converting the “compensatory sanction” to a money judgment, with the future possibility that it could be serially converted back to a contempt order, *for the same underlying contempt*, if the money judgment was not satisfied. (“In other words, the contempt ends when the contemnor pays the full amount.”) App. A, at 13a. *FTC v. Leshin*, Case 12-12811, opinion dated June 5, 2013 (no F.3d cite as of this writing). This despite the statement in the first appellate opinion that “inability to pay may be

relevant to and provide a defense for contempt...” App. B, at 52a. *Leshin 1* at 1239.

11. This Petition for Certiorari follows because of the important judicial and public policy issues raised in the proceedings below, which first and foremost includes the total lack of due process pursuant to *United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994). The other issues include the mislabeling of what was clearly an indirect criminal contempt as a civil contempt, and the complete lack of any guidance as to the proper procedures to be followed in these circumstances, where a so-called compensatory contempt sanction is “converted” to a money judgment without a jury trial as required by the 7th Amendment. It is important for this Court to address these issues, because contempt procedures are used by literally every court in the land on a frequent basis. They are also coming up more and more frequently in this Court, especially concerning enforcement of complex consent decrees. This Court has not really addressed contempt in this context since *Bagwell*, almost 20 years ago.¹ Since that time we now live in a new world, with new technology serving many millions of new consumers. In this new context, consent decrees typically run 50 to 75 or even 100 pages or more, and are so complex and confusing as

¹ Cf. *Turner v. Rogers*, 546 U.S. ____, 131 S. Ct. 2507 (2011). “Neither do we address what due process requires in an unusually complex case where a defendant “can fairly be represented only by a trained advocate.” at ____ (page 16 of Slip Opinion).

to be impossible to comply with *in toto*, *frequently resulting in unintended technical violations*. It is time for this Court to take a fresh look at the due process issues surrounding contempt, particularly in the context of these increasingly lengthy, complex and confusing consent decrees, where so much is at stake. *Turner*, Id.

12. Petitioners contend that it is not enough that a party be given “mere” notice and an opportunity to be heard, *although even that did not occur here*, where both the notice and the opportunity to be heard were deficient. The Federal Rules of both Civil and Criminal Procedure, notions of both procedural and substantive Due Process, and the implications of the 5th, 6th and 7th Amendments all cry out for a more definitive procedure to follow so that all parties who stand accused of contempt before the bar of justice, and also stand to be sanctioned in amounts greater than any amount paid in the underlying litigation, are afforded the same rights as ordinary litigants. In the case of civil proceedings those rights involve ordinary discovery, disclosure and proper preparation for the opportunity to be heard, the same as in criminal proceedings where litigants are afforded proper discovery, *Brady* materials and such other discovery as are afforded any persons accused of a crime. Contempt proceedings should not be allowed to evolve into the government’s or the courts’ new, favorite “go-to” tool to shortcut Due Process and deprive persons of jury trials and other rights, in order to punish technical violations of

lengthy, complex orders, without giving defendants the fair chance to prove their compliance, or at least good faith and mitigation of damages.

13. Petitioners recognize that there is a mountain of case law stating that courts have “broad discretion” to fashion a “remedy” (singular, not serial) for contempt. But since this Court has not meaningfully addressed contempt in this context since *Bagwell*, almost 20 years ago, it is now time to re-climb that mountain. In the modern world, with consent decrees now typically running to fifty pages or more, and with courts now claiming to be able to enter contempt sanctions and *convert* them to money judgments without a jury trial, and convert them *back* to contempt, back and forth like a ping-pong game, without proper procedures specifically mandated by this Court, trial courts below would be able to enter virtually any kind of serial sanctions *and* judgments against litigants accused of contempt. There would be no rhyme or reason. Due Process would be meted out arbitrarily based on the whims and caprices of judges and not based on any objective, Constitutional standard.

14. Under circumstances such as these, Due Process is critical because the only standard of review is “abuse of discretion”, which makes contempt next to impossible to appeal. That is a specific evil this Court noted in *Bagwell*, which was not addressed when the merits of the contempt

at issue there were reached instead.² And this lack of realistic procedures has already resulted in a conflict between the Circuits. In *Federal Trade Commission v. Kuykendall*, 371 F. 3d 745 (10th Cir. 2004), the 10th Circuit allowed a contempt defendant to do discovery and present evidence mitigating damages, while the 11th Circuit in the instant case used a presumption to assess a “compensatory” sanction of “all fees” without giving the alleged contemnors any real opportunity to prepare for or be heard on that issue. The use of a “presumption” without even the opportunity to rebut said “presumption” is fatal to Due Process. Even in a civil action a defendant is entitled to defend on damages or rebut “presumptions.” In a criminal case, the defendant is afforded an opportunity to offer evidence in mitigation of punishment, as well as have a jury trial. Yet nothing approaching this was afforded Petitioners below. It was nothing more than a summary trial where Due Process was ripped from the nurturing womb of Justice and simply dispatched without a second thought.

15. There are also additional Constitutional issues here. If the case below was ever a situation

² “But the contempt power also uniquely is “liable to abuse.” *Bloom*, 391 U.S., at 202, 88 quoting *Ex S.Ct.*, at 1482, *parte Terry*, 128 U.S. 289, 313, 9 S.Ct. 77, 82-83, 32 L.Ed. 405 (1888). *Bagwell*, at 831. And “particularly “in view of the heightened potential for abuse posed by the contempt power,” *id.*, at 500, 94 S.Ct., at 2704; see also *Harris v. United States*, 382 U.S. 162, 164-165, 86 S.Ct. 352, 354, 15 L.Ed.2d 240 (1965). *Id.*

with the possibility of a money judgment being entered, then the Seventh Amendment is implicated and the Petitioners were entitled to notice that a money judgment could be entered, and the right to have a jury trial. Such right was denied. Even a "compensatory" contempt sanction is not a money judgment because it would not be enforceable by a Rule 69 Writ of Execution. Does the "broad discretion" afforded in contempt proceedings "trump" the Constitution? To the extent that a contempt sanction can just be "converted" to a money judgment in violation of the rights afforded by the 7th Amendment?

16. Because there was no meaningful notice as to the contempt "trial," or what damages were sought, let alone the right to do discovery on those matters, and prepare, the trial court failed to afford the defendants adequate Due Process. The trial judge wanted to vindicate the authority of the court, not really compensate customers who paid fees. How were those customers harmed? How *could they* have been? *Especially* in light of the fact that the Court *required* their contracts to be transferred to another provider to continue getting the *same* contractual services for the *same* (or even greater) fees. This was obviously not your garden-variety compensatory sanction. Nonetheless, the trial judge simply ordered a court-appointed Monitor to calculate the amount of *all fees* without any trial on damages whatsoever. This was a violation of the Petitioner's rights to confront witnesses against them as guaranteed by the Sixth

Amendment in a criminal case and the Fifth Amendment and Federal Rules of Evidence in a civil case. Furthermore, Equal Protection issues arise when litigants in the same posture are treated differently, procedurally, in identically empowered Article III courts. See, i.e., *Kuykendall*, supra. These issues are unaddressed but are equally important and raise the *same public policy considerations*: “What is sufficient ‘notice’?” and “What is a sufficient ‘opportunity to be heard’?” And when does notice fall short of Due Process; and when does the opportunity to be heard fall short of Due Process?

17. At the very least, in *Bagwell* and *Kuykendall* those petitioners were given ample and sufficient notice, an opportunity to engage in meaningful discovery, and an opportunity to mount a proper defense. These things were denied to Petitioners herein at the trial and appellate levels.

18. The exploration of these questions is paramount to the efficient and fair administration of the business of virtually every court in the land. Further, this Court should determine whether a single contempt may be converted back and forth serially, and possibly ad infinitum, from a “compensatory” sanction to a money judgment and if not satisfied in execution, back to a contempt order. Also, this Court should decide uniform, proper procedures to be used in civil contempt proceedings in the more-and-more common situations involving lengthy, complex and confusing

consent decrees, where unintended technical violations can result in the possibility of a money judgment greater than the amounts paid in the underlying case, which might be convertible back and forth between money judgment and contempt, and under what circumstances said procedures should be utilized.

REASONS FOR GRANTING THE PETITION

The proceedings below were held by the trial judge with virtually no notice. In fact, the trial judge never entered a show cause order, a pretrial order, or a trial order. No discovery deadlines were set, and the Petitioners had only a few days over a holiday weekend to prepare their response to the FTC's Show Cause motion. This does not constitute preparing a defense, only a response. This was clearly insufficient time to mount a competent defense. In fact, though the Respondent had nine months to prepare its motion, plan its attack, and significant resources to subpoena witnesses to appear with no notice or praecipe to the Petitioners, the Petitioners had virtually no time to prepare anything. In fact, the limited time allowed to respond to the original 22 page Motion for Order to Show Cause was shorter than the usual time provided by the local rules to respond to any motion.

No order to show cause was in fact entered. No actual notice of the contempt "trial" was ever given. No damages trial was held. At the end of the

proceedings, the trial judge entered an order of contempt and then simply held that the sanction would be disgorgement of "all fees" and then simply held that any unpaid disgorgement amount would be "converted" to a money judgment which might be reconverted to some new amorphous, undefined contempt, if the execution on the money judgment was not satisfied. The trial court required and FTC obtained all of the Petitioners *exempt* and non-exempt assets in the proceedings below, which ordinarily would have purged any civil contempt. Unsatisfied in exacting punishment, the trial judge and the FTC sought to permanently continue the contempt. In other words there would be no end to the contempt order, there could be no purge, despite inability to pay; the contempt would go on and on forever without end, converting to and fro from contempt to execution to contempt to execution. This not only lacks Due Process, it lacks any form of finality or even common sense.

This case represents a gross miscarriage of justice and a clear departure from any known Constitutional principles. It is pregnant for review.

CONCLUSION

The procedures employed below, or the lack thereof, the rush to summary trial by ambush, the lack of appropriate notice of any sort, and the consequent misuse of convertible revolving-door contempt-to-money-judgment-to-contempt orders simply makes no sense. No litigant would ever be

able to properly mount a defense to a contempt allegation; judges would be free to fashion any procedural device they chose to bend the contempt power in ways unimpaired by the Constitution and in dereliction of this Court's admonishments in *Bagwell*. Simply put -- no one would be able to know what was expected of them. As this Court held in *Goldberg*, supra, courts are constrained to provide not only notice and an opportunity to be heard, but that the notice be *meaningful* and give a litigant sufficient time to respond, and a *meaningful* opportunity to defend. Anything short of that violates the object of the Fifth Amendment which is ultimately the "full and fair" opportunity to prepare and be heard. If that full and fair opportunity has been denied in any portion, then any proceedings held below must be reversed in their entirety.

Certiorari should be granted and the decisions below should all be quashed.

Respectfully submitted,

Richard G. Elie, Esq.
Attorney for Petitioners
712 East McNab Rd.
Pompano Beach, Florida 33060
(954) 941-9711 (Telephone)
(954) 941-9750 (Facsimile)
richardgelie@yahoo.com