EARLE A. PARTINGTON #45731
1330 BISHOP STREET, SUITE 1330
HONOLULU, HAWAII 96813
TELEPHONE: (808)526-9500
FACSIMILE: (808)537-1144
EMAIL: info@partington-foley.com

Respondent *pro se*

FILED
AUG 14 2015
STATE BAR COURT CLERK'S OFFICE
SAN FRANCISCO

RECEIVED
AUG - 6 2015
STATE BAR COURT CLERK'S OFFICE
SAN FRANCISCO

STATE BAR COURT

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of EARLE A. PARTINGTON, No. 45731, A Member of the State Bar	Case No.: 12-J-10617 RESPONDENT'S ANSWER; EXHIBIT A; CERTIFICATE OF SERVICE

RESPONDENT'S ANSWER

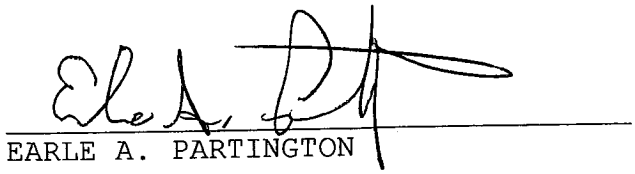
Respondent Earle A. Partington hereby answers the Notice of Disciplinary Charge in the above matter which he received by certified mail on July 17, 2015.

Respondent hereby admits all of the disciplinary charges alleged in paragraphs 1-15 of the Notice. Respondent has always been willing to admit these allegations and does not know why this matter has gone to formal disciplinary proceedings.

Respondent hereby raises the defense of denial of his federal and state constitutional rights to due process of law in the federal litigation for judicial review occurring *after* the

kwiktag® 197 145 367

discipline set forth in the Notice and as detailed in Exhibit A attached hereto.



EARLE A. PARTINGTON
Respondent *pro se*

Electronically Filed
Supreme Court
SCAD-11-0000162
02-JUN-2015
11:47 PM

SCAD-11-0000162

IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL,	)
	)
Petitioner,	)
	)
v.	)
	)
EARLE A. PARTINGTON,	)
	)
Respondent.	)
	)

RESPONDENT'S MOTION TO
VACATE THE ORDERS FILED IN THIS CASE

DECLARATION OF JEFFREY A. DENNER

DECLARATION OF EARLE A. PARTINGTON

EARLE A. PARTINGTON
1001 Bishop Street, Suite 1330
Honolulu, Hawaii 96813
Telephone: (808) 526-9500
Facsimile: (808) 537-1144

EARLE A. PARTINGTON
Respondent *pro se*

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... i-iv

I. INTRODUCTION 1

II. FACTS 3

III. THE D.C. CIRCUIT JUDGMENT AND OPINION IS VOID FOR LACK OF SUBJECT MATTER JURISDICTION TO THE EXTENT THAT IT ADDRESSED PARTINGTON'S APA CLAIMS ON THE MERITS IN THE FIRST INSTANCE, AN ISSUE THAT HAS NEVER BEEN LITIGATED IN ANY COURT OF THE FIRST INSTANCE 5

IV. THE FEDERAL COURTS HAVE DENIED PARTINGTON HIS RIGHTS TO DUE PROCESS (INCLUDING EQUAL PROTECTION) UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, §5, OF THE HAWAII CONSTITUTION 9

A. Partington was denied prior notice that the D.C. Circuit was usurping the district court's exclusive, original jurisdiction in the first instance to decide the merits of his APA judicial review 9

B. Partington was denied his right to judicial review in the district court 10

C. Partington was denied his right to an appeal to a court of appeals from a district court decision on the merits of his APA claims 12

V. PARTINGTON WAS DENIED ACCESS TO THE FEDERAL COURTS IN VIOLATION OF HIS FEDERAL AND STATE CONSTITUTION RIGHTS TO (1) DUE PROCESS OF LAW, AND (2) PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES 12

VI. PARTINGTON WAS DENIED HIS FEDERAL AND STATE CONSTITUTIONAL PROTECTION OF THE LAWS IN THAT HE WAS SINGLED OUT AS THE ONE AND ONLY LAWYER SUSPENDED BY ONE OF THE JUDGE ADVOCATES GENERAL WHO WAS NOT AND IS NOT ENTITLED TO THE DUE PROCESS RIGHTS SET FORTH ABOVE, PRIMARILY ACCESS TO THE FEDERAL COURTS 13

VII. CONCLUSION 19

DECLARATION OF JEFFERY A. DENNER

DECLARATION OF EARLE A. PARTINGTON

TABLE OF AUTHORITIES

CASES PAGE

Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) 6

Bank of Hawaii v. Kunimitsu, 91 Haw. 372, 984 P.2d 1198, (1999) 1

Bender v. Willamsport Area Sch. Dist.,
475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) 5, 6

In re Brux, 216 F.Supp. 956 (D.Haw.1963) 12

Burnham v. Superior Ct. of Calif., County of Marin,
495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) 7

Carroll v. United States, 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed.2d 1442 (1957) 5

Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963) 8

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) 7

Gschwind v. Cessna Aircraft Co., 232 F.3d 1342 (10th Cir.2000) 7

Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed 530 (1909) 17

In re Harper, 725 F.3d 1253 (10th Cir.2013) 1

Home Idem. Co. v. Arapahoe Drilling Co., 115 N.M. 204, 848 P.2d 1131 (App.1993) 10

Honolulu Weekly, Inc. v. Harris, 298 F.3d 1037 (9th Cir.2002) 19

Hormel v. Lelvering, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed 1037 (1941) 9

Hovey v. Elliot, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897) 14, 17

HRPT Properties Trust v. Lingle, 715 F.Supp.2d 1115 (D.Haw.2010) 18

Industrial Addition Ass'n v. C.I.R., 323 U.S. 310, 65 S.Ct. 289, 89 L.Ed. 260 (1945) 6

Insurance Corp. of Ireland v. Compagnie des Bauxite de Guinee,
465 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) 8

Johnson v. Manhattan Ry., 289 U.S. 479, 53 S.Ct. 721, 77 L.Ed. 1331 (1933) 8

CASES PAGE (continued)

Jones v. Helms, 452 U.S. 412, 101 S.Ct. 2434, 61 L.Ed.2d 118 (1981) 18, 19

Kansas City So. Ry. v. Great Lakes Carbon Corp., 624 F.2d 822 (8th Cir.1980) 7

Kamaole Point Dev. LP v. County of Maui, 573 F.Supp.2d 1354 (D.Haw.2008) 18

KNG Corp. v. Kim, 107 Haw. 73, 110 P.3d 397 (2005) 10

Lee v. United Pub. Workers, AFSME, Local 646, AFL-CIO,
125 Haw. 317, 260 P.3d 1135 (App.2011) 13

Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976) 6

Little v. Crawford, 449 F.3d 1075 (9th Cir.2006) 13

Miller v. Avirom, 127 U.S.App.D.C. 367, 384 F.2d 319 (1967) 8

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) 10

N Group LLC v. Hawaii County Liquor Comm'n, 681 F.Supp.2d 1209 (D.Haw.2009) 18

O'Rourke Bros., Inc. v. Nesbitt Burns, Inc., 201 F.3d 948 (7th Cir.2000) 7

Partington v. Houck, 406 U.S.App.D.C. 257, 723 F.3d 280,
mandamus denied, *In re Partington*, 134 S.Ct. 699 (2013) 4, 11, 18

Partington v. Houck, 840 F.Supp.2d 236 (D.D.C.2012) 4, 8, 9

Partington v. Houck, 2014 WL 5131658 (D.C. Cir.2014) 5

Public Citizen, Inc. v. NHTSA, 376 U.S.App.D.C. 443, 489 F.3d 1279 (2007) 7

Ramil v. Keller, 68 Haw. 608, 726 P.2d 254 (1986) 17

Rex v. Sussex Justices, Ex parte McCarthy, [1924] 1 K.B. 256, [1923] All E.R. 233 (1923) . 19

Romero v. Star Markets, Ltd., 82 Haw. 402, 922 P.2d 1018 (App.1996) 10

Roxas v. Marcos, 89 Haw. 97, 969 P.2d 1209 (1998) 9

Singleton v. Wolff, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) 9

CASES PAGE (continued)

Skipper v. French, 130 F.3d 603 (4th Cir.1997) 9

State v. Adams, 97 Haw. 475, 40 P.3d 877 (2002) 10

State v. Miller, 84 Haw. 269, 273, 933 P.2d 606 (1997) 13, 19

State v. Villeza, 85 Haw. 258, 942 P.2d 522 (1997) 14

Steel Co. v. Citizens for Better Env't,
523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) 6

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148, 128 S.Ct. 761, 169 L.Ed.2d 627 (2008) 6

United States v. General Motors Corp., 171 U.S.App.D.C. 27, 518 F.2d 420 (1975) 8, 9

Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073, 75 L.Ed.2d 1060 (1985) . . . 18

Wing Wu Chan & Co. v. Hawaiian Gov't, 7 Haw. 498 (1888) 17

Young v. County of Hawaii, 947 F.Supp.2d 1087 (D.Haw.2013) 18

UNITED STATES CONSTITUTION

Fifth Amendment 10, 18

Fourteenth Amendment 18

UNITED STATES CODE

5 U.S.C. §702 3

28 U.S.C. §1291 . . . . . 4, 5, 7

28 U.S.C. §1331 . . . . . 4, 6, 7

FEDERAL RULES OF CIVIL PROCEDURE PAGE continued)

Rule 11 11

Rule 26 11

Rule 33 11

Rule 36 11

Rule 37 11

RULES OF THE SUPREME COURT OF THE STATE OF HAWAII

Rule 2.15(c)(1) 1, 2

Rule 2.15(c)(2) 1, 2, 3

HAWAII STATE CONSTITUTION

Article I, §5 . . . . . 1, 10

HAWAII RULES OF CIVIL PROCEDURE

Rule 3.3(a)(1) 3

SCAD-14-0000679

IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL,	)
	)
Petitioner,	)
	)
v.	)
	)
EARLE A. PARTINGTON,	)
	)
Respondent.	)
	)

RESPONDENT'S MOTION TO VACATE THE ORDERS FILED IN THIS CASE

Respondent Earle A. Partington respectfully moves this court for an order (1) vacating this court's order to show cause why reciprocal discipline should not be imposed upon Respondent, (2) all orders subsequent thereto (including the order of suspension filed November 9, 2011), and (3) restoring Respondent to the *status quo ante*.

This motion is based upon Rule 2.15(b) & (c) of this court, the First, Fifth, and Fourteenth Amendments of the United States Constitution, and Article I, §§4 & 5, of the Hawaii Constitution, as well as the attached memorandum and Declaration of Jeffrey A. Denner.

DATED: Honolulu, Hawaii, June 2, 2015.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Respondent *pro se*

SCAD-11-0000162

IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL,	)
	)
Petitioner,	)
	)
v.	)
	)
EARLE A. PARTINGTON,	)
	)
Respondent.	)
	)

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Respondent Earle A. Partington ("Partington") is asking this court to set aside the orders of this court that resulted in his suspension from the practice of law for 30 days and to restore him to the *status quo ante*. Article I, §5, of the Hawaii Constitution provides:

> No person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the laws, ...

An attorney has a property interest in his law license. *Bank of Hawaii v. Kunimitsu*, 91 Haw. 372, 388, 984 P.2d 1198, 1214 (1999). Attorneys facing disciplinary proceedings are entitled to the due process of law, including proper notice. *In re Harper*, 725 F.3d 1253, 1257 (10th Cir.2013).

Rule 2.15(c)(1) & (2) of this court's rules provides with regard to the imposition of reciprocal discipline:

> (c) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (b) above, the supreme court shall enter an order imposing the same or substantially equivalent discipline, or restrictions or conditions upon the attorney's license to practice law

> in this jurisdiction, unless Counsel or the attorney demonstrates, or it clearly appears upon the face of the other jurisdiction's record, that:
>
> > (1) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
> > (2) there was such an infirmity of proof establishing the factual basis for the discipline, or restrictions or conditions as to give rise to the clear conviction that the supreme court could not, consistent with its duty, accept as final the other jurisdiction's conclusion on that subject;

The issues Partington is raising relating to Rule 2.15(c)(1)[1] have *never* been litigated in any court and could not have been litigated when this court suspended Partington on November 9, 2011 (R 34), because these issues did not arise until 2013 after his suspension was concluded on February 29, 2012 (R 103).

II. FACTS

The general facts in this case are not in dispute. The Judge Advocate General of the Navy (NJAG) indefinitely suspended Partington from appearing as an attorney before all Navy and Marine Corps courts and boards in May 2010. The matter arose out of two statements Partington

---

[1] As to Rule 2.15(c)(2), Partington is aware that he raised this issue with this court prior to his suspension. He discovered that all courts treat another jurisdiction's discipline as virtually conclusive. In his federal litigation, Partington challenged the Navy defendants to point to any parts of the Navy record that supported the findings against him. They refused. Neither the Navy defendants, the D.C. Circuit, nor anyone else (including this court) have ever identified any such evidence. So long as no one will tell Partington how his first statement was false or where in the record he made the second statement, and he is barred from actually confronting in court the Navy defendants;he has been left to denying his guilt on paper. Because of the voluminous size of the Navy record, no court has been willing to go through the evidence with the necessary thoroughness to understand how the Navy defendants manipulated the evidence to reach the erroneous conclusion that Partington was guilty. Partington is left in the frustrating position that there is no evidence that he made the false statements and no one has or will identify any such evidence.

made in an appeal brief to the United States Navy-Marine Court of Criminal Appeals.[1]

The NJAG forwarded its suspension of Partington to this court which issued on April 19, 2011 (R 7), an order to show cause why reciprocal discipline should not be imposed. As Partington had not exhausted his right to judicial review in a United States District Court pursuant to the Administrative Procedure Act (APA) (5 U.S.C. §702), Partington sought a stay of this court's proceeding pending that review which this court denied. This court then suspended Partington for thirty days. Thereafter, Partington's litigation continued in the federal courts in the District of Columbia.

---

[1] The Navy alleged that the statements were false, but refused to tell Partington, despite multiple requests, how they were false. The first statement was that the military judge in the underlying court-martial had acquitted the accused of certain specifications under one charge. The Navy hearing officer found that the military judge had said that he was entering findings of not guilty as to the specifications in issue, *but that the military judge did not mean what he said*, and thus Partington's literally true statement was therefore false! The second statement concerned *when* Partington had made a motion at trial. The Navy hearing officer in his findings *sub silentio* changed the *past perfect tense* which Partington had used to the ordinary *past* tense and then found Partington had made a false statement which in fact he *never* made. The entire Navy record was filed by ODC in this case (R 1). Partington brings this matter to the court's attention so that this court will understand why he is so determined to pursue this matter. All Partington wants is the justice which has so far been denied to him. This memorandum will not discuss rule 2.15(c)(2) further.

This matter is still quite important to Partington. While this court did not stay reciprocal discipline, the State Bar of California (SBC) did stay such proceedings pending his federal litigation. As the federal litigation is over, the SBC has moved forward with reciprocal discipline based upon this court's discipline. Unless Partington admits to the SBC that he is actually guilty of the Navy charges, the SBC will not stipulate to reciprocal discipline and will file formal charges against Partington. As of now, the statutory costs Partington must pay to the SBC are over $3000. If there is no stipulated discipline, Partington's costs may double or triple. ODC has informed Partington that he would violate HRPC 3.3(a)(1) if he admits actual guilt as to the Navy charges if he knows that he is not guilty regardless of any adjudication. See Declaration of Earle A. Partington attached.

Partington sought judicial review of the NJAG suspension in the United States District Court for the District of Columbia, one of the district courts which Congress has vested exclusive, original jurisdiction to hear such reviews pursuant to 28 U.S.C. §1331 in cases such as Partington's case. The Navy defendants moved to dismiss on the ground that Partington had no right to judicial review whatsoever, and the district court granted that motion. *Partington v. Houck*, 840 F.Supp.2d 236 (D.D.C.2012). The district court *expressly* held that it had not addressed the merits of Partington's claims under the APA. 840 F.Supp.2d at 245.

Partington appealed to the United States Court of Appeals in for the District of Columbia Circuit which is a court with jurisdiction *limited* to appeals. 28 U.S.C. §1291. The Navy defendants promptly confessed error as to the district court's denial of judicial review. Partington sought remand to the district court in both his opening and reply briefs. The court of appeals first held that the district court had erred in denying Partington his statutory right to judicial review under the APA. *Partington v. Houck*, 406 U.S.App.D.C. 257, 267, 723 F.3d 280, 290 (2013). However, instead of remanding the case to the district court for a hearing on the merits of Partington's APA claims, the court of appeals (1) *sua sponte,* (2) without notice to the parties that the court intended to usurp the district court's exclusive jurisdiction, (3) without any briefing on the issue of subject matter jurisdiction of the court of appeals to hear the merits of Partington's APA claims *in the first instance*, and (4) contrary to published precedent of the D.C. Circuit that it had no such jurisdiction, affirmed the district court by deciding that there was sufficient evidence to support the NJAG's action. 406 U.S.App.D.C. at 262, 723 F.3d at 285.[2]

---

[2] The Supreme Court denied a petition for a writ of mandamus on this issue. *In re Partington*, 134 S.Ct. 699 (2013).

The court of appeals conducted the judicial review of Partington's APA claims *in the first instance* with no right of appeal thereafter nor prior notice to Partington that it was doing so.

As the subject matter jurisdiction of the court of appeals has never been litigated, Partington returned to the district court to move on his APA claims for judicial review. Partington argued that the court of appeals judgment was void because that court had and has no subject matter jurisdiction to review APA claims such as Partington's claims *in the first instance.* Both the district court and the court of appeals (2014 WL 5131658[3]) held the Partington had no right to attack the court of appeals judgment.

This motion is Partington's one and only chance to litigate the issues raised below. These arguments are supported by uncontested case law. The simple fact is that the Navy defendants only prevailed in the D.C. federal litigation brought by Partington by having the federal courts deny Partington his constitutional rights to petition the government for redress of grievances and to due process (including equal protection) of the law as set out below.

III. THE D.C. CIRCUIT JUDGMENT AND OPINION IS VOID FOR LACK OF SUBJECT MATTER JURISDICTION TO THE EXTENT THAT IT ADDRESSED PARTINGTON'S APA CLAIMS ON THE MERITS IN THE FIRST INSTANCE, AN ISSUE THAT HAS NEVER BEEN LITIGATED IN ANY COURT OF THE FIRST INSTANCE

The jurisdiction of the federal courts of appeal is prescribed by statute and is limited to *appeals* from final decisions of the federal district courts. 28 U.S.C. §1291; *Bender v. Willamsport Area Sch. Dist.*, 475 U.S. 534, 541-42, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501, 511 (1986); *Carroll v. United States*, 354 U.S. 394, 399, 77 S.Ct. 1332, 1336, 1 L.Ed.2d 1442, 1446

---

[3] *cert. denied*, 2015 WL 730989. This occurred on April 20, 2015, and concluded the federal litigation.

(1957). It is an established principle that the jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65, 128 S.Ct. 761, 772, 169 L.Ed.2d 627, 642 (2008). Federal courts have the duty to *sua sponte* determine if they have jurisdiction to hear a case; and these courts may not take jurisdiction over an appeal which is not authorized by statute. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 95, 118 S.Ct. 1003, 1013, 140 L.Ed.2d 210, 227 (1998); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 & 746, 96 S.Ct. 1202, 1204 & 1207, 47 L.Ed.2d 435, 439 & 442-43 (1976). Although Partington does not dispute the basic principle that a court must determine its own jurisdiction, *at the very least it must do just that.* That was not done in the federal courts.

"Subject matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt." *Ashcroft v. Iqbal*, 556 U.S. 662, 671, 129 S.Ct. 1937, 1945, 173 L.Ed.2d 868, 879 (2009). *Industrial Addition Ass'n v. C.I.R.*, 323 U.S. 310, 313, 65 S.Ct. 289, 291, 89 L.Ed. 260, 263 (1945). In the federal litigation, the first D.C. Circuit panel *never* determined if it had subject matter jurisdiction to review the merits of this case *in the first instance*, and it cannot be disputed that it did not and does not have such jurisdiction *in the first instance.* As previously noted, that original jurisdiction is vested *exclusively* in the district court pursuant to 28 U.S.C. §1331.

In *Bender*, the Supreme Court noted that

> This obligation to notice defects in a court of appeals' subject-matter jurisdiction assumes a special importance when a constitutional question is presented [as in the instant case]. In such cases we have strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation

> and a full development of the relevant facts. [475 U.S. at 541-42, 106 S.Ct. at 1331, 89 L.Ed.2d at 511.]

"A court lacks jurisdiction to consider the merits of a case over which it is without jurisdiction, and thus by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379, 101 S.Ct. 669, 676, 66 L.Ed.2d 571, 581-82 (1981). The "judgment of a court lacking jurisdiction is void." *Burnham v. Superior Ct. of Calif., County of Marin*, 495 U.S. 604, 608, 110 S.Ct. 2105, 2109-10, 109 L.Ed.2d 631, 638 (1990) (*per* Scalia, J., with three justices concurring and five justices concurring with the judgment); *accord Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1347 (10th Cir.2000); *O'Rourke Bros., Inc. v. Nesbitt Burns, Inc.*, 201 F.3d 948, 951 (7th Cir.2000); *Kansas City So. Ry. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 827 (8th Cir.1980).

Here, jurisdiction in the first instance was and is still vested in the district court. 28 U.S.C. §1331. A court of appeals has only *appellate* jurisdiction. 28 U.S.C. §1291. The merits of Partington's APA case (i.e., judicial review) were never addressed by the district court. Thus, judicial review on the merits of Partington's claims was not before the D.C. Circuit on appellate review. The D.C. Circuit in *Public Citizen, Inc. v. NHTSA,* 376 U.S.App.D.C. 443, 451, 489 F.3d 1279, 1287 (2007), recognized that:

> We first determine whether we have subject-matter jurisdiction to directly review the tire industry petitions' challenge to NHTSA's refusal to [review an agency action.] As we have explained: "Because district courts have general federal question jurisdiction under 28 U.S.C. §1331, *the normal default rule is that persons seeking review of agency action go first to district court rather than to a court of appeals. Initial review [of agency decision] occurs at the appellate level only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action.*" *Watts v. SEC.*, [375 U.S.App.D.C. 409, 413,] 482 F.3d 501, 505

> (2007) (Internal quotation marks and citations omitted). [Emphasis added.]

Accord Miller v. Avirom, 127 U.S.App.D.C. 367, 371-72, 384 F.2d 319, 321 (1967).

If the judgment of the D.C. Circuit is void for lack of subject matter jurisdiction, may it be attacked, collaterally or otherwise? As stated in *Johnson v. Manhatian Ry.*, 289 U.S. 479, 495-96, 53 S.Ct. 721, 727, 77 L.Ed. 1331, 1344 (1933):

> [A]n attack can be successful only where and to the extent that it discloses a want of power as distinguished from error in the exertion of power that was possessed.

The only exception to this rule is where a party has had an opportunity to litigate the question of subject matter jurisdiction; then an attack is barred by *res judicata* or collateral estoppel. *Insurance Corp. of Ireland v. Compagnie des Bauxite de Guinee*, 465 U.S. 694, 702 n.9, 102 S.Ct. 2099, 2014 n.9 72 L.Ed.2d 492, 501 n.9 (1982); *Durfee v. Duke*, 375 U.S. 106, 111, 84 S.Ct. 242, 245, 11 L.Ed.2d 186, 191 (1963). As the issue of subject matter jurisdiction was never litigated in the D.C. Circuit in *Partington v. Houck*, and such jurisdiction was lacking, that court's judgment is void and of no effect and thus may be collaterally attacked in this court.

The D.C. Circuit tried to circumvent this rule by claiming that it was empowered to uphold the district court on a different theory that the district court applied "as long as the record supports [the] reason[ing] and [the D.C. Circuit] avoid[ed] denying [Partington] a fair opportunity to dispute the facts material to the new theory.'" 406 U.S.App.D.C. at 262, 723 F.3d at 285. The D.C. Circuit cited to *United States v. General Motors Corp.*, 171 U.S.App.D.C. 27, 28, 518 F.2d 420, 421, (1975), but this case involved a summary judgment by the district court *on the merits*, not a judgment of this court *denying any and all right of review* and Partington had

no notice that the D.C. Circuit was doing what it did.[4] Unlike *General Motors*, Partington had *no* opportunity whatsoever to present his case to the district court, the only court with jurisdiction in the first instance to hear his APA claims. Partington was barred all access to the district court. *Partington v. Houck* is a unique case.

The district court never reviewed or passed on Partington's APA claims on the merits. The rule is well established that courts of appeals do not pass upon issues not litigated below as here where the district court *expressly* refused to review Partington's claims on the merits. *Singleton v. Wolff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826, 837 (1976); *Hormel v. Lelvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 85 L.Ed 1037, 1041 (1941); *Skipper v. French*, 130 F.3d 603, 610-11 (4th Cir.1997). The D.C. Circuit's failure to apply this law and determine that it did not have subject matter jurisdiction *in the first instance* denied the court of appeals that jurisdiction as a matter of law.

---

[4] See the Declaration of Partington's attorney in the federal courts attached hereto. Partington could not find a single federal court of appeals case in which any of the circuits upheld the jurisdiction of a court of appeals to decide *in the first instance* an APA appeal even remotely similar to the one on *Partington v. Houck* where the plaintiff was denied the right to "a fair opportunity to dispute the facts" in the district court. This court is requested take judicial notice of the contents of the record and file in the federal courts in *Partington v. Houck*, which is available on PACER. *See Roxas v. Marcos*, 89 Haw. 97, 110 n.9, 969 P.2d 1209, 1228 n.9 (1998). *Partington v. Houck* is a unique case.

IV. THE FEDERAL COURTS HAVE DENIED PARTINGTON HIS RIGHTS TO DUE PROCESS (INCLUDING EQUAL PROTECTION) UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, §5, OF THE HAWAII CONSTITUTION

A. Partington was denied prior notice that the D.C. Circuit was usurping the district court's exclusive, original jurisdiction in the first instance to decide the merits of his APA judicial review

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objection." *Romero v. Star Markets, Ltd.*, 82 Haw. 402, 412, 922 P.2d 1018, 1025 (App.1996) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950)). The requirement of reasonable notice is regarded as part of the due process limitations to the jurisdiction of a court. *Ibid.* It is a procedural due process right. *KNG Corp. v. Kim*, 107 Haw. 73, 80, 110 P.3d 397, 404 (2005); *see State v. Adams*, 97 Haw. 475, 482, 40 P.3d 877, 884 (2002); *Home Idem. Co. v. Arapahoe Drilling Co.*, 115 N.M. 204, 207, 848 P.2d 1131, 1134 (App.1993).

Here, there can be no argument that Partington or his counsel had any prior notice whatsoever that the D.C. Circuit intended to usurp the district court's exclusive, original jurisdiction to decide the merits of Partington's APA claims. (See the Declaration of his counsel attached.) In fact, the D.C. Circuit had previously ruled that it did not have such jurisdiction (as noted in previous argument). There is no way Partington or his counsel could have anticipated the D.C. Circuit's action. This lack of notice was a denial of due process to Partington.

B. Partington was denied his right to judicial review in the district court

It is beyond dispute that Partington had the right to judicial review in a United States district court of the NJAG action against him. The D.C. Circuit *expressly* held that the district court erred in denying that review to him. *Partington v. Houck*, 406 U.S.App.D.C. 257, 267, 723 F.3d 280, 290 (2013). The only question is whether the D.C. Circuit had subject matter jurisdiction to conduct the merits review itself in the first instance. As shown above, the D.C. Circuit had no such jurisdiction and Partington had no chance to litigate subject matter jurisdiction.

Equally important are the specific rights that Partington was denied when he was denied access to the district court to litigate the merits of his APA claims. Partington lost the right to compel the Navy defendants to answer his complaint and to move for sanctions if they failed to admit that the first of his two statements alleged to be false was in fact true and that Partington never made the second statement (FRCP 11). Partington lost the right to seek discovery (FRCP 26), to ask interrogatories (FRCP 33), to request admissions (FRCP 36), and to seek sanctions for failure to make disclosures or cooperate in discovery (FRCP 37).

The rights granted by these rules from the Federal Rules of Civil Procedure to those who litigate in the federal district courts were essential to Partington establishing that he had committed no ethical violations in his military appellate brief. As noted, the Navy charges grew out of two statements the Navy hearing office found that (1) Partington had made, and (2) they were false. Partington's defense was simple. The first statement was true. The second statement

he never made because the Navy hearing officer in his findings *sub silentio* changed the verb tense that Partington used thus changing entirely the meaning which Partington intended.

Partington had the basic rights to use these rules to force the Navy defendants to admit that the first statement was true and that he did not make the second statement. However, he was denied his rights to do so. These rights do not exist in the court of appeals. They only exist in the federal *district* courts - the courts of first instance, and Partington was barred access to the district court to litigate the merits of his claims. These rights are not inconsequential. They are essential to litigating a case.

C. Partington was denied his right to an appeal to a court of appeals from a district court decision on the merits of his APA claims

It is beyond dispute that, in Partington's federal litigation, there was no judicial review in the district court and, thus, no district court judgment on the merits of his APA claims from which he could have appealed to the court of appeals. For the same reason as set forth in the previous argument, this denial of his right to appeal was a denial of due process.

V. PARTINGTON WAS DENIED ACCESS TO THE FEDERAL COURTS IN VIOLATION OF HIS FEDERAL AND STATE CONSTITUTION RIGHTS TO (1) DUE PROCESS OF LAW, AND (2) PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES

It is a deprivation of a person's constitutional rights to prevent his meaningful access to the civil courts. *In re Brux*, 216 F.Supp. 956, 957 (D.Haw.1963).

> The right of access to the courts is one aspect of the right to petition the government fox redress. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, [612,] 30 L.Ed.2d 642 [, 646] (1972). The right of access to the courts is not absolute and unlimited. "All that is required is a reasonable right of access - a reasonable opportunity to be heard." *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 554 (3rd Cir.1985).

Lee v. United Pub. Workers, AFSME, Local 646, AFL-CIO, 125 Haw. 317, 328, 260 P.3d 1135, 1146 (App.2011).

The question here is whether Partington had a reasonable right of access, i.e., to be heard when the D.C. Circuit expressly recognized that right in the valid part of its opinion, and then denied him all access to the federal courts to challenge and litigate the lack of subject matter jurisdiction in the void part of its opinion. It is important to note that Partington has been denied *any* and all *access* to the federal courts to litigate any of the issues raised in this motion, and no court *with subject matter jurisdiction* has ever addressed the merits of his APA claims - expressly or impliedly.[5]

VI. PARTINGTON WAS DENIED HIS FEDERAL AND STATE CONSTITUTIONAL PROTECTION OF THE LAWS IN THAT HE WAS SINGLED OUT AS THE ONE AND ONLY LAWYER SUSPENDED BY ONE OF THE JUDGE ADVOCATES GENERAL WHO WAS NOT AND IS NOT ENTITLED TO THE DUE PROCESS RIGHTS SET FORTH ABOVE, PRIMARILY ACCESS TO THE FEDERAL COURTS

As held in *State v. Miller*, 84 Haw. 269, 273 & 276, 933 P.2d 606, 610 & 613 (1997):

> The Hawaii and United States Constitutions mandate that a person shall not be deprived of life, liberty or property without due process of law. Haw. Const. art. I, § 5; U.S. Const. amend. XIV, § 1.
>
> * * *
>
> The guarantee of equal protection of the laws under Hawaii and United States Constitutions requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. However, "[e]qual protection does not require that all persons be dealt with identically, but it does require a distinction made have some relevance to the purpose for which the classification is made." In the absence of a suspect classification or an intrusion

---

[5] This is not a case where the federal courts, *with proper jurisdiction*, just reached the wrong result for which there is generally no remedy. *See Little v. Crawford*, 449 F.3d 1075, 1081-82 (9th Cir.2006), and cases cited therein.

> upon a fundamental constitutional right, the challenged classification must bear some rational relationship to legitimate state purposes." [Citations omitted.]

"The essence of the equal protection guarantee embodied in the federal and state constitutions is that 'all persons similarly circumstanced shall be treated alike'" (citations omitted). *State v. Villeza*, 85 Haw. 258, 267, 942 P.2d 522, 531 (1997).

In *Hovey v. Elliot*, 167 U.S. 409, 413-19, 17 S.Ct. 841, 843-45, 42 L.Ed. 215, 219-21 (1897), the Supreme Court held in a case of contempt imposed by a D.C. court without subject matter jurisdiction to so do that:

> The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.
>
> In *McVeigh v. United States,* [78 U.S. 259,] 11 Wall. 259, [20 L.Ed. 80 (1871),] the court, through Mr. Justice Swayne, said (p. 78 U. S. 267): "In our judgment, the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."
>
> And, quoting with approval this language, in *Windsor v. McVeigh,*93 U. S. [at] 277, [23 L.Ed. 914 (1876),] the Court, speaking through Mr. Justice Field, again said (pp. 93 U. S. 277-278):
>
> "The principle, stated in this terse language, lies at the foundation of all well ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and

conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be, in effect, to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, 'Appear and you shall be heard,' and, when he has appeared, saying, 'Your appearance shall not be recognized, and you shall not be heard.' In the present case, the district court not only, in effect, said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation. It was, in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

This language but expresses the most elementary conception of the judicial function. At common law, no man was condemned without being afforded opportunity to be heard.

* * *

Story, in his treatise on the Constitution (vol. 2, § 1789), speaking of the clause in the Fifth Amendment where it is declared that no person "shall be deprived of life, liberty, or property without due process of law," says:

"The other part of the clause is but an enlargement of the language of Magna Carta, *'nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum, vel per legem terrae'* (Neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land). Lord Coke says that these latter words, *'per legem terrae'* (by the law of the land), mean by due process of law -- that is, without due presentment or indictment, and being brought into answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law."

Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the

government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department -- the source and fountain of justice itself -- has yet the authority to render lawful that which, if done under express legislative sanction, would be violative of the Constitution. If such power obtains, then the judicial department of the government, sitting to uphold and enforce the Constitution, is the only one possessing a power to disregard it. If such authority exists, then, in consequence of their establishment, to compel obedience to law, and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

In *Galpin v. Page,* [85 U.S. 350,] 18 Wall. 350, [21 L.Ed. 959 (1873),] the Court said (p. 85 U. S. 368):

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

Again, in *Ex parte Wall,* 107 U. S. 289, 2 Sup.Ct. 569, [27 L.Ed. 532 (1883),] the Court quoted with approval the observations as to "due process of law" made by Judge Cooley in his Constitutional Limitations at page 352, where he says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College Case:*" "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying:

"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry,' and 'render judgment only after trial.'"

The necessary effect of the judgment of the Supreme Court of the District of Columbia was to decree that a portion of the award

> made in favor of the defendant -- in other words, his property -- belonged to the complainants in the cause. The decree therefore awarded the property of the defendant to the complainants upon the hypothesis of fact that, by contract, the defendant had transferred the right in or to this property to the complainant. If the court had power to do this by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law? If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law? No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other; the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safeguards.

And in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350, 29 S.Ct. 370, 379-80, 53 L.Ed 530, 544 (1909), the Supreme Court held that:

> The fundamental guaranty of due process is absolute, and not merely relative. The inherent want of power in a court to do what was done in *Hovey v. Elliott* was in that case deduced from no especial infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the government without transgressing the constitutional safeguard as to due process at all times dominant and controlling where the Constitution is applicable. Indeed, in *Hovey v. Elliott,* the impotency of the legislative department to endow the judicial with the capacity to disregard the Constitution was emphasized.

Accord Ramil v. Keller, 68 Haw. 608, 620, 726 P.2d 254, 262 (1986); *Wing Wu Chan & Co. v. Hawaiian Gov't*, 7 Haw. 498, 503-04 (1888). The facts of *Hovey* are very close to those in Partington's federal litigation. Just as in *Hovey*, a court without jurisdiction denied Partington

his constitutional rights.[6]

In the federal litigation, Partington was a "class of one" because, according to the D.C. Circuit in *Partington v. Houck*, every lawyer suspended by one of the Judge Advocates General has a right to access to APA judicial review in the district court on the merits of the lawyer's APA claims and a right of access to appeal the district court's judgment on the merits to the court of appeals - *that is, every lawyer so suspended except Partington!*

Hawaii does not appear to have any cases addressing "class of one" claims, but the United States District Court for the District of Hawaii held in *HRPT Properties Trust v. Lingle*, 715 F.Supp.2d 1115, 1141 (D.Haw.2010):

> Individuals that constitute a "class of one" are protected by the Equal Protection Clause; when [government] action does not implicate a fundamental right or a suspect classification, the plaintiff can establish a "class of one" claim by demonstrating that [plaintiff] alone has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.

Citing to Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074, 75 L.Ed.2d 1060, 1063 (1985); *accord N Group LLC v. Hawaii County Liquor Comm'n*, 681 F.Supp.2d 1209, 1229-30 (D.Haw.2009); *Kamaole Point Dev. LP v. County of Maui*, 573 F.Supp.2d 1354, 1376 (D.Haw.2008).

There can be no rational basis for singling out Partington to deny him his rights to access to the federal courts as well as his right to notice as was done in his federal litigation. The Supreme Court, in discussing the purpose of the Equal Protection Clause held in *Jones v. Helms*,

---

[6] The Equal Protection Clause of the Fourteenth Amendment applies to the United States government through the Fifth Amendment Due Process Clause. *Young v. County of Hawaii*, 947 F.Supp.2d 1087, 1102 (D.Haw.2013).

452 U.S. 412, 424 n.23, 101 S.Ct. 2434, 2442 n.23, 61 L.Ed.2d 118 n.23 (1981), that the clause was meant to:

> establish[ ] equality before the law, and it gives to the humblest, the poorest, and most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.[7]

VI. CONCLUSION

Partington filed his claim for judicial review in the district court because that was the court with subject matter jurisdiction to hear it. The only "justice" Partington has received in this entire matter has been a ruling from the D.C. Circuit that he had a right to APA judicial review - a ruling within the court's subject matter jurisdiction. At the same time, the D.C. Circuit took that right away - a ruling for which that court did *not* have subject matter jurisdiction, a ruling Partington has been *absolutely barred* from litigating in the federal courts.

This famous quote from the Lord Chief Justice of England in *Rex v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, 259, [1923] All E.R. 233, 234 (1923), should be the benchmark for reviewing what happened to Partington.

> it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

---

[7] Equal protection is analyzed simarly under the United States and Hawaii constitutions. *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047 n.10 (9th Cir.2002), *citing to State v. Miller*, 84 Haw. 269, 276, 933 P.2d 606, 613 (1997).

In Partington's case, justice was neither done nor seen to be done.[8]

DATED: Honolulu, Hawaii, June 2, 2015.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Respondent *pro se*

[8] Partington requests leave of this court to appear before and argue his case..

SCAD-11-0000162

IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL, Petitioner, v. EARLE A. PARTINGTON, Respondent.	)))))))))))	**DECLARATION OF JEFFREY A. DENNER**

Declaration of Jeffrey A. Denner

I, Jeffrey A. Denner, hereby declare as follows:

1. I was the attorney for Earle A. Partington in his federal litigation in the District of Columbia arising out of his effort to obtain judicial review under the Federal Administrative Procedure Act (APA) of the action by the Judge Advocate General of the Navy (NJAG) in suspending him indefinitely from appearing before all Navy and Marine Corps courts and boards. I have been an attorney in Boston, Massachusetts, for 42 years.

2. At the time I took Partington's case, I understood that, under the APA, he was entitled to judicial review in a United States District Court in the first instance with a right to appeal from the decision on the merits of his claims to the appropriate United States Court of Appeals.

3. On my recommendation, Partington's action for judicial review was filed in the United States District Court for the District of the District of Columbia. The Navy defendants (including the NJAG) moved to dismiss Partington's APA claims and never answered Partington's complaint. Partington had no opportunity request admissions, submit

interrogatories, move for sanctions or present his defenses to the district court. Those defenses were based on the facts that, as to the two sentences in the appellate brief he filed in the court-martial appeal which formed the basis for the Navy charges against him of making false statements, the first sentence was clearly true and the Navy hearing officer in his decision changed the second sentence from what Partington said to something entirely different by *sub silentio* changing the verb tense from the past perfect tense Partington used to an ordinary past tense which Partington did not use thereby finding him guilty of saying something he never said. The Navy defendants moved to dismiss on the ground that Partington had to right to judicial review which motion the district court granted (840 F.Supp.2d 236 (D.D.C.2012)), and the matter was appealed to the United States Court of Appeals for the District of Columbia Circuit.

4. It was my intent to use requests for admissions and interrogatories to the Navy defendants once they answered Partington's complaint in the district court. As they were successful in having the district court rule erroneously that Partington had no right to judicial review without answering the complaint, I had no opportunity to do any of these things. There is no provision in law to do these things in the federal courts of appeal as they are not courts of first instance. Soon after the first appeal was filed, the Navy defendants confessed error as to the denial of judicial review in the district court. I expected the D.C.Circuit to remand the matter to the district court for Partington's judicial review.

5. At no time prior to the decision of the D.C. Circuit in this first appeal (406 U.S.App.D.C. 257, 723 F.3d 280 (2013)) did it occur to me that that court would assume the jurisdiction of the district court to decide the merits of Partington's APA claims in the first instance as the law was and still is clear to me that such jurisdiction was and is vested exclusively

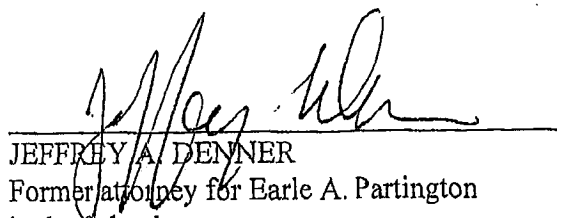
in the district court. There had been no opportunity to litigate subject matter jurisdiction because neither the court nor the parties raised it.

6. At no time prior to the decision of the D.C.Circuit in the appeal did I receive any notice from any person in any form that the D.C. Circuit intended to assume the jurisdiction of the district court in the first instance to decide Partington's APA claims on the merits. Had I received such notice, I would have had the issue researched. Then, I would have objected setting forth the D.C. Circuit case law holding that the court of appeals does not have subject matter jurisdiction to decide the merits in the first instance in cases such as Partington's in that the D.C.Circuit is an appellate court which cannot decide cases on the merits in the first instance. I was taken completely by surprise when the court of appeals *sua sponte* assumed the district court's jurisdiction without notice and without any opportunity to be heard on the issue.

7. As I had received no notice of the D.C. Circuit's intent to assume the district court's jurisdiction, I had no opportunity to object on behalf of Partington. To my knowledge, the issue of the subject matter jurisdiction of the court of appeals as set forth above has never been litigated in any court in either of Partington's two appeals. My effort to litigate this issue for Partington was barred subsequently by the court of appeals ruling in Partington's second appeal when it held in an unpublished decision that its prior judgment could not be attacked in the federal courts.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

DATED: Boston, Massachusetts, May 30, 2015.



JEFFREY A. DENNER
Former attorney for Earle A. Partington
in the federal courts

STATE BAR COURT

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of EARLE A. PARTINGTON, No. 45731, A Member of the State Bar	Case No.: 12-J-10617 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, Colleen Nicholas, am over the age of eighteen and not a party to the within proceeding. I hereby certify that a copy of *RESPONDENT'S ANSWER* was served on the following person by deposit of this document in an envelope, postage prepaid, with a USPS clerk at the counter of the United States Post Office in downtown Honolulu, Hawaii, on the afternoon of August 11, 2015, addressed to:

STATE BAR OF CALIFORNIA
Heather E. Abelson
Deputy Trial Counsel
180 Howard Street
San Francisco, California 94105-1639

DATED: Honolulu, Hawaii, August 11, 2015.

Colleen Nicholas

COLLEEN NICHOLAS