

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT PIERCE DIVISION

UNITED STATES  
PLAINTIFF,  
vs.  
MARCELLUS M. MASON, Jr.,  
DEFENDANT

Case No.: 02-14020-CR-MOORE  
**DEFENDANT'S MOTION TO VACATE  
CONVICTION**

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DEFENDANT, Marcellus M. Mason, Jr. hereby submits his DEFENDANT'S *MOTION VACATE CONVICTION*. In support of this motion, Defendant states the following:

1. At the outset, Mason reasserts his right to defend himself and file this motion as Mason has had three court appointed attorneys, and none have filed a motion like the one now before this court.
2. An information was presented in this matter on December 3, 2002. (D.E. #6).
3. The information alleges violations of a *sua sponte* issued pre-filing injunction (D.E. #878) rendered in Civil Case No. 99-14027-CV-Graham/Lynch on September 20, 2001<sup>1</sup>. (D.E. #6).
4. The information specifically alleges that the Defendant did willfully and knowingly disobey and resist a lawful order of a Court of the United States, that is, the order issued by the Honorable Donald L. Graham, United States District Judge, on September 20, 2001....”
5. Additionally, the information alleges “or contact other litigants by Court Order dates September 20, 2001. (D.E. #6. pg.2). This is a specific reference to the *sua sponte* issued pre-filing injunction which

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<sup>1</sup> At pages 1, 2, and 3 Judge Graham attempts to list eleven lawsuits that he claims were filed in the S.D.Fla. According to Judge Graham himself, “ **A Complaint is not considered filed until the filing fee is paid.**” See 00-14202, (DE #10, dtd. 11-2-2000); 00-14201, (DE #10, dtd. 11-21-2000). Five of these lawsuits had no filing fee paid, and according to Judge Graham, not filed: **(1)** 00-14116-CV-Graham, **(2)** 00-14201-CV-Graham, **(3)** 00-14202-CV-Graham, **(4)** 01-14074-CV-Graham, **(5)** 01-14078-CV-Graham. These 5 lawsuits were **dismissed without prejudice** and are “non-suits” simply because Judge Graham denied Mason *in forma pauperis* and stated no reason for this denial.

Of the 6 remaining lawsuits that Judge Graham claim was filed by Mason, Case No. 14240-CV-Graham was filed by Highlands County against Mason.

Of the five remaining lawsuits, 01-14230-CV-Graham, was removed from state court by the Defendants after the injunction of September 20, 2001 where they knew the case would be automatically assigned to Judge Graham.

Consequently, of the remaining four lawsuits, Case Nos. 99-14027-CV-Graham, 99-14042-CV-Graham, 99-14257-CV-Graham, and 99-14314-CV-Graham were consolidated into one case, Case No. 99-14027-CV-Graham.

states: “[T]he Court enjoined Mason from any further contact with the [Highlands County Government] Defendants or Defendants' employees. Mason, however, ignored the Court's order and continued to contact the Defendants [Highlands County Government].” (D.E. #878, pg. 4), Civil Case No. 99-14027-CV-Graham/Lynch. This statement is a direct reference to orders rendered by a Magistrate in that case on June 19, 2000 and July 25, 2000. (D.E. # 201). (D.E. # 246). Mason will refer to these orders of June 19, 2000,(D.E. # 201), and July 25, 2000, (D.E. # 246), as “not injunctions per se” or “orders prohibiting direct communication with the government”.

6. On April 26, 2001, [D.C. Case No. 99-14027] the Eleventh Circuit [11<sup>th</sup> Cir.. Case No. 01-11305], while denying a *in forma pauperis* petition for mandamus, gave Mason the following advice:

With regard to his requests for relief from the order granting the defendants' motions for preliminary injunction, which the court construed as a preliminary discovery motion, Mason has an alternative remedy. He may either comply with the district court's discovery order and challenge it on appeal from the final judgment, or refuse to comply with the order and challenge its validity if cited for contempt . See Rouse Constr. Int'l, Inc. v. Rouse Constr. Corp., 680 F.2d 743, 745 (11th Cir . 1982) .

7. A notice of appeal for Civil Case No. 99-14027-CV-Graham/Lynch was filed in this Court on or about June 25, 2001, (D.E. #625). On September 20, 2001, the date that the *sua sponte* issued pre-filing injunction (D.E. #878) was rendered; the matter was on appeal and bearing Eleventh Circuit Case No. 01-13664.
8. On or about October 1, 2001, Marcellus Mason filed a fee paid petition for mandamus with the Eleventh Circuit, U.S. Court of Appeal, which among other things, challenged the validity of the *sua sponte* issued pre-filing injunction of September 20, 2001.
9. On December 5, 2001, the Eleventh Circuit, declined to review the *sua sponte* issued pre-filing injunction (D.E. #878) of September 20, 2001 while stating only: “The " petition for writ of mandamus and petition for writ of prohibition" is DENIED.” The direct appeal, Eleventh Circuit Case No. 01-13664, was still pending and no briefs had been filed at this point.
10. On March 6, 2002, Eleventh Circuit Case No. 01-13664, the Eleventh Circuit struck Mason’s brief for arguing against the September 20, 2001 *sua sponte* issued pre-filing injunction. Moreover, the Eleventh Circuit ordered Mason to file all new initial briefs less any mention of the *sua sponte* issued

pre-filing injunction. The Eleventh Circuit claimed the *sua sponte* issued pre-filing injunction was “beyond the scope of appeal”.

11. On March 25, 2002, 19 days after the Eleventh Circuit, struck Mason’s brief for arguing against the *sua sponte* issued pre-filing injunction, Highlands County argued for the same *sua sponte* issued pre-filing injunction in their Answer Brief on pages 18 and 19. However, the Eleventh Circuit, while granting Mason’s motion to strike Highlands County brief for arguing for the same *sua sponte* issued pre-filing injunction, did not make Highlands County file all new answer briefs as they had done Mason. The Eleventh Circuit claimed that it would not consider the *sua sponte* issued pre-filing injunction in its decision.
12. On October 16, 2002, the Eleventh Circuit decided the direct appeal, D.C. Case No. 99-14027-CV-Graham, 11<sup>th</sup> Cir. Case No. 01-13664. In the entirety of the very verbose 14 page (unpublished) opinion, there is no discussion as to why the so-called “discovery orders”, [(D.E. #201); ,(D.E. #246)] were or were not violative of the First Amendment; however, there is ample discussion about Mason’s so-called violation of these “discovery orders.” The Supreme has expressly held that ““in cases raising First Amendment issues . . . an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.” Gentile v. State Bar Of Nevada, 501 U.S. 1030, 1038 (1991).
13. The opinion of October 16, 2002, the direct appeal, D.C. Case No. 99-14027-CV-Graham, 11<sup>th</sup> Cir. Case No. 01-13664, does not decide [even though fully briefed] a jurisdictional issue like whether or not Judge Graham should have disqualified. The Eleventh Circuit simply ignores this jurisdictional issue [disqualification] on appeal, Case No. 01-13664, October 16, 2002, and treated it like a side or collateral issue. The only reference to this issue in a very verbose 14 page opinion is: “*Mason also raises issues that relate to non-sanction matters, e.g., the dismissal of individual defendants from the second consolidated amended complaint, the dismissal of claims from his fourth consolidated amended complaint, the denial of his motions to disqualify the district court and magistrate*

*judges,...*". See Page 10. There is absolutely no discussion as to whether Judge Graham should have or should not have disqualified.

14. At pg. 14, D.C. Case No. 99-14027-CV-Graham, 11<sup>th</sup> Cir. Case No. 01-13664, the Eleventh Circuit specifically uses the September 20, 2001 that it stated to Mason was "beyond the scope of appeal".  
*"Moreover, despite the closure of the case by the district court, Mason's continual filing of motions with the court addressing matters previously settled prompted the district court to prohibit Mason from further filings without explicit permission and initiate criminal contempt proceedings. Therefore, the record supports the districts court's implicit finding that a sanction less than dismissal of the action with prejudice would have no effect."*<sup>2</sup>
15. On January 23, 2003, D.C. Case No. 99-14027-CV-Graham, 11<sup>th</sup> Cir. Case No. 01-13664, the Eleventh Circuit, denied without comment, Mason's motion for rehearing which had specifically pointed out to the Court that it had not, among other things, reviewed the "not injunctions per se" or "orders prohibiting direct communication with the government" or "discovery orders" of June 19, 2000 ,(D.E. # 201), and July 25, 2000, (D.E. # 246) and the issue of disqualification of Judge Graham.
16. A trial and a conviction proceeded on the basis of alleged violations of the *sua sponte* issued pre-filing injunction (D.E. #878) of September 20, 2001.

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<sup>2</sup> "This circuit has clearly stated that because dismissal is considered a drastic sanction, a district court may only implement it, as a last resort, when: (1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice." See World Thrust Films v. International Family Entertainment, 41 F. 3d 1454 (11<sup>th</sup> Cir. 1995). The Eleventh Circuit rigidly requires district courts to make findings explaining why lesser sanctions would not suffice. Rhini Cellular, Inc. v. Greenberg, 2006 U.S. App. LEXIS 14266, \*15 (11<sup>th</sup> Cir. 2006). The Eleventh Circuit has consistently vacated and reversed Rule 41(b) dismissals where the district court failed to explicitly make the finding that lesser sanctions would not suffice. See e.g., Turner v. United States, 2006 Fed. Appx. 952 (11<sup>th</sup> Cir. 2006); Rex v. Monaco Coach, 155 Fed Appx. 485 (11<sup>th</sup> Cir. 2005); Betty K Agencies, LTD v. M/V Monada, 432 F.3d 1333 (11<sup>th</sup> Cir. 2006); Ford v. Fogarty Van Lines, 780 F. 2d 1582, 1583 (11<sup>th</sup> Cir.1986);Tweed v. Florida, 151 Fed. Appx. 856, 857 (11<sup>th</sup> Cir. 2005). The Eleventh Circuit felt so strongly about this prong that it reversed the district court without even bothering to analyze the contumacious conduct prong in World Thrust. Very infrequently the Eleventh Circuit has found implicit in an order the district court need not make that finding; however the Eleventh Circuit has only inferred such a finding "where lesser sanctions would have "greatly prejudiced' defendants." World Thrust at 1456. Relying upon this apparently little used exception, the Eleventh Circuit then used the *sua sponte* issued injunction of September 20, 2001, that this court claimed was "beyond the scope of appeal", to affirm Judge Graham and make the "implicit finding that a sanction less than dismissal of the action with prejudice would have had no effect." It is

## ISSUES BEFORE THIS COURT

The *sua sponte* issued pre-filing injunction of September 20, 2001 is invalid due to the following:

- An order or judgment issued in violation of due process is void and a legal nullity. Pgs. 6-7.
- The district court did not have jurisdiction of the matter on September 20, 2001 because an appeal had been filed since June 25, 2001. pg. 7, 8.
- The *sua sponte* issued pre-filing injunction was issued without notice and opportunity to be heard, or due process. Pgs. 8-10.
- The *sua sponte* issued pre-filing injunction makes a finding of “bad faith” inconsistent with due process. Pgs. 10-11.
- The collateral bar doctrine is inappropriate in this matter due to the following:
  - The Eleventh Circuit has refused to conduct appellate review of the *sua sponte* issued pre-filing injunction. Pg. 11.
  - The *sua sponte* issued pre-filing injunction is transparently invalid. Pgs. 12-14.
  - The preponderance of the evidence yields that the *sua sponte* issued filing injunction was issued for an unlawful purpose. Pg. 14.
  - The *sua sponte* issued pre-filing injunction caused an irretrievable loss of Mason’s constitutional right of access to the courts. Pg. 14, 15.
- The orders prohibiting or enjoining direct communication with the Highlands County government are unconstitutional due to the following:
  - The right to communicate directly with the Highlands County government is protected U.S. Const., First Amendment, Florida Constitution, and Florida Statutes. Pgs. 15-16.
  - A Federal Magistrate, a statutory judge, is prohibited by statute from issuing an injunction. Pgs. 16-17.
  - A label like “discovery issue” or “discovery order” can not be used to undermine substantive rights. Pg. 17-18.

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quite remarkable in that the *sua sponte* issued pre-filing injunction of September 20, 2001 used to justify a dismissal

- A federal judge has no jurisdiction with respect to the Florida Records Act. Pg. 18.
- The orders prohibiting or enjoining direct communication with the Highlands County government are classical “prior restraints.” Pgs. 21-25.

## LEGAL DISCUSSION

### JURISDICTION OF THIS COURT

“At a minimum, due process requires notice and a hearing where the individual has a meaningful opportunity to confront the evidence against him.” Vanelli v. Reynolds SchoolDist. No. 7, 667 F.2d 773, 780 (9th Cir. 1982)). Further, Mason has a Sixth Amendment right to confront evidence and witnesses against him. It was Judge Graham and the U.S. Government that brought this matter, Case No. 99-14027-CV-Graham, (D.E. #878), (D.E. #201), and (D.E. #246) to this Court. Consequently, Case No. 99-14027 and the criminal contempt in this matter are inextricably intertwined. More importantly, Judge Graham is precluded by law, from deciding the validity of the very *sua sponte* issued pre-filing injunction that forms the basis of the information in this matter.

### RELIEF UNDER RULE 60(b)(4), Fed.R.Civ.P.

Rule 60(b) Fed.R.Civ.P.in pertinent part states:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (4) the judgment is void;

A Rule 60(b)(4) is not subject to any time limitation. Carter v. Fenner, 136 F.3d 1000,1006 (C.A.5 (La.), 1998); Hertz Corp. v. Alamo Rent-A-Car, Inc., 16 F.3d 1126, 1130 (C.A.11 (Fla.), 1994)(“the time within which a Rule 60(b)(4) motion may be brought is not constrained by reasonableness”). See Oakes, below, (vacating a 12 year old order.) “Rule 60(b)(4) motions leave no margin for consideration of the district court's discretion as the judgments themselves are by definition either legal nullities or not... it is "a per se abuse of discretion for a district court to deny a motion to vacate a void judgment... if "the motion is based on a void judgment under rule 60(b)(4), the district court has no discretion ---- the judgment is either void or it is

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of case of June 20, 2001.

not." Jackson v. Fie Corporation, 302 F.3d 515, 521-22(USCA5, 2002). “[D]istrict courts have little leeway. Once a district court decides that the underlying judgment is void, the trial judge has no discretion and must grant the appropriate 60(b) relief.” Blaney v. West Jr. Sec. Dept. of the Army, 209 F.3d 1027, 1031 (7th Cir., 2000). Carter v. Fenner, 136 F.3d 1000 (C.A.5 (La.), 1998). There can be no discussion otherwise as the pre-filing injunction of September 20, 2001, (D.E. #878), was issued *sua sponte*.

It is well settled that an order issued in violation of due process is void. “Generally, a judgment is void under Rule 60 (b) (4) “if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, **or if acted in a manner inconsistent with due process of law.** (emphasis added)” E.g., Burke v. Smith, 252 F.3d 1260 (11<sup>th</sup> Cir. 2001; U.S. v. Boch Oldsmobile, Inc., 909 F.2d 657, 662 (1st Cir. 1990; Beller & Keller v. Tyler, 120 F.3d 21, 23 (2nd Cir. 1997; Union Switch & Signal v. Local 610, 900 F.2d 608, 612 n.1 (3rd Cir. 1990); Eberhardt v. Integrated Design & Const., Inc. 167 F.3d 861, 867 (4th Cir. 1999); New York Life Ins. Co. v. Brown, 84 F.3d 137, 143 (5th Cir. 1996) Simer v. Rios, 661 F.2d 655, 663-4 (C.A.7 (Ill.), 1981)(“a judgment is void for purposes of Rule 60(b)(4) is if the judgment was entered in violation of due process... Because this notice never was delivered the judgment must be vacated as void.”). “No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.” Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 15 (1907).

## **JUDGE GRAHAM LACKED JURISDICTION OF THE CASE BECAUSE THE MATTER WAS ON APPEAL**

Judge Graham did not have jurisdiction of the matter because the case, D.C. Case No. 99-14027-CV-Graham, 11<sup>th</sup> Cir. Case No. 01-13664, was on appeal when the order of September 20, 2001 was rendered. The notice of appeal was promptly filed on or about June 25, 2001. (D.E. #625). The US Supreme Court has held that: “The filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982);. The Eleventh Circuit involved

the *sua sponte* issued injunction of September 20, 2001 in the appeal. It appears that the Eleventh Circuit and Judge Graham can have it both ways. For example, the Eleventh Circuit has stated:

The September 20, 2001 order did not relate to the issue on appeal, but instead enjoined Mason from filing any further pleadings in the district court without permission. Because the order related to collateral issues, the district court had jurisdiction to issue it.

See pg. 4, Case No. 04-11894, May 20, 2004. The Eleventh Circuit correctly supports this “collateral issue” with a citation to Doe v. Bush, 261 F.3d 1037, 1064 (11th Cir. 2001). However, the problem lies in the undeniable fact that Eleventh Circuit was perfectly willing to take this so-called “collateral issue” [September 20, 2001 injunction] and use it against Mason in the direct appeal. In its opinion of October 16, 2002, Case No. 01-13664, pgs. 13-14, this Court stated:

Moreover, despite the closure of the case by the district court, Mason's continual filing of motions with the court addressing matters previously settled prompted the district court to prohibit Mason from further filings without explicit permission and initiate criminal contempt proceedings. Therefore, the record supports the district court's implicit finding that a sanction less than dismissal of the action with prejudice would have had no effect.

If the order of September 20, 2001, were truly a “collateral issue”, then why was it used in the order affirming Judge Graham. Adding injury to insult, the Eleventh Circuit actually struck Mason’ brief for arguing against this order and caused him the unnecessary time and expense of writing new briefs without reference to the same order it used against Mason and allowed the appellees to argue in their brief without making them write new briefs.

### **THE *SUA SPONTE* ISSUED PRE-FILING INJUNCTION VIOLATES THE WELL ESTABLISHED RIGHT OF DUE PROCESS**

A pre-filing injunction “entered against a litigious plaintiff is “an extreme remedy,” which “should be used only in exigent circumstances...[and] the litigant in question must **first be afforded notice and an opportunity to respond.**” Heimbecker v. 555 Associates, Civil action No. 01-6140 (E.D. Pa. 3/26/2003) (E.D. Pa., 2003) (citing Chippis v. U.S.D.C. for the M.D. of Pa., 882 F.2d 72, 73 (3d Cir. 1989)). At the very beginning of the narrative, the very first sentence and paragraph states: “*THIS CAUSE came before the Court sua sponte.*” (D.E. #878). This Court need not proceed any further because this fact is fatal to the validity of the *sua sponte* issued pre-filing injunction. It is immaterial that the *sua sponte* issued pre-filing injunction may

or may not be otherwise justified because “proper procedures must be followed.” Finn v. Gunter, 722 F.2d 711 (C.A.11 (Fla.), 1984)(insisting on due process and refusing to affirm a summary judgment due to alleged ultimate futility ). In a very long line of cases, U.S. Circuit Courts of Appeal and other jurisdictions have consistently, without variation, rejected *sua sponte* issued filing injunctions or pre-filing injunctions issued without notice and opportunity to respond. In Weaver v. Sch. Bd., 2006 U.S. App. LEXIS 8128 (unpublished) (11<sup>th</sup> Cir. 2006), the Court held that a litigant was entitled to “notice and an opportunity to be heard” before a restriction was imposed on the litigant’s ability to challenge an injunction. See Cok v. Family Court of Rhode Island, 985 F.2d 32 (C.A.1 (R.I.), 1993) (vacating a pre-filing injunction issued without notice); Sires v. Fair, 107 F.3d 1;1997 U.S. App. LEXIS 2173 (1<sup>st</sup> Cir. 1997)(vacated because the litigant “was not “warned or otherwise given notice that filing restrictions were contemplated”);MLE Realty Assoc. v. Handler, 192 F.3d 259,262 (2nd Cir., 1999)(vacating a *sua sponte* issued injunction because notice was not given). Lau v. Meddaugh, 229 F.3d 121, 123 (2nd Cir., 2000)(vacating a sua sponte issued injunction); Moates v. Barkley, 147 F.3d 207, 208 (C.A.2 (N.Y.), 1998) (“district court may not impose a filing injunction on a litigant *sua sponte* without providing the litigant with notice and an opportunity to be heard.”). Brow v. Farrelly, 994 F.2d 1027 (C.A.3 (Virgin Islands), 1992)(vacating a *sua sponte* issued injunction); Williams v. Cambridge Integrated Services Group, 2005 U.S. App. LEXIS 18624,\*7;148 Fed. Appx. 87 (3<sup>rd</sup> Cir. 2005)( reversing and holding that: “Sufficient notice and opportunity to be heard are essential prerequisites to the entry of a pre-filing injunction.”); Gonzalez v. Usher Feiner, 2005 U.S. App. LEXIS 8370,\*12;131 Fed. Appx. 373 (3<sup>rd</sup> Cir. 2003)(reversing a *sua sponte* issued injunction and questioning whether a pre-filing injunction is warranted based on Gonzalez's history of filing six frivolous cases in ten years.). “It is imperative that the court afford the litigant notice and an opportunity to be heard prior to issuing such an injunction.” In Re Head, 2006 U.S. App. LEXIS 8265,\*;174 Fed. Appx. 167 (4<sup>th</sup> Cir. 2006)(vacated a 10 yr. old *sua sponte* injunction); Cromer v. Kraft Foods N. Am., Inc., 390 F.3d 812, 819 (4th Cir. 2004)(vacating a pre-filing injunction issued without notice); De Long v. Hennessey, 912 F.2d 1144, 1147-48 (9th Cir.), cert. denied, 498 U.S. 1001, 111 S.Ct. 562, 112 L.Ed.2d 569 (1990)(reversed for failure to notice of pre-filing injunction); Tripati v. Beaman, 878 F.2d 351,354 (C.A.10 (Wyo.), 1989)(vacated and holding that the litigant is “entitled to notice and an opportunity to oppose the court's order before it is instituted.”); Procup v. Strickland, 567 F.Supp. 146 (M.D. Fla.,

1983)(court issued a show cause order) Procup v. Strickland, 760 F.2d 1107, 1110 (C.A.11 (Fla.), 1985) (held that district court did give adequate notice and opportunity to be heard before issuance of the injunction); Cofield v. Alabama Pub. Serv. Comm., 936 F.2d 512, 514 (11th Cir.1991)(noting that court issued show cause order prior to rendering pre-filing injunction); In re Powell, 851 F.2d 427, 431 (D.C.Cir.1988)(reversing and holding “If a pro se litigant is to be deprived of such a vital constitutional right as access to the courts, he should, at least, be provided with an opportunity to oppose the entry of an order restricting him before it is entered.”); Martin v. Circuit Court, 627 So.2d 1298 (Fla.App. 4 Dist., 1993)(reversing a pre-filing order and holding that “limiting the constitutional right of access to the courts, essential due process safeguards must first be provided”); Lawsuits of Carter, In re, 510 S.E.2d 91, 95; 235 Ga.App. 551 (Ga. App., 1998)(reversing a pre-filing injunction because notice or an opportunity not given’); Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1296 (11th Cir. 2002) (holding that injunctions "may not be expanded beyond the meaning of its terms absent notice and an opportunity to be heard.").

Courts have felt that the notice and opportunity to respond was so important that they have reversed district courts even where they thought the pre-filing injunction was otherwise valid. See Oliver, In re, 682 F.2d 443, 446 (C.A.3 (Pa.), 1982); Scott v. Wells Fargo Home Mortgage, 2005 U.S. App. LEXIS 15709,\*;143 Fed. Appx. 525(4<sup>th</sup> Cir. 2005); Gagliardi v. McWilliams, 834 F.2d 81, 83 (3d Cir. 1987).

### **THE *SUA SPONTE* ISSUED PRE-FILING INJUNCTION MAKES A FINDING OF BAD FAITH INCONSISTENT WITH DUE PROCESS**

“A court **must**, of course, exercise caution in invoking its inherent power, and it **must comply with the mandates of due process**, both in determining that the requisite bad faith exists and in assessing fees.” (emphasis added) Chambers v. Nasco, Inc., 501 U.S. 32, 50 (1991). “The court **must afford the sanctioned party due process**, both in determining that the requisite bad faith exists and in assessing fees. Id. **Due process requires** that the attorney (or party) be given fair notice that his conduct may warrant sanctions and the reasons why... “ In Re Mroz, 65 F.3d 1567 (11th Cir. 1995); Thomas v. Tenneco Packaging Co., 293 F.3d 1306 (11th Cir. 2002); Byrne v. Nezhad, 261 F.3d 1075 (11th Cir. 2001)(“A court should be cautious in exerting its inherent power and ‘**must comply with the mandates of due process**’”); First Bank Of Marietta

v. Hartford Underwriters Insurance Company, 2002 U.S. App. LEXIS 21117,\*25;2002 FED App. 0356P (6th Cir. 2002); In Re Atlantic Pipe Corp., 304 F.3d 136, 143 (1st Cir. 2002)(“[A] district court's inherent powers are not infinite... the use of inherent powers **must comport with procedural fairness.**”) Lockary v. Kayfetz, 974 F.2d 1166,1170 (C.A.9 (Cal.), 1992); In re: Rimsat, 212 F.3d 1039 (7th Cir., 2000); In re Kujawa, 256 B.R. 598, 611-12 (Bankr.8 th Cir., 2000). Nowhere in the *sua sponte* issued pre-filing injunction does it even pretend to have given Mason notice and opportunity to respond.

### **COLLATERAL BAR IS NOT APPROPRIATE IN THIS MATTER**

“As a general rule, a party may not violate an order and raise the issue of its unconstitutionality collaterally as a defense in the criminal contempt proceeding.” In re Providence Journal Co. at 820 F.2d 1346.

However, :

There are situations, however, where the collateral bar rule is inapplicable. First, if the issuing court lacks subject-matter jurisdiction over the underlying controversy or personal jurisdiction over the parties to it, its order may be violated with impunity. (internal citations omitted). "In such a case, the original order is deemed a nullity, and the accused contemnor cannot be fairly punished for violating nothing at all." (internal citations omitted).. Second, the collateral bar rule presupposes that adequate and effective remedies exist for orderly review of the challenged ruling; in the absence of such an opportunity for review, the accused contemnor may challenge the validity of the disobeyed order on appeal from his criminal contempt conviction and escape punishment if that order is deemed invalid. Third, the order must not require an irretrievable surrender of constitutional guarantees. (internal citations omitted). In such a case, the only way to preserve a challenge to the validity of the order and repair the error is to violate the order and contest its validity on appeal from the district court's judgment of criminal contempt. Finally, court orders that are transparently invalid or patently frivolous need not be obeyed.

In Re Novak, 932 F.2d 1397 (11th Cir. 1991). Mason contends that the latter three situations are applicable to this matter.

Mason makes no argument with respect to this first except with respect to subject matter jurisdiction.

The collateral bar rule presupposes that adequate and effective remedies exist for orderly review of the challenged ruling; however, in this matter there were no adequate and effective remedies as the Eleventh Circuit declined to review the *sua sponte* issued injunction on numerous occasions. A petition for mandamus was filed on or about October 1, 2001 seeking appellate review of the *sua sponte* issued pre-filing injunction. On December 5, 2001, the Eleventh Circuit refused to review the validity of the *sua sponte* issued injunction: “The "*petition for writ of mandamus and petition for writ of prohibition*" is *DENIED*.” This order also denies a stay. Additionally, since the case, 99-14027-CV and Eleventh Circuit Case No. 01-13664, was still on

appeal and the briefs were not filed until March 2002, the Eleventh Circuit could have consolidated the mandamus petition with the direct appeal, but it declined to do so. The record indicates that Mason followed the procedure set forth in Kleiner v. First Nat. Bank Of Atlanta, 751 F.2d 1193 (11th Cir.1985), which directed:

If the order is believed to be incorrect, the remedy generally is to seek a change in the order—usually by a motion to quash—and, if this is denied, then to appeal and, absent a stay, promptly to comply with the order.

The *sua sponte* issued pre-filing injunction in this matter is transparently invalid. “[A]n exception to the collateral bar rule is appropriate for transparently void orders, it is inappropriate for arguably proper orders.” In re Providence Journal Co. at 820 F.2d 1347. “A party subject to an order that constitutes a transparently invalid prior restraint on pure speech may challenge the order by violating it.” Id at 1344. “A party may not, upon appealing a contempt order, challenge the constitutionality of the underlying restraining order it has violated, unless that order is “transparently invalid” **or has been declared unconstitutional in an unrelated proceeding**.”(emphasis added) Thomas, Head and Greisen Employees Trust v. Buster, 95 F.3d 1449, 1455 (C.A.9 (Alaska), 1996); Hart v. Massanari, 266 F.3d 1155, 1180 (9th Cir. 2001)(holding that a lawyer cannot be said to have willfully violated a court order or rule where another court had ruled the rule or court order to be unconstitutional).. See Gregory v. Depte, 896 F.2d 31 (C.A.3 (Pa.), 1990)(“Criminal contempt sanctions, by contrast, do survive the reversal of an underlying injunction that was not “transparently invalid” when issued.”); U.S. v. Terry, 802 F. Supp. 1094, 1101 (S.D. NY 1992)(noting the importance of order having any pretence to validity at the time it was issued); In Re Special Proceedings, 291 F.Supp. 2d 44, 50 (R.I. 2003). “[A] transparently invalid order cannot form the basis for a contempt citation. (citing 3 *Wright, Federal Practice & Procedure* § 702 at 815 n.17 (1982) (collateral bar rule does not apply if the order violated was transparently unconstitutional)); (citing *State ex rel. Superior Ct. of Snohomish County v. Sperry*, 79 Wash. 2d 69, 483 P.2d 608 (1971), cert. denied, 404 U.S. 939, 92 S. Ct. 272, 30 L. Ed. 2d 252 (contempt citation improper because order violated was transparently void)). In Re Providence, at 820 F.2d 1347. In Novak, as legal justification for invoking the collateral bar doctrine, the court stated: “The district court did not issue an order that was, at the time, clearly unauthorized by any source of power.” As fully set forth above, it

was well settled on September 2001 that a *sua sponte* issued pre-filing injunctions or pre-filing injunctions rendered without [due process] notice and opportunity to be heard are simply invalid. “A void judgment is from its inception a legal nullity.” Boch Oldsmobile, at 909 F.2d 661. See Anderson v. Dunn, 19 U.S. 204, 217 (1821)(“the constitution, by prohibiting an act, renders it void, if done; otherwise, the prohibition were nugatory. Thus, the warrant is a nullity.”); Lops v. Lops, 140 F.3d 927, 941 n. 19(11th Cir. 1998) (“something that is null has no legal or binding force.”); Carter, at 136 F.3d 1006 (“[a] void judgement is one which, from its inception, was a complete nullity and without legal effect.”). There were also warning signs abound as court after court has expressly stated that pre-filing injunctions are an “extreme measure” applicable under the most exigent circumstances. E.g., Castro v. United States, 775 F.2d 399 (1st Cir. 1985); Abdul-Akbar v. Watson, 901 F.2d 329, 332 (3d Cir. 1990). Moreover, as fully set forth above, courts have vacated and reversed *sua sponte* pre-filing injunctions even when the reviewing court thought the *sua sponte* issued pre-filing injunction was otherwise valid. Generally speaking, in a long line of cases, the United States Supreme Court and the Eleventh Circuit has held that impingements of constitutional rights are, without variation, subject to the strictures of “due process” or notice and opportunity to be heard prior to their enactments. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951); Goldberg v. Kelly, 397 U.S. 254 (1970), Fuentes v. Shevin, 407 U.S. 67 (1972); Owen v. City Of Independence, 445 U.S. 622 (1980); Carey v. Piphus, 435 U.S. 247, 259 (1978); Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Weaver at, 2006 U.S. App. LEXIS 8128, \*4; It is equally well settled that the right of access to the courts is constitutionally protected. Weaver at, 2006 U.S. App. LEXIS 8128, \*4 (Meaningful access to the courts is a right of constitutional significance.); Whitfield v. Scully, 241 F.3d 264 (2nd Cir. 2001). Lastly, and more importantly, the very idea of a contempt judgment based upon an invalid order taints the entire contempt process. Dickinson, 465 F.2d at 514.

Courts have vacated criminal contempt convictions based upon unconstitutional orders. See Berry, In re, 65 Cal.Rptr. 273, 68 Cal.2d 137 (Cal., 1968)(vacating a criminal contempt conviction the temporary restraining order was unconstitutional hence void and invalid); State v. Alston, 887 P.2d 681, 256 Kan. 571 (Kan., 1994)(vacating criminal contempt convictions due to invalid prior restraints); State v. Alston, 887 P.2d 681, 256 Kan. 571 (Kan., 1994)(vacating criminal contempt convictions due to invalid prior restraints); State

v. Coe, 679 P.2d 353, 101 Wn.2d 364 (Wash., 1984)(rejecting a prior restraint on lawfully obtained information and reversed a contempt violation); Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (C.A.6 (Ohio), 1996).

The record and the law clearly establish that the *sua sponte* issued filing injunction was rendered for an improper purpose. “[B]efore a district court issues a pre-filing injunction against a pro se litigant, it is incumbent on the court to make "substantive findings as to the frivolous or harassing nature of the litigant's actions... To make such a finding, the district court needs to look at "both the number and content of the filings as indicia" of the frivolousness of the litigant's claims.” De Long, at 912 F.2d 1148. See May vs. Shell Oil Company, 2000 U.S. Dist. LEXIS 14786, \*7 (S.D. Fla. 2000)(“courts have a duty to ensure that frivolous or meritless lawsuits do not interfere with their constitutional function:”)<sup>3</sup>; Urban v. United Nations, 768 F.2d 1497, 1500 (D.C. Cir. 1985)(holding that an injunction’s purpose is to fashion a remedy to stem the flow of frivolous actions);Tripati v. Beaman, 878 F.2d 351, 353 (10th Cir. 1989)(“Litigiousness alone will not support an injunction restricting filing activities.”); Ruderer v. United States, 462 F.2d 897, 899 (8th Cir. 1972) (“affinity for litigation, standing alone, would not provide a sufficient reason for issuing such an injunction.”). Nowhere in the *sua sponte* issued pre-filing injunction does it identify one single lawsuit that Mason filed that was frivolous. As a matter of act, Judge Graham is precluded by law from asserting that D.C. Case No. 99-14027-CV was without merit because Judge Graham refused to rule on pending summary judgments by both Highlands County and Mason<sup>4</sup>. A court does not have the duty to protect itself from non-frivolous litigation. It is not unlawful to prosecute a meritorious action. See Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983). “Access to the courts is a fundamental tenet of our judicial system; legitimate claims should receive a full and fair hearing no matter how litigious the plaintiff may be.” In re Oliver, at 682 F.2d 446. It was Judge Graham himself who adopted the following: “*However, at this point, none those other cases have*

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<sup>3</sup> Judge Graham is fully aware of the frivolous requirement because it was his court that cited May vs. Shell Oil Company, 2000 U.S. Dist. LEXIS 14786, \*7 (S.D. Fla. 2000). See Case No. 00-14240, (D.E. #27, dtd. 1-16-01)(D.E. 33 dtd. 2-13-01).

<sup>4</sup> See (Doc. 507);(Doc. 667);(Doc. 668 );(Doc. 706);(Doc. 797). Incidentally, the Defendants have tacitly admitted by not refuting with record evidence, that the Plaintiff has made a prima face case. See Defendants’ Summary Judgment Motion, (Doc. 769, Pg. 7).

*totally dismissed with prejudice. There are viable claims pending in those cases. \* \* \* While there are other pending cases between these parties, there is nothing near the extent of the litigation which this Court and the Eleventh Circuit Court of Appeals usually look for justifying injunctive relief.”* Case No. 00-14240, (D.E. #27, dtd. 1-16-01)(D.E. 33 dtd. 2-13-01). Furthermore, at no time during any litigation that Mason was involved in did Judge Graham impose any Fed.R.Civ.P. Rule 11 sanctions or threaten to do so for filing motions that lacked a substantial basis. The district court uses a “scatter gun” that doesn’t hit the essential core requirement for issuing a pre-filing injunction.

The *sua sponte* issued pre-filing injunction has required an irretrievable surrender of Mason’s constitutional guaranteed right of access to the courts to vindicate any hiring decision that Highlands County may make since its enactment on September 2001 and the future. Given the *sua sponte* issued pre-filing injunction, Mason could file for a job with a government agency like Highlands County who could say: “We don’t hire niggers” Consequently, as a direct result of *sua sponte* issued pre-filing injunction, Highlands County would be given an instant defense to unlawful discrimination. More importantly, Mason actually filed a petition for mandamus [Case No. 01-157154] with the Eleventh Circuit on October 1, 2001 who refused to review the *sua sponte* issued pre-filing injunction for validity on December 5, 2001. Additionally, as fully set forth above, on direct appeal, the Eleventh Circuit actually struck Mason’s brief for arguing against the *sua sponte* issued pre-filing injunction.

**THE ORDERS PROHIBITING DIRECT COMMUNICATION WITH THE GOVERNMENT ARE  
UNCONSTITUTIONAL**

On June 19, 2000 and July 25, 2000, the Magistrate Judge, Lynch, issued the following directives:

Plaintiff shall be prohibited from contacting any of the Defendants, including their supervisory employees and/or the individual Defendants, regarding any matter related to this case. (DE #201).

Plaintiff shall correspond only with Defendants' counsel including any requests for public records.” (DE #246). “Plaintiff shall be prohibited from contacting any of the Defendants, including their supervisory employees and/or the individual Defendants, regarding any matter related to this case. (DE #246).

“[T]here is nothing that prohibits one party to a litigation from making direct contact with another party to the same litigation. These rules are designed to regulate the conduct of nonlawyers, and simply do not apply to the conduct of nonlawyers.” E.E.O.C. v. McDonnell Douglas Corp., 948 F.Supp. 54, 55 (E.D.Mo. 1996).

“[P]arties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party to a controversy with a government agency with a government officials about the matter. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter. Rule 4-4.2, R. Regulating Fla. Bar.

U.S. Const. amend. I states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Even if one could make the insane argument that Mason is not entitled to communicate with the government directly under the First Amendment, he could still do so under Florida law. Florida has the authority “to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.” Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). Additionally: “Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law.” Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999). Article 1, Fla. Const., in pertinent part states:

SECTION 4. Freedom of speech and press.—

Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

SECTION 9. Due process.—

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

SECTION 24. Access to public records and meetings.--

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and

judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution

Fla.Stat., §119.07, in pertinent part states:

(1)(a) Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

## UNCONSTITUTIONAL INJUNCTION

“Notwithstanding any provision of law to the contrary-(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court except a motion for injunction relief...” 28 U.S.C. § 636 (b)(1)(A). “A prohibitive or preventive injunction commands a person to refrain from doing an act and necessarily operates on unperformed acts and prevents a threatened but nonexistent existent injury.” State of Ala. v. U.S., 304 F.2d 583, 597 (C.A.5 (Ala.), 1962). According to Black’s Law Dictionary, an injunction is a “court order commanding or preventing an action.” Black’s Law Dictionary, pg. 800, 8<sup>th</sup> Edition, Bryan A. Garner, Editor in Chief, @ 2004 West Publishing Company. The Magistrate’s orders, among other things, commands that “Plaintiff shall correspond only with Defendants' counsel including any requests for public records.” The Magistrate’s orders prohibits or prevents “contacting any of the government Defendants, including their supervisory employees and/or the individual Defendants...”. Even more compelling support that these orders are really injunctions comes from the Highlands County’s attorneys themselves who specifically entitled their motion as Defendants Motion For Preliminary Injunction. (Doc. 199). Moreover, in their prayer for relief the Defendants requested “an injunction prohibiting Plaintiff from contacting any of the Defendants...” (Doc. 199, pg. 4). “An injunction is a coercive order by a court directing a party to do or refrain from doing something, and applies to future actions.” Ulstein Maritime, Ltd. v. United States, 833 F. 2d 1052, 1055 (1<sup>st</sup> Cir. 1987). “When a decree commands or prohibits conduct, it is called an injunction.” Gates v. Shinn, 98 F. 3d 463, 468 (9<sup>th</sup> Cir. 1995); Zetrouer v. Zetrouer, 89 Fla 253 (Fla. 1925)(“A prohibitory, sometimes called preventive, injunction is one that operates to restrain the commission or continuance of an act and to prevent a threatened injury). “The term ‘injunction’ in Rule 65(d) is not to be read narrowly but includes

all equitable decrees compelling obedience under the threat of contempt.” Consumers Gas & Oil v. Farmland Indus., 84 F.3d 367, 370 (10<sup>th</sup> Cir. 1996). See United States v. Santtini, 963 F. 2d 585, 590 (3<sup>rd</sup> Cir. 1992)(court of appeals not constrained by district courts characterization of its order). “Ordinarily, since an injunction is defined not by its title but by its effect on the litigants, . . ., it would be assumed that an order that has the practical effect of an injunction is an injunction for the purposes of Sec. 1292(a)(1).” Abernathy v. Southern California Edison, 885 F.2d 525, 529 n.14(C.A.9 (Nev.), 1989). Some well-known cliches might be appropriate at this juncton. If it walks like a duck and quacks like a duck, then it is a duck. A rose by any other name is still a rose.

### **YOU CAN CALL WHAT IT WANT, UNCONSTITUTIONAL “DISCOVERY ORDERS”**

The Magistrate, the U.S. Government, and Highlands County would have us to believe that a Federal Magistrate Judge could label an order a “discovery order” and take away rights guaranteed by the U.S. Constitution, Florida Const., and the Florida Statutes. This is intuitively an absurd proposition on its face, knowledge of the law notwithstanding. cf. Sampson v. Murray, 415 U.S. 61, 86-7 (1974) (“A district court, if it were able to shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding.”). “[A] State cannot foreclose the exercise of constitutional rights by mere labels.” Railroad Trainmen v. Virginia Bar, 377 U.S. 1, 6 (1964). “[T]he name which the judge gives the order is not determinative”. Geneva Assur. v. Medical Emergency Services, 964 F.2d 599 (7th Cir. 1992). “The right to petition government for redress of grievances — in both judicial and administrative forums — is ‘among the most precious of the liberties safeguarded by the Bill of Rights...’ [B]ecause of its central importance, this right is “substantive rather than procedural and therefore cannot be obstructed, regardless of the procedural means applied.” Graham v. Henderson, 89 F.3d 75 (2nd Cir. 1996). In In Re Rafferty, 864 F.2d 151 (D.C. Cir. 1988), the Court held that information not obtained through a discovery request is not “discovery.” Mason can demand that Highlands County produce documents with or without the Federal Rules of Civil Procedure and any “discovery order”. American Federation Of Labor v. Watson, 60 F. Supp. 1010, 1016 (S.D.Fla. 1945) (“The courts cannot create a new Constitution, Laws and court-made rules of expediency must not be placed above the Constitution.”) Even if a court has the misguided notion that it has to somehow must

protect the Highlands County government or any government from direct communication with it from an opposing party about the matter in controversy, the constitution must still be respected. “[T]he interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment.” Bernard v. Gulf-Oil Co., 619 F.2d 459, 474 (5th Cir. 1980) (en banc), aff’d, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981)<sup>5</sup>.

#### **UNCONSTITUTIONAL “DISCOVERY ORDERS”**

"Courts cannot judicially create any exceptions, or exclusions to Florida's Public Records Act." Board of County Commissioners of Palm Beach County v. D.B., 784 So. 2d 585, 591 (Fla. 4th DCA 2001). See also Wait v. Florida Power and Light Company, 372 So. 2d 420, 425 (Fla. 1979) (holding that a litigant engaging in litigation before a federal forum, does not give up its independent statutory rights to review public records under chapter 119). Highlands County does not have the right not to be communicated with. Cf. U.S. v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000) (“ rule in legal ethics prohibiting *ex parte* contacts with represented parties...does not create a right in a party not to be contacted by opposing counsel.”).

#### **UNCONSTITUTIONAL VIOLATION OF STATES’ RIGHTS**

“Plaintiff shall correspond only with Defendants' counsel including any requests for public records.” (DE #246). The Federal Rules of Civil Procedure do not create federal jurisdiction. In re Infant Formula Antitrust Litigation, MDL 878 v. Abbott Laboratories, 72 F. 3d 842, 843 (11<sup>th</sup> Cir. 1995) (citing Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 368-370 & n. 7, 98 S.Ct. 2396, 2400 & n. 7, 57 L.Ed.2d 274 (1978). Judge Graham or no federal judge has jurisdiction with respect to Florida Public Records. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people” U.S. Const., Amend. X. Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938), “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State...[S]upervision over either the legislative or the judicial action of the States

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<sup>5</sup> Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding upon this court unless and until they are overruled by the Eleventh Circuit sitting en banc. Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc ).

is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States.”

## UNCONSTITUTIONAL PRIOR RESTRAINTS

"The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" Weaver v. Bonner, 309 F.3d 1312, 1323 (11<sup>th</sup> Cir. 2002). "Prior restraint has traditionally been defined as a 'predetermined judicial prohibition restraining specified expression . . . .' The essence of prior restraint is that it places specific communications under the personal censorship of the judge." "Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." Alexander v. United States, 509 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993); Bernard, at 619 F.2d 467. The orders prohibiting or enjoining direct communication with the Highlands County Government are clearly "judicial" in origin because a Federal Magistrate issued them. "[P]ure speech –[is]-speech not connected with any conduct." In Re Providence, at 820 F.2d 1348. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.;" see also Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" New York Times Company v. United States United States v. Washington Post Company, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)(citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963)). "[T]he principal purpose of the First Amendment's guaranty is to prevent prior restraints." In Re Providence at 820 F.2d 1348. "Prior restraints are presumptively unconstitutional and face strict scrutiny." Burk v. Augusta-Richmond County, 365 F.3d 1247 (11th Cir., 2004). "In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech. " Providence Journal Co, at 820 F.2d 1348. The presumption of unconstitutionality of prior restraints has been described as "virtually insurmountable" by Supreme Court judges and others. In Re Providence, at 820 F.2d 1348 (citing Near, 283 U.S. at 713). The Supreme Court has refused to uphold a "prior restraint" even when the matter of national security was involved. See New York Times, at 403 U.S. 713, above. In over two centuries, the United States Supreme Court, composed of nine Article 3 judges, has never upheld a prior restraint involving pure speech;

however, in this matter, a statutory judge, Magistrate Judge Lynch breezes right through this barrier and issues a prior restraint on pure speech with no problem.

“It is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction.’ So too, direct penalization, as opposed to incidental inhibition, of First Amendment rights constitutes irreparable injury.” Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983). “Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss — a loss in the immediacy, the impact, of speech.” Bernard, at 619 F.2d 469. In [D.C. Case No. 99-14027], the Eleventh Circuit [11<sup>th</sup> Cir.. Case No. 01-11305], declined to do an interlocutory appeal of these so-called “discovery orders”. See ¶5, above. Additionally, on direct appeal, D.C. Case No. 99-14027-CV-Graham, 11<sup>th</sup> Cir. Case No. 01-13664, the Eleventh Circuit refuses to discuss the validity of these so-called “discovery orders”, while it needlessly spends 14 pages talking about alleged violations of clearly unlawful orders. Exactly, when would this Court have Mason get his First Amendment right to communicate with the Highlands County government back? At some point along the line these so-called “discovery orders” will be tested for validity. (D.E. #201)(D.E. #246). See ¶¶11-14, above. One does not need a law degree to know that there is something inherently wrong with an order that states: “*Plaintiff shall correspond only with [private attorneys] Defendants’ [Highlands County Government] counsel including any requests for public records.*” (DE #246). “*Plaintiff shall be prohibited from contacting any of the Defendants [Highlands County Government], including their supervisory employees[Highlands County Government employees] and/or the individual Defendants [Highlands County Government], regarding any matter related to this case.*” Juxtapose the Magistrate’s “discovery order” against the First Amendment, which in pertinent part states: *Congress shall make no law ...; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.* As the “discovery order” and the First Amendment are irreconcilable and cannot co-exist, either the First Amendment or the Magistrate’s “discovery order” have to be rejected.

Highlands County to meet the requirements of injunction. Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1097 (11th Cir., 2004) (“As the first factor makes clear, any motion or suit for a traditional

injunction must be predicated upon a cause of action, such as nuisance, trespass, the First Amendment, etc., ")

" A district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.' Id. 1096

In Test Masters Educational Services, Inc. v. Singh, 428 F.3d 559, 578 (Fed. 5th Cir., 2005), the district court "enjoined Singh from communicating directly with, threatening, or harassing Test Masters Educational Services, Inc., its employees, its staff, or TES's counsel, counsel's employees, or counsel's staff." The Fifth Circuit, (citing Alexander v. United States, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993), defined "prior restraints" thusly: *Prior restraints are "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur."* Id. at 579. The Fifth Circuit then expressly declared: "The district court's order enjoining Singh from having any future communication with the specified persons was a prior restraint." Id. The Court went on to find:

To quote selectively from the district court, the court found that the parties had demonstrated an "immaturity" and "mean-spirited[ness]," and that Singh was pursuing "vexatious litigation." However, despite the perhaps need of these parties to never speak again, the court did not detail, and the record does not reflect, any "exceptional circumstances" to justify permanently enjoining Singh from generally communicating with TES, TES's counsel and their staff and employees. The district court's order enjoining Singh from communicating with TES employees, TES's counsel, and its counsel's employees was a prior restraint limiting Singh's first amendment rights, and because the injunction order is not supported by exceptional circumstances, it is an unconstitutional restraint on Singh's free speech rights. \*\*\* The cantankerous relationship between these parties is clearly evident from the record in this case. There is enough evidence presented in the record to justify an injunction order prohibiting Singh from threatening or harassing TES, its employees, its staff, TES's counsel, counsel's employees, or counsel's staff. However, the injunction here went beyond enjoining harassing and threatening conduct. The district court's order swept too broadly when it prohibited all communication between Singh and TES employees, staff or TES's counsel, counsel's employees or counsel's staff. Id. at 579-80.

If the Plaintiff in Test Masters has the first amendment right to engage in hostility and vitriol with a private entity, then surely Mason has the same right to engage in hostility and vitriol with a government entity like Highlands County that the First Amendment expressly permits, Judge Lynch's personal notions of civility notwithstanding. Bernard v. Gulf-Oil Co., 619 F.2d 459, is likewise instructive and analogous to the instant case. "Material unequivocally not protected by the Constitution may be the subject of a prior restraint if

sufficient procedural safeguards are provided.” Id. at 471. Stated alternatively, material unequivocally protected by the Constitution **may not be** the subject of a prior restraint. Mason’s right to “to petition the government for a redress of grievances” or Highlands County is expressly protected by the First Amendment.

If the exigencies of the Sixth Amendment do not lessen the burden on those who seek to justify prior restraints, the interests of a civil litigant cannot do so. (internal citations omitted). The "interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." . Thus, the general presumption against prior restraints is not mitigated by a claim that the fair and orderly administration of justice is at stake. Id. at 474. The Magistrate’s heretofore undisclosed interest in rendering the “discovery orders” in the instant case clearly does not even rise to level of the Sixth Amendment interests in Bernard, nor the national security interest in New York Times, above.

Based upon the foregoing, Mason specifically requests the following in the way of relief:

- A declaration that the so-called “discovery orders”, Case No. 99-14027-CV- Graham, (D.E. #201, dtd. 6-19-2000) and (D.E. #2461, dtd. 7-25-2000), are unconstitutional.
- Vacate the *sua sponte* issued injunction of September 20, 2001, Case No. 99-14027-CV- Graham, (D.E. #878).
- Vacate the contempt conviction in this matter.

Respectfully submitted:

Dated this 8<sup>th</sup> day of June 2007

Marcellus M. Mason, Jr.  
214 Atterberry Drive  
Sebring, FL 33870

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#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and electronic copies of the foregoing has been furnished via US Mail, postage prepaid, first class, and or electronically, on June 8, 2007, to: Robert Waters, Assistant U.S. Attorney, 99 N.E. 4<sup>th</sup> Street, Suite 300, Miami, Florida 33132-2111 and to: Leon Watts, 200 South Indian River Drive, Suite 207, Ft. Pierce, FL 34950; Allen, Norton & Blue, 324 South Hyde Park Avenue, Suite 350, Tampa, Florida, 33606 .

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