

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 DISMISS,
DEFENDANT'S MOTION FOR
DECLARATORY RELIEF, DEFENDANT'S
MOTION FOR A DUE PROCESS HEARING,
AND DEFENDANT'S MOTION FOR
PUBLICATION**

DEFENDANT, Marcellus M. Mason, Jr. hereby submits *Defendant's Motion To Dismiss, Defendant's Motion For Declaratory Relief, Defendant's Motion For A Due Process Hearing, And Defendant's Motion For Publication*. In support of this motion, plaintiff states the following:

1. Complainant, Mr. Donald L. Graham initiated this contempt proceedings because of alleged, but unproven allegations, with respect to Case No. 99-14027-CV-Graham. This case was closed on June 20, 2001, (DE #791), and notice of appeal was filed on June 25, 2001, (DE #795).
2. On November 22, 2001, Mr. Graham started this contempt procedure by rendering what he termed a *Notice of Hearing on Conduct of Parties During Proceedings*. (DE # 884). This notice makes absolutely no mention of a contempt proceeding. This hearing was re-noticed on January 25, 2002, *Re-Notice of Hearing*. (DE #892). There is no mention of a contempt procedure in this notice either. The true nature of these hearings is not revealed until February 4, 2002 when Graham rendered his Omnibus Order Notifying Plaintiff Of Contempt Procedure. (DE #895). This linkage between the notice of hearing on November 22, 2001 and the contempt is affirmatively established in the order of March 22, 2002. See 99-14027-CV-Graham, Docket Entry 900, pg. 7. In fact, in this document, Mr. Graham asserts: "*On January 25, 2002, the Court noticed a hearing on the conduct of the parties throughout the aforementioned litigation. Mason failed to attend the hearing. On February 4, 2002, the Court issued an omnibus order detailing Mason's contemptuous behavior and putting Mason notice of possible contempt proceedings.*" See 99-14027-CV-Graham, Docket Entry 900, pg. 7. This notice of hearing contains absolutely no hint

of a contempt proceeding even though Mr. Graham implicitly suggests that the notice of hearing of January 25, 2002 was to apprise the Defendant of such a proceeding.

3. Mason sent Mr. Graham two letters asking why he needed “*a hearing on the conduct of the parties throughout the aforementioned litigation*” on a case that was closed on June 20, 2001, (DE #791), and notice of appeal was filed on June 25, 2001, (DE #795). Mr. Graham failed to respond to either letter. However, on September 6, 2002, and in stark contrast to Mr. Graham, Judge Moore, a friend, colleague, and co-worker of Judge Graham, stated that he no longer had jurisdiction of a case (02-14049-CV-Moore) that was assigned to him since the case was on appeal (11th Cir. Case No. 02-13418-BB. In reply to a motion for clarification from Mason, Judge Moore stated that he could not publish a case, could not state why an order is legal, could not publish the exact text of an order, and could not recuse because the case was on appeal and because he lacked “jurisdiction.” see S.D.Fla. Case No. 02-14049, (DE #63).
4. Pursuant to 18 U.S.C. § 401 and Federal Rule of Criminal Procedure 42(b) an Order to show cause was rendered on March 22, 2002. See 99-14027-CV-Graham, Docket Entry 900. However, the first, Omnibus Order Notifying Plaintiff of Contempt Procedure was filed on February 4, 2002. See 99-14027-CV-Graham, Docket Entry 895.
5. Defendant appeared before the Magistrate on Monday, April 8, 2002 at 9:30 p.m at the United States Courthouse, Courtroom 106, 300 South Sixth Street, Fort Pierce, Florida.

LEGAL MEMORANDUM

1. Judicial Notice

“It is proper for a court to judicially notice matters outside of the record if they are generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Norman v. Housing Auth., City Of Montgomery, 836 F.2d 1292 (11th Cir. 1988). In order to save the tremendous costs of reproducing documents that all concerned parties are already in possession of or are readily available as public records, Mason requests that

this Court take judicial notice of the fact that Mason challenged the order of September 20, 2002, (DE #878) in the following actions:

A. ATTEMPTED LEGAL ATTACKS ON ORDER OF SEPTEMBER 20, 2002, (DE #878)

- Mason filed his Petition For Writ Of Mandamus with the United States Supreme Court on January 31, 2002, Supreme Court Case No. 01-9541, D.C.Case No. 01-14230, 11th Cir. Case No. 01-16135-D, which was denied, without comment, on June 10, 2002.
- Mason filed his Petition For Writ Of Certiorari with the United States Supreme Court on March 22, 2002, Supreme Court Case No. 01-9407, D.C.Case No. 00-14240, 11th Cir. Case No. 01-16217-G, which was denied, without comment, on June 3, 2002.
- Mason filed his Petition For Writ Of Certiorari with the United States Supreme Court on March 22, 2002, Supreme Court Case No. 01-9410, D.C.Case No. 01-14078, 11th Cir. Case No. 01-16218-H, which was denied, without comment, on June 3, 2002.
- Mason filed his Petition For Writ Of Mandamus And Petition For Writ Of Prohibition with the United States Supreme Court on April 27, 2002, Case No. 01-10367, which was denied, without comment, on October 7, 2002.
- Mason filed a motion for a stay with the United States Supreme Court with J. Kennedy, Case No. 01A595, on December 11, 2001, which was denied by J. Kennedy, without comment, on February 8, 2002.
- Mason filed in petition for mandamus in the Eleventh Circuit on 01-15754-A, on September 29, 2001, which was denied by “the Court”, unsigned, and without explanation, on December 5, 2001.
- Mason paid the filing fee for Case No. 01-15754-A on October 12, 2001.
- Mason filed his Appellant’s Emergency Motion For A Stay Pending Review in the Eleventh Circuit on 01-15754-A, on October 23, 2001, which was denied “the Court”, unsigned, and without

explanation, on December 5, 2001. A Motion For Reconsideration And Clarification was filed on December 8, 2001, which was denied and unsigned on January 25, 2002. “by the Court.”¹

- Mason filed in petition for mandamus in the Eleventh Circuit, Case No. 02-11476-A, on or about March 18, 2002 ,which was denied by J. Dubina, on May 1, 2002. More accurately, the mandamus petition was not denied, but the in forma pauperis motion was denied because “Mason has an adequate alternative remedy on appeal regarding this issue.” A Motion for Rehearing on the denial of in forma pauperis was submitted on May 10, 2002 and promptly denied and unsigned “by the Court” on June 13, 2002.
- Mason filed a petition for mandamus in the Eleventh Circuit that was docketed on August 30, 2002, Case No. 02-14646-A, on October 7, 2002, which was denied by “the Court”, no signature, on May 1, 2002. “This appeal is DISMISSED, sua sponte, for lack of jurisdiction. Appellant Marcellus Mason's notice of appeal, filed on June 24, 2002, is untimely from the district court's order enjoining him from filing additional pleadings, entered on September 21,2001.”
- Mason filed a petition for mandamus in D.C.Case No. 00-14240, 11th Cir. Case No. 01-16217-G, on November 1, 2001. On January 14, 2002, Judge Rosemary Barkett denied IFP status because the mandamus petition was frivolous due to the following: “*Although Mason alleges that the district court has failed to permit him to file a notice of appeal, the district court's docket sheet does not reflect that it has ever received a notice of appeal or that it had been returned, and Mason does not attach any correspondence to his mandamus petition to support this claim.*” Mason then filed his Petitioner’s Motion For Rehearing on January 19, 2002 and attached proof positive that he had filed a notice of appeal. On March 19, 2002, the Eleventh Circuit ordered its clerk, to file notice of appeals in D.C. Case No. 01-14240.

¹ The explanation for denial was: “Petitioner has offered no reason sufficient to warrant either reconsideration or clarification of this Court's Order.” One of the techniques that the law clerks that decides motions and cases at the Eleventh Circuit is deny a motion or petition without offering any reason, and as a result of this any motion for rehearing can be summarily denied by simply saying “we considered that already.” This technique undermines the rules for reh-hearing.

- Mason filed a notice of appeal in D.C. Case No. 00-14240, 11th Cir. Case No. 02-12010-F, on September 22, 2001. After Mason fought a bitter battle to prove he filed a notice of appeal, the case was subsequently dismissed by denying a motion to proceed in forma pauperis. This appeal was subsequently docketed on April 15, 2002. Notwithstanding the fact that the Eleventh Circuit was in possession of IFP motion filed in this same D.C. Case No. 00-14240 for the mandamus petition, and coupled with the fact that Mason filed a new IFP motion, the Eleventh Circuit dismissed the appeal on May 9, 2002.
- Mason filed a petition for mandamus in D.C. Case No. 01-14078, 11th Cir. Case No. 01-16218-H, on November 1, 2001. On January 8, 2002, “/s Frank M. Hull,” denied IFP status because the mandamus petition was frivolous due to the following: *“Although Mason alleges that the district court has failed to permit him to file a notice of appeal, the district court’s docket sheet does not reflect that it has ever received a notice of appeal or that it had been returned, and Mason does not attach any correspondence to his mandamus petition to support this claim.”* Mason then filed his Petitioner’s Motion For Rehearing and attached proof positive that he had filed a notice of appeal. On March 19, 2002, the Eleventh Circuit ordered its clerk, to file notice of appeals in D.C. Case Nos. 01-14078 and 01-14230.
- D.C. Case No. 01-14078, direct appeal, was docketed on April 15, 2002, 11th Cir. Case No. 02-12011-G. A motion to proceed IFP was filed, however the Eleventh Circuit claimed it had no record and dismissed the appeal on April 26, 2002. Mason then filed a Motion to Reinstate Dismissed Appeal on April 30, 2002, however this motion was returned to Mason unfilled on May 3, 2002.
- Mason filed a petition for mandamus in D.C. Case No. 01-14230, 11th Cir. Case No. 01-16135-D, on October 29, 2001. This case was dismissed by J. Barkett on November 19, 2001 by denying a motion to proceed in forma pauperis². A Motion for Reconsideration And Clarification was submitted on November 30, 2001 and denied “by the Court”, unsigned, on December 28, 2001.

² “Petitioner’s motion to file the mandamus petition in forma pauperis is DENIED because the petition is frivolous. See 28 U.S.C. §1915 (a) . The Court notes Petitioner already has a mandamus petition pending before the Court,

- D.C. Case No. 01-14230, 11th Cir. Case No. 02-10873-G, docketed on April 17, 2002, direct appeal, was dismissed as yet another in forma pauperis motion was denied³ on June 27, 2002 and signed by “/s Rosemary Barkett.” Mason filed on his *Appellant’s Motion For Clarification* on July 9, 2002 begging the Eleventh Circuit to set forth the factual and legal basis for stating this appeal was frivolous, however, on August 29, 2002, “by the Court,” unsigned, simply stated: “Upon review, appellant’s notion is DENIED. The Court’s Order of June 27, 2002, stands as written.” On September 5, 2002, *Appellant’s Motion For Rehearing*. On October 23, 2002, “By the Court,” unsigned, denied in forma pauperis again with no explanation.
- On January 14, 2002, D.C. Case No. 00-14240, 11th Cir. Case No. 01-16217-G, signed by Rosemary Barkett⁴, the Court denied in forma pauperis status on Mason’s petition for mandamus because the petition for mandamus is “frivolous” as “Mason can raise all these issue[s] on appeal.”

B. DIRECT APPEAL-D.C. Case No. 99-14027-CV-Graham, 11th Cir. 01-13664

The Court should take judicial notice with respect to the following:

- On or about February 21, 2002, the Appellees filed their Appellees’ Motion To Strike Appellant’s Initial Brief. The Appellees expressly argued that Mason’s arguing of the orders of September 20, 2001, (DE #878), was beyond the scope of appeal and further that order this did not have any impact upon the Court’s entry of the dismissal.

docketed here as No. 01-15754, in which Petitioner seeks much the same relief Sought in this petition. The Court also notes that Petitioner is not entitled to mandamus relief as to the order granting summary judgment as Petitioner could have filed an appeal from that Order. See U.S. v. Fernandez-Toledo, 737 F.2d 912, 919 (11th Cir. 1984).” Judge Barkett, Order dated November 19, 2001.

³ “Appellant’s motion for leave to proceed on appeal in forma pauperis is DENIED because the appeal is frivolous. See Pace v. Evans, 709 F.2d 1428 (11th Cir. 1983). Appellant’s motion to determine jurisdiction, or motion for summary reversal, or in the alternative, for remand is DENIED.”

⁴ Judge Barkett was a member of the panel that decided Cit. Concerned About Children v. School Bd., 193 F.3d 1285, 1289(11th Cir. 1999) (“[W]e acknowledge that an order that does not rule on a request for injunctive relief, but that has the effect of denying it, may be immediately appealable.”); Delta Air Lines v. Air Line Pilots Assoc., 238 F.3d 1300, 1308 (11th Cir. 2001)(“ We have jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1292, which permits appeals from interlocutory orders of district courts ‘granting, continuing, modifying, refusing or dissolving injunctions.’”). More importantly, this case and all other cases associated with the injunction of September 20, 2001, Case No. 99-14027-CV-Graham, (DE #878) were already “closed.”

- On March 6, 2002, the Eleventh Circuit “granted in part” Appellees’ motion to strike and ordered Mason to go through the trouble and expense of filing a “corrected” Initial Brief. This decision was due in part to: “Appellant’s arguments regarding an argument not within the scope of this appeal, contained at contained at pages 31-33 of Appellant’s brief...” Judge Black signed this order.
- On April 23, 2002, Judge Frank Hull signed an order that stated:” Appellant's motion to strike Appellees' brief is GRANTED IN PART to the extent that Appellees cite to the District Court's September 20, 2001, Omnibus Order as that order is outside the scope of this appeal. This Court will disregard any references in Appellees' brief to matters outside the scope of this appeal.”⁵
- On October 16, 2002, the Eleventh Circuit rendered an Opinion, which expressly used the order of September 20, 2002 to support the decision. “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.” See Opinion, Page 14. The order of September 20, 2001 is used to justify a dismissal decision that was made on June 20, 2001.

C. TIMING OF PERTINENT EVENTS

This Court should take judicial notice of the timing of the following events:

- On **July 30, 2001**, Mason initiated a lawsuit against Donald L. Graham bearing S.D.Fla. Case No. 01-14224-CIV-Middlebrooks. Contemporaneous with the filing of the lawsuit Mason filed a motion to proceed *in forma pauperis*.
- On **January 11, 2002** (six months after the suit was filed), Judge Middlebrooks, Graham’s co-worker and colleague, denied Mason’s motion to proceed *in forma pauperis* in S.D.Fla. Case No. 01-14224-CIV-Middlebrooks.

⁵ Appellant had to produce a “corrected brief,” while the court simply “ignored” the Appellees’ brief.

- 28 U.S.C. § 372(c) Complaint, #01-0054, was initiated by Mason on or about **September 14, 2001**.
- A Petition for Review (#01-0054) was filed on or about **November 13, 2001**.
- 28 U.S.C. § 372(c) Complaint (#01-0068) was initiated by Mason on or about **November 22, 2001**.
- A Petition for Review (#01-0068) was filed on or about **December 18, 2001**.
- 28 U.S.C. § 372(c) Complaint #02-0006 was initiated by Mason on or about **February 8, 2002**.
- A Petition for Review (#02-0006) was filed on or about **February 23, 2002**.
- Judge Graham was served with a civil lawsuit, Case No. 02-14049-CIV-Moore, on **January 23, 2002**. This case is now on appeal bearing Case No. 02-13418. This lawsuit was originally filed in state court, Tenth Judicial Circuit, In and For Highlands County, Florida, Sebring, Florida, however Graham has this lawsuit removed to federal court where a co-worker, colleague, and personal friend [Judge Moore] could try the case.

D. PENDING 28 U.S.C § 372(c) COMPLAINTS AGAINST JUDGE GRAHAM

This court should also take judicial notice that the following 28 U.S.C § 372(c) are pending against Judge Graham:

- 28 U.S.C § 372(c) Complaint #02-0052 was initiated on October 30, 2002 and docketed by the Eleventh Circuit on November 15, 2002.
- 28 U.S.C § 372(c) Complaint #02-0029 was initiated on July 18, 2002 and docketed by the Eleventh Circuit on July 24, 2002.
- 28 U.S.C § 372(c) Complaint #02-0034 was initiated on August 13, 2002 and docketed by the Eleventh Circuit on August 23, 2002.

E. MANDAMUS, 11th Circuit Case No. 01-11305, D.C. Case No. 99-14027-CIV-Graham

Mason requests that this Court take judicial notice of the fact that Mason filed a petition for mandamus in D.C. Case No. 99-14027-CIV, 11th Cir. Case No. 01-11305, seeking, among other things, to compel Judge Graham to make a ruling on a motion for a preliminary injunction, which was submitted on November 24, 1999. (DE #39). The Eleventh Circuit declined to address the mandamus petition on the merits, instead it chose to attack the accompanying IFP motion. “*His mandamus petition, however is frivolous because he has failed to establish that he is entitled to mandamus relief to compel the district court to rule on his motion for a preliminary injunction.*”⁶ See 11th Case No. 01-11305, Opinion dated April 26, 2001, pg. 2. The mandamus petition was filed on or about March 8, 2001. At the time motion was submitted on March 8, 2001, Judge Graham had the motion for a preliminary injunction on file for 471 days, starting with the date of filing on November 24, 1999.

2. JURISDICTION

The Notice of Appeal was filed on June 25, 2002. (DE #795). “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); Fogade v. ENB Revocable Trust, 263 F.3d 1274, 1286 (11th Cir. 2001). “Once an appeal is taken, the district court is divested of jurisdiction except to take action in aid of the appeal until the case is remanded to it by the appellate court, or to correct clerical errors under Rule 60(a).” Logan v. Burgers Ozark Country Cured Hams, 263 F.3d 447,454 (5th Cir. 2001).

⁶ See contra, US East Telecommunications v. US West Inf. Sys., 15 F.3d 261 (2nd Cir. 1994) (citing Hudson v. Parker, 156 U.S. 277, 288, 15 S.Ct. 450, 454, 39 L.Ed. 424 (1895)) (“A Court confronted by a motion authorized by the Rules must decide the motion within a reasonable time....[T]he right of a movant to have a motion decided is so clear that it will be enforced under proper circumstances by mandamus.”).

3. JUDICIAL ESTOPPEL

“Judicial estoppel is an equitable concept intended to prevent the perversion of the judicial process.... The purpose of the doctrine, "is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.... The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings.” Burnes v. Pemco Aeroplex, Inc., 01-13865, 2002 U.S. App. LEXIS 9529,*5-7 (11th Cir. 2002). On August 31, 2002, Mason filed his *Plaintiff's Motion For Clarification, Plaintiff's Third Motion For Publication, And Plaintiff's Motion To Disqualify* in Case No. 02-14049-CV-Moore. In reply to a motion for clarification from Mason, Judge Moore stated that he could not publish a case, could not state why an order is legal, could not publish the exact text of an order, and could not recuse because the case was on appeal and because he lacked “jurisdiction.” see S.D.Fla. Case No. 02-14049, (DE #63). This Court is now judicially estopped from claiming Judge Graham had jurisdiction of Case No. 99-14027-CV-Graham beyond June 25, 2001, (DE #795), the date the notice of appeal was filed. All allegations in the Complaint are for alleged behavior commencing on October 22, 2001.

4. Judge Graham Was Required To Disqualify Due To Misconduct And Prejudicial Behavior

In Case No. 99-14027-CV-Graham and at the Eleventh Circuit, direct appeal, Case No. 01-13664-A, 28 U.S.C. § 372 (c) Complaint, Case No. 01-0054, and petition for mandamus, Case No. 01-15754-A, Mason made the following allegations of misconduct against Judge Graham:

1. **Mr. Graham sat on a motion for a preliminary injunction for over 574 days and took no action.**

On November 24, 1999, Mason filed a motion for a preliminary injunction pursuant to Title VII. (Doc # 39). Mason made repeated motions and filings with Judge Graham to figure out why he refused to

rule on his motion for a preliminary injunction⁷. Indeed the Eleventh Circuit has even legitimized this behavior because this Court had previously stated: “*His mandamus petition, however is frivolous because he has failed to establish that he is entitled to mandamus relief to compel the district court to rule on his motion for a preliminary injunction.*” See, 11th Case No. 01-11305, Order dated April 26, 2001, pg. 2. In other this words, the Eleventh Circuit and Mr. Graham are saying that Mason has no remedy if a judge refuses to do his job and rule on a motion for preliminary injunction even if it takes 574 days. If refusing to rule on a motion for 574 days is not prejudicial and reckless behavior, then there is no such thing.

2. Judge Graham has committed naked and unabated aggressive acts of usurpation.

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).

The pertinent comments to Rule 4-4.2, R. Regulating Fla. Bar specifically states the following:

Also, parties 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.

See also Restatement of the Law (Third) The Law Governing Lawyers, §99. Cmt. K., pg. 76. As set forth above, Mr. Graham has repeatedly refused to cite legal authority for these orders.

3. Graham mismanaged this case by allowing motions and filings to simply “die on the vine.”

Graham allowed the following filings and submissions of Mason’s to languish for up to eight months:

⁷ See for example, (DE #60); (DE #66); (DE #80); (DE #88); (DE #93); (DE #160); (DE #164); (DE#165); (DE#171); (DE#183); (DE#187); (DE#211); (DE#214); (DE#219); (DE #288); (DE #295); (DE #300); (DE #305);

(DE #388, 10/25/00); (DE #437, 11/29/00); (DE #438, 11/29/00); (DE #439, 11/29/00); (DE #440, 11/29/00); (DE #441, 11/29/00); (DE #518, 3/5/01); (DE #544, 3/12/01); (DE #554, 3/14/01); (DE #555, 3/14/01); (DE #561, 3/16/01); (DE #563, 3/18/01); (DE #607, 3/28/01); (DE #632, 4/4/01); (DE #637, 4/9/01); (DE #660, 4/13/01); (DE #667, 4/18/01); (DE #693, 4/30/01); (DE #694, 5/1/01); (DE #702, 5/7/01); (DE #703, 5/07/01); (DE #709, 5/10/01); (DE #710, 5/10/01); (DE #711, 5/10/01); (DE #712, 5/10/01); (DE #714, 5/10/01); (DE #715, 5/10/01); (DE #716, 5/10/01); (DE #723, 5/11/01); (DE #724, 5/11/01); (DE #726, 5/16/01); (DE #733, 5/18/01); (DE #734, 5/18/01); (DE #741, 5/21/01); (DE #742, 5/21/01); (DE #749, 5/23/01); (DE #775, 6/6/01); (DE #776, 6/6/01); (DE #777, 6/6/01); (DE #780, 6/6/01); (DE #786, 6/19/01); (DE #788, 6/19/01).

In other words, Mr. Graham does not have to rule on Mason's filings.

- 4. Mr. Graham lied and intentionally misrepresented the law.** Graham stated in this lawsuit, 99-14027, that Mason could not state a claim under 42 U.S.C. § 1981 against a state actor while at the very same time in Case No. 00-14094-CIV-Graham, Fa Nina St. Germain v. Highlands County Board of County Commissioners, he allowed a Plaintiff to state a claim under 42 U.S.C. § 1981 against the very same state actor, Highlands County. In this lawsuit, Case No. 99-14027-CIV-Graham, Graham's Court stated: "*Counts Eight, Nineteen, Twenty-One, Twenty-Three and Twenty-Five deal with §1981 claims. This Court believes that those claims should likewise be dismissed pursuant to the Eleventh Circuit's opinion in Butts v. County of Volusia, 222 F.3d 891(11th Cir. 2000). In Butts, the Eleventh Circuit held that §1983 constituted the exclusive remedy against state actors for violation of rights contained in §1981. See Page 3, Report and Recommendation, (DE #435).* Graham signed this Report and Recommendation. See (DE #466), page 2. Fa Nina St. Germain's §1981 claims were disposed of on the facts, not the law and not Butts v. County of Volusia, 222 F.3d 891(11th Cir. 2000). See Pages 2, Order on Summary Judgment, Case No. 00-14094, (Doc. 58).

Clearly, Judge Graham either lied to Mason or Fa Nina St. Germain as he could not have told the truth to the both of us.

These complaints of misconduct and prejudicial behavior were disposed of in the following manner:

372(c) Complaint, Case No. 01-0054:

The allegations of the Complaint are "directly related to the merits of a decision or procedural ruling" and/or "Action on the complaint is no longer necessary because of intervening events, and therefore moot". Consequently, pursuant to 28 U.S.C. §372(c)(3)(A) and (3)(B) and Addendum Three Rule 4 (a)(2), this Complaint is DISMISSED.

Mandamus Petition, Case No. 01-15754:

The "petition for writ of mandamus and petition for writ of prohibition" is DENIED.

Direct Appeal, Case No. 01-13664-A

"Mason also raises issues that relate to non-sanction matters, e.g., .. the denial of his motions to disqualify the district court and magistrate judges, and the merits of his complaint." See Opinion, pg. 10. There is no other mention of the allegations of misconduct in the entirety of this 14 page opinion.

5. The Speedy Trial Act has been violated.

With respect to the Speedy Trial Act, the Eleventh Circuit has stated:

The Act mandates that defendants be brought to trial within seventy days "from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1). The accounting of time under the Act is subject to excludable delay attributable to the defendant as well as other particularized delays set out in section 3161(h)(1).

See United States v. Mers, 701 F.2d 1321 (11th Cir. 1983).

"If the defendant is not tried within the seventy-day time limit, the court must dismiss the indictment upon motion by the defendant." U.S. v. Miles, 290 F.3d 1341, 1349 (11th Cir. 2002). Mason made his appearance before the Magistrate on April 9, 2002, or 226 days to date, November 22, 2002. "Under both §§ 3162(a)(1) and (a)(2), the district court has discretion to dismiss a case either with or without prejudice....[there is no preference for one type of dismissal over the other. However, in choosing between the two, the court is to be

guided by a careful consideration of factors, including at a minimum the three factors specifically enumerated in both parts of § 3162(a): "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(1), 3161(a)(2)." U.S. v. Brown, 183 F.3d 1306, 1309-10 (11th Cir. 1999). "[I]n order to prevent abuse of the Speedy Trial Act's deadlines, we require a showing of "some affirmative justification" by the government to warrant a dismissal without prejudice." U.S. v. Godoy, 821 F.2d 1498, 1505 (11th Cir. 1987); United States v. Russo, 741 F.2d 1264, 1267 (11th Cir. 1984)("the mere lack of improper motive is not a sufficient excuse for the delay."). In Russo, the Eleventh Circuit dismissed the case with prejudice where the clock started on January 23, 1981 and ended with the trial date on July 8, 1981, or 166 days. Taking this most generous date in the Complaint, the clock would start on April 9, 2002, or 227 days to date, November 22, 2002, and counting, this Complaint, pursuant to Russo, must be dismissed with prejudice.

A. DEFENDANT'S SIXTH AMENDMENT RIGHT TO A SPEEDY HAS BEEN VIOLATED

"In evaluating whether the constitutional guarantee to a speedy trial had been violated, this court must consider (1) the length of the delay, (2) the reason for the delay, (3) whether and when the defendant asserted the right to a speedy trial, and (4) whether defendant has suffered actual prejudice as a result of the delay.. These factors must be considered together — no single factor is sufficient to find a deprivation of the defendant's Sixth Amendment right. If each of the first three factors weigh heavily in favor of the defendant, however, the defendant is not required to demonstrate actual prejudice." United States v. Schlei, 122 F.3d 944 (11th Cir. 1997). "[A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim." Doggett v. United States, 505 U.S. 647, 655 (1992).

The length of delay factor is in Mason's favor. Judge Graham, according to his own words, started this contempt process on November 22, 2001. See 99-14027-CV-Graham, Docket Entry 900, pg. 7, (DE #892) (DE # 884). Mr. Graham should not be allowed to undermine the speedy trial act by surreptitiously starting a

contempt procedure on November 22, 2001. The record clearly establishes that Mr. Graham started the contempt process in stealth. Other than Mason making an appearance before the Magistrate on April 9, 2002, there has been no other action on this matter. “A delay is considered presumptively prejudicial as it approaches one year.” Schlei, *supra*.

The reason for the delay factor is in Mason’s favor. There have been no pretrial motions, illness of an essential government witness, defendant's substitution of counsel; nor scheduling conflicts resulting in the unavailability of certain defense counsel that one year could not have solved. One of the considerations that weigh against the Mr. Graham is the frivolousness of this Complaint. As argued below, this Complaint is totally without merit, and indeed may even tortious or criminal.

As to the third factor, Mason is asserting his right to a speedy trial has been compromised without notice of any scheduled trial.

In conclusion all three factors weigh heavily in favor of Mason, consequently this Complaint is ripe for dismissal with prejudice.

6. The Complaint fails to state a violation of 18 U.S.C. § 401

Neither of the charging documents, (DE #895),(DE #900), set forth the specific legal basis or the specific provision under 18 U.S.C. § 401 it claims has been violated. It is the responsibility of the judge to set forth required elements of contempt under Rule 42(b), Fed.R.Crim.P. See In Re Novak, 932 F.2d 1397 n. 2(11th Cir. 1991). “The purpose of Rule 42(b) is to provide the contemnor with an opportunity to prepare a defense.” In Re Kitterman, 696 F. Supp. 1366, 1371 (Nev. 1988). Clearly, it is not unreasonable for a layman to expect an experienced federal judge and lawyer to be specific about the particular subsection under 18 U.S.C. § 401 that the judge alleges has been violated. Of the two charging documents, (DE #895),(DE #900), the only legal basis that can be determined is the following:

A. 18 U.S.C. § 401

18 U.S.C. § 401 states:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

B. Subsection (1)

“Criminal contempt under § 401(1) has four elements that must be proven beyond a reasonable doubt: (1) misbehavior, (2) in or near the presence of the court, (3) with criminal intent, (4) that resulted in an obstruction of the administration of justice.” U.S. v. Ortlieb, 274 F.3d 872, 874 (5th Cir. 2001); U.S. v. McGainey, 37 F.3d 682, 684 (D.C. Cir. 1994).

MERE INFLAMMATORY REMARKS IS NOT MISBEHAVIOR

““The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil . . . [T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.⁸” “Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.” In Re Little, 404 U.S. 553, 555 (1972); Craig v. Harney, 331 U.S. 367 (1947). “[T]rial courts might not constitutionally punish, through use of the contempt power, newspapers and others for publishing editorials, cartoons, and other items critical of judges in particular cases.” Gentile v. State Bar Of Nevada, 501 U.S. 1030, 1069. [S]uch punishments could be imposed only if there is a clear and present danger of some serious substantive evil which they are designed to avert. Id. Personal attacks on the judge are not attacks on the Court. Ortlieb, at 274 F.3d 878-9. “[M]ere disrespect or affront to the judge's sense of dignity will not sustain a citation for contempt.” United States v. Seale, 461 F.2d 345 (7th Cir. 1972). “A showing of imminent prejudice to a fair and dispassionate proceeding is,

⁸ Compare to: “[j]udge’s with egos and thin skins have no right to be in the justice business.” (DE #900, pg. 6).

therefore, necessary to support a contempt based upon mere disrespect or insult.” Id. In Barrett v. Harrington, 130 F.3d 246 (6th Cir. 1997), the Court expressly held that the following statements or allegations against judges is constitutionally protected speech; (1) unusually arrogant and irascible; (2) failed to show appropriate respect for litigants appearing before her; (3) expressing strong feelings and making profane statements about judge. “The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.” Bridges v. California, 314 U.S. 252, 270-1 (1941). The record clearly shows that Mr. Graham was a litigant, Case No. 02-14049, 01-14224, and the subject of multiple 28 U.S.C. § 372(c) complaints, 01-0054, 01-0068, and 02-0006, during the relevant time period, and more importantly there was no “court” during the relevant time period. .

Applying the law to the instant case, the allegations raised in either of the charging documents fail as a matter of law. (DE #895); (DE #900). The first such allegation of “abusive and derogatory language with respect to the Court” does not occur until October 22, 2001, or five months after the case was closed on June 20, 2001, 99-14027-CV-Graham, Docket Entry 791. (DE #895, pg. 5); (DE #900, pg.5). All other alleged acts are subsequent to October 22, 2001. The case was noticed for appeal on June 25, 2001, 99-14027-CV-Graham, Docket Entry 791. More importantly, the charging documents themselves admit the case was closed. (DE #895, pg. 5); (DE #900, pg.5) (“On June 20, 2001, in view of Mason’s repeated refusal to comply with the Court’s rules and orders, the court dismissed case number 99-14027”). Lastly, and equally important all of the allegations of inflammatory language is directed squarely at Mr. Graham. None of the documents, Mr. Graham references in his complaint are court documents. It would be absurd to argue that there is an imminent threat to the administration of justice for comments allegedly made more than four months after the case was closed. If the remarks alleged in the Complaint are an imminent threat to the administration of justice, then it was Mr. Graham himself

who caused it by publicly releasing his personal copies of documents. More importantly, Mr. Graham was actually a named Defendant in lawsuits during this time period and the subject of multiple 28 U.S.C. § 372(c) complaints.

“NOT SO NEAR THERETO”

“The words "so near thereto" are meant as geographic terms that limit the subsection's application to acts within the immediate vicinity of the courtroom, such as the adjoining hallway or the jury room.” In Re Stewart, 571 F.2d 958 (5th Cir. 1978)⁹ (quoting Nye v. U.S., 313 U.S. 33, 48-49, 61 S.Ct. 810, 815-816, 85 L.Ed. 1172, 1180 (1941)). “[T]he power to punish for contempts "can only be exercised to insure order and decorum" in court.” Nye., at 313 U.S. 48. “It is not sufficient that the misbehavior charged has some direct relation to the work of the court. ‘Near’ in this context, juxtaposed to ‘presence,’ suggests physical proximity not relevancy. In fact, if the words ‘so near thereto’ are not read in the geographical sense, they come close, as the government admits, to being surplusage.” Id. 49. The distance from Miami, Florida, the location Miami Federal Courthouse and Judge Graham’s chambers, to Sebring, Florida, where Mason was during the time of allegations is at least 150 miles. It is difficult to see how Mason interrupt the “order and decorum in court” from 150 miles away in a closed case. There is no evidence that Mason was even in Dade County in whole of 2001 or 2002.

LACK OF WILLFUL INTENT

According to Graham’s own Court, Mason is too stupid to know the law. “*The Plaintiff alludes to this Court’s rulings, issued June 19 and July 25, 2000, directing that he should not contact any of the Defendants or individual Defendants, including their supervisory employees, regarding any matter related to this except through their counsel of record. If the Plaintiff was represented, his attorney that this is proper procedure.*” (99-14027-CIV-Graham, DE #766, pg. 3, para. 5). Criminal contempt

⁹ Decisions by the former Fifth Circuit issued before October 1, 1981 are binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

requires “a contemptuous act and a willful, contumacious, or reckless state of mind.” In Re Joyce, 506 F.2d 373 (5th Cir. 1975). See also In Re Jaques, 761 F.2d 302 (6th Cir. 1985)(holding that civil contempt proceeding, intent in disobeying the order to appear is irrelevant to the validity of the contempt finding). “In order to be guilty of criminal contempt, the defendant must have engaged in his conduct with a willfulness that "implies a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation.” In Re Chandler, 906 F.2d 248 (6th Cir. 1990).

OBSTRUCTION OF THE ADMINISTRATION OF JUSTICE REQUIREMENT

“Subsection 3 is in contrast to Subsection 1, which does expressly require a finding of obstruction” U.S. v. Galin, 222 F.3d 1123, 1127 (9th Cir. 2000). “[C]onviction under § 401(1) requires an "actual" obstruction of the administration of justice” U.S. v. McGainey, 37 F.3d 682, 684 (D.C. Cir. 1994). “Actual obstruction of the administration of justice requires at a minimum that the defendant's conduct had an effect on the proceedings, which presupposes a cause triggered by the attorney's acts.” Ortlieb, at 274 F.3d 876. “The crucial difference between subsections (1) and (3) for our purposes is the objective result requirement regarding obstruction of justice in subsection (1) and the lack of such a requirement in subsection (3).” United States v. Griffin, 84 F.3d 820 (7th Cir. 1996); United States v. Lumumba, 794 F.2d 806 (2nd Cir. 1986). “[T]he conduct must amount to an "actual obstruction of justice", that it must effect the "immediate interruption" of the court's business...” United States v. Seale, 461 F.2d 345 (7th Cir. 1972) (citing in In re Michael, 326 U.S. 224,227, 66 S.Ct. 78, 90 L.Ed. 30); Taberer v. Armstrong World Industries, Inc., 954 F.2d 888 (3rd Cir. 1992)(“ The first subsection of the federal statute governing punishment of contempts, 18 U.S.C. § 401, expressly requires a showing of obstruction.”). “[M]ere disrespect or affront to the judge's sense of dignity will not sustain a citation for contempt...” A showing of imminent prejudice to a fair and dispassionate proceeding is, therefore, necessary to support a contempt based upon mere disrespect or insult.” United States v. Seale, 461 F.2d 345 (7th Cir. 1972). The Government cannot make an argument that an obstruction in the administration occurred for several reasons. Firstly, there was no Court in session. Additionally, in the underlying case,

99-14027-CV-Graham, there was never a trial. Secondly, there was no judicial process and the case was closed on June 20, 2001. Mr. Graham, or the Clerk had the words “**CLOSED CIVIL CASE**” boldly printed in the upper left-hand corner of the order. Thirdly, even more remarkable is the conclusion that if the administration of justice was obstructed, then Judge Graham actually caused the condition. The first such allegation or incident occurs on October 22, 2001. If the administration of justice was being obstructed, then why doesn't Judge Graham take some affirmative action immediately to stop justice from being obstructed in a closed case? Judge Graham does nothing but secretly plans a contempt procedure and it is only on November 22, 2001 that Judge Graham wants to hold a hearing on conduct of parties during proceedings of a case closed on June 20, 2001. A closed case, by definition and as a matter of natural logic, cannot be obstructed. Lastly, and equally important, Judge Graham was divested of jurisdiction on June 25, 2001 when the notice of appeal was filed. (DE #795).

C. Subsection (3)

“To support a § 401(3) conviction, “the government must prove: (1) that the court entered a lawful order of reasonable specificity; (2) the order was violated; and (3) the violation was willful.” U.S. v. Bernardine, 237 F.3d 1279, 1282 (11th Cir. 2001); U.S. v. Burstyn, 878 F.2d 1322 (11th Cir. 1989). Assuming the charging documents attempt to state a violation the order of September 20, 2001, (DE #878), this order cannot form the basis of future contempt complaint because it is not lawful. In De Long v. Hennessey, 912 F.2d 1144, 1149 (9th Cir. 1990), the Court vacated a similar injunction and remanded to the district court to follow proper procedures, where as here, the injunction had the following defects:

- No record of prior notice before issuing the injunction. Id. at 1147.
- Inadequate record for Review. Id.
- Lack of Substantive Findings of Frivolousness. Id. at 1148.

According to the Eleventh Circuit and the Supreme Court of the United States, the order of September 20, 2001 is void because it violated Mason's right of 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...” Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991); Byrne v. Nezhad, 261 F.3d 1075 (11th Cir. 2001). “In addition, the accused must be given an opportunity to respond, orally or in writing, to the invocation of such sanctions and to justify his actions.” In Re Mroz, 65 F.3d 1567, 1575 (11th Cir. 1995); Thomas v. Tenneco Packaging Co., 293 F.3d 1306, 1320 (11th Cir. 2002)(“for the imposition of sanctions to be proper, a court ‘**must comply with the mandates of due process....**’”); Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir. 1998). Judge Graham did not give Mason any notice of his order of September 20, 2002, (Doc. 878). In fact, the order expressly states it was issued *sua sponte*. (Doc. 878, pg. 3). Moreover, the order expressly invokes the Court’s “inherent powers.” (Doc. 878, pg. 6). In its opinion of October 16, 2002, D.C. Case No. 99-14027-CV-Graham, 11th Circuit Case No. 01-13664-A, the Eleventh Circuit also states the district court invoked its inherent powers. See Opinion, ppgs. 9, 12, 14. “Generally, a judgment is void under Rule 60(b)(4) ‘If the court that rendered it lacked jurisdiction if the subject matter, or the of the parties, or if it acted in a manner inconsistent with due process of law.’” Burke v. Smith, 252 F.3d 1260, 1263 (11th Cir. 2001). “A judgement is void for the purposes of Rule 60(b)(4) if the court that rendered it lacked jurisdiction of the subject matter, ... **or if it acted in a manner inconsistent with due process of law**...And if the underlying judgment is void, it is per se abuse of discretion for a district court to deny a movant’s motion to vacate a judgment under Rule 60(b)(4).” Robinson Eng. Co. Pension Plan And Trust v. George, 223 F.3d 445, 448 (7th Cir. 2000); Oakes v. Horizon Financial, ___ F.3d ___ ;2001 U.S. App. LEXIS 17034(11th Cir. 2001); Federal Election Com’n v. Al Salvi For Senate, 205 F.3d 1015, 1019 (7th Cir. 2000); 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);Gschwind v. Cessna Aircraft Co. 232 F.3d 1342, 1346 (10th Cir. 2000). Courts have specifically held that injunctions of the type entered here require due process prior to its issuance. See Tripati v. Beaman, 878 F.2d 351, 354 (10th Cir. 1989)(litigant “is entitled to notice and an opportunity to oppose the court's order before it is instituted.”); Gagliardi v. McWilliams, 834 F.2d 81, 83 (3d Cir. 1987); In re Oliver, 682 F.2d at 446 ; In re Hartford Textile Corp., 613 F.2d 388, 390 (2d Cir. 1979); Procup v. Strickland, 792 F.2d 1069 (11th Cir. 1986)(noting that the

district court issued an order to show cause prior to rendering the injunction). In De Long, *infra*, 912 F.2d 1147, the court remanded the case to the district court because the record failed, as here, to show that the Plaintiff was provided with “adequate notice and a chance to be heard before the order was filed.”

The order of September 20, 2001 is void for vagueness and overbreadth, to the extent it asserts that the following:

Any request for permission to file additional pleadings in the above captioned cases already before the Court SHALL be in the form of an application filed with the Clerk of Court and addressed to United States District Judge Donald L. Graham. This application shall consist of a one paragraph explanation of the requested relief in the proposed pleading, and shall not exceed one page. The application shall not include the proposed pleading.

This order is vague and overly broad and exceeds the scope of a district judge. For example, it makes no distinction between the types of motions. A litigant does not need the permission of a federal judge to file motions for the district judge to disqualify and notice of appeals. A district judge does not have the legal authority to preclude a litigant from filing either of these motions. Otherwise a district judge would have the ability to arrogate his own authority. Similarly, this order would also suggest that Mason needs the district judge’s permission to file a motion to proceed on appeal IFP when the Eleventh Circuit requires that a litigant file the motion in the district court first. According to at least one circuit court of appeals, a district judge does not have the legal authority to prevent a litigant from filing motions for relief under Rule 60(b)(4). In Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 502 (5th Cir. 2000), the court categorically stated:

We notice that the district judge in this matter, like some other district judges in this circuit, has the custom of usually, or even always, prohibiting litigants from filing motions for reconsideration or relief, such as those contemplated by Fed.R.Civ.P. 59 and 60. No judge has that authority

Secondly, it is impossible to lay out the factual and legal basis for which this litigant may seek relief given in a mere one-page, one-paragraph letter given the extensive history of the litigation and the myriad of complex legal issues involved. Should the district judge deny the proposed motion, it would make it impossible for Mason to prevail on appeal because some pertinent fact or issue of law would not be present or raised in this one-page, one-paragraph “explanation.” Given this fact, the very thing the Eleventh Circuit would say is “we decline to review an issue raised for the first time on appeal.” see

Rayburn v. Hogue, 241 F.3d 1341, 1349 n.11 (11th Cir. 2001). A one-page, one-paragraph “explanation” does not guarantee that the district judge will make a ruling to allow Mason to submit a Rule 60(b) motion to demand recusal, or to seek to void an order. In fact the record clearly shows that Judge Graham feels, with the Eleventh Circuit’s express consent, that he does not even have to rule on a motion. Meanwhile, the time constraints under Rule 60(b) are expiring while Judge Graham refuses to rule on a motion.

The injunction of September 20, 2001 is invalid on its face because it fails to make the required legal findings in that it is poorly documented and fails to identify where in the record that Mason has filed either frivolous pleadings or actions. In fact, the order only attempts to speculate at Mason’s motive for bringing the action(s) in question. "The rule generally prevailing is that, where a suitor is entitled to relief in respect to the matter concerning which he sues, his motives are immaterial; that the legal pursuit of his rights, no matter what his motive in bringing the action, cannot be deemed either illegal or inequitable; and that he may always insist upon his strict rights and demand their enforcement." Johnson v. King-Richardson Co., 36 F.2d 675, 677 (1st Cir. 1930)¹⁰. The sole basis for issuing the injunction is the following mere conclusory statements:

Mason's original action against Defendants was case no. 99-14027. (the "Original Action").² After vexatious and relentless litigation on the part of Mason, including continual attempts to directly communicate with the Defendants rather their attorneys, the Court enjoined Mason from any further contact with the Defendants or Defendants' employees. Mason, however, ignored the Court's order and continued to contact the Defendants. In his various e-mails to the Defendants, Mason stated: 1)"Anybody who supports your position on this matter is a racist and is part of the problem. I fear no man!!! This includes white men wearing robes."; 2) "You don't have enough insurance and smart lawyers to outrun the law and defeat me."; 3) "I ain't going to have a handful of white bigots run over me."; 4)"Now go call your daddy in Fort Pierce and see if he can get you out of this mess.;" 5)". . .the hell I would give them, hell like you are getting. . .I ain't going to be bully by no racist whie man." (Case Number 99-14027, D.E. #646).

¹⁰ See *1 Fla. Jur. 2d, Actions*, Section 29, Page 289, ("Courts will generally not inquire into the motives which actuate the plaintiff in bringing his action, if he has a legal right which he seeks to protect. It is no defense to a valid cause of action that the motive or ulterior purpose of the plaintiff in bringing the suit is based on animosity or malice. Where the plaintiff shows a right to the relief sought, it is immaterial that he is seeking it for purposes other than the ascertainment and enforcement of the rights which he relies.")

NO COURT has ever issued such an injunction without first finding that a litigant has a history of filing frivolous lawsuits¹¹. “[P]re-filing orders should rarely be filed.... [A]n order imposing an injunction "is an extreme remedy, and should be used only in exigent circumstances.” De Long, at 912 F.2d 1147. The burden of proof is not on the litigant to prove that he did not violate judicial process, the burden of proof is the Court to justify its injunctions. See Green v. Carlson, 649 F.2d 285 (5th Cir. 1981)(carefully examining the pleadings and noting that the pleadings were frivolous and recognizing the need to curtail further frivolous and malicious filings); Perry v. Pogemiller, 16 F.3d 138 (7th Cir. 1993)(“[F]ederal courts possess the inherent power and constitutional obligation to prevent abuse of the judicial process by a litigant who engages in a pattern of frivolous litigation.”). No Court has the “inherent power” to preclude litigants from filing meritorious lawsuits. Indeed this injunction belies Graham’s own “findings” in a previous case, 00-14240¹². As a matter of fact on 1/16/01, **Graham’s Court**, when responding to a request for these same type of an injunction by these same Defendants, stated: ““*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 to for justifying injunctive relief. The other cases between these parties herein are still pending.*” See D.C. Case No. 00-14240, (*DE #27, Page 3*). Between January 16, 2001 and September 20, 2001, there was only one other lawsuit filed, 01-14230-CV-Graham, which was removed to the S.D.Fla. by the Defendants. This so-called “finding of bad faith” and pendant injunction is not properly documented. “An adequate record for review should include a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed.” De Long, at 912 F.2d 1147. See Cok v. Family Court Of Rhode Island, 985 F.2d 32, 35 (1st Cir. 1993)(requiring a sufficiently developed record be presented for review and holding that it would helpful had the court identified what previously filed frivolous cases.); Werner v. State Of Utah, 32 F.3d 1446, 1448 (10th Cir. 1994)(“This court approves restrictions placed on

¹¹ Using the very same cases cited by the order yields the following: Procup v. Strickland, 792 F.2d 1069 (11th Cir. 1986) (176 cases, most frivolous); In re McDonald, 489 U.S. 180, 184 n.8 (1989)(“ 73 other filings with this Court — including 19 for extraordinary relief — all of which have been denied without recorded dissent.”); Martin Trigona v. Shaw, 986 F.2d 1384, 1387 (11th Cir. 1993)(250+ civil suits); Copeland v. Green, 949 F.2d 390 (11th Cir. 1991)(eight lawsuits frivolous).

¹²This lawsuit was initiated by Highlands County Board of County Commissioners

litigants with a documented lengthy history of vexatious, abusive actions...”); Phillips v. Carey, 638 F.2d 207, 209 (10th Cir. 1981) (“It is apparent that such limitations are suitable only in well documented and extreme cases.”). There is no specific information about the quality of the other lawsuits this Court refers to. The mere number of lawsuits previously filed does not justify issuing a restricting injunction. Ruderer v. United States, 462 F.2d 897, 899 (8th Cir. 1972) (“In our view, appellant’s affinity for litigation, standing alone, would not provide a sufficient reason for issuing such an injunction.”); Tripati, at 878 F.2d 353 (“Litigiousness alone will not support an injunction restricting filing activities.”). To hold otherwise would necessarily yield the absurd notion that after lawsuit x, defendants and tortfeasors could engage unlawful behavior with no fear of liability. “[B]efore a district court issues a pre-filing injunction against a prose 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. The injunction fails to identify so much as one pleading that Mason has filed to be without merit. There is not a single reference to the record other than, (DE #646), which refers to email that was not authenticated and which the Magistrate had ruled to be irrelevant to any claim or defense pending in the matter. “[O]rders restricting a person’s access to the courts must be based on adequate justification supported in the record...” Id. at 1149.

NO LAWFUL ORDER

As argued above, the order of September 20, 2001, (Doc. 878) is clearly void. According to the Eleventh Circuit, the proper thing to do when a litigant believes an order is not lawful is to:

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.

Kleiner v. First Nat. Bank Of Atlanta, 751 F.2d 1193 (11th Cir. 1985).

As stated above, Mason filed petitions for certiorari, mandamus, and a motion for stay with the U.S.

Supreme attacking this order. e.g., Case No. 01-9541, Case No. 01-9407, Case No. 01-9410, Case No.

01A595, and Case No. 01-10367. Additionally, Mason filed direct appeals, mandamus[s], and motions

for stays with the Eleventh Circuit. e.g., 01-15754-A, Case No. 02-11476-A, Case No. 02-14646-A, Case No. 01-13664-A, Case No. 01-16217-G, Case No. 02-12010-F, Case No. 01-16218-H, Case No. 02-12011-G, Case No. 01-16135-D, and Case No. 02-10873-G. With the exception of Case No. 01-15754-A, which was DENIED without comment, the Eleventh Circuit collaterally attacked all other direct appeals and mandamus applications by simply denying IFP status? Where does Mason go when he cannot get appellate review? In a really egregious move, the Eleventh Circuit actually struck Mason's brief for arguing the order of September 20, 2001 and forced Mason to file another brief, and then the Eleventh Circuit turned around and used the same order, September 20, 2000, to affirm the district court.

Normally under the collateral bar doctrine, a party may not challenge a district court's order by violating it. Instead, he must move to vacate or modify the order, or seek relief in the appellate court. U.S. v. Cutler, 58 F.3d 825, 832 (2nd Cir. 1995). More to the point, the Eleventh Circuit expressly told Mason that the way to challenge an order for validity is to not to comply and challenge on appeal. See 11th Cir. Case No. 01-11305, pg. 2, ("he [Mason] may either comply with the district courts 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."). The Eleventh Circuit set forth the following circumstances when an order can be disobeyed and not subject the litigant to a criminal contempt charge:

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. In such a case, the original order is deemed a nullity, and the accused contemnor cannot be fairly punished for violating nothing at all. 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. 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. This exception is based, as is the first for jurisdictional defects, on the notion that "the right of the citizen to be free of clearly improper exercises of judicial authority" demands respect.

In Re Novak, 932 F.2d 1397 (11th Cir. 1991):

Firstly, Judge Graham, according to Judge Moore lacked jurisdiction of the underlying case because a notice of appeal had been filed which divested Judge Graham of the underlying case. See Case No. 02-

14049-CV-Moore, (DE#63). If Judge Moore could not state why orders that he ruled on were or were not legal, could not publish a case, or could not re-write a final order reflecting the text of orders he relied upon to make a judgment, all of which have aided the Eleventh Circuit on appeal, because a notice of appeal had been filed, then how can Judge Graham issued the order of September 20, 2001 when the case had been on appeal since June 25, 2001? Additionally, Judge Graham was required to recuse under 28 U.S.C. § 455(a) long before he issued the order of September 20, 2001. “Disqualification is mandatory for conduct that calls a judge's impartiality into question.... At a minimum, § 455(a) requires prospective disqualification of the offending judge, that is, disqualification from the judge's hearing any further proceedings in the case.” U.S. v. Microsoft Corp., 253 F.3d 34, 116 (D.C. Cir. 2001). “In general, judges should recuse themselves when they have become enmeshed in personal disputes with parties before them.” Smith v. Lockhart, 923 F.2d 1314, 1322 n.10 (8th Cir. 1991). Indeed, “[M]any attorneys are fearful of even filing a complaint against a judge to a circuit judicial council, due to fear of retaliation from that complained-against judge. If there is a fear in merely filing a complaint against a judge, it is evident that a greater fear arises from actually testifying against a judge...” U.S. v. Anderson, 160 F.3d 231, 233 (5th Cir. 1998). The record shows that the Eleventh Circuit has refused to address allegations of misconduct raised against Judge Graham in every possible manner. In fact, in their opinion of October 16, 2002, the Eleventh Circuit does not even mention the allegations of misconduct directed at Mr. Graham. It is important to note that the Eleventh Circuit has never endorsed Judge Graham's behavior or stated the allegations of misconduct raised by Mason are without merit. Secondly, to extent that the collateral bar rule presupposes that adequate and effective remedies exist for orderly review of the challenged ruling, the instant case clearly reveals that in reality there are no adequate and effective remedies as Mason challenged the order in question in every conceivable possible in the Eleventh Circuit and in the U.S. Supreme Court. Thirdly, the order in question encroaches on Mason's constitutional right of access to the Courts. Mason has constitutional right of access to the Courts. See e.g., Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Bounds v. Smith, 430 U.S. 817, 821-23 (1977); Johnson v. Avery, 393 U.S. 483, 490 (1969). “Courts as well as citizens are not free ‘to ignore all the procedures of the law....’. The ‘constitutional freedom’ of which the Court speaks can be won only if judges honor the

Constitution.” Walker v. City Of Birmingham, 388 U.S. 307, 338 (1967)(Mr. Justice Douglas, dissenting). Mason has every right, for example, to submit Rule 60(b), Fed.R.Civ.P. motions to protect his rights. Rule 60(b) motions are time sensitive. Fourthly, the order is invalid on its face without subjecting it to intense legal scrutiny. For example, even this order, which severely restricts Mason’s constitutionally protected interest in accessing the Courts of the United States, admits it does so *sua sponte*. Generally, all constitutionally protected interests required due process before they are deprived. See Resolution Trust v. Town Of Highland Beach, 18 F.3d 1536 (11th Cir. 1994)(“Procedural due process requires adequate notice and an opportunity to be heard "at a meaningful time and in a meaningful manner.”). Given that Mr. Graham was the subject of lawsuits, Case No. 01-14224-CV-Middlebrooks, 02-14049-CV-Graham, and 28 U.S.C. § 372(c) complaints, 01-0054, 01-0068, and 02-0006, most of which preceded the order of September 20, 2001 and all of which preceded the contempt charges, Mason now argues that this contempt procedure violates his substantive due process rights, “Deprivation of a property interest rises to the level of a substantive due process violation if done for improper motives and achieved through means that are arbitrary and capricious, and lacking any rational basis.” Id. “Due process is perhaps the most majestic concept in our whole constitutional system.” Anti-Fascist Committee v. McGrath, 341 U.S. 123, 174 (1951)(Mr. Justice Frankfurter, concurring). Additionally, the order of September 20, 2001 is invalid on its face because it fails to identify the pattern of frivolous pleadings or actions that Mason has filed.

CONCLUSION

This Complaint is frivolous and is meant to harass. Mr. Graham has no earthly reason to believe that a criminal contempt proceeding could convene based upon his allegations. The Complaint represents a gross abuse of power and meant to intimidate the Defendant or stop the Defendant from initiating scathing attacks of Mr. Graham’s misconduct through section 372(c) complaints, appeals, and mandamus petitions. This Complaint has several gargantuan and fatal legal problems that were discovered by a mere layman, an experienced trial lawyer, knowing all the facts, could mount even more fatal legal problems.

WHEREFORE, and based upon the foregoing, Mason requests the following:

- That this matter be dismissed with prejudice forthwith.

- That this matter be released for publication.
- That this Court declare that Mason had a due process right to oppose the injunction of September 20, 2001, and further that Mason was denied same.
- That this Court grant Mason a due process hearing with respect to the order of September 20, 2001.

Respectfully submitted:
Marcellus M. Mason, Jr.
218 Florida Drive
Sebring, FL 33870

Dated this 25th day of November 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via US Mail, postage prepaid, first class, on November 25, 2002, to: Robert Waters, Assistant U.S. Attorney, 99 N.E. 4th Street, Suite 300, Miami, Florida 33132-2111.
