No. ______________________

______________________

IN THE

SUPREME COURT OF THE UNITED STATES

______________________

GORDON C. REID — PETITIONER
(Your Name)

vs.

(FNU) LOCKETT, Warden, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gordon C. Reid
(Your Name)

United States Penitentiary Lewisburg
Post Office Box 1000
(Address)

Lewisburg, Pennsylvania 17837
(City, State, Zip Code)

Not applicable
(Phone Number)

# QUESTION(S) PRESENTED

1. Whether a finding of "abuse of judicial process" is tantamount to "maliciousness" under the PLRA, 28 U.S.C.§ 1915(e)(2), where it is premised entirely on an erroneous answer to a single query on a prisoner complaint form, unrelated to any any claim against the defendants and is devoid of any intent to manipulate, vex, injure or harass either the defendants or the court?

2. Whether the district court may deny an application to proceed in forma pauperis under the PLRA, but nevertheless direct the applicant pay appellate fees?

3. Whether the district court may impose a "strike" under the PLRA for simply applying for in forma pauperis status under the PLRA?

4. Whether the district court's conclusion that Plaintiff's appeal was not taken in good faith or its denial of his motion for leave to proceed in forma pauperis on appeal could be challenged on appeal?

5. Whether the Rule 11(c) Fed. R. Civ. P., determination conflicted with relevant decisions of this Court?

# LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

☑ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

First Name Unknown ("FNU") Lockett, Warden;  
FNU Taylor, Captain of the Guards;  
John Doe, Lieutenant of the Guards;  
John Doe #2, Lieutenant of the Guards;  
John Doe #3, Lieutenant of the Guards;  
FNU Reynolds, Lieutenant of the Guards;  
FNU Brown, Lieutenant of the Guards;  
FNU Ware, Lieutenant of the Guards;  
FNU Carr, Lieutenant of the Guards;  
FNU Burkey, Lieutenant of the Guards;  
FNU Burkette, Lieutenant of the Guards;  
FNU Allen, Lieutenant of the Guards;  
FNU Kane, Acting Director;  
John Doe #4, Regional Director;  
Jane Doe, Nurse;  
Jane Doe #2, Nurse;  
Jane Doe #3, Nurse;  
Jane Doe #4, Nurse;  
Jane Doe #5, Nurse;  
Jane Doe #6, Nurse; and  
FNU Taylor, prison guard.

## TABLE OF CONTENTS

## INDEX TO APPENDICES

# TABLE OF AUTHORITIES CITED

continued on following page

## STATUTES AND RULES

## OTHER

None

| | |
|---|---|
| Collier v. Reigio, 760 F.3d 279 (11th Cir. 1985) | 16 |
| Cooper v. Wood, 1997 U.S. App. LEXIS 15896 (8th Cir. 1997) | 13 |
| F.D. Rich Co., Inc. v. United States ex rel Industrial Lumber Co., Inc., 417 U.S. 116 (1974) | 18 |
| In re Noz, 65 F.3d 1567 (11th Cir. 1995) | 18 |
| In re Porto, 645 F.3d 1294 (11th Cir. 2011) | 18 |
| Mitchell v. Nobles, 873 F.3d 869 (11th Cir. 2017) | 18 |
| Neitzke v. Williams, 490 U.S. 319 (1989) | 11 |
| Ross v. Fogam, 635 Fed. Appx. 824 (11th Cir. 2016) | 14 |
| Spencer v. Rhodes, 656 F. Supp. 458 (E.D. N.C. 1982) | 11 |
| United States v. Adkinson, 247 F.3d 1289 (11th Cir. 2001) | 19 |
| United States v. Gilbert, 198 F.3d 1293 (11th 1999) | 19, 20, 21 |

IN THE

# SUPREME COURT OF THE UNITED STATES

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

☑ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at ______________________________; or,
☐ has been designated for publication but is not yet reported; or,
☑ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at ______________________________; or,
☐ has been designated for publication but is not yet reported; or,
☑ is unpublished.

☐ For cases from **state courts**: N/A

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

☐ reported at ______________________________; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the ______________________________ court appears at Appendix ______ to the petition and is

☐ reported at ______________________________; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

# JURISDICTION

☐ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was August 23, 2018.

☑ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: ____________________, and a copy of the order denying rehearing appears at Appendix ______.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including ________________ (date) on ________________ (date) in Application No. ___A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts:** N/A

The date on which the highest state court decided my case was ______________. A copy of that decision appears at Appendix ______.

☐ A timely petition for rehearing was thereafter denied on the following date: ____________________, and a copy of the order denying rehearing appears at Appendix ______.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including ______________ (date) on ______________ (date) in Application No. ___A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

# CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C § 1915

Rule 11(c), Federal Rules of Civil Procedure

## STATEMENT OF THE CASE

Petitioner Gordon C. Reid is, and was at all times related to the foregoing action, a federal prisoner in custody of the Federal Bureau of Prisons ("BOP"). On July 12, 2017, while immured at BOP's United States Penitentiary ("USP") Coleman II facility located in Coleman, Florida, Petitioner brought suit against twenty-one prison officials alleging violations of constitutional, regulatory, and statutory rights, privileges and immunities when officials at said facility, without legal cause or justification placed him in full restraints ("ambulatory" restraints), applied the restraints in manner intended to cause pain and injury, and refused to remove the restraints for several days. He also alleged that during that tribulation the handcuffs cut into his skin and peeled his skin away from the flesh, but was denied medical attention.

Petitioner invoked Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) under 28 U.S.C.§ 1331; 28 U.S.C.§ 1361 (An action to Compel an Officer of the United States to Do His Duty); 28 U.S.C.§ 2201 and 2202 (the Declaratory and Further Relief Acts); 28 U.S.C.§ 1651 (the All Writs Act); and 5 U.S.C.§ 702 (the Administrative Procedures Act). He requested compensatory, exemplary and injunctive relief. See Docket for United States District Court for the Middle District of Florida, Ocala Division, Electronic Case Filing ("D.Ct. ECF") No. 1.

Petitioner, who is indigent and without the means of defraying court cost and fees, also filed a motion to proceed in forma pauperis together with a motion for temporary restraining order. (D. Ct. ECF Nos. 2 and 3, respectively). On July 21, 2017, granted the motion to proceed in forma pauperis under 28 U.S.C.§ 1915A; a couple of weeks later, on August 8, 2017, denied the motion for temporary restraining order, and on the morrow ordered amendment of the Complaint. (D.Ct. ECF No. 9). Petitioner informed the district court he would not be amending for the reasons proffered by its order to amend, prompting the district court to issue a show cause order (to show why the action should not be dismissed for failure to amend); however, unlike the underlying order to amend, the show cause now suggested the basis of the order to amend was the district court's desire to plead the case on the court's prisoner complaint form. Cf. order to amend (D. Ct. ECF No. 9), to show cause order (D. Ct. ECF No. 11). For that reason, Petitioner "amended" his Complaint repleading his case verbatim on the court's complaint form. Thereafter, on October 18, 2017, the district court issued a second show cause directing Petitioner show cause within 14 days why the action should not be dismissed because he erred in answering a single query on the form that had no impact whatsoever on the litigation. (D. Ct. ECF No. 15). After being granted two extensions of the deadline (D. Ct. ECF Nos. 16-20), Petitioner responded on December 26, 2017, contending he had given a veritable and reasonable response to the query at issue. (ECF No. 21) On January 2, 2018, the district court concluded the error was a deliberate attempt to deceive the court, and dismissed the case without prejudice ECF 22

## Statement of Facts

Because much of this turns on Petitioner Reid's choices in the prosecution of the instant action, a description of the context within which those choices were made together with the possible impact of those choices follows.

At the outset of this litigation Petitioner filed a motion to proceed in forma pauperis ("IFP Motion") (Doc. 2). This motion, which was docketed on July 12, 2017 (along with the initial Complaint (Doc. 1)) was made under 28 U.S.C. § 1915, and granted by the district court (Magistrate Judge Phillip R. Lammens) on July 21, 2017. (Doc. 5). None of the information, verified or unverified, set forth in the IFP Motion and supporting documents have anything to do with the district court's contention that Petitioner was not candid and truthful with the district court. See Order Dismissing Case (Doc 22). This assertion or "finding" is premised on the answer Appellant gave to one of a number of queries set forth on the district court form Complaint when, several months later, he was made to re-plead on that form (see Amended Complaint (Doc. 9)). That query inquired as follows:

> Have you filed other lawsuits in state or federal court otherwise relating to the conditions of your imprisonment?

Amended Complaint at § VIII.C. But even this query requires some context. Section VIII, overall, inquires into specific aspects of a pro se prisoner's litigation history. The first query in section VIII inquires into previous litigations with respect to the "three strikes rule," specifically asking:

> To the best of your knowledge, have you had a case dismissed based on this "three strikes rule"?

Section VIII. The next inquiry in that section (designated § VIII.A.) seeks to determine whether the instant action is "successive," and accordingly asks:

> Have you filed other lawsuits in state or federal
> court dealing with the same facts involved in this case?

Id. at VIII.A. The ensuing query, designated § VIII.B., and subparts is conditioned on a positive response to the preceding query (§ VIII.A.) and requests disclosure of additional specifics related to that response. See § VIII.B which inquires:

> If your answer to A is yes, describe each lawsuit
> by answering questions 1 through 7 below.

Id.

Section VIII, therefore, is a tripartite query in which each part solicits information related to a specific aspect of a pro se prisoner's litigation history. the first part (§ VIII) relates to the "three strikes rule"; the second (§ VIII.A. and B.) relates to "successive" litigation; and the third part (§ VIII.C.) concerns state or federal lawsuits relating to the conditions of the pro se prisoner's confinement. It is this, the third part of the Section VIII tripartite query, the district court implicitly found Petitioner deliberately omitted relevant information, specifically, 4 cases the district court concluded should have been disclosed, but were not. (Show Cause Order at 1, also Order Dismissing the Case at 1) despite Petitioner's contention that the omissions were engendered by his belief that the omitted cases did not qualify and not by any motive to deceive. Response to Show Cause Order (D. Ct. ECF No. 21)

On appeal to the United States Court of Appeals for the Eleventh Circuit the panel denied the motion for leave to proceed and dismissed the appeal on the premise that the appeal was "frivolous." See opinion dismissing case ("Dismissal Order") affixed hereto at Appendix A. The panel found Petitioner's "argument that the district court erred in concluding that he had abused the judicial process - because the lawsuits that he failed to disclose did not relate to his current conditions of confinement, and, therefore, would not have been responsive to the questions on the complaint form - is belied by the record. Reid is currently serving a federal sentence, which he was also serving when at least one of his undisclosed lawsuits was filed." Dismissal Order at 2. While Petitioner did make such a claim with respect to the three other cases, he did not make that claim with regard to the case being referenced by the panel, that case manifestly being Reid v. Federal Bureau of Prisons, Case No 1:13-cv-2149-JTT-JDK (W.D La 2013); in relation to that case Petitioner argued that he did not disclose the case because the case was characterized as one challenging the "fact or duration of confinement" as opposed to challenging the "conditions of confinement," and therefore did not qualify as a "conditions of confinement" case. Nevertheless, the appellate panel found no merit with his arguments, and that a dismissal for abuse of the judicial process is deemed a dismissal based on maliciousness. Id. at 3.

## REASONS FOR GRANTING THE PETITION

(a) THE UNITED STATES COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND/OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER; AND

(b) HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, AND HAS DONE SO IN A WAY THAT CONFLICTS WITH A DECISION OF ANOTHER COURT OF APPEALS.

It being unclear to this pro se Petitioner whether the Court of Appeals for the Eleventh Circuit ("COA") sanctioned the district court's dismissal of his action under 28 U.S.C. § 1915 or Rule 11(c) of the Fed. R. Civ. P., or both, Petitioner, out of an abundance of caution, argues this Petition in relation to both. In any case, it makes no appreciable difference apropo of the reasons for granting this Petition except for the question of federal law that has not been, but should be settled by this august Court. That point of distinction relates solely to the definition of "malicious" within the context of 28 U.S.C. § 1915 (e)(2)(B)(i) (formerly 28 U.S.C. § 1915(d)) which provides:

> (e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that --
>
> (B) the action or appeal --
>
> (i) is frivolous or malicious;

Id. It perhaps worth noting that neither the Magistrate Judge's ORDER To SHOW CAUSE (D.Ct. ECF No. 15) appended hereto at Appendix D, nor the subsequent DISMISSAL ORDER (D.Ct. ECF No. 22) appended hereto at Appendix C, utilize the word "malicious." in the body of the respective documents. Those document justify dismissal under both § 1915 and Rule 11(c) for abuse of the judicial process (purportedly "The failure to exercise candor in completing the (Civil Rights Complaint) form, while acknowledging that the answers are made under penalty of perjury, ..." DISMISSAL ORDER at 3). The term "malicious" is interjected for the first time on appeal in the panel's decision dismissing the appeal. In that decision the panel opined that "because the dismissal order clearly indicated that the case was dismissed for abuse of judicial process, and such a dismissal is deemed a dismissal based on maliciousness for the purposes of §1915." ORDER DISMISSING APPEAL, appended hereto at Appendix A.

Petitioner therefore requests this Court define the term "malicious" within the context §1915(e)(2)(B)(i). In the case sub judice, the COA has essentially held that Petitioner's erroneous response to a single query of no importance in this litigation (for he had already been granted IFP (in forma pauperis) status, and did not, to his knowledge, have any "strikes" - as that term is used in §1915(g) - and certainly not three "strikes") is a "malicious" act; and did so without engaging in a subjective inquiry into Petitioner's motives. The finding of the COA in this respect is contrary to binding law in at least one other Circuit as well as precedent of its own Circuit.

As the district court aptly opined in Spencer v. Rhodes:

> This court has attempted to point out that although our courts have dabbled with what §1915(d) means by... "malicious," no concrete of the entire phrase has been articulated. This court submits that this reluctance or difficulty of defining the phrase has been articulated. This court submits that this reluctance or difficulty of defining the phrase is due to the fact that the statute was not drawn with words calculated to provide the judiciary with a rigid formula of when an in forma pauperis action should be dismissed; rather the statute's intent sought the utilization of the exercise of judicial discretion.

Id. 656 Fed. Supp. , 462 (E.D.N.C. 1987). Similarly, the Prison Litigation Reform Act ("PLRA") does not define, inter alia, the term "malicious." See Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2004) (same: "The PLRA does not define the terms 'frivolous,' or 'malicious'..."). In Neitzke v. Williams, 490 U.S. 312, 325 (1989), this Court indicated a complaint is frivolous within the meaning of §1915(d) "where it lacks an arguable basis either in law or in fact." The Court, however, did not define what is "malicious" under the statute.

The original form of §1915(d) was labelled Chapter 209, Section 4. On April 14, 1892, Mr. Stockdale, from the Committee on the judiciary, submitted a report summarizing this proposed and eventual adopted legislation. His report maintained, in pertinent part:

> The proposed law will not of vexatious litigation . . . The court may dismiss the suit at any time if it be made clear that the allegation of poverty is probably untrue, or if he be satisfied <u>the cause of action</u> is frivolous or malicious.

(The word "probably" was deleted from the bill prior to its adoption.) (emphasis added) H. Rep. No. 1079, 52nd Cong., 1st Sess. (1892). Thus, it is manifest from the language of the seminal bill that the object of the malice was the cause of action or the defendant, not the Court. Therefore, assuming in arguendo Petitioner's erroneous answer was a malicious act directed at the Court (which it was not), dismissal under §1915(e)(2)(B)(i), the fruit of §1915(d), was inappropriate where the purported malicious act nothing to do with the cause of action.

Petitioner also contends the COR's definition, as extrapolated from it's application, of the term "malicious" is demonstrably a horse of a different color in juxtaposition to the application of that term in several Circuits. Again, assuming in arguendo, the district court is correct in concluding the omission was not an error, but an intentional act, such an act alone does not equate malice, or, as argued, infra, "bad faith." In the Eighth Circuit, its cases have interpreted "malicious" to apply to situations "where the plaintiff knows the allegations to be false; where the complaint is plainly part of a longstanding pattern of abusive and repetitive lawsuits;

and where the complaint contains disrespectful references or abusive language." Cooper v. Wood, 1997 U.S. App. LEXIS 15896 (8th Cir. 1997) (internal quotations and citations omitted). Also see Washington v. Reno, 1995 U.S. App. LEXIS 15728 (6th Cir. 1995) ("Generally, however, a complaint is malicious under § 1915(d) if it is repetitive or evidences an intent to vex defendants or abuse the judicial process by relitigating claims decided in prior cases.").

In Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2004), the 9th Circuit held that in defining, inter alia, "malicious" "we look to 'their ordinary, contemporary, and common meaning.' Id. (citation omitted). Utilizing Webster's Third New International Dictionary the found "(a) case is malicious if it was filed with the 'intention or desire to harm another.'" Id. Not surprisingly, then, in Brown v. City of Philadelphia Office of Human Resources, 2018 U.S. App. LEXIS 24223 (3rd Cir. 2018) the Third Circuit held: "A court that considers whether an action is malicious must, in accordance with the definition of the term 'malicious,' engage in a subjective inquiry into the litigant's motivations... to determine whether the action is an attempt to vex, injure or harass the defendant." Id. Here, without any inquiry into Petitioner's motivations, the district court concluded his singular act of allegedly intentionally omitting relevant information with respect to a § 1915A review it had already conducted, and which would not have altered the Court's conclusion, was an abuse of the judicial process tantamount malice.

Ironically, the COA's decision contradicts both published and unpublished decisions of that Circuit. In Ross v. Fagan, 635 Fed. Appx. 824, 833 (11th Cir. 2016) the panel vacated and remanded reasoning,

> Regarding Ross's mistakes in the instant action regarding his prior litigation history on the Prisoner Form, this Court notes that the magistrate judge specifically declined to address the issue and the district court did not make any specific findings about them. It is not clear to this Court that the mistakes Ross made reporting dispositions of his cases against Hurst and Mickle were made in bad faith. Furthermore, it is not clear that accurately disclosing those dispositions would have even resulted in a finding that Ross had three strikes under the PLRA, and the district court did not specifically make such a finding.

Id. at 833-34. In this case, none of these factors made any difference: bad faith was automatically imputed; and the district court, by reason of having earlier granted the IFP application, had implicitly found Petitioner did not have three strikes.

The decision also contravenes Circuit precedent in the case Camp v. Oliver, 798 F.2d 434 (11th Cir. 1986). The IFP application was granted on 07.21.17 (ECF No. 5). Five months later on January 19, 2018, the district court dismissed the case pursuant to, inter alia, 28 USC §1915. See Dismissal Order, D.Ct. ECF No. 22. "(S)ection 1915(d) empowers the court to dismiss the complaint if, after granting in forma pauperis permission, the court later determines the action is frivolous or that the affidavit of poverty is untrue." **Camp v. Oliver**, 798 F.2d 434, 437 (11th **Cir.** 1986). Here, the district court dismissed under **Section 1915** not because "the action is frivolous or that the affidavit of poverty is untrue, *id.*, but because in the opinion of the district court, Appellant's allegedly inaccurate answer to the VIII. C. query constituted an "abuse of the judicial process." **Order** (of dismissal) at p. 3. However, the district court's opinion does not articulate any manner in which the allegedly inaccurate answer impacted the district court's decision to grant IFP status under **§1915**. The district court posits that "the existence of prior litigation initiated by a prisoner is required in order for the Court to apply **28 U.S.C.§ 1915(g)** (the "three strikes rule" applicable to prisoners proceeding in forma pauperis)." ***Id.*** It is not "the existence of prior litigation," *id.*, that is required for the district court's application of **§1915(g)**; it is, more precisely, the existence of

> three or more prior occasions, (where the applicant) while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it was frivolous, malicious, or fails to state a claim upon which relief may be granted, ...

*Id.* Insofar as the district court has not suggested that any of the nondisclosed cases were dismissed on such grounds, or, indeed, that Appellant has ever brought a case that was dismissed on such grounds, his answer to VIII. C. did not have any impact on the district court's previous order granting IFP status. (And in any case Appellant's answer to the § VIII "three strikes" query, to which he answered "no," has not been shown to be anything but veritable.)

The district court's suggestion that the answer to VIII. C. may have impacted and impeded its determination of whether to dispose of this action as successive fares no better. The § VIII.A. query succinctly inquires whether "Appellant has filed other lawsuits in state or federal court dealing with the same facts involved in this action?" *Id.* Appellant answered "No." And the district court has not suggested this answer is inveritable or that any of the nondisclosed cases share the same facts involved in this case.

The focus with respect to dismissal under **§ 1915** "is to weed out the litigant who falsely understates his net worth in order to obtain in forma pauperis status to which he is not entitled based upon his true financial worth." *Camp*, 798 F.2d at 438 & n.3. And, by analogy, to weed out the litigant who falsely represents his eligibility under the three strikes provision. See, e.g., *Rivera v. Allin*, 144 F.3d 719, 721 (11th Cir. 1998). "The purpose of section 1915 permitting dismissal if the affidavit ... is untrue is not to punish the litigant whose affidavit contains an insignificant discrepancy...." *Camp*, at n.3. "Not every inaccuracy in an affidavit of poverty, no matter how minimal, should be construed as a false allegation of poverty so as to cause loss of in forma pauperis eligibility and dismissal of the complaint." *Id.*

As summarized in *Camp*: In *Collier v. Rergio*, 760 F.2d 279 (11th Cir. 1985), a panel of this Circuit affirmed a dismissal. There, the court noted that the petitioner's affidavit of poverty alleged no funds when he actually had thirty cents in his prison account. More important however, the court found that the petitioner was a "chronic litigant who manipulates the amount of funds in his account so as to support his assertions of indigence." *Id.* at The panel in *Camp* concluded that "the Collier panel obviously upheld the dismissal because of the petitioner's history of fraudulent manipulation of his bank account." *Camp*, at 437-38. "We doubt," the *Camp* panel opined, "that, absent a petitioner's bad faith, the (*Collier*) panel would have interpreted an affidavit of no funds coupled with a bank balance of thirty cents as a fraudulent misrepresentation of poverty warranting as harsh a sanction as dismissal with prejudice.

The allegedly inaccurate answer to the VIII.C. query in the *Amended Complaint* has, if any at all, a very attenuated connection to Appellant's IFP application and supporting affidavit of indigency filed months prior to the *Amended Complaint*. Regardless to the strength of that connection two material factors may be discerned: (1) the allegedly inaccurate answer to the VIII.C. query neither contradicted nor undermined any of the answers or assertions made in Appellant's IFP application and supporting affidavit of indigency; and (2) that the allegedly inaccurate statement did not, per se, invalidate Appellant's entitlement to IFP status under §1915. It is only by reason of the district court's conclusion that the allegedly inaccurate statement constituted an "abuse of the judicial process" that the sanction of dismissal is imposed; however, for such reasons set forth infra II.B, this conclusion is utterly bereft of any foundation; and without that foundation the district court's sanction of dismissal is exposed for what it is: punishment for an "insignificant discrepancy" in an affidavit, or in this case, verified *Amended Complaint*. A purpose that is not countenanced under §1915. *Camp*, at n3

Wherefore, Appellant contends the district court committed reversible error

## THE APPEALS COURT ERRED WHEN IT DISMISSED APPELLANT'S AMENDED COMPLAINT UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE & §1915

### A. The District Court's Order of Dismissal Fails to Adequately Set Forth Specific Findings

In addition §1915, the district court also cites *Rule 11(c)* of the Federal Rules of Civil Procedure as grounds for dismissal. *Order Dismissing*

*Case* at p.3. Rule 11 authorizes the district court to sanction a party who files a pleading containing a false factual representation if that party knows of, or did not reasonably inquire into, the falsehood. See **Fed. R. Civ. P. 11(b), (c)(1)**. See also *Attwood v. Singletary*, 105 F.3d 610, 612 (11th Cir. 1997)("Rule 11 sanctions are proper when a party files a pleading that has no reasonable factual basis [or] when the party files a pleading in bad faith for an improper purpose." (internal quotations omitted)); and *Mitchell v. Nobles*, 873 F.3d 869, 875 (11th Cir. 2017). Before imposing sanctions under a district court's inherent powers, the district court must make a finding of bad faith. *In re Mroz*, 65 F.3d 1567, 1575 (11th Cir. 1995); and *In re Porto*, 645 F.3d 1294, 1304 (11th Cir. 2011)(The court must make specific findings as to the party's conduct that warrants sanctions.). This the district court did not adequately set forth. The district court's opinion, which accuses Appellant of being dishonest, fails to specify an improper purpose; consequently, at best, the *Order Dismissing Case* specifies the possible impact an insignificant discrepancy might have on judicial economy, nothing more.

Wherefore, Appellant respectfully contends a sanction of dismissal under **Fed. R. Civ. P. 11** cannot be sustained where the court failed to make adequate specific findings as to Appellant's conduct that warrants dismissal.

### B. Assuming in Arguendo That the Answer to VIII. C. Was Inaccurate or Even False, It Was Not a Sufficient Basis to Justify Dismissal Under Either Rule 11 or § 1915

Under §1915, "[a] finding that the plaintiff engaged in bad faith litigiousness or manipulative tactics warrants dismissal. Similarly, dismissal under Rule 11 also requires bad faith. *Attwood* at 612. Also see *F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974); and *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Bad faith is an objective standard that is met if the party's conduct was objectively reckless, or outside the bounds of acceptable conduct. *Amlong and Amlong, PA v. Denny's, Inc.*, 500 F.3d 1230, 1242 (11th Cir. 2006); also see *Paterson v. Aiken*, 841 F.3d 386, 387 (11th Cir. 1988) ("The bad faith element is determined by objective standards of reasonableness."). And "without a finding of fraud or bad faith whereby the very temple of justice has been defiled, a court enjoys no discretion to employ inherent powers to impose sanctions." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (internal quotation marks omitted).

Here, the district court imposed the penultimate sanction based upon its conclusion that (1) the VIII.C. query requested disclosure of all of Appellant's prior federal cases without qualification, and (2) that "(Appellant) failed to truthfully disclose all of his prior federal cases." *Order Dismissing Case* at p. 1. Assuming, in arguendo, the district is correct as to both conclusions, Appellant nevertheless contends that the failure to disclose, without more, is not sufficient to establish bad faith. "Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity, ... it contemplates a state of mind affirmatively operating with furtive design or ill will." *United States v. Gilbert*, 198 F.3d 1293, 1299 (11th Cir. 1999); also see *United States v. Adkinson*, 247 F.3d 1289, 1292 (11th Cir. 2001) As argued supra, not every inaccuracy or insignificant discrepancy in a sworn statement is cause for the guillotine. Indeed, in *Byrne v. Nezhat*, a panel of this Court declined to find that a plaintiff had acted with bad faith despite the district court findings that the party had made several false assertions in affidavits, depositions and sworn statements filed with the court. *Id.*, 261 F.3d 1075 (11th Cir. 2001). The *Byrne's* panel opined that:

> Even if we accept (the district court's) finding as true, false statement alone do not indicate bad faith. Without a 'smoking gun' statement from the plaintiff, i.e., 'I know my claim is frivolous and I am pursuing this

> claim to harass the defendants,' a district court makes a determination of bad faith by drawing inferences from the conduct before it. Standing alone, a false or inconsistent statement in a deposition does not compel the conclusion of bad faith. A false statement can be evidence of bad faith, if, for instance, there is other evidence in the record indicating that the statement was made for a harassing or frivolous purpose.

*Id.* at 1125. Accepting, in arguendo, the district court's finding that Appellant did not "truthfully disclose all of his prior federal cases," **Order Dismissing Case** at p. 1, it is at this juncture the vehicle becomes depleted: neither the **Order Dismissing Case** nor the magistrate judge's **Order to Show Cause** so much as suggest there is other evidence in the record indicating that the (false answer to the VIII.C. query) was made ...," **Byrne**, at 1125, "with a furtive design or ill will." **United States v. Gilbert**, at 1299.

**Attwood v. Singletary**, supra, upon which the district court relies is consistent with **Gilbert** and **Byrne**. In **Attwood v. Singletary**, supra, the plaintiff inmate filed a claim under **42 U.S.C.§1983** alleging physical injuries and willful deprivation of proper medical care. He also filed a motion to proceed in forma pauperis in order to avoid liability for court fees and costs. He filed an affidavit attesting he had no accounts, control over, or income from any bank account since 1991, and that he owned no real estate or other valuable property. He filed numerous such claims in the Southern and Northern district courts of Florida.[5] The magistrate judge concluded that Attwood intentionally misstated his income to obtain indigent status and filed his claim in bad faith. The district

---

[5] The Court found Attwood had filed at least 61 claims in the District Court for the Southern District alone. *Id.* at 611.

court accepted the findings of the magistrate judge and imposed sanctions pursuant to **§1915(d)** and **Fed. R. Civ. P. 11.** On appeal the court affirmed noting Attwood's false claim of indigency and his history of abusing judicial process, and that another district had recently concluded he was not indigent and enjoined him from filing suits that did not comply with **Rule 11.** Upon these facts the **Attwood** panel concluded that Attwood's actions showed a history of bad faith litigiousness and deceit. **Id.** Thus, not only was Attwood's false statement found to have been made "with a furtive design...," **Gilbert**, at 1299, i.e., to obtain in forma pauperis status to which he was not entitled based upon his true financial worth, the **Attwood** panel found other evidence in the record indicating that Attwood was engaging in manipulative tactics.[6] In another case relied upon by the district judge, **Rivera v. Allin**, supra, the court also apparently found the plaintiff acted "with a furtive design...," **Gilbert**, at 1299, when he failed to disclose his previous lawsuits by reason of which he was ineligible for in forma pauperis status. This case does not share these dynamics: there is neither a furtive design nor ill will attached to the allegedly false answer; furthermore, there is not any evidence in the record that the answer was made for a harassing or frivolous purpose, or to impede the Court in managing its caseload. As stated above, at best what the district court describes is the failure to disclose case(s) that have no impact on anything of substance, or indeed anything at all. It is precisely what the **Camp** panel characterized as an "insignificant discrepancy," **id.** at n.3, i.e., assuming the answer to the VIII. C. query is, in fact, inaccurate.

---

[6] Attwood regularly brought suits under **42 U.S.C.S § 1983** on the same factual grounds, changing only the venue or the names of the defendants. **Attwood** at 611. Also he had been sanctioned for, inter alia, bringing claims that no reasonable factual basis. **Id.** at 612.

Therefore, the COA's decision is in contravention to this Court's holding in Chambers v. Nasco, supra, where it is devoid of any finding of bad faith.

## The Assessment of Court Costs Under the PLRA, 28 U.S.C.S §1915 Upon Denial of an Application to Proceed IFP on Appeal Violates the Dictates and Spirit of that Provision.

Subsequent to the docketing of the appeal the COA directed Petitioner file a motion to for leave to proceed IFP in the district court. Upon filing the IFP motion, the district court denied the motion, imposed an additional "strike," and ordered Petitioner be assessed appellate court costs under the PLRA. Petitioner contends, however, that the imposition of the "strike" and "fees" was premature; that he should have been given the option to withdraw his appeal, pay the filing fee upfront, or apply for IFP in the appellate court, upon whose discretion it was to impose a "strike" or fees. Petitioner contends that the district court exceeded its authority under 28 U.S.C.S §1915, and that by its actions he was forced to pursue the appeal where had he known that by simply applying for IFP he could incur both a "strike" and payment of appellate fees, he may have opted out of applying.

Typically, e.g., a prisoner may bring an application to proceed IFP under the PLRA, and if upon reviewing the application, the court determines the action frivolous, it may deny the application; but the dismissal does prejudice the filing of a paid complaint, making the same allegations. Denton v. Hernandez, 504 U.S. at 34. What the district court has done here is deny the application, but nevertheless proceed to require payment under the PLRA; thus, an indigent prisoner, of all people, incurs the double-whammy of having to pay the court fees twice to file a paid complaint or appeal.

## CONCLUSION

Petitioner submits he is entitled to reversal of the Order dismissing his appeal as frivolous, imposing "strikes," and denying IFP status.
The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gordon C. Reid

Gordon C. Reid, pro se

Date: Nov. 15, 2018