19-6903

ORIGINAL

No._____

In the Supreme Court of the United States

ALVIN R. BARNEY II, Petitioner, v. ESCAMBIA COUNTY, FLORIDA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Alvin R. Barney, II
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QUESTIONS PRESENTED

FIRST QUESTION

This first question is whether the Eleventh Circuit had the authority or subject matter jurisdiction to dismiss a premature notice of appeal as a sanction for failure to prosecute when no final judgment has been entered?

SECOND QUESTION

As an alternative basis for reversal, the second question is whether the Eleventh Circuit abused its judicial discretion when it dismissed the appeal as a sanction for failure to prosecute without a finding of bad faith?

PARTIES TO THE PROCEEDING AND RELATED CASES

Alvin R. Barney, II v. Escambia County, Florida, et al Appeal No: 18-14561

Barney II, Alvin R., Appellant/Petitioner, Pro Se

Barry, Steven, Chairman, Escambia County Board of County Commissioners, Defendant;

Carothers, Alicia D., Attorney for David Morgan

Clerk of Court, Initials (**alb**), United States District Court for the Northern District of Florida and Advocate for the Defendants;

Cosby, Jessica L., Resident/Private Person, Escambia County, Florida, Defendant;

Duncan, Hon. Scott J., Judge, First Judicial Circuit, Escambia County Courthouse, State of Florida;

Eddins, William E., State Attorney of the First Judicial Circuit, State of Florida;

Escambia County, Florida, Political Subdivision, State of Florida, Defendant;

Garmon, Eric R., Attorney for David Morgan

Goodman, Hon. Ross, Judge, First Judicial Circuit, Escambia County Courthouse, State of Florida;

Green, Harry, Defendant/Deputy Sheriff, Escambia County, Florida, Defendant;

Glaze, Todd J., Defendant/Deputy Sheriff, Escambia County, Florida, Defendant;

Kinsey, Hon. Patricia A., Judge, First Judicial Circuit, Escambia County Courthouse, State of Florida;

Moody, Ashley, Attorney General, State of Florida, Attorney for Judge Kinsey

Morgan, David, Sheriff, Escambia County, Florida, Defendant;

Peppler, Charles V., Attorney for Escambia County, Florida;

Rininger, Glenn W., Attorney for Deputy Sheriff Harry Green, Todd J. Glaze;

Rodgers, Hon. Margaret C., Chief United States District Judge, United States District Court for the Northern District of Florida and Advocate for Judge Kinsey;

Stafford III, William H., Attorney for Judge Kinsey;

Stefani, Diane, State Attorney of the First Judicial Circuit, State of Florida;

Stone, Kelsey, State Attorney of the First Judicial Circuit, State of Florida;

Truckenbrod, Lisa., Attorney for Sheriff David Morgan, Deputy Sheriff Harry Green, Todd J. Glaze;

Warner, William G., Attorney for David Morgan;

Related Cases

Barney v. Florida Department of Revenue, U.S. District Court for the Northern District of Florida (Pensacola Division), 3:18-cv-00620-MCR-HTC. Judgment entered on March 18, 2019.

Barney v. Florida Department of Revenue, Appeal No. 19-11049-C, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on August 1, 2019; October 11, 2019.

TABLE OF CONTENTS Page(s)

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alvin R. Barney respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Clerk's judgment dismissing the appeal as a sanction for failure to prosecute and the Eleventh Circuit's opinion denying Barney's Motion to Set-Aside the Judgment of Dismissal and to Reinstate the Appeal is listed at Appendix A & A-1. The Magistrate Judge's Report and Recommendation that the complaint be dismissed with prejudice as a sanction for failure to prosecute under Fed.R.Civ.P. 41(b), and the District Court's final order adopting the magistrate judge's report and recommendation. Appendix B & B-1.

JURISDICTION

The Clerk of the Eleventh Circuit entered an order and judgment dismissing Barney's appeal with prejudice as a sanction for the failure to file an appellant's brief within the time fixed by the rules on August 1, 2019. The Clerk entered the mandate on this same day. Barney filed a timely Motion to Set-Aside the

Judgment of Dismissal and to Reinstate the Appeal on August 15, 2019. The Clerk returned the document unfiled and indicated that it was filed on August 22, 2019. Petitioner filed a motion for Reconsideration on September 3, 2019. The Panel Court entered an order denying the motion for reconsideration on October 11, 2019. This Court has jurisdiction under 28 U.S.C.§1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

Title 28 U.S.C. § 636(b)(1)(B), (C)

(b)
(1) Notwithstanding any provision of law to the contrary—

(B)

a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C)

the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Title 28 U.S.C. § 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Title 28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States ...

Title 28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Title 28 U.S.C. § 1746

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1)

If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2)

If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

STATEMENT OF THE CASE

On January 3, 2017, Petitioner/ Plaintiff filed a multi-party, multi-claim lawsuit under 42 U.S.C. Section 1983 against seven defendants, including the Escambia County (Florida) Sheriff Department. Petitioner filed the complaint to vindicate his right to be free from arrest and detention without probable cause.

Plaintiff was arrested in Pensacola, Florida in November 2015, and was confined to jail for nearly five months based upon an unsworn police report. The arrest and detention were in violation of the Fourth Amendment because they were not based upon probable cause supported by oath or affirmation. See Ex parte Burford, 7 U.S. 448, 453 (1806); Albrecht v. United States, 273 U.S. 1 (1927); Gerstein v. Pugh, 420 U.S. 103 (1975). See Plaintiff's Partial Motion and Memorandum of Law for Summary Judgment.

The Defendants/Respondents in this case include Escambia County, Florida; Steven Barry, Chairman, Escambia County Board of Commissioners; David Morgan, Sheriff, Escambia County; Todd G. Glaze, Deputy Sheriff, Escambia County; Harry Green, Deputy Sheriff, Escambia County; the Honorable Patricia A. Kinsey, State Court Judge; and Jessica Cosby, a private citizen acting in concert with the Sheriff Deputies. Plaintiff sued all Defendants in their official capacities. Although Plaintiff paid the filing fee, service of process was authorized for all Defendants except Defendant Kinsey (Judge Kinsey).

Defendants Escambia County, Steven Barry, David Morgan, Todd G. Glaze, and Harry Green (hereinafter County Defendants) filed motions to dismiss the complaint with prejudice. (ECF No: 14, 17 & 18). Defendant Cosby filed an answer. (ECF No: 19) Even though Plaintiff sued Escambia County for the unconstitutional conduct of its employees, the individual Defendants filed separate motions to dismiss as if Plaintiff were suing them in their individual capacities.

Plaintiff filed a Partial Motion for Summary Judgment against the Escambia County Defendants on September 26, 2017. (ECF No: 22) The summary judgment motion was referred to the Magistrate Judge for consideration on

September 27, 2017. Pursuant to the motion, Plaintiff argued, among other things, the following:

> "The County cannot present a genuine dispute as to any issue for trial because the arrest affidavit is insufficient on its face, in that it "does not reflect that it was sworn to before an individual authorized to administer oaths." Placide v. State of Florida, 189 So.3d 810, 813-814 (Fla. 4th DCA 2015). An unsworn police report is not competent evidence to establish probable cause because a probable cause determination made at first appearance is based on an affidavit of a police officer, a sworn complaint, sworn deposition testimony, or other testimony under oath properly recorded. *Perry v. State*, 842 So.2d 301, 303 (Fla. 5th DCA 2003); Florida Rules of Criminal Procedure 3.133(a)(3).
>
> The Supreme Court has held that "A law enforcement officer must present a written affidavit or sworn complaint to the committing magistrate demonstrating probable cause to believe that the accused has violated the criminal law of the State." See Gerstein v. Pugh. See Article I, § 12, Fla. Constitution."

The magistrate judge did not make a report and recommendation on the motion for summary judgment and the motion was never decided on its merits.

Plaintiff filed a Motion for Issuance of Summons as to Judge Kinsey on September 28, 2017. (ECF No: 24) But the district court later dismissed the claims against Judge Kinsey on November 1, 2019. (ECF No: 42)

On November 15, 2017, Petitioner filed a notice of appeal on the order dismissing the claims against Judge Kinsey prior to service of process. (ECF No: 44) The appeal was assigned Appeal number 17-15079.

On December 28, 2017, while the appeal was pending, the district court entered an order directing clerk to issue summons for Judge Kinsey. (ECF No: 64) The district court subsequently reversed its order of dismissal as to Judge Kinsey, finding the following:

> "In the Eleventh Circuit:
>
> [A] sua sponte dismissal under Rule 12(b)(6) will not stand where: 1) the defendant has not filed an answer and the plaintiff still had a right to amend his complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure; 2) the plaintiff has brought his claim in good faith; and 3) the district court has failed to provide the plaintiff with notice of its intent to dismiss or an opportunity to respond. Am. United Life Ins. Co. v. Martinez, 480 F.3d 1043, 1069 (11th Cir. 2007) (citing Jefferson Fourteenth Assocs. v. Wometco de P.R., Inc., 695 F.2d 524, 527 (11th Cir. 1983)). This is the case "[e]ven if [the] claim ultimately has no merit." Jefferson, 695 F.2d at 527; see also United States v. Jones, 125 F.3d 1418, 1428 (11th Cir. 1997) ("The plaintiff is the master of the complaint. The plaintiff selects the claims that will be alleged in the complaint. Some may be substantially justified, others may not be."). (ECF No: 76)
>
> Barney's claim against Judge Kinsey should not have been dismissed with prejudice. Prior to dismissal, Judge Kinsey had not appeared in the case and Barney had yet to amend his complaint (Element No. 1). There is no indication that Barney filed his claims against Judge Kinsey in bad faith, even if his claims appear to lack merit (Element No. 2). Most importantly, Barney was not given an opportunity to weigh-in before the magistrate judge recommended, sua sponte, that the Court should dismiss Barney's claims against Judge Kinsey with prejudice. (Element No. 3). Barney was entitled to amend his complaint once as a matter of course." id.

On January 4, 2018, the Eleventh Circuit dismissed the appeal sua sponte for lack of jurisdiction. Plaintiff filed a dispositive motion for Judgment on the Pleading against Defendant Cosby on January 12, 2018. (do. 67) The magistrate judge did not make a report and recommendation on the motion and the motion was never decided on its merits.

On January 18, 2018, Plaintiff filed a Motion and Memorandum of law for Summary Judgment against Judge Kinsey. (ECF No: 71) Plaintiff argued, among other things, the following:

> "Summary judgment is appropriate at this stage of the proceedings because the record shows that there is a lack of evidence to support the probable cause determination made by Judge Kinsey. There is no presentation of proof to support the probable cause determination because the police report is not sworn to before a person authorized to administer oaths. See the attached Non-adversary Probable Cause Determination and unsworn Arrest Report which are attached as Exhibits 1 & 4 of the enclosed Memorandum of Law. The lack of evidence to support the probable cause determination is dispositive of the entire case because it is illegal to arrest a person and confine him to jail based upon an unsworn police report." Id.

Judge Kinsey did not file an opposing motion and the magistrate judge did not make a report and recommendation and the motion was never decided on its merits.

On May 30, 2018, the Magistrate Judge filed a R&R recommending that Plaintiff's the civil rights complaint be dismissed without prejudice as all the Defendants in this case. See docket entry 94 where the Magistrate Judge recommended the following:

> REPORT AND RECOMMENDATION: That defendants' motions to dismiss (docs. 78, 80, 81, and 82) be GRANTED and that plaintiff's claims against Escambia County, Florida; Steven Barry; David Morgan; Todd Gerald Glaze; Harry Green; and Patricia A. Kinsey be DISMISSED WITHOUT PREJUDICE. That plaintiff's motion for judgment on the pleadings against Ms. Cosby (ECF No: 67) be DENIED and plaintiff's claims against Ms. Cosby DISMISSED WITHOUT PREJUDICE for failure to state a claim upon which relief can be granted. That plaintiff's motion for summary judgment against Judge Kinsey (ECF No: 71) be DENIED. That all other pending motions be DENIED as moot. That the clerk of court be directed to close the file. R&R flag set. Signed by MAGISTRATE JUDGE CHARLES J KAHN, JR on 5/30/2018. Internal deadline for referral to district judge if objections are not filed earlier: 6/27/2018. (djb) (Entered: 05/30/2018)

(Appendix B-1)

After filing a motion for extension of time on June 13, 2018, Plaintiff filed a timely Objection to the R&R with the clerk on June 27, 2018. (ECF No: 95 & 97) Plaintiff argued, among other things, that the Court should not adopt the R&R because the Magistrate Judge violated the Magistrate Act by failing to make proposed findings of fact and recommendations for 10 of Plaintiff's dispositive motions, including his motions for summary judgment, in violation of Title 28 § 636(b)(1)(B), (C). (ECF No: 97)

On August 29, 2018, the Court adopted the R&R, dismissed the complaint, closed the case and ordered that case filed be destroyed in 90 days. (ECF No: 99 & 100) In dismissing the complaint and closing the case, the court stated that it made "a de novo determination of any timely filed objections." id. The Court's adoption of the R&R reads as follows:

> ORDER ADOPTING REPORT AND RECOMMENDATION. Defendants' 78, 80, 81, and 82 motions to dismiss, are GRANTED and plaintiffs claims against Escambia County, Florida; Steven Barry; David Morgan; Todd Gerald Glaze; Harry Green; and Patricia A. Kinsey are DISMISSED WITHOUT PREJUDICE. Plaintiffs motion for judgment on the 67 pleadings against Ms. Cosby, is DENIED and plaintiffs claims against Ms. Cosby are DISMISSED WITHOUT PREJUDICE for failure to state a claim upon which relief can be granted. Plaintiff's 71 motion for summary judgment against Judge Kinsey, is DENIED. All other pending motions are DENIED as moot. Signed by JUDGE M CASEY RODGERS on 8/29/2018. (alb) (Entered: 08/29/2018) (ECF No: 99) (Appendix B)

The clerk's docket entry reads as follows:

> CLERK'S JUDGMENT re 99 Order Adopting Report and Recommendation. 90 Day Deadline set for destruction of working file 11/27/2018 (alb) (Entered: 08/29/2018) See ECF No: 100

In dismissing the complaint and closing the case, the district court did not specifically order Plaintiff to file an amended complaint, and Plaintiff was not warned that if he did not file an amended complaint his case will be dismissed. The Court did not state under what legal authority the complaint was dismissed as to the County Defendants and Judge Kinsey, the State Defendant.

On September 19, 2018, Plaintiff filed his Third Motion for Relief From Judgment on the district court's order and judgment adopting the R&R. (ECF No: 101) (Appendix C) Plaintiff construed the recommended order of dismissal as an involuntary dismissal as a sanction for failure to prosecute under Fed.R.Civ.P. 41(b). That the district court adopted the R&R which recommended that the complaint be dismissed with prejudice as a sanction for failure to prosecute because Plaintiff did not file an amended complaint.

However, as argued in the Rule 60(b)(4), "leave to amend is permissive, rather than mandatory", and it is impermissible to dismiss a case under Rule 41(b) for failure to amend complaint. See, Hertz Corp. v. Alamo Rent-A-Car, Inc., 16 F.3d 1126 (11th Cir. 1994), Briehler v. City of Miami, 926 F.2d 1001, 1002, (11th Cir.1991); Mann v. Merrill Lynch, Pierce, Fenner, and Smith, Inc., 488 F.2d 75, 76 (5th Cir.1973) (impermissible to dismiss a case under Rule 41(b) for failure to amend complaint)." Appendix C, pg. 9 thru 12.

Believing that the judgment was final and appealable, Plaintiff filed an amended notice of appeal on October 26, 2018. (ECF No: 104). Plaintiff amended the existing appeal No. 17-15079, which had been dismissed for lack of jurisdiction as to Judge Kinsey on January 4, 2018.

The case remained on appeal from October 29, 2018, until the Clerk of the Eleventh Circuit dismissed the appeal as a sanction for failure to prosecute because Petitioner did not file a timely brief.

On October 29, 2018, the Clerk of the Eleventh established a new appeal and docketed it as Appeals Docket No: 18-14561. The Clerk dismissed the Petitioner's appeal twice as sanctions for failure to pay the filing even though the filing fee had already been paid to the district court clerk before the appeals were dismissed and subsequently reinstated.

The last dismissal of the appeal was reinstated on May 7, 2019. Pursuant to the order, the Clerk issued a Briefing Notice advising Appellant that his brief was due on or before June 17, 2019, and the appendix was due no later than 7 days from the filing of the brief.

On June 13, 2019, and after realizing that no judgment had been entered because the clerk of the district court did not enter the substance of the judgment in the civil docket, Appellant filed a Motion for the Entry of Judgment in the district court. Appellant argued that "he has a right to appeal a judgment that complies with the Federal Rules of Civil Procedure, and it appears that the judgment in this case does not comply with Rule 58 of the Federal Rules of Civil Procedure because

the substance of the Court's opinion is not set forth in the electronic docket in accordance with Rule 79(a)." (ECF No: 115)

On June 13, 2019, Appellant filed a motion for stay further proceeding in the Eleventh Circuit pending a determination on the Motion for the Entry of Judgment. The district court denied the motion for the entry of judgment on June 14, 2019, without explanation. (ECF No: 116)

Appellant filed an Amended Notice of Appeal on the order denying the motion for entry of judgment on June 19, 2019. (ECF No: 117)

On June 20, 2019, the Eleventh Circuit denied the Motion for Stay and directed Appellant to file a brief within 30 days.

On July 15, 2019, Appellant filed a Motion for Relief From Judgment or Order (Rule 60(b)(4) Motion) on the judgment denying the motion for entry of judgment in the district court. (ECF No: 118)

On July 16, 2019, Appellant submitted to this Court a Notice of Filing of the Rule 60(b)(4) Motion in the Eleventh Circuit. The district court denied the Rule 60(b)(4) motion on July 17, 2019. (ECF No: 119)

On July 19, 2019, Appellant filed a Second Amended Notice of Appeal on the Order denying the Rule 60(b)(4) Motion. (ECF No: 120)

On August 1, 2019, the Clerk of the Eleventh Circuit entered a Judgment dismissing the appeal as a sanction for the failure to prosecute because Petitioner did not file a brief within the time fixed by the rules. Appendix A-1. The Clerk entered the mandate on this same day.

This is the third time the Clerk dismissed the appeal as a sanction and this is the third time that the Clerk did not make a bad faith finding.

Petitioner filed a timely Motion to Set-Aside the Judgment of Dismissal and to Reinstate the Appeal on August 15, 2019. The Clerk returned the document unfiled and indicated that it was filed on August 22, 2019. However, the "face" of the document shows that if was filed on August 15, 2019. (Appendix D)

Petitioner filed a motion for Reconsideration on September 3, 2019. The Eleventh Circuit entered an order denying the motion on October 11, 2019. Appendix A

In sum, the district court involuntarily dismissed Petitioner's complaint as a sanction for failure to prosecute because he did not file an amended complaint. And, the Eleventh Circuit involuntarily dismissed Petitioner's appeal as a sanction for failure to prosecute because he did not file a timely brief. Neither the district court nor the appellate court found that Petitioner acted in bad faith in failing to file an amended complaint or that he acted in bad faith in failing to file a brief within the time fixed by the rules.

Petitioner now seeks certiorari on the Eleventh Circuit's judgment of dismissal.

REASONS FOR GRANTING THE PETITION

WHETHER THE ELEVENTH CIRCUIT HAD THE AUTHORITY OR SUBJECT MATTER JURISDICTION TO DISMISS A PREMATURE NOTICE OF APPEAL AS A SANCTION FOR FAILURE TO PROSECUTE WHEN NO FINAL JUDGMENT HAS BEEN ENTERED?

This Court should grant certiorari and correct the jurisdictional error described above. As demonstrate below, the appeal was prematurely filed under Fed. R. App. P. 4(a)(2) because the clerk of the district court did not enter the judgment in the civil docket in accordance with Fed.R.Civ.P. 58 and 79(a).

This case is analogous to the Court's decision in FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U. S. 269, 276 (1991), on the points of law analyzing a premature notice of appeal under Fed.R.App.P. 4(a)(2).

In *FirsTier*, the Court dealt only with the question of whether the bench ruling made in the case was a "decision" under Rule 4(a)(2). The Court affirmed that the ruling was a decision under Rule 4(a)(2), and that the appellate court had jurisdiction over the appeal once the judgment was entered. "Under the Rule, a premature notice of appeal relates forward to the date of entry of a final "judgment" only when the ruling designated in the notice is a "decision" for purposes of the Rule." id. at 498 U. S. at 278, fn. 4.

Like the Court's decision in *FirsTier*, the district court's ruling in this case constitutes a "decision" under Rule 4(a)(2). Therefore, Petitioner's premature notice of appeal relates forward to the date of entry of a final judgment. But because the clerk of the district court has not entered the judgment in the civil docket in accordance with Fed.R.Civ.P. 58 and 79(a), the appeal is still premature.

Since no final judgment has been entered, the Eleventh Circuit lacked jurisdiction to order Petitioner to file a brief and when he failed to do so dismissed his appeal with prejudice as a sanction for failure to prosecute.

Therefore, the Court should invoke its supervisory powers and correct this jurisdictional error by summarily reversing the orders of the Eleventh Circuit with instructions that the appeal be reinstated and that the judgment be properly entered in the electronic docket. See Title 28 U.S.C. § 2106 (giving the federal appellate courts broad authority to issue rulings "as may be just under the circumstances"); Fed. R. App. P. 2, permitting an appellate court to "suspend" its rules for "good cause," and to "order proceedings as it directs.").

Standard of Review

A determination of whether a court has subject matter jurisdiction is reviewed de novo, and this Court has jurisdiction to determine whether the Eleventh Circuit had jurisdiction to dismiss Petitioner's appeal as a sanction for the failure to prosecute without first determining its own jurisdiction which is a threshold matter.

"The requirement that jurisdiction be established as a threshold matter `spring[s] from the nature and limits of the judicial power of the United States' and is inflexible and without exception. "Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 94-95 (1998) (quoting Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884).

In denying Petitioner's Motion to Set-Aside the Judgment of Dismissal and to Reinstate the Appeal, the Eleventh Circuit found the following:

> On June 20, 2019, this Court required Appellant to file his initial brief within 30 days. Appellant did not file the initial brief by the due date, and his appeal was dismissed. Appellant contends that a motion he filed in the district court tolled the brief's due date under 11th Cir. R. 31-1(b).
>
> Appellant's argument is incorrect. See Fed. R. App. P. 4(a)(4)(A)(vi) (applicable only to motions under Fed. R. Civ. P. 60 "filed no later than 28 days after the judgment is entered"). Appellant's motion is DENIED.

In effect, the Panel Court affirmed the Clerk's dismissal of Appellant's appeal on the grounds that his Rule 60(b)(4) motion was untimely because it was not filed within 28 days after the judgment is entered pursuant to Fed. R. App. P. 4(a)(4)(A)(vi).

Petitioner respectfully disagrees with the Panel Court's findings because he was not required to file an initial brief within 30 days of June 20, 2019, and the Rule 60(b)(4) motion was not untimely. The reason is because the Panel Court

lacked jurisdiction to order Petitioner to file a brief and to later affirm the dismissal of the appeal because the clerk of the district court had not entered the judgment in the civil docket in accordance with Fed.R.Civ.P. 58 and 79(a).

This Court has long held that "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, *first,* of this court, and *then* of the court from which the record comes." Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884); Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 94-95 (1998) Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 547 (1986); Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453 (1900); Castleberry v. Goldome Credit Corp., 408 F.3d 773, 779 (11th Cir. 2005). So this Court must satisfy itself of its jurisdiction before we can address whether the district court had jurisdiction. See Peppers v. Cobb County, 835 F.3d 1289, 1296 (11th Cir. 2016) ("[W]e are obliged first to consider our power to entertain the claim.").

A court must first satisfy itself of our own jurisdiction is a rule without exception: "Without jurisdiction[,] the court cannot proceed at all in any cause." *Steel Co.,* 523 U.S. at 94, 118 S.Ct. 1003 (quoting Ex parte McCardle, 74 U.S. 506, 514, 7 Wall. 506 (1868)). "[J]urisdiction is power to declare the law," so when it

does not exist, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.*

In dismissing the appeal in this case as a sanction for failure to file an appellate brief, the Eleventh Circuit did not make written determination of its jurisdiction to hear the appeal. (Appendix A)

Had the Court determined its own jurisdiction, it would have found that the notice of appeal was premature because the clerk of the district court had not properly entered the judgment.

This Court has held that a premature appeal is one in which "[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." Fed. R. App. P. 4(a)(2). FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U. S. 269, 276 (1991); Manrique v. United States, 581 U.S. ____ 2017.

"Under Rule 4(a)(2), a premature notice of appeal does not ripen until judgment is entered. Once judgment is entered, the Rule treats the premature notice of appeal "as filed after such entry." FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U. S. at 275; HBI, Inc. v. Sessions Payroll Mgmt., Inc. (In re

Mackey), 232 B.R. 784, 787 (9th Cir. BAP 1999) ("Premature notices of appeal are permitted to be filed once a decision is announced but before the order or judgment is entered. They are treated as filed, i.e. constructively filed, after the entry of the order and on the day thereof."

Rule 4(a)(2), "was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment." Manrique v. United States, 581 U.S. ____ 2017, quoting, FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U. S. at 276.

The reason the appeal is premature in this case is because Petitioner filed the initial notice of appeal after the district court announced its decision by adopting the magistrate judge report and recommendation, but before the entry of the judgment by the clerk of the district court.

Specifically and on August 29, 2018, the district court entered a final order adopting the magistrate judge's report and recommendation dismissing Petitioner's civil rights complaint with prejudice. The memorandum opinion reads as follows:

> Pursuant to and at the direction of the Court, it is ORDERED AND ADJUDGED that Plaintiff's claims against Escambia County, Florida; Steven Barry; David Morgan; Todd Gerald Glaze; Harry Green; and Patricia A. Kinsey are DISMISSED WITHOUT PREJUDICE. Plaintiff's claims against Ms. Cosby are DISMISSED WITHOUT PREJUDICE for failure to state a claim upon which relief can be granted. Plaintiff's motion for summary judgment against Judge Kinsey is DENIED. (ECF No: 100).

On this same day, August 29, 2018, the clerk entered the judgment in the civil docket. The judgment reads as follows:

> CLERK'S JUDGMENT re 99 Order Adopting Report and Recommendation. 90 Day Deadline set for destruction of working file 11/27/2018. (alb) (Entered: 08/29/2018)

On September 19, 2018, Petitioner filed a Rule 60(b)(4) motion asserting that the order was void because, among other things, the complaint was dismissed with prejudice as a sanction without a finding of bad faith. (ECF No: 101) Appendix C. The district court summarily denied the motion on September 24, 2018. (ECF No: 102).

Petitioner filed an amended notice of appeal on September 28, 2018, on the order adopting the R&R and the order denying the Rule 60(b)(4) motion. The district court did not file the notice. October 29, 2018, the Clerk of the Eleventh Circuit changed the appeal number from 17-15079 to 18-14561 and then docketed the notice of appeal on October 29, 2018, rather than on September 28, 2019.

Although it seems that the amended notice of appeal was filed on October 29, 2018, in order to make it appear that the appeal was untimely filed, the fact that the clerk of the district court did not file the amended notice of appeal and transmit the same to the Eleventh Circuit is no fault of the Petitioner and his amended notice of appeal should be treated as filed on September 28, 2018, in the interest of of justice and fundamental fairness.

Because Petitioner filed an amended notice of appeal on September 28, 2018, within 30 days after the district court announced its decision by adopting the magistrate judge report and recommendation, but before the entry of the judgment, the appeal is premature. The appeal is currently premature because the clerk of the district court has not entered the judgment in the civil docket as required by Fed.R.Civ.P. 58 and 79.

Rule 58 of the Federal Rules of Civil Procedure governs the time of entry for judgments. Subject to a few exceptions, the general rule is that judgments "must be set out in a separate document." Fed. R. Civ. P. 58(a). And under Rule 58(c)(2), "judgment is entered . . . when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs: (A) it is set out in a separate document; or (B) 150 days have run from the entry in the civil docket."

Indeed, Rule 58 of the Federal Rules of Civil Procedure contemplates two independent events necessary for "judgment" to be "entered": a separate document must set out the judgment, and the judgment must be "entered in the civil docket under Rule 79(a)." See Graddy v. Educational Credit Management Corp., 2019 WL 949063, (11th Circuit) (Unpublished), quoting, Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 688 (4th Cir. 1978) (describing Rule 58's "dual requirement" for entry of judgment, such that entry "occurs only when the essentials of a judgment or order are set forth in a written document separate from the court's opinion or memorandum and when the substance of this separate document is reflected in an appropriate notation on the docket sheet").

The separate document requirement of Rule 58 is intended to provide a bright-line for litigants and courts to identify when the period for appeals begins. United States v. Indrelunas, 411 U.S. 216, 220-22 (1973). The rule "must be mechanically applied in order to avoid new uncertainties as to the date on which judgment is entered." Id. at 222.

This Court has suggested in dicta that a substantive docket entry is necessary to start the clock for filing a notice of appeal (mentioning, among other things, the

requirement that the clerk make a docket notation showing the substance of the judgment and stating that "[w]hen all of these elements clearly appear final judgment has been both pronounced and entered, and the time to appeal starts to run"). United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 232-33 (1958).

Here, the clerk's docket entry (58) reads as follows:

> CLERK'S JUDGMENT re 57 Order Adopting Report and Recommendation. 90 Day Deadline set for destruction of working file 6/17/2019. (alb) (Entered: 03/18/2019)

The clerk's docket entry does not comply with the Rule 79(a)(3) because setting a deadline to destroy the working file it is not the substance of the order adopting report and recommendation. (Appendix B) It is well settled that a "docket entry that doesn't even say who won, surely cannot qualify" as a judgment. Reynolds v. Wade, 241 F.2d 208, 210 (9th Cir. 1957).

The Eleventh Circuit has recently held that a docket entry that fails to comply with this show-the-substance requirement has not been "entered in the civil docket under Rule 79(a)." Graddy v. Educational Credit Management Corp., 2019 WL 949063. This opinion is available on the internet. 11th Cir.R. 36-2.

Had the clerk of the district court entered the substance of the judgment in the docket as required by Fed. Rules Civ. P. 79(a)(3), there is no question that the order adopting the report and recommendations would have been "final" under § 1291. FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U. S. at 277.

Hence, since the district court clerk failed to comply with its ministerial duty, no judgment has been entered and the appeal clock has not begun to tick. The "clock does not start ticking until judgment has been "entered in the civil docket under Rule 79(a)." Graddy v. Educational Credit Management Corp., 2019 WL 949063, id.

Thus, because no judgment has been entered, the Eleventh Circuit lacked subject jurisdiction to dismiss the appeal with prejudice as a sanction for failure to prosecute and the orders of the Eleventh Circuit are void for lack of subject matter jurisdiction.

This Court has long held that void judgments are those rendered by a court which lacked jurisdiction, either of the subject matter or the parties. See Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 2d 278 (1940). Indeed, an order

that exceeds the jurisdiction of the court is void, and can be attacked in any proceeding in any court where the validity of the judgment comes into issue. See Rose v. Himely (1808) 4 Cranch 241, 2 L ed 608; Pennoyer v. Neff (1877) 95 US 714, 24 L ed 565; Thompson v. Whitman (1873) 18 Wall 457, 21 l ED 897; Windsor v. McVeigh (1876) 93 US 274, 23 L ed 914; McDonald v. Mabee (1917) 243 US 90, 37 Sct 343, 61 L ed 608.

This Court has also held that a void order or judgement is void even before reversal", Valley v. Northern Fire & Marine Ins. Co., 254 U.S. 348,41 S. Ct. 116 (1920). "Courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgements and orders are regarded as nullities; they are not voidable, but simply void, and this even prior to reversal." Williamson v. Berry, 8 HOW. 945, 540 12 L. Ed. 1170, 1189 (1850).

As demonstrated above, the order dismissing Petitioner's appeal as a sanction for failure to prosecute is in direct conflict or abrogates Federal Rules of Civil Fed.R.Civ.P. 58 and 79(a); Appellate Rule 4(a)(2); and the precedent decisions of this Court as well as the decision in FirsTier Mortgage Co. v. Investors Mortgage Insurance Co., 498_U.S._269 (1991).

dismissed the appeal with prejudice and as a sanction for failure to prosecute without making a finding of bad faith. The Eleventh Circuit did not address this issue in denying the motion to set-aside the judgment of dismissal. (Appx A)

This Court has held that the "authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an `inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R. Co., 370 U.S. 626, 630-631 (1962); Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991).

This power "must be exercised with restraint and discretion and used to fashion an appropriate sanction for conduct which abuses the judicial process." Roadway Express, Inc. v. Piper, 447 U.S. 752, 764, (1980). A court may exercise this power to sanction the willful disobedience of a court order, and to sanction a party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Marx v. Gen. Revenue Corp., 568 U.S. 371, 382 (2013) (citing Chambers, 501 U.S. at 45-46).

In this case, the Clerk's judgment of dismissal is fundamentally erroneous on its face and void because it does not make a finding that Petitioner acted in bad faith in failing to file a timely brief. The Eleventh Circuit's order adopting or affirming the Clerk's judgment of dismissal is equally void because it is based upon the underlying judgment of dismissal.

The Eleventh Circuit committed plain error or abused its discretion in failing to vacate the judgment of dismissal which did not make a finding of bad faith. "The key to unlocking a court's inherent power is a finding of bad faith. Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir. 1998); Sciarretta v. Lincoln Nat'l Life Ins., 778 F.3d 1205, 1212 (11th Cir. 2015); Purchasing Power, LLC v. Bluestem Brands, Inc., 851 F.3d 1218, 1223 (11th Cir. 2017).

Bad faith exists when the court finds "that a fraud has been practiced upon it, or that the very temple of justice has been defiled." Chambers, 501 U.S. at 46 Id. Further, a finding of bad faith is warranted where a party or attorney knowingly or recklessly raises a frivolous argument, delays or disrupts the litigation, or hampers enforcement of a court order. Thomas v. Tenneco Packaging Co., 293 F.3d 1306, 1320 (11th Cir. 2002); Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1545 (11th Cir. 1993).

Cir. 1993).

The bad faith inquiry is primarily focused "`on the conduct and motive of a party, rather than on the validity of the case.'" Esoteric, LLC v. One (1) 2000 Eighty-Five Foot Azimut Motor Yacht Named M/V STAR ONE, 478 F. App'x 639, 643 (11th Cir. 2012) (per curiam) (quoting Rothenberg v. Sec. Mgmt. Co., 736 F.2d 1470, 1472 (11th Cir.1984)).

Because the Eleventh Circuit involuntarily dismissed Petitioner's appeal as a sanction for failure to prosecute without making a finding of bad faith, it abused its discretion and this Court should summarily reverse. Title 28 U.S.C. § 2106; Fed. R. App. P. 2.

CONCLUSION

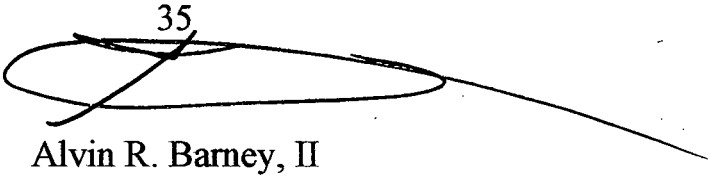
The petition for a writ of certiorari should be granted.

Respectfully Submitted,

DECLARATION UNDER PENALTY OF PERJURY

Pursuant to the provisions of Title 28 U.S.C. Section 1746, I declare under the penalty of perjury that the foregoing is true and correct.

This 4th day of December ~~27th day of November~~ 2019.



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No._____

In the Supreme Court of the United States

ALVIN R. BARNEY II, Petitioner, v. ESCAMBIA COUNTY, FLORIDA, Respondent.

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

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 33.2(b), I certify that this document is less than 40 pages and has a word count of 7,092. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman, size 14.

Declaration Under Penalty of Perjury

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 4th day of December 2019.

Alvin R. Barney II
Petitioner