No -_____ 19-8372

In the Supreme Court of the United States

Abdul-Hakiym Ismaiyl

v.

Donald C. Nugent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for writ of Certiorari

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QUESTIONS FOR REVIEW

Whether a Circuit court, once the veracity of the factual findings of a Dist. Court has been contended not to exist, and not supported by the record, and thus clearly erroneous abdicates its duty by accepting those set of facts as true without reviewing the record pertaining said dispositive material facts; also in matters where a Cir. Court parrot's factual findings presented by a Dist. court which have been contended as erroneous commits error in doing so without a determination on whether said facts are erroneous or not once contended to be. Also, where in forma pauperis applications are concerned does a circuit court abuse its discretion when it refuses to review the record, but also fails to inquire *if any* non-frivolous legal issues exist as found in the actual pleading before it denies the in forma pauperis application as not being made in good faith based on the findings contended to be erroneous made by the lower court and not by the circuit's actual independent review of the material factual allegations of the pleadings found in the record which are contrary and contradicts the Dist. Court findings.

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PETITION FOR A WRIT OF CERTIORARI

Abdul-Hakiym In Propria Persona respectfully petitions for a writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Cir. Court of Appeals whose judgment is herein sought to be reviewed is reported at 2019 U.S. App. LEXIS 32631 (App., B). The orders of the district court are reported at 2019 U.S. Dist. LEXIS 2585 (App., A).

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2019. A petition for rehearing was denied on Oct. 30, 2019, (App., C). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

FEDERAL RULES OF PROCEDURE

Federal Rules of Civil Procedure 60 (d) (1).

STATEMENT OF THE CASE

On the 28th of Dec. 2018, Petitioner Abdul Ismaiyl Filed in the Northern Dist. Court of Ohio an Independent action in equity for fraud on the court. (*See independent action for fraud on the court 1:18-cv-02984-PAG Doc #: 1 Filed: 12/28/18 1 of 34. PageID #: 1*). He also sought leave for Informa Pauperus status. (See 1:18-cv-02984-PAG Doc #: 2 Filed: 12/28/18 PageID #: 2). The Independent Action sought relief from a Judgment procured by fraud in the Northern Dist. Court under case number 16-1314 filed on August 31, 2016. The pleading stated that the Aug. 31, 2016, judgment was procured by fraud on the court, due to the deliberate fraudulent concealment of material facts before the court; those concealed facts were then replaced with deliberate false fraudulent facts not found in the four corners of the pleading or its attachments which prevented the court from acting in its normal capacity, prejudicing the Plaintiff and prevented the matter from being taken to trial, and heard fairly on the merits. The Independent Action also presented clear and convincing material facts in support of the claim of fraud on the court demonstrating Fraudulent Concealment, and Fraudulent Misrepresentation of material facts, which was done deliberately by a judicial officer one Donald C. Nugent. On the 7th of

January 2019 Judge Gaughan speaking for the Northern Dist. Court granted the IFP Motion, however, denied the independent action under 28 U.S.C. § 1915(e)(2)(B) for reasons that the defendant (Nugent) is immune from suits seeking monetary or equitable relief; further stating that the matter was barred by the collateral attack doctrine; the Dist. Court presented its factual findings in support of its legal conclusion that "Plaintiff (Petitioner) contends that because of defendant's alleged "fraudulent misrepresentation" of Ismaiyl's claims, the Closed Case was not adjudicated on the merits *and he was deprived of his right to substantive and procedural due process under the Fourteenth Amendment*", and therefore the Dist. Court construed the matter as a *Bivens* action referencing Doc. 1 at 19-33[1], ¶¶ 20, 21, 25, 29, 30, 32, 35,36 of the pleading in support thereof. (See Dist. Court Judgment and Memorandum Appendix A Pages 2,4-6). The Dist. Court's findings that Ismaiyl sued Judge Donald C. Nugent for equitable relief due to constitutional violations must be made clear that these set of facts are nowhere to be found in the record. However, here we would like to digress to raise a point that we feel worthy of this honorable court's consideration, which is the Dist. Court did state in its memorandum that Ismaiyl alleged fraudulent misrepresentation of material

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[1] The references provided by the Dist. court require review and not deference or blind acceptance that they support the narrative provided by the Dist. Court. Only the actual review of the record by the Sixth Cir. would have exposed the references were feigned to only give the appearance that there existed facts justifying construing the independent action as a Bivens action when those set of facts never existed. However, the Sixth Cir. abdicated its duty to review the record as a whole.

facts, but not fraud on the court. This statement, however, made by the Dist. Court repudiates the actual claim for fraud on the court raised by the pleading because of how erroneously the term fraudulent misrepresentation was presented by the Dist. court as if the term was intended to be an action in tort. It is a matter of record that the pleading raised the claim of fraud on the court and not fraud inter partes; in support of this claim Petitioner cited *Johnson v. Bell*, 605 F. 3d 333,339 (6th Cir.2010)[2] (Where the court held that "*Fraud on the court consists of conduct: "1) on the part of an officer of the court; that 2) is directed to the judicial machinery itself; 3) is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; 4) is a positive averment or a concealment when one is under a duty to disclose; and 5) deceives the court.*"). The words found in the third and fourth prong established by *Johnson* are the same as the definition of the legal terms of Fraudulent concealment, and fraudulent misrepresentation by definition if not verbatim. To establish fraud on the court Prong (3) and (4) in *Johnson* states that an officer must show any conduct that is intentionally false willfully, blind to the truth or is in reckless disregard to the truth. Black's Law Dictionary 5TH ED. Defines Fraudulent Misrepresentation as: A false statement as to material fact, . . . *statement is fraudulent if speaker knows statement to be false or if it is made with utter*

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[2] (See Case: 1:18-cv-02984-PAG Doc #: 1 Filed: 12/28/18 21 of 34. ¶ 23-36 PageID #: 21)

disregard of its truth or falsity. Black's Law Dictionary 5TH ED. At 596. Here it can be seen that if the conduct of the officer in question is an "*intentional false statement*" of fact willfully blind to the truth he in fact by definition has made a fraudulent misrepresentation, because a statement is false if the speaker (officer) knows the statement to be false or made with utter disregard to its truth. Black's Law Dictionary 5TH Ed. In other words if the false statement was made intentionally by an officer of the court and in reckless disregard of the truth as articulated in the third prong of *Johnson* by definition it is fraud on the court because it was directed at the judicial machinery and the court was deceived by the officer's intentional false statement i.e. Fraudulent Misrepresentation. Prong four establishes that the officer must make a positive averment or concealment *when one is under a duty to disclose.* Fraudulent Concealment is defined as: *The hiding or suppression of a material fact or circumstance which the party is legally or morally bound to disclose. The employment of artifice planned to prevent inquiry or escape investigation and to mislead or hinder the acquisition of information disclosing a right of action.* Black's Law Dictionary 5TH ED. At 596. As seen here if an officer makes a concealment when one is under duty to disclose, or *to prevent inquiry or escape investigation and to mislead or hinder the acquisition of information disclosing a right of action,* he has in fact by definition committed fraud on the court i.e. fraudulent concealment. Petitioner's point here is that the use of these terms

in an action for fraud on the court does not in any way convert the action into common law tort for fraud seeking damages or equitable relief. Albeit, that some of the elements to be plead and language therein are the same per se, however, a common-law tort for fraudulent concealment and fraudulent misrepresentation are distinctively different and not the same, and it is the relief sought and how the elements are plead that make the determining factor. The Dist. court was fully aware that the facts plead and relief sought was the relief afforded for claims of fraud on the court. The Dist. Court stated that "[f]or relief, plaintiff (Petitioner) requests that defendant's judgment in the Closed Case not be enforced and be vacated[3]. This brings us to the very same issue that was contended in the lower court, and on appeal before the Sixth Cir. IFP Petition, which has never been addressed and is now before this court, and that is if the material facts used by the lower court (that Ismaiyl sued Judge Nugent in equity due to constitutional violations) are not found in the entire record then it is clearly erroneous. Moreover, *[a] district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard[Bivens].* (Emphasis added) *Betts v. Costco Wholesale Corp.*, 558 F. 3d 461, 467 (6th Cir. 2009). On Feb. 04, 2019 Petitioner filed Fed. R. 59(e) Motion with memorandum in support raising the

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[3] Appendix A at Page 2 See Also Fed. R. Civ. Proc. 60 (d)(1)(3)

issue that the Dist. Court's factual findings and legal conclusions were clearly erroneous; such as the statement of fact that Ismaiyl had sued Nugent in equity due to constitutional violations. Because no set of facts existed in the record to support the Dist. Court's factual findings; the finding therefore was clearly erroneous, and the legal application of Bivens was therefore misplaced and an abuse discretion. *See Agathos v. Starlite Motel*, 977 F.2d 1500, 1504 (3d Cir. 1992) (highlighting that a finding of fact is only "clearly erroneous" if the record lacks sufficient evidence to support the court's factual conclusions). Further, raising misapplication of the collateral attack doctrine in matters of fraud on the court; because in truth, the pleading was an independent action that plead elements for fraud on the court. Albeit, the action sounds in equity, however, it is no more than a procedural remedy that has survived from the older forms of writs used to obtain relief *from a judgment*. *See United States v. Beggerly,* 524 US 38, 45(1988). And therefore the Dist. Court construing it as a Bivens action by using clearly erroneous facts not found in the pleading or the record as a whole was an abuse of discretion. These aforementioned points were raised in the 59 (e) application. (*See 59 (e) Motion 1:18-cv-02984-PAG Doc #: 5 Filed: 02/04/19 1 of 17. PageID #: 48*). On Feb. 02, 2019 the Dist. Court entered a marginal entry denying the 59 (e) application for reasons that the motion did not satisfy the requirements of R. 59 (e). On March 04, 2019, Ismaiyl filed a motion for judicial notice pursuant to Fed. R. Evid.

201(a),(b)(2),(c)(2),(e) requesting audience before the court to be heard pertaining to the legal and factual errors made by the court surrounding an independent action in equity. (*See Motion for Judicial notice 1:18-cv-02984-PAG Doc #: 7 Filed: 03/04/19. PageID #: 67).* However, on March 05, 2019, the request for hearing on the motion for judicial notice was denied. On March 03, 2019, Petitioner timely appealed to the Sixth Cir. Court of Appeals under CN 19-3174, and pursuant to Fed. App. R. 24(a)(5) sought leave by motion and memorandum in support to proceed on appeal in IFP status; Petitioner contended that the Dist. Court created the narrative inter alia that Judge Nugent was being sued for equitable relief due to constitutional violations out of whole cloth and suppressed the material allegations for fraud on the court and did not abide by governing law; [b]ecause a district court has no discretion not to abide by governing law, an erroneous legal conclusion deserves no deference on appeal. (Citation omitted) *United States v. LaDeau*, 734 F.3d 561, 566 (6th Cir. 2013). (*See FED. APP. R. 24(a)(5) Motion IFP 19-3174 Document: 8 Filed: 04/03/2019 Page: 8*). On August 28, 2019, the Sixth Cir. denied the IFP Petition deferring to the Dist. Court lock stock and barrel stating [t]his court has carefully reviewed *Ismaiyl's "pleadings" and agrees that his appeal lacks an arguable basis in law.* First, *if construed as a Bivens action—as the district court did—Ismaiyl's claim lacks an arguable basis in law* because (1) a federal district court judge has absolute immunity, and (2) the action is barred

by the collateral attack doctrine. Second, even if construed as an independent action in equity under Fed. R. Civ. P. 60(d)(1), the claim would still lack an arguable basis in law because this court *has already rejected these same claims in a previous appeal. See Ismaiyl,* No. 16-4308. It "is not the function" of an independent action "to relitigate issues finally determined in [a] prior action." (Citations omitted) (emphasis sic) (emphasis added). (See Sixth Cir. Order Denying IFP 19-3174 Document: 10-2 Filed: 08/23/2019 Page: 2) See Appendix B. On September 6, 2019, Petitioner filed Motion for Reconsideration; this application was denied on Oct. 30, 2019. Petitioner appeals from the Sixth Cir. final judgment denying the Motion for Reconsideration on Oct. 30, 2019, to this honorable court. See Appendix C.

REASON FOR GRANTING THE WRIT

This writ should be granted to maintain adherence to well settle law, because the Sixth Cir. has acted in contravention of this court's precedent on what determines if an appeal is taken in good faith and has abdicated its duty to check the record for clear error in doing so.

We contend that the Sixth Cir. has overlooked the law and acted in contravention of the requirements of what a pleading must exhibit in order to be taken in good faith and rejected this court's precedent; the overlooking of the law has occurred because the Sixth Cir. has abdicated its duty to review the record for clear error and has excepted clearly erroneous factual findings unsupported by the record as true by the Dist. Court even though contested.

The Fifth Cir. has explained in *Howard v. King,* 707 F. 2d 215, at 220 (5th Cir. 1983) quoting the holding of this Court on the requirements of an appeal taken in good faith that, "Good faith" *is demonstrated when a party seeks appellate review of any issue not frivolous. Coppedge v. United States,* 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962). An investigation into the in forma pauperis movant's objective good faith, while necessitating a brief inquiry into the merits of an appeal, *does not require that probable success be shown.* The inquiry is limited to whether the appeal involves "*legal points arguable on their merits (and therefore not frivolous).*" *Anders v. California,* 386 U.S. 738,744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The Sixth Cir. did not give a brief inquiry on whether the pleading offered *"any issues"* with legal points arguable on their merits because it deferred and did not review. Such as the legal issue raised for fraud on the court by the independent action in equity for relief from judgment. R. 60 (d) in part states that [t]his rule does not limit a court's power to: (1) entertain an independent action to relieve a party from a judgment, order, or proceeding; (3) set aside a judgment for fraud on the court. See Fed. R. Civ. Proc. 60(d)(1)(3). As this honorable Court has stated in *Anders v. California* good faith does not require probable success be shown but rather the appeal involves legal points arguable on their merits i.e. has stated a claim upon which relief can be granted, and not that relief will be granted. However, deference is shown by the Sixth Cir.'s own statement as for the reasons denying

the IFP Motion was that First, *if construed as a Bivens action—as the district court did—Ismaiyl's claim lacks an arguable basis in law.* Point one, this statement clearly establishes that the Sixth Cir. relied on the findings provided by the lower court and it did not review the record for clear error as it stated "if- construed as a Bivens – *as the district court did* -Ismaiyl's claim lacks an arguable basis in law. However, the application of Bivens was erroneous because there are no facts in the record to support the factual finding, that Ismaiyl sued a federal judge for equitable relief due to constitutional violations or deprivations. *Supra Agathos v. Starlite Motel at 1504.* The Sixth Cir. would have known this fact was erroneous had it fulfilled its obligation of reviewing the record. The law provides that, *[t]he frequently onerous task of canvassing the whole record when it is contended that certain findings are clearly erroneous is inescapable*. (Emphasis added) *Keystone Plastics, Inc. v. C & P PLASTICS, INC.*, 506 F. 2d 960,963 (5th Cir. 1975). In another context this Court the Supreme Court has written:

> [A] reviewing court is not barred from setting aside a . . . decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when reviewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [Court's] view. Universal Camera Corp. v. Labor Bd., 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951). *Id. Keystone at 963.*

The Sixth Cir. in the instant matter did not say, after reviewing the record (pleading) we find sufficient material facts or evidence to support the Dist.

Court's findings rejecting the contention posed by Ismaiyl that clearly erroneous facts were used by the Dist. Court to construe the matter as a Bivens action instead of an action for fraud on the court. However, Sixth Cir. suppressed the claim of fraud on the court. When it is clear that if an action for fraud on the court was raised in the pleading this would - establish an arguable basis in law and is not frivolous. It is imperative that this court grants certiorari to make clear that an action for fraud on the court although sounding in equity is not misconstrued as a suit for damages or equitable relief but rather relief from a judgment or proceeding as R. 60(d) articulates and does not trigger immunity because an officer is so named a defendant in that action. Because it is the conduct of the officer in question which is the bases of the action, which allows the vacation of the judgment; the officer's fraudulent conduct is an integral element in proving fraud on the court, void of this element fraud on the court does not exist. This would mean in contrast no litigant could ever obtain relief from a fraudulent judgment if an officer of the court has some involvement, because all a court would have to say is that they are protected by immunity making Fed. R. 60 and that which it has preserved as a remedy granting relief from judgments null and void. We ask this Court to draw a bright line that would prevent this problem in the future. The second point presented by the Sixth Cir. pertaining the collateral attack doctrine demonstrates again the abdication of its duty of reviewing the record and not

adhering to the law acknowledged in its own Court that it is well-settled law that the collateral attack doctrine is not applicable in cases of fraud on the Court. *See JGR, Inc. v. Thomasville Furniture Indus. Inc.*, 505 Fed. Appx. 430, at **9 2012 U.S. App. LEXIS 23408 (6th Cir. 2012). See Appendix D. The Sixth Cir. would have known as a matter of record the facts at issue raised by the pleading was for fraud on the court and not a claim of constitutional violations seeking equitable relief had it reviewed the record as required. The Sixth Cir. further errored stating that the claim would still lack an arguable basis in law because the Sixth Cir. has already rejected these same claims in a previous appeal *See Ismaiyl*, No. 16-4308. Although the Sixth Cir. gave an impression that it reviewed the record it – did – not but only parroted the Dist. Court without any evidence in the record to support its findings as required by law. The Dist. Court stated "[p]laintiff (Petitioner) states in the instant complaint that defendant's alleged use of erroneous facts was raised before the Sixth Circuit on appeal" See Memorandum Appendix A Page 2 of the record. As an initial point, here res adjudicata is not determined by what someone says, but it is so determined by a judgment on the merits pertaining the matter put in issue before the court and squarely decided. The Dist. Court presented factual findings that Ismaiyl sued Judge Nugent for equitable relief due to constitutional deprivation of his right to substantive and procedural due process under the Fourteenth Amendment. See Appendix A Page 2. This

honorable Court has stated that *the preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as res judicata. Under the doctrine of claim preclusion, a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Taylor v. Sturgell,* 553 U.S. 880, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008). This would mean that there must be a judgment entry in the Sixth Cir. docket under CN 16-4308 resolving the same claim of constitutional deprivation against Judge Nugent regardless if in the instant case the issues are different if they are related to the same transaction, because as seen above the Sixth Cir. stated that it had rejected the same *claim on a previous appeal*. Furthermore, [t]he essential elements of *res judicata,* or claim preclusion, are (1) *a final judgment on the merits in an earlier action*; (2) *an identity of parties or privies in the two suits; and (3) an identity of the cause of action in both the earlier and later suits. (Emphasis added) Aunyx Corp. v. Canon USA, Inc.*, 978 F. 2d 3, 6 (1st Cir. 1992). This shows that the Sixth Cir. only gave a legal conclusion couched as a factual finding by deferring to the clearly erroneous findings of the Dist. Court[4] and did not review the record for clear error - because it would have known that there was no such claim made against judge Nugent for equitable or monetary

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[4] *See Ashcroft v. Iqbal,* 556 US 662, 1950 (2009)

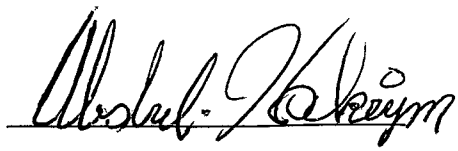
relief due to constitutional deprivation under CN 16-4308 or in the instant; nor did the Sixth Cir. address the question of erroneous evidence as stated by the Dist. Court used by Judge Nugent under 16-4308[5]. Moreover, there is no record of *[A] final judgment on the merits in an earlier action [deciding issues or claims such as Nugent committing fraud on the court or intentionally using false facts]* *Id. Aunyx Corp.* at 6. And, therefore the Sixth Cir. erred in Denying the IFP Petition on the clearly erroneous fact that this matter had already been rejected implying (res adjudicata) and thus abused its discretion by refusing to fulfill its duty to review the record for clearly erroneous facts when the veracity of the same facts used had been contended which shows a lack of concern on part of the Sixth Cir. to fulfill its obligation to ascertain if the facts are truthful, accurate as they are purported to be.

CONCLUSION

Wherefore, we supplicate that this honorable court will grant the writ certiorari by its supervisory authority to reverse the order of the Sixth Cir. due to its abdication of its duty to review the record to prevent clear error as it has failed to do in the case sub judice.

Dated January 13, 2020.

SIGNED By



[5] See Appendix E