Cause No.: 15-11861

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Mario JIMENEZ, Appellant-Petitioner, v. Karen WIZEL, et al., Appellees-Respondents.	)))))))))	On appeal from the United States District Court for the Southern District of Florida, Miami Division Lower Cause No: 15-cv-20821 Honorable Ursula Ungaro, presiding

PETITION FOR REHEARING

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I. Petition for Panel Rehearing:

Pursuant to 11th Cir. R. 40-3, Plaintiff petitions this court for a panel rehearing, believing certain points of law or facts have been overlooked or misapprehended by this Court, and thus now argues in support of this petition as follows:

II. It Was Error to Dismiss the Complaint for Failure to State a Claim:

1. Although Plaintiff showed grounds and properly "asserted claims under 42 U.S.C. § 1983 and 42 U.S.C. §§ 1985(2)-(3), [and] the Court [acquiesced that it had] federal question jurisdiction over his claims pursuant to 28 U.S.C. § 1331," Plaintiff will demonstrate that certain points of law or facts have been overlooked or misapprehended by this court, and that he was not allowed Fifth and Sixth Amendment due process all the evidence, or provided the opportunity for any discovery so important to properly prove his claims. Essential evidence remains in state records, which were available but never requested by the District Court (Dist. Dkt. 13 P. 5 at 10), further injuring Plaintiff in his ability to properly state claims.

2. Nonetheless, even with the limited amount of evidence allowed to present, Plaintiff showed enough reasonableness in his evidence, sequence of events, and claims that it cannot be said beyond doubt that Plaintiff can prove no set of facts in support of his claims to be allowed to proceed with his complaint and to assert his claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(2)-(3) clearing jurisdiction and establishing Fourteenth Amendment muster:

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957) (footnote omitted); *McKinnis v. Mosely*, 693 F.2d 1054, 1058 (11th Cir.1982); *Bank v. Pitt*, 928 F. 2d 1108 (11th Cir. 1991).

"A complaint may not be dismissed on motion if it states some sort of claim, baseless though it may eventually prove to be, and inartistically as the complaint may be drawn…particularly is this true where a defendant is not represented by counsel, and in view of rule 8(f) of the rules of civil procedure, 28 U.S.C., which requires that all pleadings shall be construed as to do substantial justice." *Burt v. City of New York*, 156 F.2d 791 (2nd Cir. 1946)

"A complaint will not be dismissed for failure to state a claim, even though inartistically drawn and lacking in allegations of essential facts, it cannot be said that under no circumstances will the party be able to recover." *John Edward Crockard v. Publishers, Saturday Evening Post Magazine of Philadelphia, Pa* (1956) Fr Serv 29, 19 F.R.D. 511, DCED Pa 19 (1958)

5. Plaintiff prays that this Court not dismiss the complaint based solely on insufficiency to state a claim, especially in light of being *pro se*, and allow him to proceed to trial as the law and the stated above precedent of this court affords him.

III. Claims Under 42 U.S.C. § 1983, and Voidness of Order Granting Emergency Motion to Suspend Petitioner's Timesharing:

6. As asserted by this Court, the First Amendment's freedom of religion intersects with the Fourteenth Amendment's due process protections of parental rights, and a parent's interest subsequently sounds under both the First and Fourteenth Amendments. See *Prince v. Massachusetts*, 321 U.S. 158, 164–66, 64 S. Ct. 438, 441–42 (1944).

7. As recognized by this court, Hernandez and Lopez are state actors by virtue of their employment at DCF. Plaintiff demonstrated that Hernandez and Lopez violated his parental right to make decisions pertaining to "the care, custody, and control" of his children, see *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060 (2000) (plurality opinion), without due process when they conspired with other Defendants to violate his constitutional guarantees and deprived him of adequate due process, service of pleadings violating FRCP 60(b).

8. In violation of his inalienable constitutional guarantees, and in deprivation of adequate process, Hernandez and Lopez provided a copy of a still ongoing DCF investigation report dated June 12, 2012, "Child Protection Team report" (Dist. Dkt. 8 P. 27 to 34), which the state court maliciously used to suspend Plaintiff's timesharing.

9. Plaintiff does not claim Hernandez and Lopez violated due process when he was not allowed the opportunity to preemptively "correct" it, but that Hernandez and Lopez violated due process when they handed the confidential CPT report to ex's attorneys, while DCF investigation was still open, in violation of DCF's Standard Operating Procedures (SOPs) to defraud the court and violate the due process requirements of the law.

10. DCF has offices in Miami-Dade County where attorneys should have gone to request the CPT report, and they should have never obtained them directly from

Hernandez and/or Lopez, especially in light that this report was used to defraud the court under the color of law, falsely alleging that:

> "Father's abuse may cause irreparable physical and emotional harm to the minor children" Dist. Dkt. 8 P. 25, and clearly contradicting the official DCF report, "[the children] are presently receiving counseling with Dr. Alicia Vidal-psychologist…Both homes have been visited and found to be appropriate for the children," all this despite the obviously biased evaluation of Hernandez throughout the report with statements such as: "They have more toys and clothes at the mother's home than at the father's" Dist. Dkt. 8 P. 38.

11. What is really troubling with Hernandez and Lopez' actions is the fact that they provided the CPT report knowing fully well that the recommendations contained therein were either already taking place or had been proven false by evidence they had already collected over the period of the investigation, namely:

> "CPT recommends that DCF should refer the children for intensive therapeutic intervention…the father be court-ordered to undergo a full psychological evaluation to assess his personality functioning and treatment needs" (Dist. Dkt. 8 P. 32).

12. Doing so, not only violated due process, and misled the lower state courts, but caused "irreparable injury" to Plaintiff and minor children.

> "Loss of First Amendment Freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. Though First Amendment rights are not absolute, they may be curtailed only by interests of vital importance, the burden of proving which rests on their government." Elrod v. Burns, 96 S Ct 2673; 427 US 347, (1976). Violations Id. at XI.5-17.

13. As the final DCF report clearly indicated, children were already receiving "intensive therapeutic intervention." "The children continue to receive counseling

with Dr. Alicia Vidal [since] Aug. 2011…. Case will be submitted for closure… pending evaluation as to the father with Dr. D'Tomasso" Dist. Dkt. 8 P. 39.

14. DCF received at least five false accusations in total against Plaintiff and almost every member of his family from some of the Defendants, all found without grounds to proceed legally against them.

15. As to the Father, a top Family Medicine graduate from University of Miami/Jackson Memorial Hospital, Cum Laude Electrical Engineer from Florida International University, ex-Olympian, an outstanding member and servant of his community, now running for the Florida Senate in hopes of stopping similar crimes in Florida, had no criminal record what so ever, and posed no danger to his minor children. On the contrary, according to school records and therapy notes (Dist. Dkt. 8, P. 47-48), minors were not only doing well with Father, but were thriving under his shared-equal custody.

16. As further violations of due process, the evidence clearly showed that Plaintiff did not, and could not have possibly received timely notice of the purported "emergency telephonic" hearing in which he lost custody of his children, Dist. Dkt. 8 P. 21 to 26.

17. The record clearly showed that the "Request for Emergency Telephonic Hearing," the "Emergency Motion to Suspend Timesharing," and the "Order Granting Emergency Motion to Suspend Petitioner's Timesharing" were all signed

and issued on the same day, July 20th, 2012, making it impossible for Plaintiff to have been given timely notice in advance of the hearing, in clear violation of Rule 60(b), making the order void *ab initio*. A judgment may be void for purposes of Rule 60(b)(4) if entered in a manner inconsistent with due process.

> *See, e.g.,* V.T.A., Inc., 597 F.2d at 224-25; *Arthur Andersen & Co. v. Ohio (In re Four Seasons Sec. Laws Litig.),* 502 F.2d 834, 842 (10th Cir.), *cert. denied,* 419 U.S. 1034, 95 S.Ct. 516, 42 L.Ed.2d 309 (1974). Rule 60(b)(4), which provides relief from void judgments, "is not subject to any time limitation." *V.T.A., Inc. v. Airco, Inc.,* 597 F.2d 220, 224 n. 9 and accompanying text (10th Cir.1979) ("if a judgment is void, it is a nullity from the outset and any 60(b)(4) motion for relief is therefore filed within a reasonable time"); *see also Venable v. Haislip,* 721 F.2d 297, 299-300 (10th Cir.1983). Furthermore, when Rule 60(b)(4) is applicable, "relief is not a discretionary matter; it is mandatory." *V.T.A., Inc.,* 597 F.2d at 224 n. 8; *see also Venable,* 721 F.2d at 300.

18. The three signatures issued on the same date by the state court proves without a shadow of a doubt that ex's attorneys, in conspiracy with state actors under the color of law, committed constitutional and due process violations against Plaintiff and minors. This was in clear violation of the constitutional guarantee to due process requiring that a parent receive "timely notice, in advance of a hearing in which parents' rights to custody are at stake." *Dykes v. Hosemann*, 743 F.2d 1488, 1494 (11th Cir. 1984). So, the record clearly showed that the Plaintiff adequately alleged and proved that his constitutional right was deprived without adequate process. See, e.g., *Novak v. Cobb Cty.-Kennestone Hosp. Auth.*, 849 F. Supp. 1559, 1567 (N.D. Ga. 1994).

19. In light of this irrefutable evidence tying a lack of process to the alleged deprivation of a constitutional right, Plaintiff once again asserts his claims against Hernandez and Lopez under § 1983, and requests to be given the opportunity to proceed with discovery, and present all evidence before a jury of his peers.

IV. Claims Under 42 U.S.C. § 1985(2), (3):

20. Plaintiff now realleges each and every above paragraph and allegation, as well as those incorporated by reference, for all purposes as though the same had been fully set forth herein. As required by these claims, Plaintiff demonstrates that there are sufficient allegations and evidence to make plausible that there was a "meeting of the minds between two or more persons to accomplish [the] common and unlawful plan." See *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000) (en banc).

21. For instance, how Hernandez and Lopez provided CPT report against DCF's SOPs to ex's attorneys to unlawfully file purported "Emergency Telephonic Hearing" signed by Yvette B. Reyes Miller, Esq. on July 20th, 2012, maliciously designed to violate Plaintiff's FRCP Rule 60(b) of proper notice resulting in the deprivation of Plaintiff's Constitutional guarantees and adequate due process.

22. Furthermore, in his claim under § 1985(2), Plaintiff invokes a class-based discriminatory animus, as a class of one; cf. *Kush v. Rutledge*, 460 U.S. 719, 726,

103 S. Ct. 1483, 1488 (1983). To establish a "class of one" equal protection claim, the plaintiff showed that:

> "[He] has been intentionally treated different from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074, 145 L. Ed. 2d 1060 (2000) (per curiam); see also *Grider v. City of Auburn*, 618 F.3d 1240, 1263-64 (11th Cir. 2010). "To be similarly situated, the comparators must be prima facie identical in all relevant respects." *Grider*, 618 F.3d at 1264.

23. Respondents triggered the district court's jurisdiction of the Plaintiff's "class of one" status through violations of Fifth and Sixth Amendment due process. Plaintiff demonstrated that he and his children have been intentionally treated differently from other similarly situated individuals when his shared-equal custody was lost by mere allegations that his Christian practice of praying with his children intentionally scared his children when praying with them, which DCF found to be false by Dr. DiTomasso's report, Dist. Dkt. 8 P. 54, and that there was no rational basis for the difference, such as Plaintiff's mental illness (Dr. DiTomasso's reports states: "Mario does not appear to be suffering from major psychiatric disease"), thus sufficiently establishing a class of one as affirmed by this Court in *Foley v. Orange County*, Court of Appeals, 11th Circuit 2016.

24. Plaintiff and children have been subjected to Tortuous Legal Abuse and PTSD Child Abuse, a billable medical condition in the DSM V, and to cruel and unusual punishment, although they have not committed any crime(s), by forced separation, only having contrived "supervised" visitations at Plaintiff's expense for

well over three years. This same vicious modus operandi of Respondents is not isolated or trivial but affects millions of alienated orphans by design throughout this nation's outlaw Family Courts. The just and proper relief in the instant case is vital to restore these millions of orphans to their parents.

25. Despite Dr. DiTomasso's report clearing Plaintiff, Dr. Archer conspired with other Defendants alleging that Plaintiff's Christian practice of praying with his children was "excessive and intrusive, and likely do approach a fanatic level" (Dist. Dkt. 8, P. 58), and later recommended and obtained "that the [Plaintiff's] telephone calls [with minors] be immediately suspended" because in her opinion Father made "frequent and repeated [Christian] religious citations," and "telephone conversations depict Mr. Jimenez continuing to make [Christian] religious references." Id.

26. Bear in mind that similarly to Plaintiff's case, Dr. Archer's conspiratory behavior, biased and unsupported opinions has led to the death of a child, Nubia Barahona, the torture of her 3 siblings, and has forced the state of Florida to pay 5 million dollars, and possibly more to other survivors, but courts ignored all this. "Dr. Archer was a defendant in the underlying lawsuits [on behalf of Nubia Barahona and her brother Victor, but] was released…because she had no insurance," please see Florida Senate SPECIAL MASTER'S FINAL REPORT: http://www.flsenate.gov/Session/Bill/2016/0048/Analyses/2016s0048.ju.PDF

27. Wizel further conspired with Archer and her attorneys by making false accusations with DCF, alleging

> "On June 6, 2012…[that father had told children that] The devil is going to kill everyone. Those bad angels will come kill us and something bad is going to happen" Dist. Dkt. 8, at 157.

28. Archer was well aware that Wizel suffered from Bipolar Disorder, and that Wizel presented a case book example of this condition, but Archer completely ignored these facts, and reported instead "No concerns are raised with respect with Ms. Wizel," Dist. Dkt. 8, P.58, http://saynotopas.com/2/

29. Wizel's attorneys, Reyes Miller, Moralez, Arango Moore, and their firms THE LEGAL DEFENSE FIRM OF SOUTH DADE, and REYES & ARANGO MOORE conspired by using above detailed false accusations and requesting a purported emergency telephonic hearing, not providing Plaintiff timely notice, and obtaining order to suspend Father's timesharing, Dist. Dkt. 8, P. 21-26, as did all other Defendants at different times during state proceedings. Garcia joined conspiracy when recommended by opposite counsel became Guardian Ad Litem (GAL) to discriminate against Plaintiff and show complete bias, see unlawful motion for payment of fees from Father only, Dist. Dkt. 13-2 at 24. Salomon joined the conspiracy when she lied to Plaintiff that he should agree to pay Wizel's attorneys fees, and once truth would come to light, he would not have to pay; a week later, Salomon asked to be removed from case due to a conflict of interest:

she accepted a job with a battered women's shelter associated with Wizel, Dist. Dkt. 8 P. 59 to 67.

V. Rehearing Is Necessary to Maintain Uniformity of Court's Decisions and Because It Involves a Question of Exceptional Importance:

30. As stated in this Court's opinion, "other [three, Colombrito v. Kelly, 764 F.2d 122, 130–31 (2d Cir. 1985); Taylor v. Gilmartin, 686 F.2d 1346, 1357–58 (10th Cir. 1982); Ward v. Connor, 657 F.2d 45, 48 (4th Cir. 1981)] circuits have recognized that a religious group may serve as a protected class for purposes of the second element of a § 1985(3) claim," but the fact that this circuit has not done so, should not preclude Plaintiff and minor children from their equal protection under the law and the Constitution, and thus deprive them of substantial justice in violation of the former and the rules of civil procedure, which require that all pleadings shall be construed as to do substantial justice, *Burt v. City of New York*, 156 F.2d 791 (2 Cir. 1946)

31. There are similarities among the instant case and those three other circuit precedents and that is precisely why this court should maintain that uniformity.

> "The complaint alleged that the defendants had (1) conspired, motivated by animus against his religion, to deprive him of his civil rights in violation of 42 U.S.C. § 1985(3), (2) deprived him of his constitutional rights under color of state law, in violation of 42 U.S.C. § 1983, and (3) discriminated against him in violation of New York State Civil Rights Law." *Colombrito v. Kelly*, 764 F.2d 122, 130–31 (2d Cir. 1985)

32. In the instant case, Plaintiff has overwhelming evidence that he and his minor children have been injured by a private conspiracy amongst Defendants to "deprogram" him of his practice of praying with his minor children, and thus interfere with their Constitutional protected rights:

> "The Supreme Court made clear in *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971), that an action will lie under § 1985(3) when a plaintiff is injured by a private conspiracy to interfere with his constitutional rights, so long as there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. (footnote omitted). Several courts have since held that religiously-motivated animus is actionable under the section. See, e.g., Ward v. Connor, 657 F.2d 45, 48 (4th Cir. 1981, cert. denied, 455 U.S. 907, 102 S.Ct. 1253, 71 L.Ed.2d 445 (1982); Weiss v. Willow Tree Civic Association, 467 F.Supp. 803, 812 n. 25 (S.D.N.Y. 1979).

33. Those who sought to deprive Plaintiff of his children just for praying for them showed that:

> "[C]ertainly their conduct is odious and has the effect of depriving the victim of important rights — his liberty, his freedom, his right to practice his religion, among other rights." *Taylor v. Gilmartin*, supra, 686 F.2d at 1357.

34. Although Plaintiff believes that private parties corruptly conspired with at least one judge in the state court, Plaintiff decided not to file charges against any judge(s) after repeated warnings from Honorable District Judge Ungaro that:

> "Judges are entitled to absolute immunity for all actions taken in their judicial capacity, except where they act in the 'clear absence of all jurisdiction.'" Bolin v. Story, 225 F.3d 1234, 1239 (11th Cir. 2000) (quoting Stump v. Sparkman, 435 U.S. 349, 356–57 (1978))."

35. However, “[p]rivate parties who corruptly conspire with a judge . . . are . . . acting under color of state law within the meaning of § 1983,” regardless of the judge’s own immunity to suit. *Dennis v. Sparks*, 449 U.S. 24, 29, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). See also 1 C. Antieau, Federal Civil Rights Acts § 60, at 111 (2d ed. 1980) ("Private persons acting in a conspiracy with public servants to deprive others of their federal rights are acting under `color of law' and subject to § 1983 actions."). A defendant's actions are under color of state law if he "reache[s] an understanding" with a judge to violate an individual's rights. *Rankin v. Howard*, 633 F.2d 844, 850 (9th Cir. 1980) (quoting *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970)), cert. denied, 451 U.S. 939,101 S.Ct. 2020, 68 L.Ed.2d 326 (1981). Thus courts have refused to dismiss claims alleging state action based on a party's having "induced a judge to abandon his impartiality." *Rankin v. Howard*, supra, 633 F.2d at 850; accord *Brucar v. Rubin*, 638 F.2d 987, 993-94 (7th Cir. 1980).

36. In *Taylor v. Gilmartin*, 686 F.2d 1346, 1357–58 (10th Cir. 1982), the essence of the case was also an attempted religious deprogramming effort together with the means which were employed to accomplish the objective. In the instant case, as in *Silkwood v. Kerr-McGee*, 637 F.2d 743, 748 (10th Cir. 1980), the court noted that the legislative history of the 1971 Civil Rights Act, the source of §

1985(3), contains an explanation by Senator Edmunds of the type of conspiracies to be remedied by the Act:

> "We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it." *Cong. Globe*, 42d Congress, 1st. Sess. 567 (1871) (emphasis added).

37. Such language clearly encompasses, **as it this in the instant case**, an

> "irrational and odious class discrimination based on national origin or religion." *Arnold v. Tiffany*, 359 F. Supp. 1034, 1036 (D.C.Cal.), aff'd on other grounds, 487 F.2d 216, 218 (9th Cir. 1973), cert. denied, 415 U.S. 984, 94 S.Ct. 1578, 39 L.Ed.2d 881(1974). "The inference to be drawn is that the six Justices in *United States v. Guest*, [383 U.S. 745, 86 S.Ct. 1170,16 L.Ed.2d 239 (1966)], adopted the position that a private conspiracy which interferes with fourteenth amendment rights [**such as is clear in the instant case**] by preventing the state from granting equal treatment or by causing the state to deprive a citizen of his constitutional rights is sufficient state action within the power of Congress to remedy under § 5 of the Fourteenth Amendment, notwithstanding the state is not actually one of the conspirators." Id. (emphasis added)

38. In *Ward v. Connor*, 657 F.2d 45, 48 (4th Cir. 1981), Mr. Ward's "parents and others acting in concert with them during an attempt to 'deprogram' him of his religious beliefs," and the same could be said of Wizel and other Defendants who conspired under the color of law to try to "deprogram" Plaintiff from praying and transmitting his Judeo-Christian faith to minor children. Plaintiff has been even warned not to pray with his minor children during the over three years that he has been forced to see his children under supervised visitations by the state court, but

he has not obeyed the warnings, not only because he strongly believes that it goes against the very essence of the Judeo-Christian values of this nation, and its Constitution, but because he believes as some great men in our history put it:

> "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." -John Adams; "The First Amendment was not created to protect the government from religious values, but to protect those with religious values from government tyranny." -Ronald Reagan.

39. Plaintiffs believes that if we are ordered, as it happened in his case, to stop praying with his children and not teach them the word of God, as required by the Bible (Deuteronomy 11:19), God orders us to disobey those orders, for we are to "obey God rather than men" (Acts 5:29).

VI. Prayer For Relief:

Plaintiff prays this Court remand to the District Court with instructions to allow discovery for Plaintiff upon his claims under 42 U.S.C. § 1983, and 42 U.S.C. § 1985(2)-(3) against all Defendants, also void state court order Granting Emergency Motion to Suspend Petitioner's Timesharing and immediately restore equal-share timesharing and 14th Amendment parental rights to Plaintiff, as well as further praying for all other justice that is true, fair and just within the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of March, 2016, a true and complete copy of the foregoing *petition for panel rehearing*, by depositing the same in the United States mail, postage prepaid, has been duly served upon all parties listed below:

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