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**21-11901-G**
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# UNITED STATES COURT OF APPEALS
# ELEVENTH CIRCUIT

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**********
**ELIAS MAKERE, FSA, MAAA**
**(Appellant/Plaintiff)**

**v.**

**HON. E. GARY EARLY, ALJ**
**(Appellee/Defendant)**
**********

On Appeal From The
United States District Court, Florida, Middle District
4:21-cv-000096-MW-MAF

**********

# APPELLANT'S OPENING BRIEF

**********

Elias Makere, FSA, MAAA
Appellant
3709 San Pablo Rd S #701
Jacksonville, FL 32224
P: 904.294.0026
E: Justice.Actuarial@gmail.com
W: TextBookDiscrimination.com
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***ORAL ARGUMENT REQUESTED***

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

*Makere v Early*, 21-11901

# CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Lower Tribunal:

| | |
|---|---|
| Fitzpatrick, Martin | Magistrate |
| Walker, Mark | District Judge |

Non-Parties:

Allstate Insurance Company (NYSE: ALL)

Division of Administrative Hearings (FL)

Florida Commission on Human Relations

Parties:

| | |
|---|---|
| Early, Hon. E. Gary (ALJ) | Defendant |
| Makere, Elias (FSA, MAAA) | Plaintiff |

Appellant is not a subsidiary/affiliate of a publicly owned corporation. Pursuant to Rule 26.1-2 11th Cir. R., Appellant does not know of any other entities that have interest in this case. Appellant hereby certifies that this CIP is complete.

---

*Showered by the raining benediction*
*for his malediction, the judge*
*lowered towards the colorless robe.*

*Sweat not, dear judge, for we will* ***cover you****. Fret not, dear judge, for*
*we will hover you above it all.*
*Forever all.* ***Above the law****.*

*Yet,* ***until forever****, that dirt still lays.*

*So, may this appellate crew dry up*
*the mal-addiction that lies below,*
*and let the people judge the judge*
*in the judge-less robe.*

---

## STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument as this case presents novel/complex topics of law and public trust. In particular, he believes verbal presentation will benefit Issues I (¶63), II, III, and IX (¶177). Pursuant to Rule 34(a) Fed. R. App. P. a party can request oral argument from this Honorable Court (also see Rule 28-1(c) 11th Cir. R.).

At this junction, Appellant does not know whether Appellee will file a brief. Nor is he sure if he will file a subsequent reply brief. Thus, it appears important for this Honorable Court to entertain oral argument so that any questions that it has may be addressed.

Lastly, Appellant asserts that none of the factors listed in Rule 34(a)(2) Fed. R. App. P. exist in this appeal.

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MISCELLANEOUS

## INTRODUCTION

Appellant, Elias Makere, was the Plaintiff in the lower tribunal; and will be referred to in this brief as "Civilian X" (Rule 28(d) Fed. R. App. P.). Appellee, Hon. E. Gary Early, was the Defendant below; and will be referred to as "Judge Y".

The following references will be used in this brief:

[A_] Appendix on Appeal[1/]

The following abbreviations will also be used:

| | |
|---|---|
| ALJ | Administrative Law Judge |
| DCA | District Court of Appeals (FL) |
| DOAH | Division of Administrative Hearings (FL) |
| EEOC | Equal Employment Opportunity Commission |
| FAC | Florida Administrative Code |
| FCHR | Florida Commission on Human Relations |
| FS | Florida Statute |
| LT | Lower Tribunal |
| RRTFB | Rules Regulating the Florida Bar |
| USFLMD | US District Court, Florida, Middle District |
| USFLND | US District Court, Florida, Northern District |

All statutory and rule references are made to their 2020 versions (unless otherwise indicated).

## JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this matter under 42 USC §1983 (by virtue of 28 USC §1331 (*federal question jurisdiction*)). On April 29, 2021, USFLND [*sua sponte*] entered final judgment dismissing Appellant's Complaint on the grounds of absolute judicial immunity. On June 4th, 2021, Plaintiff filed a timely notice of appeal (tolled by Rule 4(a)(4)(A)(iv)-(vi) Fed. R. App. P.). Thus, this Court has jurisdiction over this appeal under 28 USC §1291 (also see 28 USC §1294(1)).

## STATEMENT OF THE ISSUES ON APPEAL

I. Whether district courts can dismiss *pro se* complaints without affording amendment.

II. Whether clerical tasks are immune from civil prosecution if performed by judges.

III. Whether ministerial, administrative acts are immune from civil prosecution if performed by judges.

IV. Whether district courts can dismiss paid complaints *sua sponte*.

V. Whether district courts can plead for a defendant.

VI. Whether district courts can adopt magistrate rulings which are based on a false premise.

VII. Whether unamended, unauthorized, *sua sponte* dismissals violate 1st & 14th Amendment rights.

VIII. Whether unamended, unauthorized, *sua sponte* dismissals of some cases (instead of others) violate Equal Protection Rights.

IX. Whether the LT erred in dismissing Appellant's declaratory relief claim.

## STATEMENT OF THE CASE

Overview

1. This is a civil rights case (42 USC §1983) between a civilian (Appellant-Civilian X) and a state hearing officer (Appellee-Judge Y). Civilian X charged Judge Y with violating Civilian X's constitutional rights while Judge Y operated under *color of state law*.
2. Judge Y, a Florida public official, was an Administrative Law Judge ("ALJ") at all times material hereto. The two most prominent acts that Civilian X charged him with were (a) **destroying evidence** and (b) **committing perjury.**
3. In order to understand how/why the two parties had occasion to interact, we must review the preceding dispute. An employment discrimination lawsuit between Civilian X and Allstate Insurance Company ("Allstate").

Impetus for Appellant-Appellee Interaction (Civilian X v Allstate)

4. On June 30, 2017, Civilian X filed an employment discrimination complaint with the FCHR. Pursuant to §760.11(1) FS, he alleged that his former employer (Allstate) had violated his civil rights on the basis of race ***and*** sex (see **[A0028]**).
5. On September 8, 2017, Allstate denied ***both*** allegations (see **[A0030]**). Stating that it fired Civilian X for a legitimate reason. Specifically, because he had failed an actuarial exam (see **[A0032]**) (highlights added):

> *"[Civilian X] was terminated solely because he failed his [FSA] exam."*
>
> - Allstate Insurance Company | 9/8/17 | **[A0032]**

6. On December 15, 2017, the FCHR concluded its investigation. Notably affirming that race ***and*** sex were the basis of Civilian X's complaint (see **[A0034]**).
7. On January 19, 2018, Civilian X filed his Petition for Relief with the FCHR. Just as in his original charge, he listed only race and sex as the protected characteristics for his complaint (see **[A0036]**). Thus, pursuant to §760.11(7) FS and §120.569 FS, the FCHR transmitted it to DOAH.
8. After a series of irregularities (authority breaches, deposition sit-ins, recusals, etc.), Judge Y became the administrative hearing officer over Civilian X's case (circa November 13, 2018).

9. Despite the procedural incongruities, the facts continued to develop in Civilian X's favor; heavily. Facts which included – but were not limited to:
    a. Unwanted date requests; racist dolls, racist characterizations;
    b. Cursing at Plaintiff for buying a condolence card;
    c. Death threats; smear campaigns; lethal attacks;
10. Importantly, Allstate made it known that many of its other employees had also failed exams. Yet, Allstate never fired any of them. This was the '***smoking gun***' for proving that Allstate was guilty of discriminating against Civilian X.
11. Moreover, at the hearing, three other revelations were cementing:
    a. Allstate granted the **work-from-home privilege** to its other employees. An accommodation it denied to Civilian X many times.
    b. Allstate made Civilian X **pay $1,025** for an actuarial exam fee; a payment it never required from any of its other employees.
    c. Allstate paid Civilian X an **annual salary** that was significantly lower than his similarly-situated comparators.

12. These core facts rendered Civilian X's lawsuit (against Allstate) a textbook case of employment discrimination. One which – unfortunately – ran counter to widespread propaganda (as foretold by the Ku Klux Klan itself; and its progenies).
13. Faced with these probative facts, **Judge Y went on the attack.**

Judge Y's Unlawful Conduct: (A) Spoliation of Evidence

14. On November 30, 2018, during the moments in which the payment disparity was being revealed at trial (see ¶11b, *supra*), Judge Y ordered Civilian X to cease questioning.
15. After the hearing – around January 9, 2019 – Civilian X asked Judge Y for a redress of the cessation order (citing due process). He further detailed the importance of the requested testimony/revelation.
16. Two days later (January 11, 2019), Civilian X received a copy of the hearing transcript. It was missing one page (and one page only). That crucial page was the one that contained testimony on the payment disparity (¶11b) - and Judge Y's cessation order.
    a. It must be noted that DOAH's clerk told Civilian X (over the phone) that Judge Y was the person who scanned/photocopied the transcript. A task, of course, which non-judges primarily complete **[A0189][A0216]-[A220]**.
    b. It is also important to note that prior to this date, Civilian X had never requested a hearing transcript on his case.

i. Civilian X suspected that Judge Y knew this, and was preying on Civilian X's novice (X was *pro se*).

17. Given these circumstances – and upon Civilian X's information/belief – **Judge Y willfully and knowingly hid material evidence.**

Judge Y's Unlawful Conduct: (B) Perjury

18. Judge Y took it one step further, though, by making a wholesale removal of Civilian X's sex discrimination charge.

19. On April 19, 2019, Judge Y entered his Recommended Order ("RO").

20. The first page of the document had a section titled "*Statement of the Issue*". Where Judge Y excluded Civilian X's sex discrimination charge (see **[A0038]-[A0039]**).

21. The second page had a section titled "*Preliminary Statement*". Where Judge Y continued to exclude Civilian X's sex discrimination charge. This time, however, Judge Y made the fateful declaration that Civilian X never complained of sex discrimination prior to the DOAH proceedings (see ¶7, *supra*) (see **[A0036]**) (highlights added).

> *"[Civilian X], also for the first identifiable time, alleged that Allstate, and in particular [Civilian X's manager], engaged in sexually provocative and inappropriate behaviors, which [Civilian X] alleged to be "sexual harassment and discrimination""*
>
> - Judge Y | 4/18/19 | **[A0041]**

22. Judge Y repeated that highlighted line (ie, "*for the first identifiable time*") several more times throughout his authored RO.

23. **That statement, of course, was false.**

24. Civilian X ***did*** charge Allstate with sex discrimination.

    a. He did so in his original charge (6/30/17, see ¶4);

    b. Allstate acknowledged the sex basis (9/8/17, ¶5); and

    c. The FCHR explicitly ruled on the basis of sex (12/15/17, ¶6)

25. Nevertheless, the force and effect of Judge Y's statement made the FCHR change its tune.

26. On June 27, 2019, the FCHR issued its Final Order ("FO"). In which it listed race as the only protected characteristic in Civilian X's complaint (see **[A0043]**); and adopted Judge Y's ruling.

27. Judge Y's lie had its intended effect.

28. Now, it is important to recognize that Judge Y knew he was lying.

Judge Y's Knowledge of the Truth

29. Prior to authoring his RO, Judge Y deliberately acknowledged that the sex discrimination charge was in Civilian X's originating complaint.

30. On February 6, 2019, Allstate moved Judge Y to take official recognition of the FCHR's Determination (under §90.201 FS).[2/]

31. That state-issued Determination letter read, in pertinent part, as follows (highlights added):

> *"Complainant worked for Respondent as an Actuary. Complainant alleged that Respondent discriminated against him based on his race and sex."*
>
> - The FCHR | 12/15/17 | **[A0034]**

32. On February 18, 2019, Judge Y granted the motion **[A0109]**. Thereby cementing – unequivocally – that he **knew** that Civilian X charged Allstate with sex discrimination. He said the following (highlights added).

> *"[Allstate's] Motion for Official Recognition requests that official recognition be taken of the Notice of Determination: No Reasonable Cause, and of the Determination: No Reasonable Cause, both of which were issued by the Florida Commission on Human Relations on December 15, 2017. Those documents provided the point of entry to [Civilian X] for this proceeding."*
>
> - Judge Y | 2/18/19 | **[A0110]**

33. Thus, Judge Y's repeated "statements" to the contrary were a known lie (a massive lie – in fact).

34. A lie that impacted the outcome of Civilian X's lawsuit against Allstate. A case which sought monetary damages (among other things).

    a. Note: another case which sought monetary damages was/is the federal lawsuit Civilian X filed against Allstate in 2020 **[A0118]**. A suit that continues to this day **[A0186]**.

Ultimate Facts on Appellee's Unlawful Conduct Against Appellant

35. Judge Y broke the law in his quest to deny Civilian X relief. Judge Y:

    a. **hid evidence** (see ¶14-17); and

    b. **committed perjury** (see ¶18-34).

36. Judge Y was not performing a judicial function when he scanned/photocopied the case's transcript (¶16a).

37. Judge Y did not have authority to change Plaintiff's charge of discrimination; only the FCHR had such jurisdiction (see **[A0104]**, **[A0113]**). It was also a non-judicial act.

Immediate Procedural History

38. Given the harm that Judge Y's unlawful conduct inflicted, Civilian X filed civil rights charges at USFLND - on February 16, 2021.

39. Six days later, USFLND told Civilian X that it could not accept his complaint because it did not have a handwritten signature (instead, it had an electronic one) (highlights added):

> *"[Civilian X], proceeding pro se, sought to initiate this case by submitting a civil rights complaint under 42 U.S.C. §1983, ECF No. 1, and an application for proceeding without payment of the filing fee, ECF No. 2. Neither of those documents can be addressed at this time because they are not properly signed."*
>
> - USFLND | 2/22/21 | **[A0052]**

40. In that same order, USFLND told Civilian X to resolve the filing fee. Either by paying or by requesting indigent status. Civilian X ended up paying the fee.

41. On April 6, 2021, USFLND processed Civilian X's filing fee (see **[A0056]**). Civilian X also returned a manually-signed duplicate of his original complaint.

    a. Out of deference for USFLND's order, he made no other changes to his complaint.

42. Three days later, however, USFLND's magistrate entered a Report & Recommendation ("R&R"); requesting a full dismissal of Civilian X's complaint against Judge Y **[A0062]**.

    a. Note: in a simultaneously filed order, the magistrate acknowledged that **Civilian X paid the filing fee**:

> *"The docket also shows that [Civilian X] has now paid the $402.00 filing fee."*
>
> – USFLND | 4/9/21 | **[A0059]**

43. The R&R also led off with a false statement. The magistrate wrote "*[Civilian X] was required to submit his amended complaint "on the form used in this Court""* **[A0063]**. However, USFLND never directed Civilian X to use the court-issued complaint form. It only mentioned the application to proceed in forma pauperis:

> *"Moreover, Plaintiff's prior motion, ECF No. 2 [forma pauperis], was not on the form used in this Court"*

- USFLND | 2/22/21 | **[A0053]**

> *"1. The Clerk of Court shall forward to Plaintiff the form used in this Court for requesting leave to proceed in forma pauperis.*
>
> *2. Plaintiff shall have until March 22, 2021, to file an amended civil rights complaint, which contains his original signature, and an amended in forma pauperis motion on the form provided to him with this Order."*

- USFLND | 2/22/21 | **[A0054]**

44. USFLND's Clerk recognized this, too. As she never mailed a court-issued civil rights complaint form (*Pro Se 15*). She only sent Civilian X the court-issued form for leave to proceed in *forma pauperis*. And – of course – Civilian X actually paid the fee (¶42a *supra*).

45. The R&R also recommended dismissal on the basis of **absolute judicial immunity**.

46. Thus, on April 28, 2021, Civilian X filed his written objections to the R&R (Rule 72(b) Fed. R. Civ. P.). Doing so on the grounds of *clear error*, *lack of authority*, *lack of immunity*, and more.

47. On April 29, 2021, unfortunately, the District Court entered Final Judgment; adopting the R&R's dismissal of Civilian X's complaint **[A0087]**.

48. Neither the R&R nor the Final Judgment cited a law/statute/rule permitting it to dismiss Civilian X's paid complaint.

49. Similarly, neither order even declared whether the dismissal was with or without prejudice.

50. It must also be noted that the defendant below (ie, Judge Y) had yet to appear.

51. Likewise, at no point during the proceedings below did any party **consent to the magistrate**'s involvement.

52. Given the procedural circumstances, Civilian X filed identical charges in state court (under §768 FS, 42 USC §1983); believing that the case below had been dismissed without prejudice (Rule 41(a) Fed. R. Civ. P.). **[A0141]**

53. On June 23, 2021, the state court **entered default** against Judge Y because of his failure to contest the charges. **[A0180]**

    a. Charges that Civilian X has steadfastly explained are indisputable.

        i. Judge Y perjured himself, and it is public record (ie, not susceptible to dispute "*because [it is] capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned*" - §90.202 FS).

54. Thus, given the facts, the principles of logic & fairness, the law, precedent, and the parties' conjoined positions, Appellant will hereby present the reasons why this Honorable Court should **reverse the judgment below**. A judgment that was unauthorized, unwarranted, erroneous, incorrect, and spontaneously entered.

## STANDARD OF REVIEW

55. A district court's dismissal of a case is reviewed ***de novo*** (see Castillo v Allegro, 603 F. App'x. 913, 915 (11th Cir. 2015)). Under that standard, the Court must accept all factual allegations in the Complaint as true and make all inferences in the light most favorable to the plaintiff (ie, Civilian X) (see Chaparro v. Carnival Corp., 693 F. 3d 1333, 1335 (11th Cir. 2012)). Plus, courts must liberally construe pro se pleadings (see Tannenbaum v United States, 148 F. 3d 1262, 1263 (11th Cir. 1998)).

## SUMMARY OF ARGUMENT

56. USFLND jumped the gun, misfired, covered for Appellee, and harmed Appellant along the way. In fact, the District Court never even had a gun to begin with; yet it took Appellee's, loaded it with false ammo, and punctured a meritorious cause.

57. More definitively, USFLND dismissed Civilian X's case without giving him a chance to amend his complaint ('*jumped the gun*'). Its claims of immunity were incorrect ('*misfired*'). It covered for Judge Y by not even requiring him to appear. The lower court's actions harmed Civilian X's constitutional rights to (a) access the court (1st Amendment); and (b) the equal protections under the law (14th Amendment).

58. Moreover, USFLND had no gun to start with. Civilian X disarmed its power to spontaneously dismiss by paying the filing fee. So, the District Court's tactic was solely in Judge Y's arsenal of affirmative defenses. To make matters worse, USFLND loaded the defendant's revolver with false bullets. Blanks. Blanks to blank out a meritorious case (one which include[s] declaratory relief).

59. Thus, this Court of Appeals should resolve the mechanical defects, rebuke the wayward shooter, and remand the entire matter to the lower court. Where Civilian X and Judge Y can present the crimes to a jury of their peers.

# ISSUE I

The District Court Erred by

Not Allowing Civilian X to Amend his Complaint

'*jumped the gun*'

## OVERVIEW I

60. The Lower Tribunal erred when it dismissed Civilian X's complaint without giving him a chance to amend it.[3/]

## STANDARD OF REVIEW I

61. Fortunately, this appellate court has the power to remand this issue back, because dismissals without leave to amend are reviewed for **abuse of discretion**:

> *"We review for abuse of discretion a district court's denial of a motion to amend. Henson v. Columbus Bank Trust Co., 770 F.2d 1566, 1574 (11th Cir. 1985)"*
>
> - Bryant v Dupree, 252 F.3d 1161, 1163 (11th Cir. 2001)

62. As the 11th Circuit established in the 2005 case of Guideone, discretion is abused when a lower court goes outside the bounds of possible choices (highlights added):

> *"When we say that a decision is discretionary... we do not mean that the district court may do whatever pleases it. The phrase means instead that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.""*
>
> - Guideone v. Old Cutler, 420 F.3d 1317 (11th Cir. 2005)

## ARGUMENT I

63. USFLND – in the instant case – went **outside the boundaries of discretion** [and non-discretion] when it dismissed without permitting amendment.

64. It is uncontroverted that Appellant (ie, Civilian X) only filed one complaint in the action below; albeit twice. The first iteration had an electronic signature. And the second featured a handwritten one (Local Rule 5.1(E) USFLND).

    a. The two copies had no factual or procedural differences; just that clerical change to the signature type.

65. Moreover, Rule 15(a)(1) Fed. R. Civ. P. gave Civilian X the right to amend his complaint within twenty-one (21) days of service/response:

> *"Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:*
>
> *(A) 21 days after serving it, or*
>
> *(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."*
>
> – Rule 15(a)(1) Fed. R. Civ. P.

66. As the record shows, Appellee (ie, Judge Y) has never been served in this action (15(a)(1)(A)). As such, any conceivable answer/defensive motion is nonexistent/moot (15(a)(1)(B)).

67. Thus, in light of these procedural facts, the Lower Tribunal never even entered the guardlines of discretion.

68. The top guardline could have been found in Rule 15(a)(2). Which states that – between the 21-day period and trial - district courts '*should freely give*' permission to amend (highlights added):

> *"A district court's discretion to dismiss a complaint without leave to amend "is `severely restrict[ed]' by Fed.R.Civ.P. 15(a), which directs that leave to amend `shall be freely given when justice so requires.'"... Generally, "[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice.""*

- Bryant v Dupree, 252 F.3d 1161, 1163 (11th Cir. 2001)

69. The bottom guardline, on the other hand, could have been found in Rule 15(b). Which states that – during and/or after trial – district courts can allow pleadings to be amended. The safeguards being time considerations, prejudice, consent, and much more.

70. In the instant case, the record is clear that the lower court abandoned discretion altogether. It never even considered time, service, prejudice, consent, or '*freely giving*' Civilian X the basic course of action. *But for* this abdication, Civilian X would have been able to draft a more impenetrable complaint (eg, additional facts, etc.). Thereby staving off this appeal.

## CONCLUSION I

71. This Appellate Court should remand on this issue, because USFLND *jumped the gun* – and erred - in dismissing Civilian X's complaint without permitting amendment.

72. At the very least – and notwithstanding the Lower Tribunal's other flaws (*infra*) - amendment would have allowed Civilian X to go deeper into the reasoning against judicial immunity (reasoning that he begins to put forth in Issues II-III). Thereby letting him dodge the LT's *misfires*.

# ISSUE II

Judge Y Lacks Immunity for his Clerical Misconduct

'*misfire #1*'

## OVERVIEW II

73. Judge Y infringed on Civilian X's constitutional right to due process when he hid evidence (in violation of Chapter 918 FS). He did so by removing a crucial transcript page from the batch that he scanned (¶14-17, *supra*).

74. Photocopying transcripts, of course, is a clerical task. In other words, it is not a judicial one. Judge Y committed a non-judicial act to mute Civilian X's *prima facie* proof of the underlying case (ie, *Makere v Allstate*).

75. Thus, the District Court erred by cloaking Judge Y with judicial immunity.

## STANDARD OF REVIEW II

76. Reversal on the grounds of immunity is available to this appellate court because such a basis is reviewed *de novo*:

> *"Claims of absolute immunity present questions of law that we review de novo."*
>
> - Mikko v Atlanta, 857 F.3d 1136 (11th Cir. 2017)

Plus, the Lower Tribunal proffered this ground in its order of dismissal (which is also subject to *de novo* review).

## ARGUMENT II

77. It is well-established that absolute judicial immunity only attaches if the officer committed a judicial act within his/her jurisdiction (highlights added):

> *"A judge is absolutely immune from a section 1983 suit for damages only for (a) judicial acts (b) for which the judge has at least a semblance of subject matter jurisdiction. See Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978)"*
>
> - Lerwill v Joslin, 712 F.2d 435, 438 (1th Cir. 1983)

78. In Dykes, this Honorable Court held that it must consider **four (4) factors** when determining whether the misconduct was a "judicial act" (highlights added):

> *"In Harper v. Merckle, 638 F.2d 848 (5th Cir.), cert. denied, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981), the court focused on the following factors in determining that a judge's conduct constituted a judicial act:*
>
> > *(1) the precise act complained of... is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity."*
>
> - Dykes v. Hosemann, 776 F.2d 942, 945 (11th Cir. 1985)

79. In the instant case – when it comes to the hidden transcript page – all four factors fall in Civilian X's favor.

Factor One: Normal Judicial Function

80. Photocopying transcript pages is not a judicial act.

81. For starters, it does not require legal knowledge, discretion, or judgment.

    a. That first element - as Art. V. §8 Fla. Const. puts it - is mandatory for Florida judgeship ("*[a judge must be] a member of the bar of Florida*"). Rule 4-1-1 RRTFB goes on to say that "legal knowledge" is a key element in a judge's competence.

    b. The Preamble to Chapter 4 RRTFB states that discretion is another important characteristic of judicial work.

    c. All three of these elements come together to help determine whether a judge's behavior is judicial (highlights added):

> *"The powers conferred by these acts of Congress upon the judge as well as the Secretary are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them."*
>
> - USA v. Ferreira, 13 How. 40, 51-52 (1852)

82. Ferreira, of course, was a case that distinguished administrative functions against judicial ones. Pursuant to Ferreira, a clerical task like scanning paper would be classified as "alien" to the "legitimate functions of a judge":

> *"The duties to be performed are entirely alien to the legitimate functions of a judge or court of justice, and have no analogy to the*

*general or special powers ordinarily and legally conferred on judges or courts to secure the due administration of the laws."*

- USA v. Ferreira, 13 How. 40, 51-52 (1852)

83. Such administrative jobs are often completed by court staff:

*"Some members of a judge's staff aid in the performance of adjudicative functions"*

- Forrester v White, 484 US 219 (1988)

84. In Judge Y's circumstances, Florida legislature deemed the maintenance of transcript pages as a clerical task primarily handled by non-judges.

a. §27.0061 FS states that court reporters are responsible for transcripts.

b. §28.13 FS goes on to say that clerks "must maintain all papers", and ought not "permit any attorney or other person" to interfere.

c. §120.65 FS, in contrast, creates no such obligation on administrative law judges (ie, Judge Y).

85. In fact, DOAH itself (ie, Judge Y's employer), maintains that handling paperwork is a non-judicial task (for non-judges):

a. 28-106.104(3) FAC states that the division clerk (ie, not any judge) handles all documents received.

b. 28-106.214(1) FAC goes further by stating that the preservation (ie, non-spoliation) of trial transcripts is

not even within DOAH's jurisdiction. Rather, it is up to the administrative agencies that submit cases to DOAH:

> *"Responsibility for preserving the testimony at final hearings shall be that of the agency transmitting the petition to the Division of Administrative Hearings pursuant to Sections 120.569 and 120.57, F.S.,"*
>
> - 28-106.214(1) Florida Administrative Code

86. In practical application, public record shows that Florida appellate courts **[A0220]**, litigants **[A0189]**, and government staff **[A0218]**, all expect transcript-handling to be completed by non-judges.

87. Thus, constitutions, bar rules, Supreme Court precedence, statutory authority, state regulations, history, and common logic converge to show that Judge Y was not performing a judicial act when he photocopied/hid the trial transcript. On that factor alone, this Court should deny absolute judicial immunity.

Factor Two: Location of Events

88. The second factor falls in Civilian X's favor as well. The event-in-controversy (ie, spoliation of evidence) neither occurred in the judge's chambers nor in open court. It took place in the assistant's office (see ¶16a, *supra*).

89. The assistant's office, of course, is an administrative setting, and this Circuit states that actions in administrative settings are non-judicial (highlights added):

> *"fee determinations are made in an administrative setting rather than in an adversarial posture;"*
>
> *"..."*
>
> *"we concluded that fee determinations made by district courts pursuant to the § 3006A(d) of the Criminal Justice Act (CJA) were administrative in nature and therefore not subject to appeal as final decisions"*
>
> - USA v. Griggs, 240 F.3d 974 (11th Cir. 2001)

90. Thus, since this Court has already factored in an "administrative setting" in determining a controversial act as being "administrative in nature", it should do so again (in the instant case).

Factor Three: Centered Around a Case

91. The third factor – which is perhaps a bit more assailable – also falls in Civilian X's favor. The act in controversy (ie, hiding transcript pages instead of scanning them) is not "centered" around a case. Xeroxing pages is a nondescript task that is performed without judgment or discretion (¶81-82, *supra*).

Factor Four: Immediacy of the Event

92. Lastly, the fourth factor favors Civilian X's argument, too. The matter regarding the destruction of evidence did not happen directly/immediately out of a visit to the judge. It occurred roughly 6-weeks after the parties stood before Judge Y at trial.

93. As detailed in the statement of facts, the testimony-at-hand was proffered in November 2018 (¶14, *supra*). Yet the incomplete transcript pages were not produced until January 2019 (¶19-20).

94. In other words, the spoliation of evidence was not the byproduct of a hotly-contested judicial matter. It was the desired outcome of Judge Y's cold plan to hide Civilian X's *prima facie* evidence.

**CONCLUSION II**

95. In short, Judge Y's spoliation of evidence was not a judicial act. It was an administrative act; one which was/is not prone to judicial immunity. Had any of the administrative assistants or clerks done what Judge Y did (which they were statutorily poised to do) they would be liable under 42 USC §1983:

> *"there may be somewhat less reason to cloak judges with absolute immunity from such suits than there would be to protect such other officials."*
>
> - Forrester v White, 484 US 219 (1988)

96. So, the District Court *misfired* in its first attempt to douse Judge Y in a cloak of invincibility. An unattachable cover which would have allowed Judge Y to be immune from transgressions that no one else would be immune to.

97. Thus, this Appellate Court should reverse & remand on this issue. Especially considering the second misfire that the LT made (Issue III, *infra*).

# ISSUE III

Judge Y Lacks Immunity for his Non-Judicial Transgressions

'*misfire #2*'

## OVERVIEW III

98. The Lower Tribunal erred when it donned the cloak of judicial immunity on Judge Y (Appellee). Of the unlawful conduct Civilian X detailed in his complaint (¶14-37), Judge Y's act of perjury was not a judicial one. Thus, immunity does not attach.

## STANDARD OF REVIEW III

99. Of course, as mentioned earlier, trial court dismissals are reviewed *de novo* (¶56, *supra*). And more specific to this issue, proffers of immunity are also reviewed ***de novo*** (¶76, *supra*).

## ARGUMENT III

100. As this Court foretold, the doctrine is designed to protect the **integrity** of the court:

> *"The Court stressed that such immunity was essential to protect the integrity of the judicial process... ...we bear in mind that immunity status is for the benefit of the public as well as for the individual concerned."*
>
> - Stevens v Osuna, 877 F.3d 1293 (11th Cir. 2017)

Such protection is there to maintain **the functions** that the public relies:

> *"This provision of law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise*

*their functions with independence and without fear of consequences."*

- Bradley v Fisher, 80 US 335

101. The US Supreme Court stressed that Courts must look at the acts in question, especially since judges regularly handle **non-judicial tasks** (highlights added):

*"Here, as in other contexts, immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches... This Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity. The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform."*

- Forrester v White, 484 US 219 (1988)

102. Thus, Civilian X must show that Judge Y's perjury was committed during a non-judicial act. The act in controversy, of course, was Judge Y changing Civilian X's employment discrimination complaint. One from a basis of race & sex into one on the basis of race only [see ¶18-34).

103. Civilian X will present this in two parts. In part one, he will show that DOAH's quasi-judicial officers (eg, Judge Y) have never had authority to change the basis of a discrimination charge. Then, in part two, he will show that the act was administrative.

Part One: Judge Y Had No Jurisdiction Over Discrimination Bases

104. DOAH is an administrative agency created by §20.22 FS:

> *"There is created a Department of Management Services... [(2)...(f)] Division of Administrative Hearings."*
>
> - §20.22 FS (2020)

105. As such, Florida's Supreme Court confirmed that administrative agencies like DOAH have **limited powers** (highlights added):

> *"Administrative authorities are creatures of statute and have only such powers as the statute confers on them. Their powers must be exercised in accordance with the statute bestowing such powers, and they can act only in the mode prescribed by statute. If a power or duty is imposed upon him jointly or as a body, it may not be exercised by them acting individually and separately. They cannot rightfully dispense with any of the essential forms of proceedings which the legislature has prescribed for the purpose of investing them with power to act. A commission may not assert the general power given it and at the same time disregard the essential conditions imposed upon its exercise. Officers must obey a law found upon the statute books until in a proper proceeding its constitutionality is judicially passed upon."*
>
> - Edgerton v International, 89 So. 2d 488 (1956)

106. So, while Judge Y had the prescribed "general power" to perform a finding of fact, he did not have the essential power to change what was being searched. DOAH has said so itself, in fact:

> *"the Division does not have jurisdiction of any new charges added into the Petition for Relief or that were presented for the first time at hearing if they could have been raised in the Charge of Discrimination. New or different types of discrimination cannot be alleged in the Petition for Relief or at the disputed-fact hearing under Section 120.57(1), Florida Statutes, unless they have been alleged in the Charge of Discrimination."*
>
> - Cox v Univ of Florida, DOAH 03-4672 | [A0207]

107. Federal Courts have said the same thing about **unconferred power** from the EEOC (the federal equivalent to Florida's FCHR):

> *"Federal courts do not have subject matter jurisdiction to hear Title VII claims unless the claimant explicitly files the claim in an EEOC charge or the claim can reasonably be expected to grow out of the EEOC charge."*
>
> - Abeita v TransAmerica, 159 F. 3d 246 (6th Cir. 1998)

The above affirmation fits the instant case, because DOAH – for the purposes of employment discrimination cases – stands in the same shoes Federal Courts do (ie, adjudicating FCHR/EEOC complaints).

108. Thus, with case law proving that Judge Y had no power to change Civilian X's discrimination complaint, we must now examine how doing so was a non-judicial act.

Part Two: Perjury on a Ministerial, Non-Judicial Act

109. The 7th Circuit has established that the act-in-question is a **condition precedent** (not an item of subject matter jurisdiction):

> *"We must consider whether the requirement that the allegations in a complaint be encompassed within the corresponding EEOC charge relates to subject matter jurisdiction or whether it is more in the nature of a condition precedent. We conclude that the latter is the case... Consequently, the requirement that the scope of the EEOC charge limit the scope of the subsequent complaint is in the nature of a condition precedent with which litigants must comply rather than constituting a component of subject matter jurisdiction."*
>
> - Babrocky v. Jewel, 773 F.2d 857 (7th Cir. 1985)

110. Conditions precedent (or as Florida's 4th District Court of Appeals put it: "legal requirements") cannot be altered when relayed:

> *"We specifically held in Narco Realty, Inc. that where all of the legal requirements for platting land have been met there is no residual discretion to refuse plat approval and mandamus will lie. The same reasoning applies to approval of site plans. ... No element of discretion remains once the legal requirements have been met."*
>
> - Lauderdale Lakes v. Corn, 427 So.2d 239 (FL 4DCA 1983)

111. So, **sans discretion** the acceptance of conditions precedent becomes an **administrative act** (highlights added):

*""We reject the County's construction that those provisions of the statutes give the County unbridled discretion to deny approval... "Thus, while public policy requires municipal control of such development, nevertheless, the authority of a town to deny a landowner the right to develop his property by refusing to approve the plat of such development is, by statute, made to rest upon specific standards of a statute or implementing ordinances. Thereafter, the approval or disapproval of the plat on the basis of controlling standards becomes an administrative act.""*

- Broward County v. Narco, 359 So.2d 509 (FL 4DCA 1978)

112. In the instant case, Judge Y was granted neither the power nor the discretion to change the basis of Civilian X's FCHR Complaint. All he was allowed to do was **recite the conditions precedent; a ministerial act** (highlights added):

*"It was insisted during the argument on behalf of the petitioner that Congress cannot punish a State judge for his official acts; and it was assumed that Judge Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent.*

*Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in*

*determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads."*

- Ex Parte Virginia, 100 US 339

113. Case law shows that Judge Y's **ministerial recitation** of the conditions precedent **was a non-judicial act.** Instead, it was an administrative task; requiring no judgement; no discretion. A task which anyone could have performed. Had 'anyone' else performed it, they would be liable (¶96).

Additional Point

114. As an added note, the fact that Judge Y perjured himself while committing that act stripped him of all immunity (highlights added):

*"If the act which the [state officer] seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."*

- Ex Parte Young, 209 US 123 (1908)

## CONCLUSION III

115. In summary, since Judge Y had no power to add charges onto an FCHR complaint, he had no power to take charges off.

    a. He could only accept Civilian X's FCHR complaint *as is*.

        i. Reciting the bases was a **non-judicial, ministerial act.**

As such, the perjury that he committed while doing the latter was infirm for attaching judicial immunity.

116. Judge Y's unauthorized change to Civilian X's FCHR complaint foreshadows the next issue: the Lower Tribunal's unauthorized *sua sponte* dismissal of Civilian X's §1983 complaint (ie, the complaint below).

# ISSUE IV

The District Court Lacked Authority to *Sua Sponte* Dismiss a Paid Complaint

'*gunless*'

## OVERVIEW IV

117. The District Court lacked authority to dismiss Appellant's complaint; and, therefore, erred when it did so. For one, Appellant (ie, Civilian X) paid the filing fee. Plus, Appellee (ie, Judge Y) had not been served yet.

## STANDARD OF REVIEW IV

118. Lack of Authority receives a *de novo* standard of review. This is so for two reasons. First, because it does not require weighing facts (Guerrero v Barr, 140 S. Ct. 1062 (2020)); in other words, it is a question of law. Secondly, because pure questions of law are reviewed *de novo*:

> *"Because the case involves a pure issue of law, we review the order by the de novo standard of review."*
>
> - Southwest v Manatee Club, 773 So. 2d 594 (FL 1DCA 2001)

## ARGUMENT IV

119. This Appellate Court should reverse the decision below because the District Court lacked the requisite power to enter it.

Nothing Granted LT Authority to *Sua Sponte* Dismiss Paid Complaints

120. The record is clear: Civilian X paid the filing fee [¶41]. In fact, the magistrate below acknowledged that he did [¶42a].

121. So, the starting point for this analysis is the federal statutes. This is where the LT encounters a major problem. For neither the appealed judgment **[A0088]** nor its adopted R&R **[A0062]** cite any law (¶48).

122. The closest law there is – as Civilian X pointed out in his objections (below) **[A0072]** – is 28 USC §1915. Yet, that pertains to "Proceedings *in Forma Pauperis*". The case below, of course, was no such proceeding; Civilian X **paid the filing fee** (¶43).

123. In Nietzke, the US Supreme Court held that §1915 cannot be used to screen out paid complaints (because the fee already does):

> *"This conclusion follows naturally from §1915(d)'s role of replicating the function of screening out inarguable claims from arguably meritorious ones played out in the realm of paid cases by financial considerations."*
>
> – Neitzke v. Williams, 490 U.S. 319 (1989)

124. The next closest law is 28 USC §636. That, however, also works against the LT's dismissal because it **prohibits** a magistrate from "*involuntarily dismiss[ing] an action*" (§636(b)(1)(A)). Despite this statute, the LT still adopted the magistrate's R&R.

125. Furthermore, subsections (b)(3) through (c)(2) of §636 provide leeway for magistrates to carry out "additional duties" assigned by district courts. Yet, as Whitworth foretold, the judiciary cannot shuffle prohibitive dismissals (¶112) under the umbrella of "additional duties":

*"Thus, "[t]he absence of a specific reference to jury selection in the statute, or indeed, in the legislative history, persuades us that Congress did not intend the additional duties clause to embrace this function."*

- Thomas v. Whitworth, 136 F.3d 756 (11th Cir. 1998)

126. Moreover, "additional duties", may only be delegated if the parties consent (highlights added):

*"the Supreme Court held that the statute's "additional duties" clause constitutionally permits a magistrate judge to supervise jury selection in a felony trial where the parties state their consent. In so holding, however, Peretz reaffirmed the reasoning in Gomez, and added that, where consent is lacking, courts should be reluctant "to construe the additional duties clause to include responsibilities of far greater importance than the specified duties assigned to magistrates.""*

- Thomas v. Whitworth, 136 F.3d 756 (11th Cir. 1998)

This is another problem with the LT's ruling. Civilian X **never consented** to the magistrate's involvement in the case.

127. Consent is crucial (highlights added):

*"In addition, we have explained, "[t]he Supreme Court's interpretation of section 636(b)(3) establishes the presence or absence of consent as the crucial factor in determining what duties the section encompasses." Maragh, 174 F.3d at 1204; see also id. at 1205 (holding "consent is of paramount importance" in determining the duties the district court could delegate to a magistrate judge")"*

- USA v. Woodard, 387 F.3d 1329 (11th Cir. 2004)

128. Therefore, without consent, the LT was unauthorized to *sua sponte* enter dismissal against Civilian X. Absent any statutory authority, we should now turn to rules of civil procedure. This next analysis, though, suffers from the same maladies.

District Courts Cannot Dismiss Prior to Service

129. The record is also clear: Judge Y had yet to be served with a summons. Rule 4 Fed. R. Civ. P. covers summonses. Rule 12, on the other hand, covers dismissals.

130. Although the LT did not cite Rule 12 (or any rule of civil procedure) in its orders (ie, judgment, R&R), Civilian X will analyze it to further show that the LT's action was erroneous.

131. For starters, Rule 12 does not provide authorization for any officer (judge, magistrate, etc.) to dismiss an action *sua sponte*. The rule only deals with motions.

    a. Moreover, none of USFLND's Local Rules (via Rule 83 Fed. R. Civ. P.) create that power either.

132. Nevertheless – and with grace to USFLND's action - the 8th Circuit Court of Appeals held that *its* courts could do so. But only on the **condition that service is effectuated**:

> *"We now hold that a district court sua sponte may dismiss a complaint under Rule 12(b)(6) as long as the dismissal does not precede service of process."*
>
> - Smith v. Boyd, 945 F.2d 1041, 1043 (8th Cir.1991)

Of course, no such condition was satisfied in the instant case.

133. Thus, the LT erred in adopting an unauthorized recommendation:

> *"Upon review of the record, we conclude that the district court erred in adopting the magistrate judge's recommendation to dismiss Freeman's complaint prior to service of process."*
>
> - Freeman v. Abdullah, 925 F.2d 266, 267 (8th Cir.1991)

**CONCLUSION IV**

134. In short, this Appellate Court should reverse the Lower Tribunal's *sua sponte* dismissal of Civilian X's complaint, because the LT had no power to do such a thing. Primarily because **no authority exists** to dismiss a paid complaint:

> *"We agree with the first argument and conclude that the bankruptcy court erred by holding the Officer Appellants liable for failing to correct... Moreover, the bankruptcy court offered no authority for such conclusion, and we cannot find any... Thus, we vacate that conclusion."*
>
> - Bannistor v Ullman, 287 F.3d 394 (5th Cir. 2002)

Secondarily, because case law prohibits *sua sponte* dismissals prior to service (Smith, Freeman, etc.).

135. Thematically speaking, the District Court had no gun to rampage with. Yet it shot Civilian X nonetheless. And - as we will analyze next - it did so with a stolen weapon.

# ISSUE V

The District Court Erred by
Advocating for a Defense that Solely Belonged to Judge Y

'*stolen weapon*'

## OVERVIEW V

136. The Lower Tribunal erred by basing its dismissal on the magistrate's defensive plea of immunity. A defense which can only be pled by defendants (ie, Judge Y).

## STANDARD OF REVIEW V

137. The 11th Circuit reviews dismissals of *pro se* complaints *de novo* (see Boxer X v Harris, 437 F.3d 1107 (11th Cir. 2006).

## ARGUMENT V

138. Case law dictates that defendants (not district courts or magistrates) must plead their affirmative defenses.

139. In the instant case, the record is clear: Judge Y (ie, Appellee-Defendant) was ***not*** the one who proffered the defense of judicial immunity. The magistrate was.

140. In Doubleday, the 2nd Circuit stressed this cardinal principle: defendants – and not courts – are the only people responsible for proffering defenses (highlights added):

> *"Among the cardinal principles of our Anglo-American system of justice is the notion that the legal parameters of a given dispute are framed by the positions advanced by the adversaries, and may not be expanded sua sponte by the trial judge."*
>
> - Doubleday v. Curtis, 763 F.2d 495, 502 (2d Cir. 1985)

For all we know, Judge Y may waive the defense (see ¶53).

141. In Wagner, the 7th Circuit also affirmed that immunity defenses must be pled by defendants:

> *"declaring immunity is "a personal privilege of the defendant", and the district court "had no right to apply the [unpled defense] sua sponte"*
>
> - Wagner v. Fawcett, 307 F.2d 409, 412 (7th Cir. 1962)

142. This 11th Circuit – in Lee v Ferraro - elaborated by saying 'the public official must prove' he/she is entitled to the defense (highlights added):

> *"Qualified immunity offers "complete protection for government officials sued in their individual capacities as long as 'their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known.'... The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability... protecting from suit "all but the plainly incompetent or one who is knowingly violating the federal law." In order to receive qualified immunity, the public official "must first prove that 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'"*
>
> - Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002)

Likewise, the Dukes court reaffirmed that **the official bears the burden**:

> *"...immunity protects... officers from liability... The officer bears the initial burden"*
>
> - Dukes v. Deaton, 852 F.3d 1035, 1041 (11th Cir. 2017)

143. In addition to defining the aforementioned problem, this appellate court also designed the solution. That solution being a reversal and remand (highlights added):

> *"In this civil rights case against a sheriff and the county commissioners of an Alabama county, we reverse the district court because the magistrate judge improperly injected into the case the defense of qualified immunity."*
>
> - Moore v Morgan, 922 F.2d 1553 (11th Cir. 1991)

144. In Spaulding, this Court detailed what the lower court should do (permit service and allow the defendant to speak):

> *"John C. Spaulding, a Florida prisoner, appeals the district court's dismissal of his pro se complaint for failure to state a claim before Defendants filed a responsive pleading... We reverse and remand to allow Defendants the opportunity to respond to Spaulding's third amended complaint."*
>
> - Spaulding v Woodall, 12-12043 (11th Cir. 2014; 1/6/14)

It went on to give special consideration for pro se complaints (ie, like Civilian X's complaint below):

> *"Given the liberal construction afforded pro se litigants, we reverse and remand this case to the district court in order for Defendants to file a responsive pleading to Spaulding's third amended complaint. REVERSED and REMANDED."*
>
> - Spaulding v Woodall, 12-12043 (11th Cir. 2014; 1/6/14)

## CONCLUSION V

145. Thus, this Appellate Court should reverse the decision below because case law holds that defendants – not magistrates (or anyone else) - must plead their affirmative defenses.

146. As a segue, the Lower Tribunal was wrong for stealing Judge Y's gun and shooting Civilian X with it. Even more so because that court loaded it with false ammo (Issue VI, *infra*).

# ISSUE VI

The District Court Erred by
Adopting an Incorrect Stance

'false ammo'

## OVERVIEW VI

147. The District Court erred when it adopted the magistrate's R&R, because that recommendation was based on a false premise.

## STANDARD OF REVIEW VI

148. District Court decisions based on false notions are reviewed for clear error (see United States v Zapata, 139 F.3d 1355, 1357 (11th Cir. 1998)).

> *"ground of error is usually "available" on direct appeal when its merits can be reviewed without further factual development."*
>
> - Mills v US, 36 F.3d 1052 (11th Cir. 1994)

## ARGUMENT VI

149. The record below is clear: the magistrate never directed Civilian X (ie, Appellant-Plaintiff) to use a court-issued complaint form (¶43-44). Yet it claimed that it did, and lamented Civilian X's failure to obey a phantom instruction.

150. Thus, the magistrate's R&R was misleading.

151. In submitting misleading information to the LT, the magistrate "hijacked" Civilian X's cause. In Limone, the 1st Circuit deemed this to be error:

> *"It is certainly true that the manner in which a right is defined can make or break a qualified immunity defense"*
>
> *"..."*
>
> *"Courts must be equally careful, however, not to permit a defendant to hijack the plaintiff's complaint and recharacterize its allegations so as to minimize his or her liability."*
>
> - Limone v Condon, 372 F.3d 39 (1st Cir. 2004)

152. The District Court - pursuant to 28 USC §636(b)(1)(C) - failed to "*recommit the matter to the magistrate judge with instructions*". That failure was clear error, and this Appellate court has the power to reverse.

**CONCLUSION VI**

153. Briefly put, the court erred when it filled the false ammo (ie, the magistrate's false proffer) with final input. This Court should reverse on that basis; especially since that input harmed Civilian X's constitutional rights (Issue VII, *infra*).

# ISSUE VII

## The District Court's Ruling Violated Civilian X's 1st Amendment Right to Access the Court

'*harm #1*'

## OVERVIEW VII

154. The Lower Tribunal's aforementioned errors and authority usurpations ('*jumping the gun*', '*shooting with a stolen weapon*', etc.) struck Civilian X; injuring him in his constitutional right to (a) access the court; and (b) due process.

## STANDARD OF REVIEW VII

155. Constitutional violations are pure questions of law, and therefore receive *de novo* review (highlights added):

> *"the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it"*
>
> - USA v. Raddatz, 447 U.S. 667, 683 (1980)

## ARGUMENT VII

156. The Lower Tribunal's *sua sponte* dismissal – which Appellee (ie, Judge Y) was solely responsible for proffering (see Issue V) – was **incongruent** with Civilian X's 1st and 14th Amendment rights (access to courts, due process) (highlights added):

> *"Among the cardinal principles of our Anglo-American system of justice is the notion that the legal parameters of a given dispute are framed by the positions advanced by the adversaries, and may not be expanded sua sponte by the trial judge. The dismissal of Doubleday's claim based on an issue never pleaded by [appellee] — or even implicitly raised at trial — is inconsistent with the due*

*process concerns of adequate notice and an opportunity to be heard. Moreover, such a result runs counter to the spirit of fairness embodied in the Federal Rules of Civil Procedure."*

- Doubleday v. Curtis, 763 F.2d 495, 502 (2d Cir. 1985)

157. As the 7th Circuit put it, the LT cast itself as the defendant in the case below (highlights added):

*"By shearing the case of the accidental feature that the judge discovered and investigated the alleged unethical conduct before imposing sentence we bring into focus the principal objection to his action — it cast him in the role of a prosecutor. No one complained to him about [the ruled upon impropriety]."*

- USA v. Vague, 697 F.2d 805 (7th Cir. 1983)

That circuit went on to say that laws & common sense prohibit trial courts from being parties to the cases they adjudicate (highlights added):

*"Prosecutorial and adjudicative functions are often combined in the administrative process... But such a combination is alien to traditional conceptions of the federal judiciary, and not only because a federal judge may not sit in a case in which he is a party. 28 U.S.C. § 455(b)(5)(i); Code of Judicial Conduct for United States Judges, canon 3(C)(1)(d)(i)."*

- USA v. Vague, 697 F.2d 805 (7th Cir. 1983)

158. Thankfully, that same court of appeals also developed the solution for such violative acts. That solution, of course, was reversal (highlights added):

> *"So we cannot find any basis for what the judge did in this case — and lest this seem a timid and paltry ground for our reversing him we add that we think it a mistake to graft onto a lawsuit an issue that the judge is neither asked nor required to resolve. That not only makes federal litigation even more complicated than it already is but casts the judge in the role of a prosecutor when there is the simple alternative of reference to an ethics committee. This is a matter of particular concern in a criminal case, for reasons already indicated. The distinguished district judge in this case, though displaying a praiseworthy concern with preventing unethical conduct, exceeded his power when he ordered [appellant] to make restitution, and the judgment of contempt for disobeying that order is therefore*
>
> *REVERSED."*

- USA v. Vague, 697 F.2d 805 (7th Cir. 1983)

159. The Vague opinion applies to the instant case directly. Because, like Vague, the Lower Tribunal also made an unauthorized decision which neither party requested.

a. That decision infringed on Civilian X's 1st Amendment right to "*petition the government for a redress of grievances*". It did that by not allowing him to litigate his case.

b. That decision violated the parties' 14th Amendment rights as well. Doing so by not allowing the parties to be heard.

## CONCLUSION VII

160. Just as the 7th Circuit did previously, this 11th Circuit should reverse the decision below, because it violated Civilian X's constitutional rights. It was an unwarranted, unauthorized injury which the LT coupled with its second constitutional infringement (ie, Issue VIII, *infra*).

# ISSUE VIII

The District Court's Ruling Violated
Civilian X's 14th Amendment Right to Equal Protection

'*harm #2*'

## OVERVIEW VIII

161. Similarly, the District Court's unsolicited/unauthorized shots at Civilian X's cause of action punctured the constitutional legs for which he stood. Legs stemming from the first clause in the 14th Amendment (Equal Protection).

## STANDARD OF REVIEW VIII

162. As cited earlier (¶155), this appellate court can review constitutional violations *de novo* (USA v Raddatz).

## ARGUMENT VIII

163. The 14th Amendment prohibits the government from denying its people equal justice (highlights added):

> *"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."*
>
> - 14th Amendment | US Constitution

164. Civilian X – who sued Judge Y in the instant case – was prevented from litigating his case. USFLND stopped him; on its own accord.

165. Yet, history shows that USFLND does not [*sua sponte*] stop all similarly-situated cases.

166. In the instant case, Civilian X proffers the following criteria for being deemed "similarly-situated":

a. The case was before USFLND;

b. The defendant was a judge;

c. The filing fee was paid; and

d. The complaint was filed under 42 USC §1983 (or 28 USC §1346, or *Bivens*).

167. In Hovind v Rodgers, (3:20-cv-05484), a plaintiff sued a Federal judge under *Bivens*, and paid his filing fee. USFLND chose not to dismiss his case *sua sponte*. Instead, the lower court allowed the defendant(s) to plead their defense(s).

168. In Fleming v Kinsey, (3:07-cv-00279), a couple sued a Florida state judge under §1983, and paid their filing fee. USFLND chose not to dismiss their case *sua sponte*. Once again, the lower court allowed the defendants to defend.

169. So, the disparity in treatment is clear. USFLND dismisses some judge-defendant cases *sua sponte*, but not others. Given the nature of the underlying cause (*Makere v Allstate*, ¶4-12), this raises an inference of impermissible prejudice[4/]:

> *"Demonstrating a prima facie case [of discrimination] is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination."*
>
> - Holifield v Reno, 115 F.3d 1555 (11th Cir. 1997)

170. The cloud of demographic bias darkens upon recognizing USFLND's actions towards Civilian X lacked legitimacy. Lacking it based on (a) being unauthorized (ie, Issue IV, *infra*); (b) being

inaccurate (ie, Issues II-III, IX); (c) being illogical (ie, Issue I, V-VI); and (d) being unconstitutional (Issue VII).

171. Moreover, the LT's action was nothing short of extreme:

> *"Although the district court nowhere specified the authority upon which it relied to sua sponte dismiss Betty K's case... This much, however, is clear: a dismissal with prejudice, whether on motion or sua sponte, is an extreme sanction that may be properly imposed only when: "(1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice."*
>
> - Betty K v. MONADA, 432 F.3d 1333 (11th Cir. 2005)

In the instant case, Civilian X neither engaged in "contumacious conduct" nor was incapable of receiving the fair treatment that others received.

172. As such, USFLND's *sua sponte* dismissal with prejudice was an adverse act that violated Civilian X's 14th Amendment right.

**CONCLUSION VIII**

173. For these reasons, this Appellate Court should reverse the LT's decision, reinforce Civilian X's constitutional right to equal protection, and allow him to proceed the way that others do. A proceeding which should also restore Civilian X's request for declaratory relief (Issue IX, infra).

# ISSUE IX

The District Court Harmed Civilian X by Dismissing his Declaratory Relief Claim

'*harm #3*'

## OVERVIEW IX

174. Last but not least, the Lower Tribunal erred when it dismissed Civilian X's claim for declaratory relief. A claim that no official is immune from.

## STANDARD OF REVIEW IX

175. When a district court dismisses a declaratory relief claim, this Court reviews the decision *de novo* (highlights added):

> *"Although the district court has an area of discretion in deciding whether to grant or deny declaratory relief, that discretion should be exercised liberally in favor of granting such relief in order to accomplish the purposes of the Declaratory Judgment Act. The scope of appellate review of the exercise of such discretion is not under an "arbitrary and capricious" standard but allows the appellate court to substitute its judgment for that of the trial court. 6A J. MOORE, W. TAGGART J. WICKER, Moore's Federal Practice, 57.08[2]; McDougald v. Jenson, 786 F.2d 1465 (11th Cir. 1986)."*

- Cincinnati v Holbrook, 867 F. 2d 1330 (11th Cir. 1989)

As is well-known – and to define *de novo's* technical meaning – when an appellate court "substitutes" the trial court's rationale with its own then it is performing a *de novo* review:

> *"Here, as in Scottsdale, we would have affirmed the district court had it reached a different result, and if we were reviewing this matter de novo, we probably would have decided it differently. "By definition, however, under the abuse of discretion*

*standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion differs from a de novo standard of review." In re Rasbury, 24 F.3d 159, 168 (11th Cir. 1994)"*

- Guideone v. Old Cutler, 420 F.3d 1317 (11th Cir. 2005)

**ARGUMENT IX**

176. As the record shows, Civilian X sought declaratory relief in the district court **[A0013]** (*"plaintiff seeks declaratory relief..."*).

177. Public record also shows that Civilian X has had another federal lawsuit running parallel to the one below (¶34, *supra*). At the time he sued Judge Y, Civilian X was already several months into that case (against Allstate).

   a. As of today's date, that case has a pending *Motion in Limine* **[A0178]**. That motion, importantly, deals entirely with Judge Y's unlawful conduct (¶14-34).

      i. And it was supplemented with the default entered against him by a Florida state court (¶53).

   b. In other words, Civilian X has an active case that will be impacted by declaratory relief against Judge Y.

178. Case law empowers this Court to reverse on that ground (highlights added):

> *"To meet the requirements of the Declaratory Judgment Act there must be a "case of actual controversy", as the Constitution requires for any invocation of federal judicial authority... The case must be "of sufficient immediacy and reality" to warrant declaratory relief."*
>
> - Genentech v. Eli Lilly, 998 F. 2d, at 936;

In the instant case, Civilian X satisfies all requirements set out in Genentech. He has an 'actual case' that is being 'immediately' litigated in 'real life'.

179. Dismissal is rendered improper once that criteria gets met:

> *"When there is an actual controversy and a declaratory judgment would settle the legal relations in dispute and afford relief from uncertainty or insecurity, in the usual circumstance the declaratory action is not subject to dismissal."*
>
> - Genentech v. Eli Lilly, 998 F. 2d, at 936;

180. This 11th Circuit held that reversal is the solution:

> *"Here, under traditional federal constitutional principles and under the Declaratory Judgment Act, a "case or controversy" did, in fact, exist when Cincinnati filed its action in the district court. The district court, therefore, was in error when it dismissed the action."*
>
> - Cincinnati v Holbrook, 867 F. 2d 1330 (11th Cir. 1989)

## CONCLUSION IX

181. Thus, the record and case law are both clear. Civilian X is entitled to sue Judge Y for declaratory relief. The Lower Tribunal harmed him by shooting off that claim, and this appellate court should reverse.

---

*Now, fully dried and fully informed/*
*The robe awaits to be fully adorned/*

---

## CONCLUSION

But for the Lower Tribunal neglecting to permit complaint-amendment (Issue I), this appeal would not exist. Amendment would have allowed Civilian X to clarify the inapplicability of immunity (II-III), disclose the immediate purpose of declaratory relief (IX), and present additional facts (some of which are not subject to dispute). Plus, the LT erred by advocating for Defendant (V), while basing its unauthorized decision (IV) on a false premise (VI). All of which it did to the harm of Civilian X's constitutional rights (VII-VIII).

WHEREFORE, Appellant (Civilian X) asks this Court to reverse the lower tribunal's judgment, because it was unauthorized, incorrect, erroneous, constitutionally violative, and harmful.

Dated this 27th day of July 2021.

Respectfully submitted,

/s/ Elias Makere
**ELIAS MAKERE, FSA, MAAA,** Plaintiff
3709 San Pablo Rd. S # 701
Jacksonville, FL 32224
P: (904) 294-0026
E: justice.actuarial@gmail.com
W: TextBookDiscrimination.com
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**7/27/2021** — Date

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I HEREBY CERTIFY that on this 27th day of July 2021, I electronically filed the foregoing with the Clerk of Courts by using PACER; which will send a notice of electronic filing to the attached service list.

**/s/ Elias Makere**

Endnotes:

[1/] [A0210] means page 210 from the appendix.

[2/] at DOAH, "official recognition" = judicial notice

[3/] to be fair, the LT directed Appellant to return a manually-signed copy of his complaint. It stated that it had not taken any action on his electronically signed one. This cannot constitute amendment.

[4/] please see Canon 2C, Canon 3B *Code of Conduct for United States Judges*

**SERVICE LIST**

Elias Makere, FSA, MAAA

P: 904.294.0026
E: Justice.Actuarial@gmail.com
W: TextBookDiscrimination.com
Get ***Booked Up*** on Justice!

3709 San Pablo Rd S #701
Jacksonville, FL 32224

*(appellant-plaintiff-'Civilian X')*