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No. 08-17314

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RICHARD W. LEWIS, PhD.,
Plaintiff/Appellee,

vs.

TYRONE DUFF and LINDA DUFF,
Defendants/Appellants

and

ELIZABETH RICHITT, PhD., RICHARD WEIHER, PhD.,
DAVID ANTONUCCIO, PhD., LOUIS MORTILLARO, PhD.,
DENNIS ORTWEIN, CHRISTA PETERSON, PhD., STATE OF
NEVADA, BOARD OF PSYCHOLOGICAL EXAMINERS,
Defendants.

**DEFENDANTS'/APPELLANTS' PETITION FOR REHEARING
AND REHEARING *EN BANC* (FRAP 35, 40)**

On Appealed from the United States District Court, District of Nevada
U.S.D.C. Case No. CV-N-99-0386-LRH

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INTRODUCTION AND STATEMENT OF (COUNSEL) APPELLANTS

Defendants-Appellants, Tyrone Duff and Linda Duff (“Duff Defendants”) petition for panel rehearing pursuant to Fed.R.App.P. 40; 9th Cir. R. 40-1 and rehearing *en banc* pursuant to Fed.R.App.P. 35; 9th Cir. R. 35-1 to -3, that in their judgment one or more of the situations described in the ‘purpose’ section for rehearing *en banc* exist in the Plaintiff’s action for redress under 42 USC §1983 that’s been before this Court and the district court now going on twelve (12) years and going on ten (10) years after the district court’s jurisdiction was terminated in the order (#139), filed July 12, 2001, dismissing Defendant State of Nevada, with prejudice. Pursuant to NRS 41.0337, the Plaintiff could not maintain an action for redress under 42 USC §1983 without the State of Nevada named a party defendant under NRS 41.031. Plaintiff’s failure to file response to the Duff Defendants’ opening brief must be construed by this Court their brief, in its entirety, was meritorious.

REASONS FOR GRANTING PETITION FOR REHEARING AND REHEARING *EN BANC*

Duff Defendants’ petition for rehearing and rehearing *en banc* of the November 23, 2010 panel decision (Tashima, Berzon, Clifton) that (1) conflicts the federal statute 42 USC §1983, (2) conflicts the Nevada Revised Statutes (NRS), and (3) conflicts this Court, other Circuit Courts and the Supreme Court’s prior published opinions set forth below, which involves issues of public importance that has application beyond the parties and substantially affects a rule of national application, in which there is an overriding need for national uniformity.

I. THE COURT SHOULD GRANT REHEARING AND REHEARING EN BANC BECAUSE THE PANEL’S DECISION CONFLICTS WITH THE NEVADA REVISED STATUTES, WHICH ARE THE CURRENT CODIFIED LAWS OF THE STATE OF NEVADA AND THE CONTROLLING AUTHORITY FOR AN ACTION FOR REDRESS UNDER 42 USC §1983 IN THE STATE OF NEVADA

The panel held, “The Duffs’ contentions that the district court lacked jurisdiction to sanction them or jurisdiction over the action are without merit,” which conflicts with the Nevada Revised Statute (NRS) that pursuant to

NRS 41.0337, the order (#139) dismissed Defendant State of Nevada, with prejudice, on July 12, 2001 that terminated the district court's jurisdiction of the subject matter and the parties in the Plaintiff's action for redress under 42 USC §1983, where his complaint failed to comply with NRS 41.031(2) pursuant to:

Nevada Revised Statute 41.0337

State or political subdivision to be named a party defendant. No tort action arising out of an act or omission within the scope of his public duties or employment may be brought against any present or former:

1. Officer or employee of the State or of any political subdivision;
2. Immune contractor; or
3. State legislator,

unless the State or appropriate political subdivision is named a party defendant under NRS 41.031.

Pursuant to NRS 41.0337, the plaintiff could not maintain an action for redress under 42 USC §1983 after the order (#139), where he could not assert a cause of action against a person, who acting under color of state law, deprived him of a right guaranteed under the Constitution without naming the State of Nevada a party defendant under NRS 41.031(2), which the order (#139), filed July 12, 2001, dismissed with prejudice and was barred by the *doctrine of res judicata*. Section 1983 cannot be invoked by purely private conduct alone, therefore, it was impossible for the Plaintiff after the order (#139) to articulate a constitutional right giving rise to a claim under this statute against the Duff Defendants, which is the primary inquiry in a §1983 analysis. *Baker v. McCollan*, 443 U.S. 137, 140 (1979)

Pursuant to NRS 41.0337 and NRS 41.031, the order (#139) terminated the district court's jurisdiction of the subject matter and the parties in the Plaintiff's action for redress under 42 USC §1983 on July 12, 2001. The district court lacked the inherent power to supersede the Nevada Revised Statutes, which are the current codified laws of the State of Nevada and lacked judicial discretion to ignore its violation of them, when it continued to act without jurisdiction of the subject matter and the parties in the Plaintiff's §1983 action after the order (#139), filed July 12, 2001, dismissed Defendant State of Nevada, with prejudice. The panel remanded the Duff Defendants to the district court for further civil and/or criminal

proceedings against them in the Plaintiff's action for redress under 42 USC §1983, which conflicts with *Powell v. McCormack*, 395 U.S. 486, 496 (1969) that held, “[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.”

The panel lacked lawful authority to remand the Duff Defendants to the district court for further civil and/or criminal proceedings against them in the Plaintiff's §1983 action, where pursuant to NRS 41.0337, the district court lacked jurisdiction over the action after the order (#139) dismissed Defendant State of Nevada, with prejudice; it lacked the inherent power to enter sanctions against them. The district court could not create a case or controversy where none existed (*see Lasar v. Ford Motor Co.*, 399 F.3d 1101 (9th Cir. 2005)), when it resurrected the Plaintiff's §1983 action, which the order (#139) rendered it moot on July 12, 2001.

The panel's decision remanding the Duff Defendants to the district court conflicts with the prior published opinion in *Philadelphia Federation of Teachers v. Ridge*, 150 F.3d 319, 323 (3rd Cir. 1998) that held, “Proper adjudication depends on the existence of subject matter jurisdiction at all times throughout the duration of the case. Never presumed to exist, federal subject matter jurisdiction must be affirmatively demonstrated by the party seeking to invoke it before the court may proceed to the merits of the case”, which was evident, the Plaintiff failed to demonstrate the district court had jurisdiction of the subject matter and the parties after the order (#139) in his §1983 action when he failed to file a response to the Duff Defendants' opening brief.

Pursuant to NRS 41.0337, the district court lacked jurisdiction for the issuance of its order (#232), filed July 5, 2002, granting summary judgment to the remaining State Defendants, where it lacked jurisdiction of the subject matter and the parties in the Plaintiff's §1983 action after the order (#139) dismissed Defendant State of Nevada on July 12, 2001.

The panel held, “the district court did not clearly err by finding that the Duffs engaged in bad faith conduct by willfully refusing to appear at hearings.”

Pursuant to NRS 41.0337, the district court lacked lawful authority to order the Duff Defendants to appear at the hearing set for June 19, 2003 or any other hearing, where it lacked jurisdiction of the subject matter and the parties after the order (#139), filed July 12, 2001, dismissed Defendant State of Nevada, with prejudice, in the Plaintiff’s §1983.

II. THE COURT SHOULD GRANT REHEARING AND REHEARING EN BANC BECAUSE THE PANEL’S DECISION CONFLICTS WITH THE ESSENTIAL ELEMENTS REQUIRED UNDER NRS 41.0337 FOR ESTABLISHING A CLAIM UNDER 42 USC §1983

The panel’s decision conflicts with the essential elements required under NRS 41.0337 for the Plaintiff to establish a claim under 42 USC §1983 that pursuant to NRS 41.0337, the plaintiff could not maintain an action for redress under 42 USC §1983 after the order (#139), where he could not assert a cause of action against a person, who acting under color of state law, deprived him of a right guaranteed under the Constitution without naming the State of Nevada a party defendant under NRS 41.031(2), which the order (#139) dismissed Defendant State of Nevada, with prejudice, on July 12, 2001. The panel held ‘the Duffs contentions that the district court lacked jurisdiction over the action was without merit’ conflicts with the Supreme Court’s prior published opinion in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970) that held, “Under 42 USC §1983 provides civil action for deprivation of civil rights. Two elements are necessary for recovery; plaintiff must prove that defendant has deprived him of a right ‘secured by the Constitution and laws’ of the United States, and that defendant deprived him of this constitutional right ‘under color of any statute, ordinance, regulation, custom or usage’ of any State or Territory; this second element requires that plaintiff show that defendant ‘acted under color of law.’

The panel's decision conflicts with this Court's prior published opinion in *Haldane v. Chagnon*, 345 F.2d 601, 603 (9th Cir. 1965) that held, "The essential elements for establishing a claim for damages under the Civil Right Act (42 USC §1983) are the 'conduct complained engaged in under color of state law and that such conduct subjected the Plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States.'" Without the State of Nevada named a party defendant under NRS 41.031, the Plaintiff could not articulate a constitutional right giving rise to a claim under this federal statute against the Duff Defendants after the order (#139), filed July 12, 2001, which is the primary inquiry in a §1983 analysis.

The panel remanded the Duff Defendants to the district court for further criminal and/or civil proceedings against them after the order (#139) terminated the district court's jurisdiction of the subject matter and the parties on July 12, 2001 in the Plaintiff's §1983 action, which conflicts with this Court's prior published opinion in *Briley v. State of California*, 564 F.2d 849 (9th Cir. 1977) that held, "42 U.S.C. §1983 is not invoked by purely private conduct alone" and further held, "To state a claim under 42 U.S.C. §1983, a plaintiff must allege that (1) the defendant was acting under color of state law at the time the acts complained of were committed, and that (2) the defendant deprived plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. See *Williams v. Gorton*, 529 F.2d 668, 670 (9th Cir. 1976), *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 550 (9th Cir. 1974), cert. denied, 421, U.S. 949, 95 S.Ct. 1681, 44 L.Ed.2d 103 (1975); *Sykes v. State of California*, 497 F.2d 197 (9th Cir. 1974); *Cohen v. Norris*, 300 F.2d 24, 30 (9th Cir. 1962). See also *District of Columbia v. Carter*, 409 U.S. 418, 423-25, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973).

Pursuant to NRS 41.0337, the Plaintiff lacked a cognizable cause of action under color of state law remaining in his §1983 action before the district court after the order (#139) dismissed Defendant State of Nevada, with prejudice, on July 12, 2001 and therefore, he could not maintain a Section 1983 action nor could the

district court claim jurisdiction of the subject matter and the parties after the order (#139).

III. THE COURT SHOULD GRANT REHEARING AND REHEARING EN BANC BECAUSE THE PANEL'S DECISION CONFLICTS WITH THE DISTRICT COURT'S ORDER (#320) AND DEFAULT JUDGMENT (#321) THAT PERPETRATED A FRAUD UPON THE COURT

Pursuant to NRS 41.0337, the district court lacked lawful authority over the hearing held June 19, 2003, where it lacked jurisdiction of the subject matter and the parties in the Plaintiff's §1983 action after the order (#139) and therefore lacked jurisdiction for the issuance of its order (#320) and default judgment (#321), entered January 30, 2004, that awarded compensatory and punitive damages against the Duff Defendants in the amount of \$330,000.00 in favor of the Plaintiff and Western Counseling Services, LLC for the loss of a contract with the State of Nevada Division of Child and Family Services, which was not a protected federal constitution interest for redress under 42 USC §1983 and therefore, was inadmissible in the Plaintiff's §1983 action that ended with the order (#139).

The order (#320) and default judgment (#321) are conclusive evidence it was not the Duff Defendants who engage in 'bad faith conduct' nor did they 'willfully refused to appear' at the hearing[s] held June 19, 2003 but the district court's misconduct, where its order (#291), filed June 5, 2003 denied their motion (#290), filed June 3, 2003, for clarification of what subject matter jurisdiction remained before it for said hearing in the Plaintiff's §1983 action after the order (#139) dismissed Defendant State of Nevada, with prejudice, that terminated its jurisdiction on July 12, 2001 pursuant to NRS 41.0337. See Cole v. Arkansas, 333 U.S. 196 (1948). Therefore, any criminal proceedings and/or sanctions should not be brought against the Duff Defendants but brought against the Plaintiff and his attorneys of record for causing the district court to continue to act in his §1983 action, where it lacked jurisdiction to do so after the order (#139) and indisputably committed a fraud upon the court in the issuance of its order (#320) and default judgment (#321). The Supreme Court held that without proper jurisdiction, a court

cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit. See *e.g.*, *Capron v. Van Noorden*, 2 Cranch 126 (1804); *Arizonans for Official English v. Arizona*, 520 U.S. ___, ___ (1997); *Bell v. Hood*, 327 U.S. 678 (1946); *National Railroad Passenger Corp., v. National Assn. of Railroad Passengers*, 414 U.S. 453, 465 n.13 (1974); *Norton v. Mathews*, 427 U.S. 524, 531 (1976); *Secretary of Navy v. Avrech*, 418 U.S. 676, 678 (1974)(per curiam); *United States v. Augenblick*, 393 U.S. 348 (1969); and *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 86, 88 (1970), distinguished. For a court to pronounce upon a law meaning or constitutionality when it has no jurisdiction over the subject matter or the parties to do so is, by very definition, an ultra vires act, its proceedings, in there entirety, are tainted with fraud and are absolutely void in the fullest sense of the term for want of jurisdiction.

The district court on January 30, 2004 entered its order (#320) on the June 19, 2003 hearing, in Plaintiff's action for redress under 42 USC §1983 held:

“That the damages sought for lost income from the contract of Western Counseling services and the State of Nevada is found to be \$150,000.00.

The Court awards, for lost income on the sale of the business, \$30,000.00.

The Court finds that doctor Lewis, the plaintiff, has suffered damages on the account of loss of his forensic business, due to the conduct of the Duffs, in the amount of \$100,000.00.

The Court finds an award of punitive damages, in the amount of \$50,000.00, will be made.

In the amount of \$280,000.00 for compensatory damages, and in the amount of \$50,000.00 for punitive damages, in favor of plaintiff and against defendants Linda Duff and Tyrone Duff.

In favor of all of the other defendants in the case, and against plaintiff as to the claims of plaintiff against the defendants other than the Duffs.”

The district court on January 30, 2004 entered its default judgment (#321) on its order (#320) that held:

“That judgment is hereby entered in the amount of \$280,000.00 for compensatory damages, and in the amount of \$50,000.00 for punitive damages in favor of the plaintiff, and against defendants Linda Duff and Tyrone Duff.

That judgment is further entered in favor of all of the other defendants in this case, and against plaintiff, as to the claims of plaintiff against the defendants, other than the Duffs.”

The order (#320) is an itemized account of \$330,000.00 against the Duff Defendants in favor of the Plaintiff for the loss of his business Western Counseling Services, LLC allege contract with the State of Nevada Department of Child and Family Services, which was not a protected federal constitutional interest for an action for redress under 42 USC §1983 and **‘was not a sanction’** against the Duff Defendants but absolute proof that the district court acted in the clear absence of all jurisdiction in the Plaintiff’s §1983 action.

The district court lacked jurisdiction of the subject matter and the parties in the Plaintiff’s §1983 action after the order (#139) for the issuance of its order (#320) and default judgment (#321), which was conclusive evidence the district court acted under color of law in a criminal conspiracy with, including but not limited to, the Plaintiff, his attorneys of record, the State Defendants and the Nevada Attorney General’s office in a scheme that used the Plaintiff’s action for redress under 42 USC §1983 as a vehicle that framed the Duff Defendants with a fraudulent default judgment in amount of \$330,000.00 in favor of the Plaintiff and Western Counseling Services, LLC for the loss of a contract with the State of Nevada Division of Child and Family Services, which was not a protected federal constitutional interest for an action for redress under 42 USC §1983 that perpetrated a fraud upon the court.

The Constitution and Laws of the United States prohibited this Court from remanding the Duff Defendants to the district court, where its order (#320) and default judgment (#321) was conclusive evidence it, knowingly and willfully, committed a fraud upon the court. ‘Fraud upon the court’ has been defined by the 7th Circuit Court of Appeals to “embrace that species of fraud which does, or

attempts to, defile the court itself, or is a fraud perpetrated by an officer of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.” *Kenner v. C.I.R.*, 387 F.3d 689 (7th Cir. 1968); *Bullock v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985); *Trans Aero Inc. v. LaFuerga Area Boliviana*, 24 F.3d 457 (2nd Cir. 1994); *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1267 (10th Cir. 1995), cert denied, 516 U.S. 1045 (1996). The 7th Circuit further held, “a decision produced by fraud upon the court is not in essence a decision at all, and never becomes final.” When any officer of the court has committed ‘fraud upon the court’, the orders and judgments of that court are void, of no legal force or effect.

The panel’s decision remanded Duff Defendants to the district court for further civil and/or criminal proceedings and sanctions against them that was never raised before the district court and cannot be raised for the first time on appeal before this Court. *See Farhoud v. INS.*, 122 F.3d 794, 796 (9th Cir. 1997); *Bousley v. Unites States*, 523 U.S. 614, 621, 140 L.Ed.2d 828, 118 S.Ct. 1604 (1998). The panel’s decision conflicts with this Court’s prior published opinion *In re First T.D. Inv., Inc.*, 253 F.3d 520, 532 (9th Cir. 2001) that held, “If an action against the answering defendant is decided in [the answering defendants’] favor, then the action should be dismissed against both answering and default defendants.” This is especially true, where this Court’s Memorandum, filed May 1, 2006, in docket no. 04-15326 , held, “Given the district court’s previous orders dismissing the state actors- -rendering it impossible for Lewis to prevail on the merits” citing *In re First T.D. Inv., Inc.*, 253 F.3d at 532.

This Court’s Memorandum, filed May 1, 2006, in docket no. 04-15326, **modified** the district court’s order (#320) and default judgment (#321) awarding compensatory and punitive damages in the amount of \$330,000.00 against the Duff Defendants in favor of the Plaintiff to a “**sanction**” against them in the amount of \$330,000.00 payable to the Plaintiff. This Court condone the district court’s

proven fraud upon the court but covered it up in order to remand this matter to the district court for ‘more appropriate sanctions’ against the Duff Defendants.

The district court’s order (#383) is a mass confusion of contradictions that on page 10 ordered the Duff Defendants to pay the Plaintiff a monetary sanction of \$23,149.98 which contradicts with page 9 that held “Therefore, since the court dismissed the answering defendants at summary judgment (July 5, 2002, Order (#232)), the court dismisses Lewis’s action against the Duffs with prejudice” citing *In re First T.D. & Inv., Inc.* 253 F.3d at 532. The district court’s (#383), filed September 8, 2008, establishes the fact; it continue to act in the clear absence of all jurisdiction in the Plaintiff’s §1983 action for eight years after his §1983 action was dismissed, in its entirety, against all defendants, including the Duff Defendants, with prejudice, in the order (#139), filed July 12, 2001, that dismissed Defendant State of Nevada, with prejudice pursuant to NRS 41.0337. *Briley*, 564 F.2d at 849. Therefore, for this Court to remand the Duff Defendants to the district court for further proceedings it can only refer a time period prior to the order (#139), filed July 12, 2001, and must be specific on the date, time, place and the nature and cause of the accusations alleged against them in the Plaintiff’s §1983 action (see *Cole* 333 U.S. at 196), where the order (#139) unquestionably activated the Duff Defendants absolute immunity provided under NRS 641.318 that guaranteed them the same absolute immunity as the State Defendants. See *Frow v. De La Vega*, 82 U.S. 522 (1872).

The panel could not remand the Duff Defendants to the district court for civil and/or criminal proceedings and sanctions where the order (#320) and default judgment (#321) are conclusive evidence the district court perpetrated a fraud upon the court. The panel’s decision remanding the Duff Defendants to the district court where it ‘may reinstitute criminal sanctions proceedings’ or alternately ‘may impose a monetary sanction that is civil in nature or not “serious” without further proceedings’ that were never before the district court in the Plaintiff’s §1983

action, which conflicts with this Court's prior published opinions in *Sherar v. Cullen*, 481 F.2d 945 (9th Cir. 1973) that held "no sanction or penalty shall be imposed upon one because of his exercise of constitutional rights." See *Boyd v. United States*, 116, U.S. 616, 6 S.Ct. 524 (1886); *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964); *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625 (1967).

This Court was bound by the Constitution and Laws of the United States to dismiss the Plaintiff's §1983 action and all orders and judgments arising from it null and void from their inception to prevent a fraud upon the court itself. Further, this Court was bound by the Constitution and Laws of the United States to take the appropriate action against the district court, the Plaintiff, his attorneys of record, State Defendants and the Nevada Attorney General's office who initiated this fraud that has now tied the federal courts up in fraud going on twelve (12) years.

The panel's decision remanding the Duff Defendants for further civil and/or criminal proceedings and sanctions cannot overcome the following deficiencies it (1) lacked the inherent power to supersede and/or modify the Nevada Revised Statutes that pursuant to NRS 41.0337 the order (#139) dismissed Defendant State of Nevada, with prejudice, that terminated the district court's jurisdiction of the subject matter and the parties in the Plaintiff's §1983 action, (2) lacked the inherent power to supersede and/or modify the federal statute 42 USC §1983; and (3) lacked the inherent power to condone and/or cover up the district court's order (#320) and default judgment (#321) that perpetrated a fraud upon the court and lacked judicial discretion to ignore its violation of the above, and therefore, it lacked lawful authority to remand the Duff Defendants to the district court for any proceedings, civil and/or criminal and/or sanctions.

This Court must, in compliance with the Constitution and Rule of Law, must dismiss the Plaintiff's §1983 from its inception against the Duff Defendants, with prejudice, based upon the proven misconduct of the district court set forth above that tainted the Plaintiff's §1983 action in its entirety.

CONCLUSION

For the foregoing reasons, the Duff Defendants respectfully request rehearing and rehearing en banc of the issues identified, as appropriate for reasons set forth above.

DATED this 6th day of December, 2010.

By: 
TYRONE DUFF

By: 
LINDA DUFF

P.O. Box 2512
Bellingham, WA. 98227
(360) 752-1775

Appellants/Defendants In Pro Se

CERTIFICATE OF COMPLIANCE

We, hereby, certify that attached Petition for Rehearing and Rehearing En Banc has been prepared using proportionately double-spaced 14 point Times New Roman typeface and contains 3987 words pursuant to Circuit Rules 35-4 and 40-1.

Dated this 6th day of December, 2010.



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Appellants/Defendants In Pro Se

FILED

NOV 23 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. LEWIS,

Plaintiff-counter-defendant
- Appellee,

v.

TYRONE DUFF; LINDA DUFF,

Defendants-counter-claimants
- Appellants,

and

DAVID ANTONUCCIO; et al.,

Defendants.

No. 08-17314

D.C. No. 3:99-cv-00386-LRH-
RAM

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted November 16, 2010**

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: TASHIMA, BERZON, and CLIFTON, Circuit Judges.

Tyrone and Linda Duff appeal pro se from the district court's judgment imposing monetary sanctions and entering a pre-filing review order against them under its inherent power. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1135 (9th Cir. 2001); *De Long v. Hennessey*, 912 F.2d 1144, 1146 (9th Cir. 1990). We vacate and remand.

The district court did not clearly err by finding that the Duffs engaged in bad faith conduct by willfully refusing to appear at hearings and by filing duplicative and frivolous documents, and thus the court had the inherent power to sanction them. *See Gomez v. Vernon*, 255 F.3d 1118, 1133-34 (9th Cir. 2001). The Duffs' contentions that the district court lacked jurisdiction to sanction them or jurisdiction over the action are without merit.

However, we vacate the \$23,149.98 sanction imposed. The sanction was criminal in nature, because it was intended to punish the Duffs for their conduct and to vindicate the court's authority, not solely to compensate plaintiff or coerce the Duffs into compliance with a court order. *See F.J. Hanshaw Enters.*, 244 F.3d at 1137-38. The amount of the sanction was a "serious criminal penalt[y]." *See id.* at 1138. Because the sanction was criminal in nature and the amount was a

“serious” penalty, the Duffs were entitled to the full due process protections of a criminal jury trial, *see id.*, which they did not receive. On remand, the district court may reinstitute criminal sanction proceedings so long as the Duffs are provided the requisite protections. *See id.* at 1141-42. Alternatively, the district court may impose a monetary sanction that is civil in nature or not “serious,” without further proceedings, because the Duffs were previously given adequate notice and an opportunity to be heard. *See Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110-12 & n.7 (9th Cir. 2005).

We also vacate the entry of the pre-filing review order, because the district court did not comply with the factors set forth in *De Long*. *See* 912 F.2d at 1147-48. On remand, the district court may consider whether to impose a narrowly-tailored pre-filing review order after expressly addressing the relevant factors.

The Duffs shall bear their own costs on appeal.

VACATED and REMANDED.

DEC 07 2010

FILED _____
DOCKETED _____
DATE _____ INITIA _____

No. 08-17314

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RICHARD W. LEWIS, PhD.,
Plaintiff/Appellee,

vs.

TYRONE DUFF and LINDA DUFF,
Defendants/Appellants

and

ELIZABETH RICHITT, PhD., RICHARD WEIHER, PhD.,
DAVID ANTONUCCIO, PhD., LOUIS MORTILLARO, PhD.,
DENNIS ORTWEIN, CHRISTA PETERSON, PhD., STATE OF
NEVADA, BOARD OF PSYCHOLOGICAL EXAMINERS,
Defendants.

**DEFENDANTS'/APPELLANTS' PETITION FOR REHEARING
AND REHEARING *EN BANC* (FRAP 35, 40)**

On Appealed from the United States District Court, District of Nevada
U.S.D.C. Case No. CV-N-99-0386-LRH

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INTRODUCTION AND STATEMENT OF (COUNSEL) APPELLANTS

Defendants-Appellants, Tyrone Duff and Linda Duff (“Duff Defendants”) petition for panel rehearing pursuant to Fed.R.App.P. 40; 9th Cir. R. 40-1 and rehearing *en banc* pursuant to Fed.R.App.P. 35; 9th Cir. R. 35-1 to -3, that in their judgment one or more of the situations described in the ‘purpose’ section for rehearing *en banc* exist in the Plaintiff’s action for redress under 42 USC §1983 that’s been before this Court and the district court now going on twelve (12) years and going on ten (10) years after the district court’s jurisdiction was terminated in the order (#139), filed July 12, 2001, dismissing Defendant State of Nevada, with prejudice. Pursuant to NRS 41.0337, the Plaintiff could not maintain an action for redress under 42 USC §1983 without the State of Nevada named a party defendant under NRS 41.031. Plaintiff’s failure to file response to the Duff Defendants’ opening brief must be construed by this Court their brief, in its entirety, was meritorious.

REASONS FOR GRANTING PETITION FOR REHEARING AND REHEARING *EN BANC*

Duff Defendants’ petition for rehearing and rehearing *en banc* of the November 23, 2010 panel decision (Tashima, Berzon, Clifton) that (1) conflicts the federal statute 42 USC §1983, (2) conflicts the Nevada Revised Statutes (NRS), and (3) conflicts this Court, other Circuit Courts and the Supreme Court’s prior published opinions set forth below, which involves issues of public importance that has application beyond the parties and substantially affects a rule of national application, in which there is an overriding need for national uniformity.

I. THE COURT SHOULD GRANT REHEARING AND REHEARING EN BANC BECAUSE THE PANEL’S DECISION CONFLICTS WITH THE NEVADA REVISED STATUTES, WHICH ARE THE CURRENT CODIFIED LAWS OF THE STATE OF NEVADA AND THE CONTROLLING AUTHORITY FOR AN ACTION FOR REDRESS UNDER 42 USC §1983 IN THE STATE OF NEVADA

The panel held, “The Duffs’ contentions that the district court lacked jurisdiction to sanction them or jurisdiction over the action are without merit,” which conflicts with the Nevada Revised Statute (NRS) that pursuant to

NRS 41.0337, the order (#139) dismissed Defendant State of Nevada, with prejudice, on July 12, 2001 that terminated the district court's jurisdiction of the subject matter and the parties in the Plaintiff's action for redress under 42 USC §1983, where his complaint failed to comply with NRS 41.031(2) pursuant to:

Nevada Revised Statute 41.0337

State or political subdivision to be named a party defendant. No tort action arising out of an act or omission within the scope of his public duties or employment may be brought against any present or former:

1. Officer or employee of the State or of any political subdivision;
 2. Immune contractor; or
 3. State legislator,
- unless the State or appropriate political subdivision is named a party defendant under NRS 41.031.

Pursuant to NRS 41.0337, the plaintiff could not maintain an action for redress under 42 USC §1983 after the order (#139), where he could not assert a cause of action against a person, who acting under color of state law, deprived him of a right guaranteed under the Constitution without naming the State of Nevada a party defendant under NRS 41.031(2), which the order (#139), filed July 12, 2001, dismissed with prejudice and was barred by the *doctrine of res judicata*. Section 1983 cannot be invoked by purely private conduct alone, therefore, it was impossible for the Plaintiff after the order (#139) to articulate a constitutional right giving rise to a claim under this statute against the Duff Defendants, which is the primary inquiry in a §1983 analysis. *Baker v. McCollan*, 443 U.S. 137, 140 (1979)

Pursuant to NRS 41.0337 and NRS 41.031, the order (#139) terminated the district court's jurisdiction of the subject matter and the parties in the Plaintiff's action for redress under 42 USC §1983 on July 12, 2001. The district court lacked the inherent power to supersede the Nevada Revised Statutes, which are the current codified laws of the State of Nevada and lacked judicial discretion to ignore its violation of them, when it continued to act without jurisdiction of the subject matter and the parties in the Plaintiff's §1983 action after the order (#139), filed July 12, 2001, dismissed Defendant State of Nevada, with prejudice. The panel remanded the Duff Defendants to the district court for further civil and/or criminal

proceedings against them in the Plaintiff's action for redress under 42 USC §1983, which conflicts with *Powell v. McCormack*, 395 U.S. 486, 496 (1969) that held, “[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.”

The panel lacked lawful authority to remand the Duff Defendants to the district court for further civil and/or criminal proceedings against them in the Plaintiff's §1983 action, where pursuant to NRS 41.0337, the district court lacked jurisdiction over the action after the order (#139) dismissed Defendant State of Nevada, with prejudice; it lacked the inherent power to enter sanctions against them. The district court could not create a case or controversy where none existed (see *Lasar v. Ford Motor Co.*, 399 F.3d 1101 (9th Cir. 2005)), when it resurrected the Plaintiff's §1983 action, which the order (#139) rendered it moot on July 12, 2001.

The panel's decision remanding the Duff Defendants to the district court conflicts with the prior published opinion in *Philadelphia Federation of Teachers v. Ridge*, 150 F.3d 319, 323 (3rd Cir. 1998) that held, “Proper adjudication depends on the existence of subject matter jurisdiction at all times throughout the duration of the case. Never presumed to exist, federal subject matter jurisdiction must be affirmatively demonstrated by the party seeking to invoke it before the court may proceed to the merits of the case”, which was evident, the Plaintiff failed to demonstrate the district court had jurisdiction of the subject matter and the parties after the order (#139) in his §1983 action when he failed to file a response to the Duff Defendants' opening brief.

Pursuant to NRS 41.0337, the district court lacked jurisdiction for the issuance of its order (#232), filed July 5, 2002, granting summary judgment to the remaining State Defendants, where it lacked jurisdiction of the subject matter and the parties in the Plaintiff's §1983 action after the order (#139) dismissed Defendant State of Nevada on July 12, 2001.

The panel held, “the district court did not clearly err by finding that the Duffs engaged in bad faith conduct by willfully refusing to appear at hearings.”

Pursuant to NRS 41.0337, the district court lacked lawful authority to order the Duff Defendants to appear at the hearing set for June 19, 2003 or any other hearing, where it lacked jurisdiction of the subject matter and the parties after the order (#139), filed July 12, 2001, dismissed Defendant State of Nevada, with prejudice, in the Plaintiff’s §1983.

II. THE COURT SHOULD GRANT REHEARING AND REHEARING EN BANC BECAUSE THE PANEL’S DECISION CONFLICTS WITH THE ESSENTIAL ELEMENTS REQUIRED UNDER NRS 41.0337 FOR ESTABLISHING A CLAIM UNDER 42 USC §1983

The panel’s decision conflicts with the essential elements required under NRS 41.0337 for the Plaintiff to establish a claim under 42 USC §1983 that pursuant to NRS 41.0337, the plaintiff could not maintain an action for redress under 42 USC §1983 after the order (#139), where he could not assert a cause of action against a person, who acting under color of state law, deprived him of a right guaranteed under the Constitution without naming the State of Nevada a party defendant under NRS 41.031(2), which the order (#139) dismissed Defendant State of Nevada, with prejudice, on July 12, 2001. The panel held ‘the Duffs contentions that the district court lacked jurisdiction over the action was without merit’ conflicts with the Supreme Court’s prior published opinion in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970) that held, “Under 42 USC §1983 provides civil action for deprivation of civil rights. Two elements are necessary for recovery; plaintiff must prove that defendant has deprived him of a right ‘secured by the Constitution and laws’ of the United States, and that defendant deprived him of this constitutional right ‘under color of any statute, ordinance, regulation, custom or usage’ of any State or Territory; this second element requires that plaintiff show that defendant ‘acted under color of law.’

The panel's decision conflicts with this Court's prior published opinion in *Haldane v. Chagnon*, 345 F.2d 601, 603 (9th Cir. 1965) that held, "The essential elements for establishing a claim for damages under the Civil Right Act (42 USC §1983) are the 'conduct complained engaged in under color of state law and that such conduct subjected the Plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States.'" Without the State of Nevada named a party defendant under NRS 41.031, the Plaintiff could not articulate a constitutional right giving rise to a claim under this federal statute against the Duff Defendants after the order (#139), filed July 12, 2001, which is the primary inquiry in a §1983 analysis.

The panel remanded the Duff Defendants to the district court for further criminal and/or civil proceedings against them after the order (#139) terminated the district court's jurisdiction of the subject matter and the parties on July 12, 2001 in the Plaintiff's §1983 action, which conflicts with this Court's prior published opinion in *Briley v. State of California*, 564 F.2d 849 (9th Cir. 1977) that held, "42 U.S.C. §1983 is not invoked by purely private conduct alone" and further held, "To state a claim under 42 U.S.C. §1983, a plaintiff must allege that (1) the defendant was acting under color of state law at the time the acts complained of were committed, and that (2) the defendant deprived plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. *See Williams v. Gorton*, 529 F.2d 668, 670 (9th Cir. 1976), *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 550 (9th Cir. 1974), cert. denied, 421, U.S. 949, 95 S.Ct. 1681, 44 L.Ed.2d 103 (1975); *Sykes v. State of California*, 497 F.2d 197 (9th Cir. 1974); *Cohen v. Norris*, 300 F.2d 24, 30 (9th Cir. 1962). *See also District of Columbia v. Carter*, 409 U.S. 418, 423-25, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973).

Pursuant to NRS 41.0337, the Plaintiff lacked a cognizable cause of action under color of state law remaining in his §1983 action before the district court after the order (#139) dismissed Defendant State of Nevada, with prejudice, on July 12, 2001 and therefore, he could not maintain a Section 1983 action nor could the

district court claim jurisdiction of the subject matter and the parties after the order (#139).

III. THE COURT SHOULD GRANT REHEARING AND REHEARING EN BANC BECAUSE THE PANEL'S DECISION CONFLICTS WITH THE DISTRICT COURT'S ORDER (#320) AND DEFAULT JUDGMENT (#321) THAT PERPETRATED A FRAUD UPON THE COURT

Pursuant to NRS 41.0337, the district court lacked lawful authority over the hearing held June 19, 2003, where it lacked jurisdiction of the subject matter and the parties in the Plaintiff's §1983 action after the order (#139) and therefore lacked jurisdiction for the issuance of its order (#320) and default judgment (#321), entered January 30, 2004, that awarded compensatory and punitive damages against the Duff Defendants in the amount of \$330,000.00 in favor of the Plaintiff and Western Counseling Services, LLC for the loss of a contract with the State of Nevada Division of Child and Family Services, which was not a protected federal constitution interest for redress under 42 USC §1983 and therefore, was inadmissible in the Plaintiff's §1983 action that ended with the order (#139).

The order (#320) and default judgment (#321) are conclusive evidence it was not the Duff Defendants who engage in 'bad faith conduct' nor did they 'willfully refused to appear' at the hearing[s] held June 19, 2003 but the district court's misconduct, where its order (#291), filed June 5, 2003 denied their motion (#290), filed June 3, 2003, for clarification of what subject matter jurisdiction remained before it for said hearing in the Plaintiff's §1983 action after the order (#139) dismissed Defendant State of Nevada, with prejudice, that terminated its jurisdiction on July 12, 2001 pursuant to NRS 41.0337. See Cole v. Arkansas, 333 U.S. 196 (1948). Therefore, any criminal proceedings and/or sanctions should not be brought against the Duff Defendants but brought against the Plaintiff and his attorneys of record for causing the district court to continue to act in his §1983 action, where it lacked jurisdiction to do so after the order (#139) and indisputably committed a fraud upon the court in the issuance of its order (#320) and default judgment (#321). The Supreme Court held that without proper jurisdiction, a court

cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit. See *e.g.*, *Capron v. Van Noorden*, 2 Cranch 126 (1804); *Arizonans for Official English v. Arizona*, 520 U.S. ___, ___ (1997); *Bell v. Hood*, 327 U.S. 678 (1946); *National Railroad Passenger Corp., v. National Assn. of Railroad Passengers*, 414 U.S. 453, 465 n.13 (1974); *Norton v. Mathews*, 427 U.S. 524, 531 (1976); *Secretary of Navy v. Avrech*, 418 U.S. 676, 678 (1974)(per curiam); *United States v. Augenblick*, 393 U.S. 348 (1969); and *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 86, 88 (1970), distinguished. For a court to pronounce upon a law meaning or constitutionality when it has no jurisdiction over the subject matter or the parties to do so is, by very definition, an ultra vires act, its proceedings, in there entirety, are tainted with fraud and are absolutely void in the fullest sense of the term for want of jurisdiction.

The district court on January 30, 2004 entered its order (#320) on the June 19, 2003 hearing, in Plaintiff's action for redress under 42 USC §1983 held:

“That the damages sought for lost income from the contract of Western Counseling services and the State of Nevada is found to be \$150,000.00.

The Court awards, for lost income on the sale of the business, \$30,000.00.

The Court finds that doctor Lewis, the plaintiff, has suffered damages on the account of loss of his forensic business, due to the conduct of the Duffs, in the amount of \$100,000.00.

The Court finds an award of punitive damages, in the amount of \$50,000.00, will be made.

In the amount of \$280,000.00 for compensatory damages, and in the amount of \$50,000.00 for punitive damages, in favor of plaintiff and against defendants Linda Duff and Tyrone Duff.

In favor of all of the other defendants in the case, and against plaintiff as to the claims of plaintiff against the defendants other than the Duffs.”

The district court on January 30, 2004 entered its default judgment (#321) on its order (#320) that held:

“That judgment is hereby entered in the amount of \$280,000.00 for compensatory damages, and in the amount of \$50,000.00 for punitive damages in favor of the plaintiff, and against defendants Linda Duff and Tyrone Duff.

That judgment is further entered in favor of all of the other defendants in this case, and against plaintiff, as to the claims of plaintiff against the defendants, other than the Duffs.”

The order (#320) is an itemized account of \$330,000.00 against the Duff Defendants in favor of the Plaintiff for the loss of his business Western Counseling Services, LLC allege contract with the State of Nevada Department of Child and Family Services, which was not a protected federal constitutional interest for an action for redress under 42 USC §1983 and ‘**was not a sanction**’ against the Duff Defendants but absolute proof that the district court acted in the clear absence of all jurisdiction in the Plaintiff’s §1983 action.

The district court lacked jurisdiction of the subject matter and the parties in the Plaintiff’s §1983 action after the order (#139) for the issuance of its order (#320) and default judgment (#321), which was conclusive evidence the district court acted under color of law in a criminal conspiracy with, including but not limited to, the Plaintiff, his attorneys of record, the State Defendants and the Nevada Attorney General’s office in a scheme that used the Plaintiff’s action for redress under 42 USC §1983 as a vehicle that framed the Duff Defendants with a fraudulent default judgment in amount of \$330,000.00 in favor of the Plaintiff and Western Counseling Services, LLC for the loss of a contract with the State of Nevada Division of Child and Family Services, which was not a protected federal constitutional interest for an action for redress under 42 USC §1983 that perpetrated a fraud upon the court.

The Constitution and Laws of the United States prohibited this Court from remanding the Duff Defendants to the district court, where its order (#320) and default judgment (#321) was conclusive evidence it, knowingly and willfully, committed a fraud upon the court. ‘Fraud upon the court’ has been defined by the 7th Circuit Court of Appeals to “embrace that species of fraud which does, or

attempts to, defile the court itself, or is a fraud perpetrated by an officer of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.” *Kenner v. C.I.R.*, 387 F.3d 689 (7th Cir. 1968); *Bullock v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985); *Trans Aero Inc. v. LaFuerga Area Boliviana*, 24 F.3d 457 (2nd Cir. 1994); *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1267 (10th Cir. 1995), cert denied, 516 U.S. 1045 (1996). The 7th Circuit further held, “a decision produced by fraud upon the court is not in essence a decision at all, and never becomes final.” When any officer of the court has committed ‘fraud upon the court’, the orders and judgments of that court are void, of no legal force or effect.

The panel’s decision remanded Duff Defendants to the district court for further civil and/or criminal proceedings and sanctions against them that was never raised before the district court and cannot be raised for the first time on appeal before this Court. *See Farhoud v. INS.*, 122 F.3d 794, 796 (9th Cir. 1997); *Bousley v. Unites States*, 523 U.S. 614, 621, 140 L.Ed.2d 828, 118 S.Ct. 1604 (1998). The panel’s decision conflicts with this Court’s prior published opinion *In re First T.D. Inv., Inc.*, 253 F.3d 520, 532 (9th Cir. 2001) that held, “If an action against the answering defendant is decided in [the answering defendants’] favor, then the action should be dismissed against both answering and default defendants.” This is especially true, where this Court’s Memorandum, filed May 1, 2006, in docket no. 04-15326 , held, “Given the district court’s previous orders dismissing the state actors- -rendering it impossible for Lewis to prevail on the merits” citing *In re First T.D. Inv., Inc.*, 253 F.3d at 532.

This Court’s Memorandum, filed May 1, 2006, in docket no. 04-15326, **modified** the district court’s order (#320) and default judgment (#321) awarding compensatory and punitive damages in the amount of \$330,000.00 against the Duff Defendants in favor of the Plaintiff to a “**sanction**” against them in the amount of \$330,000.00 payable to the Plaintiff. This Court condone the district court’s

proven fraud upon the court but covered it up in order to remand this matter to the district court for 'more appropriate sanctions' against the Duff Defendants.

The district court's order (#383) is a mass confusion of contradictions that on page 10 ordered the Duff Defendants to pay the Plaintiff a monetary sanction of \$23,149.98 which contradicts with page 9 that held "Therefore, since the court dismissed the answering defendants at summary judgment (July 5, 2002, Order (#232)), the court dismisses Lewis's action against the Duffs with prejudice" citing *In re First T.D. & Inv., Inc.* 253 F.3d at 532. The district court's (#383), filed September 8, 2008, establishes the fact; it continue to act in the clear absence of all jurisdiction in the Plaintiff's §1983 action for eight years after his §1983 action was dismissed, in its entirety, against all defendants, including the Duff Defendants, with prejudice, in the order (#139), filed July 12, 2001, that dismissed Defendant State of Nevada, with prejudice pursuant to NRS 41.0337. *Briley*, 564 F.2d at 849. Therefore, for this Court to remand the Duff Defendants to the district court for further proceedings it can only refer a time period prior to the order (#139), filed July 12, 2001, and must be specific on the date, time, place and the nature and cause of the accusations alleged against them in the Plaintiff's §1983 action (see *Cole* 333 U.S. at 196), where the order (#139) unquestionably activated the Duff Defendants absolute immunity provided under NRS 641.318 that guaranteed them the same absolute immunity as the State Defendants. See *Frow v. De La Vega*, 82 U.S. 522 (1872).

The panel could not remand the Duff Defendants to the district court for civil and/or criminal proceedings and sanctions where the order (#320) and default judgment (#321) are conclusive evidence the district court perpetrated a fraud upon the court. The panel's decision remanding the Duff Defendants to the district court where it 'may reinstitute criminal sanctions proceedings' or alternately 'may impose a monetary sanction that is civil in nature or not "serious" without further proceedings' that were never before the district court in the Plaintiff's §1983

action, which conflicts with this Court's prior published opinions in *Sherar v. Cullen*, 481 F.2d 945 (9th Cir. 1973) that held "no sanction or penalty shall be imposed upon one because of his exercise of constitutional rights." See *Boyd v. United States*, 116, U.S. 616, 6 S.Ct. 524 (1886); *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964); *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625 (1967).

This Court was bound by the Constitution and Laws of the United States to dismiss the Plaintiff's §1983 action and all orders and judgments arising from it null and void from their inception to prevent a fraud upon the court itself. Further, this Court was bound by the Constitution and Laws of the United States to take the appropriate action against the district court, the Plaintiff, his attorneys of record, State Defendants and the Nevada Attorney General's office who initiated this fraud that has now tied the federal courts up in fraud going on twelve (12) years.

The panel's decision remanding the Duff Defendants for further civil and/or criminal proceedings and sanctions cannot overcome the following deficiencies it (1) lacked the inherent power to supersede and/or modify the Nevada Revised Statutes that pursuant to NRS 41.0337 the order (#139) dismissed Defendant State of Nevada, with prejudice, that terminated the district court's jurisdiction of the subject matter and the parties in the Plaintiff's §1983 action, (2) lacked the inherent power to supersede and/or modify the federal statute 42 USC §1983; and (3) lacked the inherent power to condone and/or cover up the district court's order (#320) and default judgment (#321) that perpetrated a fraud upon the court and lacked judicial discretion to ignore its violation of the above, and therefore, it lacked lawful authority to remand the Duff Defendants to the district court for any proceedings, civil and/or criminal and/or sanctions.

This Court must, in compliance with the Constitution and Rule of Law, must dismiss the Plaintiff's §1983 from its inception against the Duff Defendants, with prejudice, based upon the proven misconduct of the district court set forth above that tainted the Plaintiff's §1983 action in its entirety.

CONCLUSION

For the foregoing reasons, the Duff Defendants respectfully request rehearing and rehearing en banc of the issues identified, as appropriate for reasons set forth above.

DATED this 6th day of December, 2010.

By: 
TYRONE DUFF

By: 
LINDA DUFF

P.O. Box 2512
Bellingham, WA. 98227
(360) 752-1775

Appellants/Defendants In Pro Se

CERTIFICATE OF COMPLIANCE

We, hereby, certify that attached Petition for Rehearing and Rehearing En Banc has been prepared using proportionately double-spaced 14 point Times New Roman typeface and contains 3987 words pursuant to Circuit Rules 35-4 and 40-1.

Dated this 6th day of December, 2010.



TYRONE DUFF



LINDA DUFF

P.O. Box 2512
Bellingham, WA. 98227
(360) 752-1775

Appellants/Defendants In Pro Se

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. LEWIS,

Plaintiff-counter-defendant
- Appellee,

v.

TYRONE DUFF; LINDA DUFF,

Defendants-counter-claimants
- Appellants,

and

DAVID ANTONUCCIO; et al.,

Defendants.

No. 08-17314

D.C. No. 3:99-cv-00386-LRH-
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MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted November 16, 2010**

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: TASHIMA, BERZON, and CLIFTON, Circuit Judges.

Tyrone and Linda Duff appeal pro se from the district court's judgment imposing monetary sanctions and entering a pre-filing review order against them under its inherent power. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1135 (9th Cir. 2001); *De Long v. Hennessey*, 912 F.2d 1144, 1146 (9th Cir. 1990). We vacate and remand.

The district court did not clearly err by finding that the Duffs engaged in bad faith conduct by willfully refusing to appear at hearings and by filing duplicative and frivolous documents, and thus the court had the inherent power to sanction them. *See Gomez v. Vernon*, 255 F.3d 1118, 1133-34 (9th Cir. 2001). The Duffs' contentions that the district court lacked jurisdiction to sanction them or jurisdiction over the action are without merit.

However, we vacate the \$23,149.98 sanction imposed. The sanction was criminal in nature, because it was intended to punish the Duffs for their conduct and to vindicate the court's authority, not solely to compensate plaintiff or coerce the Duffs into compliance with a court order. *See F.J. Hanshaw Enters.*, 244 F.3d at 1137-38. The amount of the sanction was a "serious criminal penalt[y]." *See id.* at 1138. Because the sanction was criminal in nature and the amount was a

“serious” penalty, the Duffs were entitled to the full due process protections of a criminal jury trial, *see id.*, which they did not receive. On remand, the district court may reinstitute criminal sanction proceedings so long as the Duffs are provided the requisite protections. *See id.* at 1141-42. Alternatively, the district court may impose a monetary sanction that is civil in nature or not “serious,” without further proceedings, because the Duffs were previously given adequate notice and an opportunity to be heard. *See Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110-12 & n.7 (9th Cir. 2005).

We also vacate the entry of the pre-filing review order, because the district court did not comply with the factors set forth in *De Long*. *See* 912 F.2d at 1147-48. On remand, the district court may consider whether to impose a narrowly-tailored pre-filing review order after expressly addressing the relevant factors.

The Duffs shall bear their own costs on appeal.

VACATED and REMANDED.