No. 11-

IN THE

Supreme Court of the United States

AMLONG & AMLONG, P.A.,
KAREN COOLMAN AMLONG, and WILLIAM R. AMLONG,

Petitioners,

v.

DENNY'S, INC., T.W. SERVICES, INC., MEOS CORP., INC.,
a Florida corporation, ASIF JAWAID, individually,
RAHEEL HAMEED, individually,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1980, Congress amended 28 U.S.C. § 1927 (2006), to give United States District Courts discretion to impose fees against attorneys who "unreasonably and vexatiously" multiply proceedings. Following two appeals that produced eighty-five pages of opinions, the lower court affirmed a § 1927 sanction of $389,739.07 based on Petitioners' decision not to dismiss their client's case after she made numerous changes in her deposition. Now before this Court are two issues that are subject to a deep and abiding conflict in circuits. They are:

(1) In determining whether attorneys are liable under § 1927 for "unreasonably and vexatiously" multiplying proceedings, should the Court resolve the conflict in circuits where some circuits employ a "reasonably should have known test," others require a finding of "reckless conduct," and still others, while agreeing that "bad faith" on the part of attorneys is a requirement, disagree as to whether an objective or subjective test is to be employed?

(2) If Petitioners' behavior was sanctionable under § 1927, was it proper for the lower court, in conflict with the Fourth and Tenth Circuits, to affirm a judgment requiring payment of all fees and expenses incurred in the collateral sanctions proceeding amounting to more than 40% of the hours sought, not just the statutorily mandated "excess fees," without finding that Petitioner's defense was also unreasonable and vexatious?

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PETITION FOR WRIT OF CERTIORARI

William and Karen Amlong respectfully file this Petition for a Writ of Certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit affirming sanction in the amount of $389,739.07 pursuant to 28 U.S.C. § 1927 (2006).

OPINIONS BELOW

The opinion of the court of appeals is reported at 628 F.3d 1270 and may be found in the Appendix at A1. The Order of the District Court reaffirming the imposition of sanctions is unreported and may be found in the Appendix at A95. The District Court opinion adopting and modifying in part the Report and Recommendation of the magistrate judge with respect to the amount of fees is reported at 2004 U.S.Dist.LEXIS 15097 and may be found in the Appendix at A112. The and Recommendation of the Magistrate with respect to fees and costs is unreported and is found in the Appendix at A132. The District Court opinion upholding objections to that order is reported at 2000 U.S. Dist. LEXIS 22897 and may be found in the Appendix at A156. The Order sustaining Objections to the Magistrate's Report and Recommendation and granting Fees, Costs and Expenses is reported at 2000 U.S. Dist. LEXIS 21892 and may be found in the Appendix at A170. The Report and Recommendations of the Magistrate finding no sanctionable violations is unreported an may be found in the Appendix at B1. The Order denying the petition for rehearing *en banc* following the 628 F.3d 1270 is unreported and may be found in

the Appendix at B19. The order denying the petition for rehearing *en banc* from the 500 F.3d 2006 is reported at 2006 U.S. App. LEXIS 32624 and may be found in the Appendix at B21. The first opinion by the Eleventh Circuit is reported at 500 F.3d 1230 and may be found in the Appendix at B22. The opinion of the district judge affirming her 2004 order is unreported and may be found in the Appendix at A95. The order denying a petition for rehearing en banc is unreported and may be found in the Appendix at B19.

JURISDICTION

The Eleventh Circuit entered its order denying rehearing en banc on December 28, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1927 (2006) provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

Petitioners William and Karen Amlong are partners in a law firm specializing in Title VII

litigation. This case involves their representation of Floride Norelus, an emotionally disturbed, Creole-speaking immigrant from Haiti who had been referred to them by two local attorneys unfamiliar with employment law. Her story involved horrific allegations of sexual assault by the manager of a local Denny's restaurant and his roommate. Prior to agreeing to accept her as a client, Petitioners received assurances from referring counsel that they were convinced the incidents detailed by Ms. Norelus were true based on their background work on the case. In addition, Ms. Amlong and associates at the firm spent dozens of hours interviewing Ms. Norelus over the course of the proceedings and based on those interviews and her years of Title VII experience, reached the same conclusion. Suit was filed in December of 1994 naming Denny's, its franchisee, the manager, and his roommate as defendants.

In January of 1996, Respondents noticed the deposition of Ms. Norelus. Because of language difficulties, they retained an interpreter familiar with Haitian Creole. From the outset, Ms. Norelus demonstrated "emotional and erratic" behavior and a propensity to give false answers to questions unrelated to her Title VII charges, *e.g.*, use of cousin's name to obscure her illegal immigration status, which her counsel—an associate in Petitioners' firm—promptly corrected.

Knowing that Ms. Norelus' psychologist had diagnosed her as suffering from PTSD, the Petitioners understood that she would—at best—be difficult to depose. Concerns raised as the deposition progressed, however, were viewed as sufficiently serious to

warrant Petitioners obtaining polygraph testing of her by one of the most experienced and respected examiners in the southeastern United States. His conclusion that Ms. Norelus was truthful with respect to her "core allegations" resulted in the completion of the deposition.[1] When finished, it had encompassed eight days and produced 1353 pages of testimony.

Lacking funds to retain a professional interpreter, the Amlongs used Ms. Norelus's brother and various friends who spoke Haitian Creole to assist Ms. Norelus's review of the transcript.[2] Using this procedure, an associate read questions and answers in English that were then translated into Haitian Creole. Her responses were translated to English and the associate placed the changes and Ms. Norelus's reason for making them onto an errata sheet. This process resulted in a sixty-three page document listing 868 changes.

Respondents then moved to have the case dismissed on the basis that the document demonstrated that Ms. Norelus had lied numerous times under oath. The district judge denied the motion because it was "unclear" that material lies were involved, but granted an alternative motion to reopen. In addition, the judge charged Ms. Norelus with the costs of the deposition and required her to file an appendix incorporating any further changes in her testimony.

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[1] Following completion of the deposition, Petitioners required Ms. Norelus to undergo a second polygraph exam that, again, reconfirmed her truthfulness with the core of her Title VII allegations.

[2] Fed. R. Civ. P. 30(e) allows 30 days to review and make changes in the transcript.

The reopened deposition proved fruitless and, after three days of conflict between Ms. Norelus and defense counsel, it was terminated. As a result of Ms. Norelus's failure to comply with the order to pay costs and file the required appendix, the case was dismissed on December 5, 1996. Immediately thereafter, on January 10, 1997, Respondents filed individual motions for sanctions pursuant to 28 U.S.C. § 1927 (2006) and the court's inherent power.[3]

In response to the motions, the district court referred the issue to a magistrate judge for an initial decision. Concluding that there was a "need to develop a complete factual record," app. at B3 n.1, he conducted a four-day evidentiary hearing. After ordering counsel to submit written summaries of the evidence, the magistrate entered a Report and Recommendation denying sanctions on February 5, 1998.

He prefaced his conclusion that Petitioners had not violated § 1927 by referencing the importance of hearing counsels' testimony and "their assessment of plaintiff's credibility, their explanation of plaintiff's seeming inability to testify truthfully at times[, and] their own concerns about the underlying facts of the case . . . ." *Id.* at B14-15. On this basis he found that "from beginning to end, [Petitioners] believed in plaintiff's credibility as to [her] 'core allegations' . . .

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[3] Respondents also requested sanctions pursuant to Rule 11 and other provisions that no longer play a role in the case. In addition, they sought personal sanctions which were granted against Ms. Norelus under *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

and genuinely believed that plaintiff's claims were meritorious [despite the lack of truth in portions of her testimony] . . . ." *Id.* at B14. Turning to the errata sheet, the magistrate judge found:

> [T]he care and detail in which that document was prepared . . . reveal [a] grave concern to tell an accurate story . . . . While many of the changes might have bolstered plaintiff's case, submission of this voluminous document clearly did not, and left plaintiff open to renewed challenges concerning her credibility. . . . While plaintiff can be faulted for her conduct . . . , her attorneys should not. In the undersigned's view, they did the best they could with a most difficult client and did not try to prolong the case or multiply these proceedings to gain a tactical advantage over their adversaries.

Id. at B16.

On appeal, the district judge upheld Respondents' objections. In contrast to the magistrate judge's conclusions, she found that the changes in the errata sheet "bolstered inconsistencies or covered up falsities . . . demonstrat[ing] bad faith and willful disregard for the judicial process . . . ." App. at 215-16. Against this background, she concluded that the changes were part of "a concerted effort to provide factual support for an otherwise meritless case" and that the filing of the errata sheet was "unreasonable, vexatious behavior that unnecessarily multiplied" the proceedings, requiring sanctions be imposed pursuant to § 1927 and the court's inherent power. *Id.* at 215.

With liability established, the next segment of the opinion dealt with the interpretation of § 1927's statement that monetary compensation "may be required . . . to satisfy personally the *excess* costs, expenses, and attorneys' fees reasonably incurred because of such conduct." (emphasis added). The district court then ordered Petitioners to pay all costs and fees of opposing counsel starting from the date the errata sheet was filed, and that "award specifically include[d] fees, costs and expenses associated with the sanctions motions, evidentiary hearing and objections." *Id.* at 216. It did so without making any finding that the defense of the sanctions motion was itself unreasonable or vexatious, and hence caused Respondents to incur "excess costs, expenses and attorneys' fees" that is the standard under § 1927. Following referral to a magistrate judge for a determination of the amount of liability, the district judge approved a sanction of $389,739.07. *Id.* at A112, A130, A170, A217-18. That included approximately 1200 hours for the sanctions motions and hearing, amounting to over 40% of the total hours claimed. From that decision, an appeal was taken to the Eleventh Circuit.

In a two-to-one opinion, the appeals court reversed and remanded. The majority opinion, authored by Judge Marcus, construed § 1927 and the use of a court's inherent power as incorporating an objectively "reckless" requirement *Amlong & Amlong, P.A. v. Denny's, Inc. (Amlong I)*, app. at B39-40 that must be sufficiently egregious to be "tantamount to bad faith." App.at B37. The test, however, was qualified by the admonition that an "attorney's subjective state of mind is frequently an important piece of the calculus

because a given act is more likely to . . . be 'unreasonabl[e] and vexatious[ ]' if it is done with a malicious purpose or intent." *Id.* at B40-41.

Turning to the record, the court noted that the Petitioners' "purpose in filing the errata sheet was explored at considerable length" by the magistrate judge, *id.* at B41 n.1, and that his "evaluation required him to make finely tuned assessments of various witnesses' credibility as they testified about their states of mind, beliefs, motivations, and actions . . . ." *Id.* at B53. The opinion then sets forth over three pages of facts supporting Ms. Amlong's good-faith belief in her client's "core allegations." This recitation included: (1) numerous interviews with Ms. Norelus supported by the two referring attorneys and the associate attorney, who accompanied Ms. Norelus to her deposition and assisted in preparing the errata sheet; (2) positive results from two lie detector tests administered by one of the most respected polygraphers in the southeastern United States; (3) conclusions of a psychologist charged with the care and treatment of Ms. Norelus; and (4) unrebutted testimony that Ms. Norelus alone made all the errata sheet changes, and that neither the interpreters nor the associate charged with incorporating the changes into the errata sheet ever suggested anything to Ms. Norelus. *Id.* at B52-58.

Against this background of objective evidence, the court found it was reversible error for the district judge, "who had not heard a single word of the testimony," to impute a base motive into Petitioners' representation of their client that reached the sordid level of engaging in a "concerted effort" to "cover[] up

falsities" when the changes were made in the errata sheet. *Id.* at B61-62. Simply stated: "[T]he two factual interpretations are impossible to reconcile in any practical sense—where one [the magistrate] sees diligence and fair play, the other [the district judge] sees underhanded scheming and malevolence. The district judge's analysis necessarily and expressly rejected the magistrate judge's credibility findings." *Id.* at 62. On this basis the sanctions order was reversed and remanded with the district judge directed to either conduct a new hearing or accept the magistrate judge's findings of fact and reach her own conclusion.[4]

On remand, the district court declined to hold an evidentiary hearing but instead adopted the magistrate judge's findings of fact. Focusing on the changes in the errata sheet, she determined that the only issue to be resolved was whether a "reasonable attorney would have filed the errata sheet and continued to pursue Ms. Norelus' claims knowing what Petitioners knew at the time of filing." App. at A18. Concluding:

> [The] numerous changes contained in the errata sheet should have related [sic] to the Amlongs that [Ms. Norelus] was not able to relate a consistent account of the events underlying her claims. Therefore, the Court finds that the preparation and filing of the Errata Sheet itself, combined with the improper methods of preparation and the factual content of such

[4] Dissenting, Judge Hill found Petitioners' conduct so "objectively reckless" that it warranted a finding of bad faith. App. at A98-118.

> Errata Sheet, constituted objectively reckless conduct on the part of the Amlongs, which was so egregious that it was tantamount to bad faith. Moreover, the Amlongs[ ] continued to press forward with their case after the filing of the Errata Sheet and in spite of the fact that [Ms. Norelus] continued to evade reasonable inquiry concerning her evolving account of events alleged in this case during her reopened deposition. Taken together, this objectively reckless conduct unreasonably and vexatiously multiplied the instant proceedings.

Id. at A107-108.

On appeal, the Eleventh Circuit affirmed. *Norelus v. Denny's, Inc. (Amlong II)*, app. at A1. Judge Carnes, writing for the majority, discarded the previous panel's reliance on objective facts that supported its finding of good faith. Instead, he stated that "'[s]ubjective good faith ought not to be an infinitely expansive safe harbor to protect an attorney who brings an action that a competent attorney could not under any conceivable justification reasonably believe not frivolous.'" App. at A28 (quoting *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc)). Thereafter, in contrast to the three and a quarter page good-faith analysis found in *Amlong I*, Judge Carnes set forth four pages of facts supporting his conclusion that Petitioners should have been on notice of their client's lack of credibility. App. at A27-33. Based on this analysis, Petitioners' professional conduct was deemed so "objectively reckless" to warrant finding it "tantamount to bad faith" and, therefore, subject to § 1927 sanctions. Employing the same reasoning, the lower court was

found to have acted within the scope of its discretion when it imposed costs, expenses, and attorney's fees in the amount $389,739.07 as a sanction.[5]

The court issued its opinion on December 28, 2010. Petitioners filed a petition for rehearing *en banc* pointing to a direct conflict between the two panels' determinations of the operative facts of the case and the weight to be given to the findings by the magistrate judge that Petitioners proceeded with professionalism and a good-faith, well-founded belief in their client's case from the time the suit was filed through dismissal. Moreover, *en banc* consideration was warranted since the case presented the circuit's first opportunity to consider the proper test for liability under § 1927 as well as creating a further conflict in the circuits on the issue of the factors to be considered when determining what sanction is proper. One year later, on December 27, 2011, the Eleventh Circuit denied the petition without dissent.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve the Deep and Enduring Circuit Split on the Interpretation of the Terms "Unreasonably and Vexatiously" in § 1927.

In *Haynie v. Ross Gear Div. of TRW, Inc*, 799 F.2d 237, 243 (6th Cir. 1986), the Sixth Circuit construed § 1927 "not [to] require a finding of recklessness,

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[5] Judge Tjoflat dissented contending that the case should be reversed because the errata sheet did not meet Rule 30's requirement that it be signed by the court reporter. *Amlong II*, app at A70-94.

subjective bad faith, or conscious impropriety; . . . [and that liability attaches] by pursuing claims that [counsel] should know are frivolous."). Certiorari was filed in that case contending that there was a conflict in circuits between those courts that did not require bad faith and those that required a finding of either objective or subjective bad faith.[6] Following a grant of certiorari, the case was dismissed as moot by agreement of the parties. *Haynie v. Ross Gear Div. of TRW, Inc.*, 482 U.S. 901 (1987) (mem.). In the intervening twenty-six years the split has become even more fractured and sufficiently notorious as to be recognized in several law journal commentaries.

In 1990, a student note detailed splits among the circuits employing a "negligent conduct standard,"[7] those targeting "willful bad faith,"[8] and others requiring "reckless conduct."[9] Later, in 2005, District Judge James Holderman wrote an article contending that "[a] key issue on which the courts of appeals cannot agree is the threshold of the attorney's *mental status* necessary . . . . for finding an attorney culpable for 'unreasonably and vexatiously' multiplying the

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[6] Petition for Certiorari at 16–27, *Haynie v. Ross Gear Div. of TRW, Inc.*, 482 U.S. 901 (1987) (No. 86–1408).

[7] Janet Eve Josselyn, Note, *The Song of Sirens—Sanctioning Lawyers Under 28 U.S.C. § 1927*, 31 B.C. L. REV. 477, 482–85 (1990).

[8] *Id.* at 485–89.

[9] *Id.* at 489–93.

proceedings."[10] Pointing out that findings of violations were "link[ed] directly to . . . [§ 1927's] goals of deterrence and punishment,"[11] he concluded that it "is an issue that cries out for uniformity among the circuits due to the serious professional and personal ramifications that sanctions have on lawyers . . . ."[12]

Finally, in 2009, a student comment developed an analysis distinguishing between those circuits that require "bad faith" and those "loosening" the bad faith requirement.[13] With respect to the latter, the monograph details a split among the Fifth, Eighth, Ninth, and Second Circuits.[14]

The foregoing reflects the reality of an unabated conflict in circuits. The Sixth continues to adhere to the "'knows or reasonably should know that a claim pursued is frivolous'" standard set forth in *Ross Gear*. *Tareco Props., Inc. v. Morriss*, 321 F.3d 545, 550 (6th Cir. 2003). In *Cruz v. Savage*, 896 F.2d 626, 634 (1st Cir. 1990), the First Circuit joined the Sixth concluding that § 1927 incorporated "Rule 11's objective standard

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[10] James F. Holderman, *Section 1927 Sanctions and the Split Among the Circuits*, 32 LITIG., no. 1, Fall 2005, at 44, 46 (emphasis added).

[11] *Id.*

[12] *Id.*

[13] Lindsey Simmons-Gonzalez, Comment, *Abandoning the American Rule: Imposing Sanctions on an Empty Head Despite a Pure Heart*, 34 OKLA. CITY U. L. REV. 307, 314–18 (2009).

[14] *Id.* at 316–18.

of reasonableness under the circumstances . . . [an] objective standard . . . ."In direct conflict to the low-threshold-of-liability approach, other circuits require a finding of subjective bad faith. The Second Circuit construes professional misbehavior warranting liability as identical to that conduct falling within the scope of a court's inherent power. *Eisemann v. Greene*, 204 F.3d 393, 396 (2d Cir. 2000) (per curiam). Specifically, under either authority, a court must find "clear evidence that (1) the offending party's claims were entirely without color, and (2) the claims were brought in bad faith—that is, 'motivated by improper purposes such as harassment or delay.'" *Id.* (quoting *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 336 (2d Cir. 1999)) (citation omitted); *see also Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987)("[A]n award made under § 1927 must be supported by a finding of bad faith similar to that necessary to invoke the court's inherent power."

The Third Circuit has similar precedent. *See LaSalle Nat. Bank v. First Conn. Holding Grp., L.L.C.*, 287 F.3d 279, 289 (3d Cir. 2002) (noting adoption of a subjective bad faith standard); *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215, 1225 (3d Cir. 1995) (requiring notice that counsel is charged with litigating in bad faith prior to imposing sanctions). Explaining its reasoning for the high standard, the court had previously pointed out that a finding of bad faith is viewed as:

> [N]ecessary to avoid chilling an attorney's ethical obligation to represent his client

> zealously . . . . [and that absent such a showing] an attorney who might be guilty of no more than a mistake in professional judgment in pursuing a client's goals might be made liable for excess attorneys' fees under section 1927.

Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204, 208–09 (3d Cir. 1985) (citation omitted).

The Fourth Circuit also appears to employ a subjective analysis in construing the statute. In *Blair v. Shenandoah Women's Ctr., Inc.*, 757 F.2d 1435, 1438 (4th Cir. 1985), the court found that a district court's "finding of subjective bad faith" was proper when imposing § 1927 sanctions. *See also Thomas v. Ford Motor Co.*, 244 F. App'x 535, 539 (4th Cir. 2007) (per curiam) (unpublished) (citing subsequent Fourth Circuit opinions employing a subjective test); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1382–83 n.25 (4th Cir. 1991) ("[S]ection 1927 also requires a finding of counsel's bad faith as a precondition to the imposition of fees." (citations omitted)).

The District of Columbia Circuit's position is that "[t]he law of this circuit, reflecting a split in the circuits generally, is unsettled over whether a court must find an attorney's actions to be in bad faith" for purposes of § 1927. *United States v. Wallace*, 964 F.2d 1214, 1218 (D.C. Cir. 1992) (citations omitted). The latest district court opinion analyzing the issue confirms that, twenty years later, the issue remains unresolved. *McIntosh v. Gilley*, 753 F. Supp. 2d 46, 65 (D.D.C. 2010).

The Seventh Circuit has taken a more nuanced approach. In *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985), the court concluded that an objective bad faith test is to be employed when counsel acts "recklessly or with indifference to the law." In contrast, a subjective bad faith test is employed when a case is objectively colorable on the theory that a "lawyer who pursues a plausible claim because of the costs the suit will impose on the other side, instead of the potential recovery on the claim, is engaged in abuse of process." *Id.*

The final category includes those circuits construing the statute to incorporate some form of objectively reckless conduct in pursuing a client's cause. They include the Fifth Circuit, *Bryant v. Military Department*, 597 F.3d 678, 694 (5th Cir. 2010) (requiring "evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court" (quoting *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 525–26 (5th Cir. 2002) (distinguishing bad faith from recklessness))); the Eighth Circuit, *Clark v. United Parcel Service, Inc.*, 460 F.3d 1004, 1011 (8th Cir. 2006) ("[Sanctions permissible when] attorney's conduct 'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.'" (quoting *Tenkku v. Normandy Bank*, 348 F.3d 737, 743 (8th Cir. 2003))); the Ninth Circuit, *Lahiri v. Universal Music & Video Distribution Corp.*, 606 F.3d 1216, 1219 (9th Cir. 2010) ("Recklessness suffices for § 1927 sanctions, but sanctions imposed under the district court's inherent authority require a bad faith finding." (citations

omitted)); and the Tenth Circuit, *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc) ("Our caution against imposing § 1927 sanctions in inappropriate cases, however, should not prevent us from awarding sanctions for conduct which manifests intentional or reckless disregard of the attorney's duties to the court.").

As previously noted, the Eleventh Circuit has now joined those courts employing the *reckless* standard. In addition, the conclusion that "[s]ubjective good faith ought not to be an infinitely expansive safe harbor," *Amlong II*, app. at A28, also raises the serious, unresolved issue that concerns Judge Holderman: the lack of consensus on the mental status crucial to a finding of § 1927 liability. This, of course, is the *exact* issue raised by the two conflicting panel opinions: one expending over three pages supporting objective good faith, and the other more than four to argue that from beginning to end Petitioners' pursued this litigation in bad faith. This fact, coupled with the deep and abiding split in the circuits requires the grant of certiorari.

II. The Lower Court's Decision to Construe § 1927 in a Manner That Excludes Equitable Factors When Deciding to Grant Fees on Fees Is in Conflict with the Fourth and Tenth Circuits.

Section 1927 provides that an attorney "*may* be required by the court to satisfy *excess. . . fees* reasonably incurred" (emphasis added) once a violation is determined. The district court and the *Amlong II* panel treated that authorization as a virtual mandate for awarding all fees incurred in satellite litigation relating to § 1927 liability, in this case totaling over

40% of the time sought by Respondents, In doing so the opinions directly reject the role of equitable factors employed by two other circuits when determining whether fees should be imposed on counsel defending themselves in sanctioning hearings.

The Fourth Circuit holds as a basic proposition that lawyers "should be able to defend themselves from the imposition of sanctions without incurring additional sanctions." *Blue v. United States Department of the Army*, 914 F.2d 525, 548 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). It also admonishes, however, that "[t]o rule that sanctions can never be imposed . . . for misconduct during a sanctions hearing, no matter how egregious, would be to license the wholesale abuse of these hearings." *Id.* at 549. This accords with the Tenth Circuit, which also applied the misconduct exception in sanctions proceedings when reviewing monetary penalties imposed pursuant to the district court's inherent power where counsel "greatly multipl[ied] the proceedings." *Glass v. Pfeffer*, 849 F.2d 1261, 1266 (10th Cir. 1988).

Equitable considerations have also played a major role at the district court level. The Southern District of New York rejected a request for "piling of fees upon fees" in § 1927 sanctions proceedings because the "amount claimed . . . [was] substantially in excess" of the amount claimed for opposing the frivolous motion giving rise to the proceedings. *Novelty Textile Mills, Inc. v. Stern,* 136 F.R.D. 63, 78 (S.D.N.Y. 1991) (magistrate); *see also Fink v. Nourse*, 45 F. App'x 670 (9th Cir. 2002) (mem.) (unpublished) (affirming formal reprimand in lieu of § 1927 sanctions); *Moline v. Trans*

Union, L.L.C., 222 F.R.D. 346, 351 (N.D. Ill. 2004) (magistrate) (applying the "least severe sanction adequate to serve the [deterrence] purpose of the rule" test as an equitable factor in decision to drastically reduce amount sought as a sanction (citing *Anderson v. Cnty. of Montgomery*, 111 F.3d 494, 502 (7th Cir. 1997))).

Finally, in *Boykin v. Bloomsburg University*, 905 F. Supp. 1335 (M.D. Pa. 1995), the court dealt with a fee request for a sanctions hearing that encompassed seven days. Finding that the proceedings were "inordinately delayed by the unreasonable conduct" of counsel, the district judge—as did the Tenth Circuit in *Glass*—granted fees on the basis that denial of an award would permit knowledgeable wrongdoers to effectively chill the bringing of sanctions motions. *Id.* at 1348. In a similar vein, the Third Circuit in *In re Tutu Wells Contamination Lit.*, 120 F.3d 368, 387–88 (3d Cir. 1997), cautioned that a "categorical exclusion" of fees for pursuing sanctions was unwise, but the allowed them in the discretion of the district court. Specifically:

> [I]f a party is aware *ex ante* that the costs he incurs in exposing sanctionable conduct will never be recouped, that party may decide to forgo a sanctions proceeding altogether. In doing so, however, that party might allow otherwise sanctionable conduct to go unaddressed. In such cases, the deterrent goal of a sanction award has been lost; parties who know that the likelihood of facing a sanction proceeding are low may engage in sanctionable conduct more

> often. Therefore, we believe a district court, in the exercise of its discretion, may award attorney's fees arising from sanctions proceedings.

In re Tutu Wells, 120 F.3d at 388.

In rejecting the Fourth and Tenth Circuits' equitable approach to § 1927, Judge Carnes's opinion distinguishes the former as irrelevant since their analysis involved a "smorgasbord of sanctions theories," *Amlong II*, app. at A66, and the latter's numerous references to equitable criteria as mere dicta. *Id.* at A63-68. No amount of explanation, however, can avoid the reality of a clear conflict between the equitable approach given § 1927 by two circuits and that employed by the district court and affirmed by the Eleventh Circuit in this case. This issue, as with the issue of what criteria to employ when a court imposes § 1927 sanctions, warrants the grant of certiorari.

III. Regardless of What Construction Is Given for Determining Liability Under § 1927 or the Method for Determining the Proper Sanction upon Finding a Violation, the Lower Court Committed Reversible Error.

In essence, the lower court affirmed sanctions under § 1927 on the basis that Petitioners' representation of their client in this case was unreasonable from the start. One alternative, of course, would have been reliance on Rule 11 that applies from the moment a pleading is filed and requires that "factual contentions [in all filings] have

evidentiary support or, . . . likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . ." If this requirement has not been met, opposing counsel may serve a motion for sanctions on the offending attorney. If the improper filing is not withdrawn within the 21-day safe harbor, then the Rule 11 motion may be filed with the court.

In the two years following the filing of this case, opposing counsel never once questioned any of the charges alleged by Ms. Norelus in her complaint by employing the simple procedure made available by Rule 11. This fact, in and of itself, undercuts the claim made by the *Amlong II* court that it was obvious from the outset to any objective observer, which would include counsel for Respondents, that Petitioners knew or should have known their case had no factual basis.

As previously noted, Judge Carnes's analysis of Petitioners' conduct is in direct conflict with that of both Judge Marcus and the only person to have heard live testimony in this case: the magistrate judge. Even assuming Rule 11 had been invoked, there is more than sufficient evidence in the record to support a finding—identical to the one made by the magistrate judge for purposes of § 1927—that Petitioners did not transgress the low threshold of the knew or reasonably should have known test employed for Rule 11 violations. Put another way, nothing in this record supports Judge Carnes's after-the-fact appellate review and unwarranted conclusion that Petitioners' professionalism in this case was akin to that of "Ahab hunting the whale." *Amlong II*, app. at A24.

First, for obvious reasons, there is no Rule 11 decision to support Judge Carnes's conclusion that counsel should have abandoned their professional obligation to zealously advocate their client's cause on account of adverse deposition testimony from Respondent's employees. *Id.* at A26. Second, there is no justification for the base accusation that the only reason for having Ms. Norelus submit to two polygraph examination was for "self protection." *Id.* at A27-28. Third, with respect to the use of polygraph exams in civil and criminal cases, neither Eleventh Circuit case law[15] nor the standards employed in other situations[16]

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[15] *See United States v. Piccinonna*, 885 F.2d 1529, 1532 (11th Cir. 1989) ("[W]e believe it is no longer accurate to state categorically that polygraph testing lacks general acceptance for use in all circumstances. For this reason, we find it appropriate to reexamine the per se exclusionary rule and institute a rule more in keeping with the progress made in the polygraph field.").

[16] *E.g., United States v. Padilla*, 908 F. Supp. 923, 928 (S.D. Fla. 1995) ("[O]nce a witness' character for truthfulness or credibility has been attacked, a polygraph expert may introduce testimony as to that witness' character for truthfulness based on the results of a polygraph examination."). The current status of the admissibility of polygraph evidence in *criminal trials* (as compared to the instant civil proceeding to be heard by a single judge) has been recently analyzed as follows:

> [L]ie detector evidence stands on the precipice of admissibility as demonstrating sufficient scientific reliability for consideration by juries. . . . [M]ost circuits have disavowed the . . . norm of a per se exclusion of lie-detection evidence [and] [a]ll that remains for wide-scale admissibility . . . of expert lie detector testimony in federal court is for the science of lie detection to move incrementally forward from its present state and for these advances to be recognized by the relevant

justify the conclusion that "the only thing the polygraph examination 'proves' is that the examinee believes her own story." *Id.* at A29. Fourth, the record does not support rejection of conclusions reached by Ms. Norelus's psychologist in support of her veracity merely because she could only testify that Ms. Norelus "had been subjected to some kind of trauma by someone at some time." *Id.* at 30. Fifth, without any knowledge of Ms. Amlong's abilities as a trial lawyer and without observing Ms. Norelus explain what she was subjected to and what was done to her, the lower court nonetheless claimed the Petitioners only had a "snowball's chance" of prevailing. *Id.* at A28. In the record made before the magistrate judge and included in the briefs in the court below, however, Ms. Amlong explained in the sanctions hearing why she requested that the case be heard before a single judge and not a jury:

> I think it gave me a more powerful case. I know [there] was inconsistent [sic] with her prior testimony, but I honestly believed that if a judge had an open mind and simply listened to her and applies those powers of observations that judges get when they learn to tell whether someone's telling the truth or not, you're going to look at this woman and when you hear her tell her story you're going to realize this

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scientific community.

John Bellin, *The Significance (if any) For the Federal Criminal Justice System of Advances in Lie Detector Technology*, 80 TEMP. L. REV. 711, 715–16 (2007).

> happened to her, every bit of it happened to her . . . .

App. at B132-133.

On the basis of the foregoing as well as the conclusions previously reached by the magistrate judge and Judge Marcus, it is obvious that under the lowest standard employed for sanctions—and not that standard employed by the Eleventh Circuit and even higher standards in four other circuits—there was no conduct warranting sanctions in this case.

CONCLUSION

For the foregoing reasons, Petitioners request that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit and that this case be heard on the merits.

Respectfully Submitted,

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