**C.A. Case No. 13-15860**

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

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**Gregory Pellerin, Plaintiff And Appellant**

**vs.**

**Nevada County, et al, Defendants And Respondents.**

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Appeal From the United States District Court,
Eastern District Of California,
The Honorable Kimberly J. Mueller
Civil Case No. 2:12-CV-00665-KJM-CKD

# APPELLANT'S OPENING BRIEF

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September 4, 2013

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## STATEMENT OF JURISDICTION

### Jurisdiction Of The United States District Court, E. D. California

The basis for jurisdiction of the Complaint in the United States District Court, Eastern District of California ("District Court"), was premised upon 28 U.S.C. §1331 which gives jurisdiction over federal causes of action under Title 42 U.S.C. §1983. Pendant Jurisdiction over the state causes of action was proper under Title 28 U.S.C. §1367(a) and Title 28 U.S.C. §1343(a)(3).

The Complaint alleges nine causes of action, the first six are based upon Title 42 U.S.C. §1983 and the remaining three are pendant state claims. All of the Respondents reside within, and the acts complained of occurred within, the territorial boundaries of the District Court.

### Jurisdiction Of The Ninth Circuit Court Of Appeal

The United States Circuit Court Of Appeal has jurisdiction over this appeal of the judgment of dismissal by the District Court under 28 U.S.C. §1291 and FRAP Rule 3.

### Timeliness

The judgment of dismissal was entered by the District Court on March 28, 2013. Appellant filed a Notice Of Appeal on April 25, 2013, which is within the thirty time limit of FRAP 4(a)(1)(A).

**Finality**

The judgment of dismissal by District Court disposed of all federal and all pendant state causes of action in Appellant's Complaint. Thus, it was a final decision under 28 U.S.C. §1291.

**Standard Of Review**

An appeal from a dismissal pursuant to Federal Rule Of Civil Procedure ("FRCP") Rule 12(b) motion of all or part of an action is reviewed *de novo* and all material allegations in the complaint are deemed true and viewed in the light most favorable to the Appellant/appellant. *Goldstein v. City of Long Beach,* 715 F. 3d 750, 753 (9th Cir. 2013).

## Statement Of The Issues Presented For Review

The issues presented for review are as follows:

1. Whether the District Court was in error when it dismissed all of the federal causes of action (Counts 1-6) on the basis of collateral estoppel? [See District Court Order, EOR, pp. 13-17.]
2. Whether the District Court was in error when it found that the NCDA, DDA Francis, and DDA Westin were acting as state officials and were immune under the Eleventh Amendment? [See District Court Order, EOR, pp. 7-8.]
3. Whether the District Court was in error when it found that the NCDA, DDA Francis, and DDA Westin were absolutely immune under the doctrine of prosecutorial immunity? [See District Court Order, EOR, pp. 8-9.]
4. Whether the District Court was in error when it found that Appellant's First and Third Causes of Action were based upon *Brady* allegations without a conviction, and hence, not actionable? [See District Court Order, EOR, pp. 9-12.]
5. Whether the District Court was in error when it also found that Appellant's First and Third Causes of Action were based upon mishandling of evidence which is not a constitutional violation, and hence, no right of action? [See District Court Order, EOR, pp. 9-12.]

6. Whether the District Court was in error when it found that Appellant's Third Cause of Action for evidence mishandling/tampering was deficient for purposes of meeting the test set out in *Deveraux v. Abbey* , 263 F. 3d 1070, 1074-75 (9th Cir. 2001)? [See District Court Order, EOR, pp. 12-13.]

## Statement Of The Case

On March 16, 2012, Appellant filed a complaint against Respondents Nevada County, Deputy District Attorneys Gregory Weston and Katherine Francis, and Deputy Sheriff Jesse King. The Complaint contained the following causes of action:

First and Second: Title 42 U.S.C. §1983 actions against Nevada County Sheriffs Department ("NCSD") and District Attorneys Office resulting from failure to have any policies, practices, procedures or training for digital evidence;

Third: Title 42 U.S.C. §1983 action against NCSD Deputy Jesse King ("King") arising from inappropriate evidence handling and evidence tampering;

Fourth and Fifth: Title 42 U.S.C. §1983 actions against Nevada County Deputy DA Francis and Deputy DA Westin arising from their refusal to do any investigative work;

Sixth: Title 42 U.S.C. §1983 action against Nevada County for malicious prosecution;

Seventh: Violation of California Civil Code § 52.1(b) against Nevada County and King;

Eighth: intentional infliction of emotional distress against Nevada County and King; and

Ninth: negligence against Nevada County and King.

On April 10, 2012, Respondents filed a Motion to Dismiss under Federal Rule Of Civil Procedure ("FRCP") Rule 12(b). Appellant's Opposition was filed on May 3, 2012, and Respondents filed a Reply on May 22, 2012. Oral argument was heard on June 22, 2012, at which time the United States District Court for the Eastern District of California ("District Court") requested additional briefing on the issue of collateral estoppel. Supplemental briefs were filed by both sides on July 6, 2012. The District Court issued an order on March 28, 2013, granting the Respondents' motion to dismiss. The District Court also entered judgment against Appellant on the same day.

## Statement Of Relevant Facts

On the afternoon of April 20, 2010, Appellant was scheduled to testify in Nevada County Superior Court regarding a fraudulent loan that he had obtained from a local hard money lender Olympic Mortgage ("Olympic"). Appellant had previously filed a complaint with the Grass Valley, California Police Department about the loan. His complaint was investigated and a report was forwarded to the Nevada County District Attorneys Office ("NCDA") for further investigation. However, the NCDA never investigated Olympic. Unbeknownst to Appellant, District Attorney Clifford Newell had approximately $2.5 million dollars in personal loans with Olympic during the same time period. Complaint, EOR p. 93, ¶ 39.

However, on the morning of April 20th, one Thomas Benzing ("Benzing") entered Appellant's property in violation of a "stay away" order, purportedly to serve some legal papers. When Appellant questioned Benzine why he was on the property in violation of the court order, Benzine became hostile. Benzine assaulted Appellant twice, after which Appellant placed Benzine under citizen's arrest. Benzine resisted and Appellant used an armlock to detain him. Meanwhile, Appellant's wife had called the NCSD and had filmed much of the incident on a Flip video camera. When the NCSD arrived, Appellant released Benzine to the

NCSD and Appellant's wife gave the Flip video camera to NCSD deputy King. Complaint, EOR p. 86, ¶¶ 8-10.

Despite the video of Benzing attacking Appellant which Appellant's wife showed King at the incident scene, King took Appellant into custody and seized the Flip camera as evidence. Complaint, EOR p. 86, ¶¶ 10-11. King was primarily responsible for the preparation of the Incident Report. Officer King was also responsible for later reviewing the Flip video camera on a computer at the NCSD offices that he had seized from Mrs. Pellerin as evidence. Complaint, EOR p. 87, ¶ 13.

Instead of first making a copy of the digital contents of the Flip video camera or taking other precautions to protect the same, King plugged the Flip video camera into a USB port on a Sheriff's Department computer. He then downloaded from the internet video editing software and produced an edited version by deleting portions of the video and selecting a single one minute, eighteen second "clip" (out of an estimated 15 minutes of video) and copying this onto a CD. Complaint, EOR p. 89, ¶¶ 22-23. The clip was made in an attempt to show Appellant in a bad light. Complaint, EOR p. 89, ¶ 24.

At that time, neither the NCSD nor the NCDA had any policies, practices, procedures or training concerning the handling, viewing, processing, enhancing or

examining of digital evidence that may have prevented King's inappropriate handling of the video evidence. Complaint, EOR p. 87-89, ¶¶ 15-21.

Appellant was processed on a felony battery charge by the NCSD. King then forwarded the incident report, arrest papers, and the clip CD to the NCDA. Complaint, EOR p. 87, 89, ¶¶ 12, 14, 24. Appellant was released on bail on the afternoon of April 20th, but he had missed his opportunity to testify about the Olympic loans.

Appellant retained legal counsel and told him that the incident, including the assault and battery by Benzine, had been filmed by his wife on the Flip video camera. Appellant's counsel promptly sent informal discovery requests to Deputy District Attorney Katherine Francis ("DDA Francis") asking for the entire contents of the Flip video camera. DDA Francis delayed a month, but finally produced just the clip CD. Complaint, EOR p. 90, ¶ 25-26.

At a status conference on July 1, 2011, Appellant's counsel explained to the court that there was an apparent discrepancy between what Appellant's wife said she had filmed and what was on the clip CD. Appellant obtained permission to inspect the video camera at the NCSD evidence room, but DDA Francis declined to attend the inspection. Upon inspection at the NCSD evidence room, it was discovered that there was not a single ten-to-fifteen minute video recording as

Appellant's wife had reported, but multiple files, none of which matched the clip CD that DDA Francis had turned over. Complaint, EOR p. 90, ¶¶ 25-28.

Appellant then moved for, and was granted, a forensic examination of the Flip camera and the computers at the NCSD. Complaint, EOR p. 91, ¶ 29. Both DDA Francis and Deputy District Attorney Westin ("DDA Westin"), who took over from DDA Francis during this time period, refused to participate in the forensic examination. Complaint, EOR p. 90-91, ¶¶ 27, 29-30, Appellant's expert discovered what computer King had used at the NCSD to view the Flip camera, that King had downloaded video editing software a few minutes after plugging the Flip camera into the NCSD computer, that the video on the Flip camera was now in three separate files with unexplained time gaps, that the clip CD had been made by copying a portion of one of these three files, and that it was possible that the Flip video had been intentionally altered. Complaint, EOR p. 92, ¶ 33.

Appellant moved for a hearing to examine why the video on the Flip camera appeared to have been altered and why only the very small clip CD had been prepared instead of copying the entire contents to the Flip camera. DDA Westin opposed the motion and the court denied Appellant's motion. Appellant then petitioned for a writ of mandamus and the California Court of Appeal issued a *Palma* letter advising the trial court that due process required the holding of an

evidentiary hearing. Complaint, EOR p. 93, ¶36. The evidentiary hearing produced many of the facts that are the basis for the Complaint.

Despite the forensic examination, despite the evidentiary hearing, and despite repeated requests by Appellant's counsel, DDA Weston refused to view the Flip video camera or the copies of the three video files that Appellant's forensic expert had found. Complaint, EOR p. 93, ¶ 35-37.

Appellant filed a motion to dismiss the charges because of the improper handling of the Flip video camera. Complaint, EOR p. 93, ¶38. Appellant also filed a motion to recuse the NCDA based on the District Attorney's conflict of interest. Complaint, EOR p. 93, ¶ 39. Both motions were heard on August 4, 2011, and both were denied. Complaint, EOR p. 94, ¶ 40. Appellant filed concurrently two petitions for a writ of mandate in the Court of Appeal: one for the denial of the motion to dismiss and the other for the denial of the motion to recuse. The Court of Appeal selected the recusal issue and issued an alternative writ granting the motion for recusal of the District Attorney's office for conflict of interest. Complaint, EOR p. 94, ¶¶ 40-41.

The Attorney General's Office then substituted in as the prosecutor and met with Appellant's counsel to watch the entire video of the incident with Benzing. Complaint, EOR p. 94-95, ¶¶ 43-44. On January 26, 2012, the Attorney General's

Office (“AG”) dismissed the case. Complaint, EOR p. 95, ¶ 45. Appellant then timely filed a government tort claim with Nevada County, it was denied, and this suit followed. Complaint, EOR p. 95, ¶ 46.

It took over 20 months from the date of the incident until the charges against Appellant were dismissed by the AG. During that time Appellant was publicly humiliated by the charges, was unable to secure work, had to borrow money for legal fees, and his family life was put to grave test. These deprivations caused anguish, depression, fear, embarrassment, and personal and economic humiliation. Complaint, EOR p. 95, ¶47.

## Summary Of The Argument

**Collateral Estoppel** – The District Court, in ruling on the issue of "finality", abandoned the established rule that a case is not final unless the right to appeal has been exhausted (or waived). Specifically, the District Court created a new standard based upon whether a case was free from "direct attack". Further, the District Court appeared to conclude that the summary denial of a writ petition in California acts like an appeal and creates a final decision on the merits.

Appellant argues that the "direct attack" standard applied by the District Court for finality is not the correct rule. The correct standard remains that there is no finality until the right to appeal has arisen and has been freely exercised or waived. Further, Appellant shows that under California law the summary denial of a writ petition does not act like an appeal and does not decide the issues on the merits.

In this case, a writ petition on the motion to dismiss was summarily denied because a concurrently filed writ petition on the motion to recuse had been granted. Once the alternative writ was issued, the California Attorney General took over the case and dismissed the action. This dismissal by the AG terminated Appellant's right to appeal the adverse ruling on the motion to dismiss. Thus, no appeal ever ripened and there was no finality for collateral estoppel.

**Prosecutorial Immunity; Eleventh Amendment Immunity** – The District Court found that the conduct alleged in the Second Cause of Action against the NCDA and the conduct alleged in the Fourth and Fifth Causes of Action against DDA Francis and DDA Westin constituted prosecutorial activity that is absolutely immune. The District Court then used the same conclusions to rule these Respondents were acting as state, not local, officials when they engaged in the alleged conduct, and thus, were also immune under the Eleventh Amendment.

Appellant disagrees with the District Court's factual conclusions about the nature of the alleged conduct. The recent case of *Goldstein v. City of Long Beach*, 715 F. 3d 750 (9th Cir. 2013) provides a more succinct and clear analysis that strongly supports Appellant's contention that the factual allegations of the NCDA in the Second Cause of Action are definitely administrative in nature and do not involve prosecutorial advocacy.

Appellant further argues that the conduct in the Fourth and Fifth Causes of action involves the obligation of a prosecutor to engage in "police type" investigative work before making any charging decision, and not advocacy or even quasi-judicial conduct. In addition, regarding the Fifth Cause of Action, Appellant asserts that this duty to conduct a police-type investigation extends to any new evidence that may come into the possession of a prosecutor while a case is

ongoing. New evidence may appear at any time, even after a case is decided, and force a re-evaluation. Appellant agrees that the decision of a prosecutor, once he/she has done the investigative work required to make an evaluation of material evidence, is protected by absolute immunity. However, the flat refusal of a prosecutor to examine the most material evidence in a case, violates the constitutional rights of the accused.

**Liability For Evidence Tampering** – The District Court analyzed the substantive aspect of the Third Cause of Action using this Court's decision in *Deveraux v. Abbey*. The court found that Appellant had not successfully pleaded an action under either prong of the two part *Deveraux* test for due process violations on the basis of false evidence: i.e., (1) that the alleged facts must show that King continued the investigation despite the fact that he knew or should have known that the accused was innocent; or (2) that King used investigative techniques that were so coercive and abusive that he knew or should have known that those techniques would yield false information.

Appellant concurs that *Deveraux* is applicable. However, Appellant demonstrates that he has more than sufficiently pleaded factual allegations, which if true, meet the first of two part *Deveraux* test, and thus, Appellant has stated a good cause of action.

## ARGUMENT OF THE CASE

### I. Collateral Estoppel

In the District Court the Respondents moved, *inter alia*, to dismiss the Complaint on the ground that Appellant was barred on all causes of action by collateral estoppel arising from Appellant's motion to dismiss in the California Superior Court, County of Nevada, case no. F10-159 ("Superior Court") which was denied. Respondents' Rule 12(b) Motion To Dismiss, EOR 72-74. The District Court agreed with the Respondents and barred all of Appellant's federal claims (Counts 1-6). The District Court's decision was based upon the conclusion that the Superior Court denial of the motion to dismiss was "final" for purposes of collateral estoppel.[1] District Court Order, EOR 17.

In ruling that there was "finality" in the Superior Court ruling, the District Court held that "it does not appear that the opportunity for appeal is the gauge of the finality of a decision for preclusion purposes", citing *People v. Cooper*, 149 Cal App 4th 500, 505-506 (2007), and that the Superior Court ruling was final because

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[1] The District Court also found "identity" of issues between the Complaint and the Superior Court motion to dismiss. Appellant disputes there was sufficient identity of issues, in particular, that the Superior Court made only one factual finding, namely that there had not been any *Brady* violation, and did not discuss any of the other many facts and arguments that Appellant raised. See Plaintiff's Supplemental Brief On Collateral Estoppel, EOR 23-24. If Respondents argue this point, Appellant reserves the right to further respond.

it was free from "direct attack". *Ibid*.

Appellant argues that the District Court erred in its interpretation and application of California law defining "finality" for purposes of collateral estoppel. First, the District Court appeared to conclude that the summary denial of a writ petition in California acts like an appeal and creates a final decision on the merits. California law, however, is very clear that summary denial of a writ petition does not act like an appeal and does not decide the issues on the merits. Second, the AG's dismissal of the Superior Court action against Appellant for lack of evidence independently prevented any right of Appellant to appeal from ripening. Thus, there has never been any final decision on the merits.

1. **California Law Governs**

There is no disagreement that state law governs the application of collateral estoppel to a state court judgment in a federal civil rights action. *Ayers v. City of Richmond*, 895 F. 2d 1267, 1270 (9th Cir. 1990) (hereafter "*Ayers*").[2]

2. **Criteria For Collateral Estoppel**

Applying relevant California law, the *Ayers* decision lists four criteria that

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[2] The District Court did not cite to *Ayers*, but to *Lucido V. Superior Court*, 51 Cal. 3d 335, 341 (1990). Appellant sees no meaningful distinction in the list of criteria for estoppel in Lucido – it is essentially the same as that in Ayers and there is no significance to the real legal issue discussed below.

must be met to apply collateral estoppel based upon an underlying *criminal* case: (1) the prior conviction must have been for a serious offense so that the defendant was motivated to fully litigate the charges; (2) there must have been a full and fair trial to prevent convictions of doubtful validity from being used; (3) the issue on which the conviction is offered must of necessity have been decided at the trial; and (4) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior trial. *Ayers* at 1270-71.

The *Ayers* court explained that the phrase "full and fair" in the second criteria meant that there had to be a hearing and ruling (for a motion) or a trial on the merits with a judgment. *Most importantly, the party must then have had the opportunity to appeal such ruling or judgment*. *Ayers* at 1271-72.

> A judgment is final once the time for appeal has elapsed. *In re McDonald's Estate*, 37 Cal. App. 2d 521, 526 ... (1940). This includes a ruling on a motion to suppress which becomes final by a failure to appeal. *People v. Gephart*, 93 Cal. App. 3d 989, 996 n.3, ... (1979). Accordingly, we conclude that the adverse section 1538.5 rulings were fully and fairly litigated on the merits and that those rulings *which were not appealed* from after the entry of the guilty pleas represent final judgments for the purposes of collateral estoppel. (Emphasis added.) *Ayers* at 1272.

The Court found that Ayers had not exercised his right to appeal, which had ripened, and consequently, it held that: "Ayers' failure to appeal the adverse rulings following his guilty pleas resulted in a final judgment sufficient for the purposes of

applying collateral estoppel." *Ayers* at 1272.

### 3. Summary Denial Of Writ Petition Is Not A Decision On The Merits And Does Not Constitute An Appeal

A defendant may pursue writ relief before judgment in either a misdemeanor or felony case. Under California law, the *summary denial of a writ petition* is not a decision on the merits, does not establish law of the case, and therefore, should not be used to determine the "finality" required for collateral estoppel. *Kowis v. Howard*, 3 Cal. 4th 888, 899 (1992) ("*Kowis*") where the California Supreme Court held: "a summary denial of a writ petition does not establish law of the case whether or not that denial is intended to be on the merits or is based on some other reason. We disapprove of contrary dicta in any case." See also, *Varian Med. Systems, Inc. v. Delfino*, 35 C 4th 180, 200-201 (2005), affirming the rule of *Kowis*.

### 4. Appellant's Writ Petitions

In the Superior Court case, Appellant filed two motions: one to dismiss the case and one to recuse the NCDA. Both of these were heard on August 4, 2011, by the Superior Court and both were denied. Less than two weeks later, Appellant concurrently filed with the California Court of Appeals two petitions for a writ of mandate, one challenging the lower court's denial of the Motion to Dismiss and the other challenging the denial of the Motion to Recuse. Complaint, EOR 93-94, ¶¶

38-39.

Appellant received an alternative writ of mandate on the motion to recuse on September 29, 2011. Having granted the alternative writ on the Motion to Recuse, the Court of Appeal summarily denied the petition for the writ concerning the motion to dismiss. The Attorney General ("AG") for the State of California, having already filed a brief in opposition to the petition, declined to file a return with the Court of Appeal, and instead, substituted in as the prosecutor in the case on November 18, 2011. Complaint, EOR 93-94, ¶¶ 41-42.

The AG dismissed the case under California Penal Code (hereafter "PC") §1385 in the interests of justice on January 26, 2012, stating that: "I have reviewed every piece of evidence, every document, every photo. And in particular I have reviewed the video evidence which is the closest thing to objective evidence in this case. …. And after that review … I am convinced that there is no reasonable likelihood of convicting the Defendant on any charge at trial." EOR 95, ¶ 45.

5. **Appellant Is Not Barred By Collateral Estoppel**

The facts of this case show that the criteria under Ayers have not been met. There was no conviction in the Superior Court criminal case. Without a conviction, *a defendant has no ability*, let alone motivation, to appeal and fully litigate issues that could potentially be collaterally estopped. *Ayers* at 1272. This

case is factually similar to *Heath v. Cast*, 813 F.2d 254 (9th Cir. 1987) where no collateral estoppel was found based upon a motion to suppress evidence in a prior trial because it was a preliminary evidence motion that was independent of the real question of the defendant's guilt and the underlying action had been dismissed without a conviction. Just like in *Heath*, Appellant's ability to appeal the Superior Court's ruling was cut off by actions that were not under his control, i.e., the AG's dismissal for lack of evidence. The summary denial of Appellant's writ petition on the motion to dismiss has no legal significance and cannot be used under California law as a substitute for an appeal. *Kowis.*

The District Court, however, ignored *Ayers* and misinterpreted and misapplied *People v. Cooper*, 149 Cal. App. 4th 500, 505-506 (2007). The District Court ruled that "it does not appear that the opportunity for appeal is the gauge of the finality of a decision for preclusion purposes" and that the Superior Court Decision was final because it was free from "direct attack". District Court Order, EOR 17.

Examination of *People v. Cooper* reveals that this decision is entirely consistent with *Ayers*. The Court of Appeal found that there had been no final adjudication on the merits resulting from a federal court granting of a petition for a writ of habeas corpus, and thus, no collateral estoppel could be asserted. In so

ruling, the California Court of Appeal stated: "[t]hus, in order for res judicata or collateral estoppel to apply there must be a *final judgment or determination of an issue*; that is, a judgment or determination that is final in the sense that no further judicial act remains to be done to end the litigation." (Emphasis added.)

The District Court appears to have concluded that, since Appellant filed a writ petition that was *summarily denied*, Appellant had unsuccessfully exercised a right to appellate review. As shown above, this conclusion is inapposite to the bright line rule of the California Supreme Court in *Kowis* that a summary denial of a writ petition has no legal significance.

It is true that the Superior Court ruling was "technically" free from "direct attack" once the case had been dismissed by the AG for lack of evidence. However, Appellant's right to appeal the Superior Court ruling could only have arisen after a "conviction". *Ayers* deliberately used that term in its list of criteria to ensure that the right to appeal had, in fact, ripened under the law. Where, as here, the right to an appeal never ripens due to intervening factors beyond the control of a defendant, there can be no "finality".

The District Court simply ignored the fact that Appellant's further right to appeal the Superior Court ruling was cut off by the AG's dismissal of the charges for lack of evidence. Although the dismissal ended the litigation, and thus, there

was no further possibility of a "direct attack" by Appellant, the AG's dismissal also unilaterally terminated Appellant's ability to pursue an appeal of the Superior Court ruling. Where the state acts to end litigation and thereby unilaterally terminates a defendant's right to appeal an adverse ruling, there cannot be "finality" for purposes of collateral estoppel. To hold otherwise would effectively deny the due process right to a full and complete determination on the merits of the issues sought to be collaterally estopped.

### A. *Schmidlin v. City of Palo Alto* and *Johnston v. County of Sonoma* Distinguished

Finally, the District Court had asked both parties at oral argument to brief *Schmidlin v. City of Palo Alto,* 157 Cal. App. 4th 728, 766-775 (2008) ("*Schmidlin*"), and *Johnston v. County of Sonoma*, C10-03592 CRB, 2012WL381197 (N.D. Cal. 2012) ("*Johnston*"). A review of both cases reveals that they fully support Appellant's position.

In California, a defendant in a misdemeanor prosecution has the *right to file an appeal from a denial of a motion to suppress evidence.* PC §1538.5(j). In contrast, in a felony case, the defendant who loses a motion to suppress has no right to an appeal until after final judgment (although such a defendant may try for a writ). There is no statutory difference between a felony or a misdemeanor case with respect to a *motion to dismiss* and the right to appeal only arises after

conviction. Appellant's case was a felony case and the Superior Court decision was on a motion to dismiss, not a motion to suppress. These are critical facts that distinguish these cases.

The *Schmidlin* case involved a misdemeanor prosecution during which the defense made a motion to suppress. *Id*. at 766. The trial court denied the motion and the defense did not exercise its right to an appeal under PC §1538.5(j), thereby making the trial court's ruling final. In upholding the application of collateral estoppel on the factual issue decided in the motion to suppress, the Court of Appeal set forth an extensive analysis on the issue of "finality" that distinctly limited its holding to motions to suppress, and further, distinguished between misdemeanor and felony cases, finding that in felony cases there could be no finality on a denial of a motion to suppress because, unlike misdemeanor cases, there was no chance for appeal until after judgment. *Id*. at 772-774.

The *Johnston* case was another misdemeanor case on a motion to suppress.[1] The *Johnston* court found that: "[t]he state court unequivocally ruled

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[1] Appellant contends that the motion in *Johnston* is properly classified as a motion to suppress, not a motion to dismiss as stated by the District Court, because it challenged the evidence that the officers had probable cause to enter the Appellant's property. The California Superior Court trial judge treated it as a motion to suppress. *Johnston* at pg. 2.

after full briefing and argument by the parties…; it supported its decision with a reasoned opinion; and the decision was subject to an immediate appeal [under PC §1538.5(j)], even though Appellant decided not to pursue an appeal."

Both *Schmidlin* and *Johnston* are distinguishable because they involved motions to suppress. In California, a denial of a motion to suppress creates a right of appeal before conviction, while in a felony it does not. Appellants case was a felony prosecution and his motion was for dismissal. Thus, PC §1538.5(j) was inapplicable and no right of appeal ever ripened for Appellant because the AG terminated this right when it dismissed the action.

## II. Immunity

### 1. The Respondents, Causes of Action, And Assertions Of Immunity

The NCSD is named as a §1983 defendant in the First Cause of Action. Respondent Nevada County, which is the proper named party on behalf of the NCSD, did not assert Eleventh Amendment qualified immunity for the NCSD.[2] District Court Decision, EOR 7, lines 6-7.

NCSD Deputy King is named as a §1983 defendant in the Third Cause of Action, both in his individual capacity and as an employee of the NCSD.

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[2] The NCSD and the NCDA are agencies of Nevada County. Therefore, Nevada County is properly named as the defendant in the action on their behalf. See *Rojas v. Sonoma County*, 2011 WL 5024551 (N.D. Cal. 2011).

Respondent Nevada County is the proper named party on behalf of King as an employee of the NCSD. No Eleventh Amendment qualified immunity was asserted by either Nevada County or King. District Court Decision, EOR 7, lines 6-7.

The NCDA is named as a §1983 defendant in the Second Cause of Action. Respondent Nevada County, which is the proper named party on behalf of the NCSD, did assert Eleventh Amendment qualified immunity for the NCDA to the extent that the allegations in the Second Cause of Action is based upon the NCDA acting in its prosecutorial capacity. District Court Decision, EOR 7, lines 5-6. In addition, Respondent NCDA asserted "absolute" prosecutorial immunity under the common law.

Respondents Katherine Francis ("DDA Francis") and Gregory Weston ("DDA Weston") are named as §1983 defendants in the Fourth and Fifth Causes of Action. As deputy district attorneys working in the NCDA, they are Nevada County employees. Respondent Nevada County, which is the proper named party on their behalf, asserted Eleventh Amendment qualified immunity for both of them to the extent that the allegations in the Fourth and Fifth Causes of Action are based upon them acting in a prosecutorial capacity. District Court Decision, p. EOR 7, lines 5-6. In addition, Respondent NCDA asserted "absolute"

prosecutorial immunity under the common law.

In summary, there is no pending eleventh amendment immunity assertion for the First and Third Causes of Action. Hence, the further analysis of these causes of action are set forth in Sections III and IV, below.

### 2. Immunity For State Prosecutors Under The Eleventh Amendment Distinguished From Common Law Prosecutorial Immunity

A prosecutor engaged in activity that is "intimately associated with the judicial phase of the criminal process", such as preparation for trial, is absolutely immune from any suit arising out of such prosecutorial conduct. This doctrine arose under English common law and has been consistently applied in federal and state courts to the present day as a matter of public policy. See *Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949). Stated another way: actions that are either part of the judicial process (e.g., deciding whether to charge or not to charge, filing a complaint or indictment, participating in a hearing or trial, or responding to motions) or that are closely associated[3] with the judicial process (interviewing witnesses in preparation for a preliminary hearing or trial) will be considered "advocacy" that is absolutely immune from suit.

A prosecutor is also immune from suit under §1983 because acts of

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[3] The term "quasi-judicial conduct" is also applied to closely associated conduct.

prosecutorial advocacy on behalf of a state government are deemed "state action", and a state government cannot be sued for its action under §1983 because of bar of the Eleventh Amendment. See *Brown v. California Department of Corrections*, 554 F. 3d 747, 752 (9th Cir, 2009).

Not all activities of prosecutors are immune under the common law and not all activities of prosecutors will constitute state action. Prosecutorial immunity depends upon the nature of the activity, not the identity of the person." *Genzler v. Longanbach*, 410 F3d 630, 636 (9th Cir. 2005) ("*Genzler*"). Prosecutors do not have common law immunity when their actions involve administrative functions or investigative functions normally performed by law enforcement. *Genzler* at 636-637.

Although seemingly simple in concept, application of this rule is more subtle and complex. The question cannot be decided merely upon analysis of whether the activity was prior to the prosecutorial act of charging has occurred, even though a prosecutor thereafter assumes a predominantly adversarial role (i.e., the stage of the proceedings is not dispositive). *Genzler* at 637-638. For example, with regard to investigative activities, the U.S. Supreme Court in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) ("*Buckley*"), stated that a prosecutor is not an advocate before he/she has probable cause to make an arrest. *Buckley*. at 274. However, the U.S.

Supreme Court appended a footnote in *Buckley* (p. 274, n5) that even after deciding there is probable cause, a prosecutor may engage in further police type investigative work that is not entitled to immunity. *Genzler* at 637-638.

With the foregoing in mind, Appellant now sets forth an analysis of the Second Cause of Action, then the Fourth And Fifth Causes of Action, to determine if prosecutorial immunity is applicable.

### A. **The Allegations Against The NCDA Only Concern Administrative and Policy Matters, Not Advocacy**

The Second Cause of Action against the NCDA is a companion, parallel count to the First Cause of Action against the NCSD. The Second Cause of action is not premised upon the actions of an individual prosecutor or upon any particular case or any particular prosecutorial conduct. Rather, it is focused upon the general failure of the NCDA to have any policies, practice, procedures, or training concerning digital evidence. This failure affects any case with digital evidence and is not dependent upon the particular facts or alleged wrongdoing in an single case. Nor do these allegations concern state policies, practices, or procedures, just those of Nevada County.

The absence any advocacy or any judicial or quasi-judicial activity in the allegations of the Second Cause of Action means that there can be no absolute prosecutorial immunity under the common law. Similarly, the absence of any

advocacy, judicial, or quasi-judicial activity in the allegations of the Second Cause of Action, coupled with the fact that the allegations only concern Nevada County policies, practices and procedures, means that there is no prosecutorial conduct that bars suit under §1983.

Accordingly, Appellant's discussion of immunity for the Second Cause of Action concerns the matter of qualified immunity under the eleventh amendment and not prosecutorial immunity under the common law. The discussion of the Second Cause of Action continues in Section III, below.

### B. The Allegations Against DDA Francis And DDA Westin Concern Their Failure To Investigate, Not Their Advocacy

The Fourth and Fifth Causes of Action are different from the First and Second because they name individual deputy district attorneys rather than the NCDA. Further, they concern factual allegations of wrongful police type investigative conduct rather than administrative or procedural failures.

As discussed above in Section II.2, prosecutorial immunity (whether under the common law or by a finding of state action barred by Eleventh Amendment form suit under §1983) depends upon the nature of the activity, not the fact that the actor was a prosecutor. *Genzler at* 636. Further, prosecutors are treated as other local government officials when their actions involve administrative functions or investigative functions normally performed by law

enforcement. *Genzler* at 636-637.

A careful look at the Fourth and Fifth Causes of Action reveals that the actual conduct that is alleged to be a violation of Appellant's constitutional rights does not concern prosecutorial discretionary acts related to the charging, prosecution, or trial of Appellant's case. Rather, these allegations involve the failure to take any action, or even to communicate with the NCSD, to confirm that: (a) a forensic copy of the entire contents of the Flip video camera had been made by the NCSD; (b) that the NCSD had provided the NCDA with a complete copy of the Digital Evidence in the Flip camera; or (c) whether there was any exculpatory video on the Flip video camera. Complaint, EOR 102-103, ¶¶ 75, 81. In short, Appellant alleges that DDA Francis and DDA Westin failed to properly conduct the "police like" portion of their investigative work. This was a failure to perform their normal investigative/administrative functions that they are required to perform in every criminal investigation.

Prosecutors are entrusted with special powers and they are sworn, as the representative of the state, is to see that justice is done. The prosecutor has the obligation to ensure that the pre-trial process is carried out in a manner that discovers the truth about the accusations. *Kyles v. Whitley*, 514 U.S. 419 (1995). "This in turn means that the individual prosecutor has a duty to learn of any

favorable evidence known to the others acting on the government's behalf in the case, including the police." Id. at 437-438.

Before a prosecutor charges a crime, he/she is supposed to carry out an investigation in cooperation with law enforcement and persons involved in the incident. This is supposed to be a neutral evaluation to discover the facts. It does not entail any decision about whether to charge or for what crime, how to conduct a prosecution, or any trial conduct. If a prosecutor does not conduct any investigation before charging or, as in this case, knowingly avoids investigating critical evidence that could be determinative that has been brought to the attention of the prosecutor by the police or persons involved in the incident, there is simply no basis for the prosecutor to exercise his/her discretion in deciding whether to charge. It would be the same as flipping a coin to make the decision. Prosecutors have a duty to do more than use pure chance to decide whether to prosecute. We base our criminal justice system on the presumption that prosecutors will carry out their investigative responsibilities in a conscientious manner before charging a crime. And even after a crime is charged, that purely investigative function continues so that the prosecutor will look at new evidence that might completely change the nature of a case and even lead to a dismissal.

Obviously, there can be no simple rule about what type or extent of

investigation needs to be conducted. On the other hand, there is clearly a duty to perform a responsible investigation so that a prosecutor has a meritorious basis to decide whether to charge or not charge a crime. Appellant is not arguing that an investigation has to be perfect or that all evidence must be reviewed before a charging decision – those things are not practicable. What Appellant is arguing is that a prosecutor must fulfill their administrative and investigative responsibilities as a predicate to exercising his/her advocacy functions. Otherwise, our system of entrusting the power to enforce the criminal law to individual prosecutors depends upon prosecutors making a good faith effort to investigate the facts so that they can exercise their discretion to prosecute.

Where, as here, the prosecutors failed to carry out the basic function of making an investigation of the facts, there has been a violation of Appellant's due process rights.

3. **Qualified Immunity Under The Eleventh Amendment**

In addition to the prosecutorial immunity discussed above, qualified Immunity was asserted by Respondent Nevada County on behalf of the NCDA for the Second Cause of Action and on behalf of DDA Francis and DDA Westin for the Fourth and Fifth Causes of Action. Appellant's analysis of the assertion of qualified immunity begins with this Court's recent decision in *Goldstein v. City of*

*Long Beach*, 715 F. 3d 750 (2013) ("*Goldstein*").

The *Goldstein* decision begins with a detailed analysis of when a local government may be liable under 42 U.S.C. § 1983 for constitutional torts committed by its officials according to some policy, practice, or custom (or lack thereof). This Court held that a local government is liable for the conduct of one of its departments (or employee) when that department (or employee) has final policymaking authority for the matter at issue and was the appropriate policymaker to hold accountable for the alleged wrongful conduct or failure. *Goldstein* at 753-754.[4]

In this case, there is no dispute that the NCSD has policymaking authority for its "evidence" related policies, practices, procedures, and related training and is the appropriate policy maker to hold liable in this regard. Presumably, this is why Respondent Nevada County did not assert any eleventh amendment immunity for the allegations against the NCSD in the First Cause of Action.

There has also been no dispute that the NCDA has policymaking authority for its "evidence" related policies, practices, procedures, and related training and is

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[4] See also, *Haugen v. Brosseau*, 351 F. 3d 372, 393 (9th Cir. 2003); *Brewster v. Shasta County*, 275 F.3d 803, 807-808 (9th Cir. 2002); *Carter v. City of Carlsbad*, 2011 WL 2601027 pg. 9-10 (S.D. Cal. 2011); *Womack v. County of Amador*, 551 F. Supp. 2d 1017, 1026-1027 (E.D. Cal. 2008) ("*Womack*").

the appropriate policy maker to hold liable in this regard. However, Respondent Nevada County argues that there is eleventh amendment immunity for the NCDA because, in its view, the allegations in the Second Cause of Action "involved prosecutorial activities". District Court Decision, EOR 7, line 25, to EOR 8, line 2. Appellant disputes that the allegations of the Second Cause of Action involve prosecutorial activities. Accordingly, this Court is presented with the issue of whether these allegations involve essentially "administrative" or "prosecutorial" conduct.

In *Goldstein*, this Court found, after an exhaustive analysis of the relevant California constitutional and statutory provisions, that California district attorneys act as local policymakers when adopting and implementing internal policies and procedures related to the use of "jailhouse informants". *Id*. at 755-755. There is little purpose here of repeating the legal analysis. The same constitutional provisions and statutes apply to this case. In the words of the *Goldstein* decision: "[t]aking all of these provisions together, it is clear that the district attorney acts on behalf of the state when conducting prosecutions, but that the local administrative policies challenged by *Goldstein* are distinct from the prosecutorial act." *Id*. at 759.

The only difference between *Goldstein* and this case is that *Goldstein*

involved the failure to establish an administrative system for jailhouse informant information, whereas in this case there was a failure to establish any policies, practices, procedures, and related training for digital evidence. Just as in *Goldstein*, the subject matter of the allegations are the policies, practices and training for evidence in the investigative phase of cases, specifically the handling and preservation of evidence. There are no policies or training practices here that involve obvious prosecutorial activity such as how to authenticate evidence at trial, or how to mark and introduce physical evidence, or what provisions of the California Evidence Code may pertain to particular evidence, or the rules for the suppression of evidence.

Appellant's allegations focus on the absence of any policies, practices, procedures, and related training for digital evidence handling in the investigative phase, not the liability phase, of his case. Appellant alleges that it was this failure that allowed King to tamper with the video evidence, thereby providing the basis for the false premise that Appellant, not Benzine, was the aggressor. This clearly had nothing to do with "prosecutorial strategy". This was a purely administrative problem that led to the violation of Appellant's constitutional rights.

## III. The First And Second Causes Of Action: Liability for Failure to Have Policies, Practices, Procedures And Training To Preserve Evidence

Appellant has articulated claims in the first and second causes of action that are based upon the deliberate indifference and reckless disregard of Nevada County for the constitutional rights of the Appellant. Neither the NCSD nor the NCDA had any policies, practices, procedures, or training whatsoever for digital evidence. The absence of any administrative capability for this type of evidence violated the constitutional rights of Appellant under the Fourth (the right to liberty) and the Fourteenth (due process) amendments as the direct and proximate cause of his wrongful arrest, detention, and lengthy prosecution.

### 1. Obligation To Disclose Exculpatory Evidence

The fundamental due process right of a criminal defendant to exculpatory evidence in the possession of the prosecution is without question. *Brady v. Maryland*, (1963) 373 U.S. 83 ("*Brady*"). This right exists regardless of whether the defendant makes a specific request, a general request, or no request at all. *Brady* at p. 87, and *United States v. Agurs*, 427 U.S. 97, 107 (1976). The disclosure obligation extends to the entire contents of the prosecutor's case file and "any favorable evidence known to the others acting on the government's behalf ...." *Kyles v. Whitley*, 514 U.S. 419, 437. The Courts have consistently refused to distinguish the prosecutor's office *from the other police or administrative agencies*

*involved in the investigation*.[5] See *United States v. Auten*, 632 F. 2d 478, 481 (5th Cir. 1980); *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391-392 (7th Cir. 1985). As in this case, that includes both the NCSD and the NCDA.

2. **Obligation to Preserve Evidence**

The due process obligation to *preserve evidence* on the part of the prosecution and cooperating agencies emerged from the application of the *Brady* due process doctrine. See *People v. Hitch*, 12 Cal. 3d 641, 652 (1974) ("*Hitch*"), citing to *United States v. Bryant*, 439 F. 2d 642, 647-648 (1971) ("*Bryant*").[6] Although subsequent decisions have limited the *remedy* of defendant for a violation in a particular case,[7] the due process right of a defendant to have

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[5] Although the court's have repeatedly held that the prosecutor has the ultimate responsibility for disclosure of all exculpatory evidence to a defendant. See *United States v. Auten*, 632 F. 2d 478, 481 (5th Cir. 1980); *In Re Brown*, (1998) 17 Cal. 4th 873, 879.

[6] In *Bryant*, the D.C. Court of Appeals reasoned: "It is most consistent with the purposes of those safeguards to hold that the duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question. Otherwise, disclosure might be avoided by destroying vital evidence before prosecution begins or before defendants hear of its existence. *Hence we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation*." (Emphasis added.)

[7] See *Hitch* where the loss of a breath analyzer ampoule led to the suppression of the breathalyzer evidence, it did not result in the dismissal of the case against the defendant. Of course, see also the decisions in *California v.Trombetta*, 467 U.S. 479 (1984) ("*Trombetta*"), and *Arizona v. Youngblood*, 488 U.S. 51 (1988) ("*Youngblood*"), requiring a showing of bad faith destruction of

evidence preserved continues undiminished. Thus, both the NCSD and the NCDA had, and continue to have, a constitutional obligation to preserve evidence.

### 3. Obligation To Implement Appropriate Policies, Practices, Procedures, and Training

This distinct issue in this case, i.e., whether the due process rights of a defendant include an obligation on the part of a district attorney's office and investigative agencies to adopt and follow appropriate policies, practices, procedures, and training to protect and preserve evidence, has not, to Appellant's knowledge, been the subject of an appellate decision. However, the issue was addressed in the dissenting opinion of Justices Blackmun, Brennan and Marshall in *Arizona v. Youngblood* at pp. 65-66, where Justice Blackman wrote as follows:

> In both *Killian* and *Trombetta*, the importance of police compliance with usual procedures was manifest. Here, however, the same standard of conduct cannot be claimed. There has been no suggestion that it was the usual procedure to ignore the possible deterioration of important evidence, or generally to treat material evidence in a negligent or reckless manner. Nor can the failure to refrigerate the clothing be squared with the careful steps taken to preserve the sexual-assault kit. The negligent or reckless failure to preserve important evidence just cannot be "in accord with ... normal practice."

The obligation under due process for an investigative agency to preserve evidence with "normal practice" was further expounded by Justice

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evidence.

Blackmun with the following conclusions about the balancing of the burdens of preservation against the right of a defendant:

> Due process must also take into account the burdens that the preservation of evidence places on the police. Law enforcement officers must be provided the option, as is implicit in Trombetta, of performing the proper tests on physical evidence and then discarding it.FN7 Once a suspect has been arrested the police, after a reasonable time, may inform defense counsel of plans to discard the evidence. When the defense has been informed of the existence of the evidence, after a reasonable time the burden of preservation may shift to the defense. There should also be flexibility to deal with evidence that is unusually dangerous or difficult to store. *Youngblood* at 71.

4. **Balance Of Burden Of Preservation Against Rights Of Accused**

Here, Appellant alleges that a county sheriff's department failed to provide any training, practices or procedures (i.e., in the words of Justice Blackmun "normal practices") that could prevent the destruction of digital evidence, whether by accident or by intentional conduct.

Police around the country are trained in evidence handling techniques that have become the accepted, universal standard of practice for most types of evidence. For example, the use of evidence storage rooms with controls over access to the evidence; the use of labeling and identification to enable tracing of the evidence to where it was located (e.g., the now familiar "bag it" by police characters); control of environmental factors such as temperature, light, and humidity; the methods for collecting and preserving fingerprints; the methods for

collecting tissue and fluid samples of DNA; and so forth.

The public rightfully expects law enforcement to adapt with the progress of technology and to implement new policies, practices, procedures, and training as necessary to provide a relevant and adequate evidence handling capability. Preservation of digital evidence has become an increasing matter of importance and the proper methods for examining and testing digital evidence will only become more pronounced and vital issues as to its admissibility.

The wisdom of Justice Blackmun's dissent in *Youngblood* presaged the very situation in this case. The burden to the NCSD of having kept up with the times by implementing the necessary policies, practices, procedures or training for digital evidence was nominal compared to the due process nightmare suffered by Appellant. A simple departmental policy and procedure for making copies of digital evidence before conducting any potentially destructive examination of the evidence is just inexpensive common sense.[8] Unfortunately, the nominal burden to the NCSD was wrongfully placed far above the due process rights of Appellant (and others like him), such that he has now incurred far more cost in dollars in this single case than it would have cost the NCSD to implement a complete, department

[8] The making of backup copies of digital files has been the everyday practice of the general public for many years. Courts and lawyers are expected to make backup copies. Little children learn how to make backup copies.

wide, package of policies, practices, procedures and training. What is most unfortunate in the balancing of the burden vs. due process rights in this case is the inestimable cost to Appellant. To this day, he has been unable to obtain work because he has to "check" the box on every employment application that asks if he was arrested for a felony; to this day, he remains ruined financially; to this day, he watches the emotional and financial strain on his marriage and family.

When the burden of providing proper systematic evidence handling is so small compared to the dramatic potential harm to an accused, the due process clause requires law enforcement agencies to ensure that they have adopted reasonable measures to safeguard digital evidence from inadvertent or intentional loss or damage. The failure to have done so in this instance was a violation of Appellant's due process rights under the fourteenth amendment and Appellant has stated an appropriate cause of action for his resulting damages under §1983.

5. **The NCSD And The NCDA Had A Duty To Protect Appellant's Due Process Rights With Reasonable Policies, Practices, and Procedures For Preserving Digital Evidence**

Appellant has concisely and clearly alleged that the NCSD (Count 1) and the NCDA (Count 2) failed to have policies, practices and procedures to ensure the proper handling of evidence, including the training of officers and the communication of all of the evidence to the prosecutor. This failure is a clear act

of deliberate indifference and a reckless disregard to its constitutional obligations *with respect to gathering and protecting digital evidence.* These failures by the NCDA and NCSD violated the constitutional rights of Appellant and the Respondent's Motion to Dismiss must be denied.

### A. **The NCDA Is Responsibility For Implementing The Necessary Policies and Practices**

As stated in *In Re Brown,* (1998) 17 C. 4th 873, at 879, the rule laid down by the U.S. Supreme Court in *Kyles v. Whitley*, supra, 514 U.S. at p. 438, is clear:

> In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that 'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.' [Citation.]" (Kyles, supra, 514 U.S. at p. 438.

This is a "bright line" responsibility to establish practices, procedures and regulations as necessary to ensure that all relevant evidence is communicated from the investigative agency (NCSD) to the prosecution (NCDA). If this responsibility had been met in this case, Appellant would not have been deprived of his constitutional rights.

## IV. Liability For The Allegations In The Third Cause Of Action

In the Third Cause of Action, Appellant alleges three specific types of wrongdoing by King regarding the video evidence taken into custody at the incident scene by King.

### 1. King Was Obligated To Preserve The Evidence

The first allegation of wrongdoing by King is set forth in the Complaint, EOR 100, ¶ 65. Here, Appellant alleges that King failed to make a copy of the digital evidence before conducting any investigation of the video. This allegation is premised upon the obligation of King to properly preserve evidence (i.e., make a copy to examine so that the original evidence remained intact), that this failure was a direct and proximate cause of the violation of Appellant's constitutional rights, and that a reasonable person in King's capacity would have known about the obligation to preserve evidence and what procedures should have been followed. Obviously, this allegation follows the premise of liability for the First Cause of Action against the NCSD.

As alleged in ¶¶15-19 of the Complaint, EOR 87-88, it was established practice among law enforcement at the time that digital evidence first be copied before being examined because digital evidence is easily damaged or altered. Appellant intends to prove that King knew, or should have known, the appropriate

procedures for safeguarding and preserving digital evidence so that Appellant's constitutional rights would not be violated.

2. **King Is Liable For Suppression of Video Evidence**

Next, Appellant alleges in ¶ 68 of the Complaint, EOR 100, that King only transmitted a small portion of the video footage to the NCDA. The rest was either destroyed or never transmitted to the NCDA. This suppression was a further violation of Appellant's due process rights.

A. **Liability Under *Russo v. Bridgeport***

This suppression of evidence can be examined under either the *evidence tampering* analysis of *Deveraux* (see below), or under the evidence suppression analysis in *Russo v. Bridgeport*, 479 F.3d 196 (2nd Cir. 2007) ("*Russo*"). Both decisions begin with determining whether the alleged conduct was protected by qualified immunity under *Saucier v. Katz*, 533 U.S. 194 (2001). [A qualified immunity analysis is set out under Section IV.3.A directly following this discussion of *Russo*.] Once there is a finding that there is no qualified immunity for the alleged conduct, then either *Russo* or *Deveraux* can be applied.

The District Court mentioned, but did not analyze the allegations under the *Russo* decision with a clear explanation. District Court Order, EOR 11, lines 21-26. Russo was a suspect in an armed robbery of a gas station. He was

picked out of a line up by the station attendant as the perpetrator. The robbery had been video taped by a security camera. However, the police suppressed this video and later said that they didn't look at it because the station attendant had identified Russo as the perpetrator. The video went without careful examination by the Police or the district attorney for four months. Finally, due to defense counsel's continuing "insistence", the prosecutor actually watched the videotape. The following day the police confirmed that Russo was innocent. Russo sued under §1983 and the Second Circuit Court of Appeal upheld Russo's complaint against two officers. The key to the Russo decision was the holding of the Second Circuit that Russo was protected under the constitution "from a sustained detention stemming directly from the law enforcement officials' refusal to investigate available exculpatory evidence." *Russo* at 208.

The parallels to this case are obvious: the police suppressed the video and refused to examine it carefully to determine the innocence of the accused. It was not until defense counsel demanded that the prosecutor look at the video that the obvious truth of Russo's innocence was discovered by the prosecutor. The case was immediately dismissed.

In this case, King knew about the suppression of the evidence because he was the one who edited the Flip video and created the misleading "clip" that was

sent to the NCDA. Unlike in *Russo*, where the prosecutor finally did look at the video and dismissed, in this case DDA Francis and DDA Westin refused to ever look at the evidence. It was not until the California AG was substituted for the NCDA that the Flip video was examined and this case promptly dismissed.

The main difference between this case and *Russo* is that here DDA Francis and DDA Westin joined with the NCSD and King in perpetuating the suppression of the evidence. In this sense, the violation of Appellant's constitutional rights is far more egregious and the damage to Appellant far greater.

3. **Liability Under *Devereaux* For Evidence Tampering**

Finally, Appellant alleged that King intentionally downloaded editing software and then edited the video footage, creating a short "clip" that was sent to the NCDA, while King did not transmit to the NCDA the remaining exculpatory video taken by Mrs. Pellerin. See Complaint, EOR 89, 100-101, ¶¶ 23, 66-67, 69. The purpose of this editing was to create a video clip that did not show what really happened at the incident (i.e., that Appellant was attacked, not *vice versa*) and to cast the Appellant in as poor a light as possible.

This Court has specifically enunciated in the context of a §1983 action that: "there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by

the government." *Deveraux v. Abbey*, 263 F. 3d 1070, 1074-75 (9th Cir. 2001) ("Deveraux"). The District Court's decision, however, mistakenly found that Appellant's allegations failed to meet either part of the two part test established by this Court in *Deveraux*. District Court Decision, EOR 12, line 8, to EOR 13, line 11.

The following discussion walks through the *Deveraux* multi-step analysis and established that Appellant's allegations establish an action for liability under §1983 for evidence tampering.

A. **Qualified Immunity Test**

The first step is to decide if King is protected by qualified immunity under *Saucier*. This requires a two part test. The first prong requires a determination whether "[t]aken in the light most favorable to the party asserting injury, ... the facts alleged show the officer's conduct violated a constitutional right." *Id*. at 200-201. In *Deveraux*, this Court established that evidence tampering violates a person's constitutional right not be prosecuted based upon false evidence:

> Undertaking the first step of the two-step qualified immunity inquiry, we are persuaded that there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government. *Deveraux* at 1074.

Appellant's allegations more than meet this test. King is accused of intentionally downloading video editing software, then creating a small "clip" (1:16 minutes long) that was missing the exculpatory footage that showed Benzine attacking Appellant, then deleting some portions of the video, and then only transmitting the "clip" to the NCDA. If King had not tampered with the evidence and sent the entire video to the NCDA, Benzine, not Appellant would have been charged with assault and battery.

### B. **Reasonable Knowledge Or Belief That Rights Of Accused Were Being Violated**

With the first test for qualified immunity met, the second step is to determine whether the alleged wrongdoer, King, could have reasonably believed that his conduct did not violate the Appellant's rights. *Id*. at 1074. In other words, was the right to preservation of evidence "clearly established" such that the contours of the right were already known with sufficient clarity to make a reasonable officer in similar circumstances as King aware that what he was violating Appellant's rights.

In this case, the due process right to the preservation of evidence, if not express from the language of the US constitution itself, certainly hails from a fundamental right to a fair hearing and the right to present evidence in one's own defense. Arguably, since the time of *Brady*, and certainly since *Hitch*, the due

process right to preservation of evidence has been expressly expounded by many courts for about forty years. Indeed, proper procedures for the preservation of each of the many types of evidence have been in everyday use by law enforcement since the particular type of evidence first became available. For example, fingerprint evidence requires certain techniques for collection and storage. Photographs, documents, audio tapes, etc., all require that the original be preserved and copies made for examination. It should have been obvious to King that the digital video evidence had to be preserved by first making a copy and then only examining/testing a copy. That King knew how to copy the video evidence in this case is proven by the fact that he made a copy of a select portion when he made the one minute, sixteen second "clip". He just didn't copy the entire original, but tried to edit out/delete those portions that proved Appellant was innocent.

### C. **Appellant Has Alleged Sufficient Facts To Show That Police Should Have Known He Was Innocent**

Having met the test for overriding qualified immunity, Appellant has clearly alleged facts that support a claim under the first of the two specific "fact" tests available under *Devereaux.* This first test is whether the allegations (deemed true for purposes of a Rule 12(b) Motion) present a triable question of fact for the jury as to whether King continued the investigation of Appellant despite the fact that he knew or should have known that Appellant was innocent. Appellant has

alleged that the video contains exculpatory footage that shows Benzine attacking Appellant. Complaint, EOR 3, 89, ¶¶ 10, 23-24. Appellant alleged that the video was given to King at the Incident scene by Mrs. Pellerin. Appellant has alleged that King intentionally edited this video and created a short "clip" that he sent to the NCDA that excluded the footage showing that Benzine attacked Appellant and that attempted to cast Appellant in a bad light for the purpose of having Appellant charged with felony battery. Complaint, EOR 89-90, 101, ¶¶ 23-24, 65-69.

This is about as clear cut an example of allegations of intentional evidence tampering for the purpose of having a person wrongly charged as could be found. Appellant has further alleged that he was going to testify later on the day of the incident about a fraudulent loan that he had with an Olympic Mortgage, and further, that Nevada County District Attorney Clifford Newell at that time had $2.5 million in undisclosed personal loans with Olympic that might have been exposed by Appellant's testimony. These facts led the California Court of Appeal to issue an alternative writ granting Appellant's Motion To Recuse the NCDA from the Superior Court case on these same facts. See Complaint, EOR 93-94, ¶¶ 39-42. The California Attorney General substituted in for the NCDA and then dismissed the case for lack of evidence. Complaint, EOR 94, ¶¶ 42-43. The case never even went to a preliminary hearing.

### 4. **Appellant Has Properly Pleaded A §1983 Claim Under *Deveraux***

The District Court found that Appellant "has not cited nor as the court found any case supporting his theory that this manipulation satisfies *Deveraux's* requirement that the police used abusive techniques they knew would yield false evidence." District Court Order, EOR 13.

The District Court Decision is in error because it: (a) entirely skips an analysis under the first of the two possible fact scenarios as just discussed; and (b) mistakenly conflates the factual elements of the two different possible fact tests. As shown above, analysis under the first test shows that the allegations present more than a sufficient factual question for a jury about King's evidence tampering and that it was done with the knowledge and purpose of wrongly charging Appellant with a felony. What is more outrageous than a law enforcement officer framing someone for a felony? Does this not violate due process? Morever, the District Court conflated the language of the second possible *Deveraux* fact test with the words "that the police used abusive techniques they knew would yield false evidence." This is not part of the first test, but the second. Appellant has not argued that he meets the second fact test, and thus, this language is irrelevant and leads to an erroneous conclusion of law.

The District Court failed to understand the basic factual allegations in the

Complaint and the nature of the due process violation under *Deveraux*. The District Court asserted that Appellant "does not allege the evidence was false, merely that it was misleading." Whether the evidence fabricated or altered by King was "false" or "misleading" is not the question. The issue is whether what King did to (or with) the evidence that created the false impression of guilt on the part of Appellant when King obviously knew (or should have known) that the Appellant was innocent. The fabrication of "false" or "misleading" evidence that King knew would create the impression of guilt when King knew (or should have known) that Appellant was innocent is sufficient to hold him liable. "Misleading" is just a degree of "falsity": it is dishonest and violates the due process rights of Appellant. Whether King's evidence tampering resulted in "false" or "misleading" evidence is semantic argument: the fact is that he knew it was not the truth and would lead to Appellant being charged with a felony and not be able to testify that day about Olympic's loan practices.

## V. Liability Under The Fourth And Fifth Causes of Action

The Fourth and Fifth Causes of Action are very similar, but not identical, in their factual allegations about the conduct of DDA Francis and DDA Weston. Appellant alleges that they violated his constitutional due process rights by failing to carry out their respective investigative tasks. For both DDA Francis and DDA

Westin, the allegations are that after notice by Appellant in open court that a video of the incident had been made by Mrs. Pellerin and that this video had been given to King at the scene, they each failed or refused to do anything to examine the video evidence or even to verify that it existed. In other words, they both refused to look at the evidence or even verify if it was in the NCSD evidence room. Further, despite repeated requests by Appellant's counsel to look at the key evidence in the case, neither DDA Francis nor DDA Westin ever did a factual investigation by looking at the Flip video.

As discussed above under Section IV, the conduct in this case is more egregious than that in *Russo* because in that case the prosecutor did promplty look at the video when defense counsel brought it to his attention. Here, no matter how many times Appellant's counsel requested that DDA Francis and DDA Westin look at the Flip video, they refused. Appellant went to the California Court of Appeal for a writ of mandamus for an evidentiary hearing on the Flip video and DDA Westin still refused to examine it. Indeed, DDA Westin admitted that he never looked at the video right up to the time that the AG was substituted. This willful refusal to look at the Flip video is an egregious suppression of evidence and more than provides a basis under *Russo* for liability of DDA Francis and DDA Westin.

In addition to liability under *Russo*, Appellant asserts that DDA Francis and DDA Westin have an *obligation as prosecutors to conduct a reasonable amount of police type investigation both before and after charging*. Prosecutors should never be allowed to hide behind prosecutorial immunity as a means of deliberately avoiding their responsibility to investigate the facts. Without a reasonable investigation of the facts, how can a prosecutor ever begin to decide whether to charge or dismiss a case. DDA Francis and DDA Westin, along with Nevada County, want to allow prosecutors the right to detain and prosecute anyone without evidence under the guise of prosecutorial immunity.

Appellant argues that the responsibility of a prosecutor to gather and preserve evidence includes the obligation to look at the material evidence that is brought to the prosecutor's attention by law enforcement and/or a defendant.[9] Appellant, in letters, motions, and in open court, directed the attention of DDA Francis and DDA Westin to the video evidence taken by Appellant's wife. As alleged in the Complaint, both DDA's refused to look at the video or even confirm its existence. Complaint, EOR 92-93, ¶¶ 34-37. This behavior continued even after

[9] See *United States v. Auten*, 632 F. 2d at 481 and *In Re Brown*, 17 Cal. 4th at 879, note 2. Of course, evidence may be gathered by law enforcement that is not brought to the attention of a prosecutor, and thus, there can be no liability on the part of a prosecutor for the innocent failure to review such evidence.

the issuance of a *Palma* Letter by the California Court of Appeal directing the Superior Court to hold an evidentiary hearing regarding the possible mishandling of this video evidence.

In short, Appellant repeatedly told DDA Francis and DDA Westin over almost 20 months of litigation that if they would look at the video, they would see that Appellant was the victim, not the aggressor. DDA Francis and DDA Westin refused.

By refusing to look at critical evidence that is repeatedly brought to their attention in open court, DDA Francis and DDA Westin willfully placed themselves in a position where they were unable to properly do their work. In order to make the discretionary decision as to whether to charge and/or prosecute Appellant, DDA Francis and DDA Westin had to review at least some evidence. Can they lawfully refuse to look at evidence that they know will likely exonerate Appellant so that they will not have to exercise prosecutorial discretion about what that evidence means?

The facts of this case are unique. After the repeated failure of DDA Francis and DDA Westin to look at the evidence, it became evident that there was a bigger game being played by the NCDA. Appellant was finally able to gather enough information about the "bigger game" and he made a motion in the Superior Court

to recuse the NCDA. The Superior Court denied the motion to recuse, but as discussed above, the California Court of Appeal reviewed the facts presented by Appellant about the conflict of interest and issued an alternative writ granting Appellant's Motion To Recuse. See Complaint, EOR 93-94, ¶¶ 39-42. The California Attorney General finally looked at the video evidence and then decided to dismiss the case without even going to a preliminary hearing. Complaint, EOR 94-95, ¶¶ 43-44.

In this case there is a further factual complication. The failure of DDA Francis and DDA Westin to conduct a police type investigation continued from the outset of the case after arrest (before a complaint was filed) right through to the dismissal of the action. DDA Francis and DDA Westin steadfastly refused to review the video evidence at any time, despite repeated efforts to have them do so. This, however, raises a timing question: does the fact that the investigative failure started before the complaint continued thereafter mean that the failure to investigate the evidence was, therefore, an act of prosecutorial advocacy? This question has not, to Appellant's knowledge, been definitively decided in any case. However, in *Buckley*, the U.S. Supreme Court indicated in a footnote, *Buckley* (p. 274, n5) that even after deciding there is probable cause, a prosecutor may engage in further police type investigative work that is not entitled to immunity. *Buckley*

makes this question one of further fact finding, an extension of the fact finding about other aspects of the "nature" of the prosecutor's conduct.

Appellant argues that this case is the perfect example of what the US Supreme Court had in mind in *Buckley*. Here, there was a fundamental obligation on the part of the two deputy DA's to investigate the facts so that, in the interests of justice, they could then make a decision as to whether prosecution is appropriate. DDA Francis and DDA Westin failed to carry out this investigative obligation. Appellant contends that, just like when the AG finally took over the case, evaluated all of the evidence (including the video), and decided that there was no evidence to warrant even going to a preliminary hearing, if DDA Francis and DDA Westin had looked at the video evidence (i.e., carry out their investigative obligations), that they to would have then dismissed the case. The question for this Court is simple: can a prosecutor hide behind absolute immunity and willfully refuse to do the essential investigative work in order to harm a defendant?

## VI. **Liability For The Sixth Cause Of Action**

The rule for permitting a malicious prosecution action under §1983 is well set out in the *Womack* case, *supra n4*, at 1031-32. Although normally a malicious prosecution action is not cognizable under §1983, there is an exception when a malicious prosecution is conducted with the intent to deprive a person of equal

protection of the laws or otherwise intended to subject a person to a denial of their constitutional rights. *Womack* at 1031.

Appellant has met the threshold requirements for pursuing a malicious prosecution under §1983 by showing that he was prosecuted without probable cause, and further, that this prosecution was intended to deny Appellant his constitutional right of liberty, his right to testify against District Attorney Clifford Newell and Olympic Mortgage, and his right to due process. Complaint, EOR 86, 93-94, 95, 105, ¶¶ 8-11, 39-41, 45, and 88-89.

As pointed out in *Womack*, a Appellant has to meet state law requirements for a malicious prosecution action: namely that it was (1) pursued to a legal termination in Appellant's favor; (2) brought without probable cause; and (3) was initiated with malice. The Complaint at ¶45 shows that the matter was pursued to a legal termination in Appellant's favor when the AG dismissed the charges because: "there is no reasonable likelihood of convicting the Defendant on any charge at trial." The Complaint establishes lack of probable cause at Complaint, EOR 86, 93-94, 95, 105, ¶¶8-11, 45, and 88. And the Complaint establishes in the Complaint that the prosecution was done out of malice. EOR 93-94, ¶¶ 39-41.

The Appellant has met the requirements for a §1983 claim and has pleaded all state law elements. Consequently, the Sixth Cause of Action must be sustained.

## VII. **Pendant State Claims**

### 1. **The Seventh Through Ninth Causes Of Action Were Timely Filed**

The Respondents assert in their Rule 12(b) Motion that Appellant failed to timely assert a claim under California Government Code §911.2, EOR 77-78. Respondents state that Appellant should have filed his claim no later than six months from the date of the first forensic examination on July 27, 2010. However, Respondent ignores the fact that Appellant could not, and did not, know about the nature or extent of the Nevada County's tortuous conduct until after an evidentiary hearing was held in the Superior Court prosecution. It was not until this hearing was held on March 29-30, 2011, that Appellant finally discovered the true facts and extent of the tortuous and unconstitutional acts committed against him.

As pleaded in the Complaint, EOR 93, ¶36, on December 8, 2010, Appellant made a motion for an evidentiary hearing to discover what happened to the digital evidence in his case. The trial court denied the motion. Appellant then filed a petition for a writ of mandate to reverse the denial. The California Third District Court of Appeals issued a Palma letter on March 7, 2011, ordering the trial court to reverse its denial of Appellant's motion for a full evidentiary hearing. The trial court promptly reversed its earlier denial and an evidentiary hearing was held on March 29-30, 2011. *Ibid.* It was at this hearing that Appellant was finally able to

learn most of the facts about the lack of any policies, practices, procedures, or training at the NCSD and the NCDA regarding digital evidence, and the facts about the actual handling of the digital evidence by the NCSD in his case.

This is a classic example of the "discovery" rule whereby a statute of limitations does not begin to run until a party learns about the facts that would constitute the grounds for such cause of action. See *Brandon G. v. Gray*, 111 Cal. App. 4th 29 (2003), review denied (applied the discovery rule to the filing of tort claims under Cal. Govt. Code §911.2). Appellant did not learn about the full extent and nature of the wrongdoing by the Respondents until the March 29-30th, 2011, hearing. Therefore, the limitations period under California Government Code §911.2 did not begin to run until the conclusion of the evidentiary hearing. Appellant filed his claim with Nevada County on May 24, 2011, well within the six months limitations period when measured from the March 29-30th date of the evidentiary hearing.

2. **The Seventh Cause Of Action Alleges Violation Of Constitutional Rights**

Respondents argued in their Rule 12(b) Motion that the Appellant's Seventh Cause of Action under the Bane Act, California Civil Code §52.1(b), EOR 78-80, must be dismissed because there was no violation of his constitutional rights, and if there was, it was not done under threats, intimidation or coercion.

Appellant's allegations clearly establish that multiple constitutional rights were violated, including his liberty, due process, and right to give testimony in court about District Attorney Newell and Olympic Mortgage. See Complaint, EOR 107-108, ¶¶ 95-100.

Appellant also clearly alleged that these violations of his constitutional rights were accomplished by "coercion" when he was arrested, taken to the county jail, and booked, thereby preventing him from testifying at the scheduled hearing about Olympic Mortgage. See Complaint, EOR 86-87, 93-94, 107-108, ¶¶ 11-12, 39-41, 95-100. "Coercion" means to restrain or dominate by nullifying individual will, to compel an act or choice, or to enforce by force or threat. There can be no doubt that the physical taking of Appellant into custody and placing him in jail constituted "coercion" under Civil Code §52.1(b) that prevented Appellant from exercising his constitutional rights.

3. **The Eight And Ninth Causes Of Action**

The Respondent's Rule 12(b) Motion did not directly address the Eighth and Ninth causes of action.

Appellant wishes to direct the Court's attention to *Rojas* at p. 6 where the court dealt with similar state law claims. The *Rojas* court found that Sonoma County, California conceded that liability for such acts is provided under California

Gov. Code §815.2(a) which provides for vicarious liability of a county for the acts of its employees in the scope of their employment. See *Munoz v. City of Union City*, 120 Cal. App. 4th 1077, 1093 (2004).

## VIII. **Conclusion**

Based upon the foregoing, the judgment of dismissal by the District Court must be vacated and Appellant allowed to pursue all of the federal and state causes of action. In the event that this Court finds any of the causes for action deficient, but susceptible to amendment, Appellant requests this Court to allow Appellant to amend.

Respectfully Submitted,

s/ Patrick H. Dwyer
Patrick H. Dwyer, counsel for
Appellant

## STATEMENT OF RELATED CASES

There are no known related cases as per FRAP 28-2.6.

s/ Patrick H. Dwyer
Patrick H. Dwyer, counsel for
Appellant

9th Circuit Case Number(s) 13-15860

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Attorney for Appellant Gregory Pellerin

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