C.A. Case No. 13-15860

UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Gregory Pellerin, Plaintiff And Appellant

vs.

Nevada County, et al, Defendants And Respondents.

APPELLANT'S PETITION FOR REHEARING EN BANC

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

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July 15, 2015

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Issues Presented For Rehearing

The issues presented for rehearing are:

1. Whether the Court misconstrued California law governing collateral estoppel by failing to require that the right to an appeal be exhausted or waived as a prerequisite for the criteria of "finality".
2. Whether the District Court violated Appellants's due process right to "fundamental fairness" when it enforced collateral estoppel against Appellant after his right to appeal had been abridged by events beyond his control.

Statement Of Counsel Of Purpose Of Petition

It is the judgment of counsel for Appellant/Petitioner that this Petition should be heard *en banc* for three reasons:

(a) the use of collateral estoppel terminates the ability to have a claim *heard on the merits*, and thus, the criteria for its use are of the greatest importance in all manner of cases in this circuit;

(b) the Memorandum Decision that is the subject of this Petition ignores the prior decisions of this circuit and is in conflict with other decisions concerning when a decision is "final" for purposes of collateral estoppel; and

(c) there is an absence of any Supreme Court or court of appeal decision on the questions presented and there is a need to establish a national rule.

I. History Of The Collateral Estoppel Argument In This Action

A. The Original Motion To Dismiss In Superior Court

In the Superior Court case, Appellant filed two concurrent motions: a Motion To Dismiss and a Motion to Recuse the Nevada County District Attorney ("NCDA"). The Superior Court denied both. Appellant then concurrently filed two petitions for a writ of mandate.[1] Complaint, EOR 93-94, ¶¶ 38-39.

Faced with concurrent petitions for mandamus, the California Court of Appeal issued an alternative writ of mandate on the Motion to Recuse, along with a summary denial on the Motion to Dismiss. While it is not possible to now read the minds of the appellate court panel, it seems reasonable that it granted the petition on the Motion To Recuse with the hope that an unbiased prosecutor would pursue fairness and justice. This would be a much less radical alternative than granting the petition on the Motion to Dismiss and it would protect both the interests of the Appellant and the People.

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[1] Previously, Appellant had obtained a *Palma* letter from the California Court of Appeal instructing the trial court to grant an evidentiary hearing so that Appellant could gather evidence about the video tampering. Complaint, EOR 92, ¶ 36.

The California Attorney General ("AG") then immediately substituted in for the NCDA as the prosecutor. Complaint, EOR 93-94, ¶¶ 41-42. Promptly after reviewing the evidence, the AG dismissed the case under California Penal Code §1385 in the interests of justice, 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.

Had the AG not dismissed the charges, Appellant would have moved to recuse the trial judge for bias, having twice obtained extraordinary relief from serious irregularities in the proceedings.

B. **Respondent's Use Of Collateral Estoppel**

In the District Court action, Respondents moved to bar all causes of action by applying collateral estoppel to the issues raised in Appellant's prior Motion to Dismiss. EOR 72-74. The District Court granted Respondents' FRCP 12(b) motion. District Court Order, EOR 17. In doing so, the District Court held that the fact that Appellant's right to appeal had been superceded by the AG's dismissal was not a

factor in deciding whether there was finality for preclusion purposes. Rather, the District Court observed that Appellant had filed a petition for mandamus that was summarily denied and that this was sufficient review to establish finality.

Appellant pointed out to the District Court, and later to this Court on appeal, that under California law the summary denial of a writ petition is not a decision on the merits and does not establish law of the case in any respect, and consequently, is irrelevant in deciding if there is "finality" for purposes of collateral estoppel.[2]

Appellant further argued on appeal that the District Court Decision erroneously interpreted and misapplied California law defining "finality" for purposes of collateral estoppel. Appellant argued that the AG's dismissal of the Superior Court action terminated Appellant's right to appeal the Superior Court ruling on the Motion To Dismiss. Appellant correctly pointed out that under California law, *collateral estoppel is not to be applied unless there had been a right to appeal that*

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[2] In *Kowis v. Howard*, 3 Cal. 4th 888, 899 (1992) ("*Kowis*") the California Supreme Court stated that "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."

was either exhausted or waived. Through no fault of Appellant, he was prevented from correcting the trial court ruling. Thus, there is no basis for a determination of "finality" as required for collateral estoppel.

However, in the Memorandum Decision of July 1, 2015 ("Memorandum Decision"), this Court appears to have ignored established California law and affirmed the District Court Decision. First, it did not adhere to the prerequisite for collateral estoppel that *the right to appeal had to be exhausted or waived* . Then, despite the California rule that a denial of a petition for mandamus has no precedential value, see *Kowis* supra note 2, it erroneously observed that Appellant had filed a petition for mandate that was denied. Based thereon, it held that the Superior Court ruling was "sufficiently final" to be accorded preclusive effect.

II. Summary Of California Law Of Collateral Estoppel

A. 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, 1270-1271 (9th Cir. 1990) ("*Ayers*").

The *Ayers* decision, argued in 1989, relied upon the decision of the California Court of Appeal in *McGowan v. City of San Diego*, 208 Cal. App. 3rd 890 (1989) ("*McGowan*") for the criteria to use in deciding if collateral estoppel should apply. The *McGowan* decision centered upon whether a plaintiff's misdemeanor convictions could provide the basis for collateral estoppel in a subsequent civil action under 42 U.S.C. §1983. The *McGowan* factors for applying collateral estoppel cited by *Ayers* were:

> (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 prior conviction is offered must of necessity have been decided at the criminal 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 1271.

In its discussion of the second criteria, i.e., that "there must have been a full and fair" proceeding, the *Ayers* court carefully considered *whether the plaintiff had been given the opportunity to appeal the adverse ruling on a motion to suppress*. The *Ayers* decision specifically found that the plaintiff had "fully exercised his right to appeal" the denial of his motion to suppress in the prior criminal action. Further, it

also found that *Ayers* had then not exercised his statutory right to appeal these rulings after entry of judgment. *Having found that plaintiff had been given the opportunity to appeal the entry of judgment, but had not taken advantage of it, collateral estoppel was properly applied*.

B. Criteria For Collateral Estoppel Under California Law

The *Ayers* decision was followed the next year by the California Supreme Court decision in *Lucido V. Superior Court*, 51 Cal. 3d 335, 341 (1990) ("*Lucido*"). The criteria listed by the *Lucido* Court, although employing somewhat different language, was essentially the same:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. *Fourth, the decision in the former proceeding must be final and on the merits*. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.
>
> *Lucido* at 341.

Comparing the "language" of the criteria used in *Ayers* and *Lucido*, it is apparent that there still had to be (a) identity of the issues; (b) privity, (c) necessity for deciding the issue such that there was an

incentive for the party to be charged to fully litigate the issue, (d) and a *final* decision on the merits.[3]

However, the terminology of a "full" proceeding used in *Ayers* was replaced with the terminology of a "final" proceeding in *Lucido*. But as shown below, there is no practical difference because they both mean that *the right to appeal had been exercised or knowingly waived* before the criteria of finality is satisfied.

C. California Law Has Always Required That There Must Have Been An Opportunity To Appeal Before Applying Collateral Estoppel

California appellate decisions, both before and after *Lucido,* have consistently held that collateral estoppel should not be applied unless the party against which it is sought: (a) had a right to appeal; and (b) either exhausted that right or waived it.

The pre-*Lucido* decision in *Sandoval v. Superior Court*, 140 Cal. App. 3d 932, 936 (1983) ("*Sandoval*") is instructive. Here, the California Court of Appeal premised its holding upon both prior

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[3] In addition to meeting the foregoing, the *Lucido* decision further found that a sixth test must be applied. This test is *whether public policy is served* by the application of collateral estoppel under the particular circumstances of the matter. *Lucido* at 342-343.

California decisions and the principles set forth in the Restatement 2d Judgments. Here is how the *Sandoval* court put the question:

> The Restatement cautions: 'Before [giving carry-over effect], the court should determine that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered. Thus preclusion should be refused if the decision was avowedly tentative. On the other hand, that the parties were fully heard, that the court supported its decision with a reasoned opinion, *that the decision was subject to appeal or was in fact reviewed on appeal*, are factors supporting the conclusion that the decision is final for the purpose of preclusion.' Quoting from Restatement 2d Judgements § 13, Emphasis Added.

The *Sandoval* decision has been repeatedly cited in Court of Appeal decisions regarding collateral estoppel. An example is the post-*Lucido* decision of *Border Business Park Inc. v. City of San Diego*, 142 Cal. App. 4th 1538,1565 (2007) ("*Border*") where the Court of Appeal applied collateral estoppel because, as expressly stated in *Sandoval*, the plaintiff had the opportunity to challenge the ruling, request entry of judgment and then appeal, but knowingly failed to take advantage of this right. Consequently, *there was a final decision subject to an appeal*, and thus, the trial court's ruling had estoppel effect. Here are the Court's words:

> A prior adjudication of an issue in another action may be deemed "sufficiently firm" to be accorded preclusive effect based on the following factors: (1) whether the decision was not avowedly tentative; (2) whether the parties were fully heard; (3) whether the court supported its decision with a reasoned opinion; and (4) *whether the decision was subject to an appeal*. ...
>
> If Border had wished to challenge the ruling, it could have requested entry of judgment and appealed the dismissal of its cross-complaint. ...
>
> Border effectively acquiesced in the ruling by failing to obtain a final judgment and filing an appeal ...
>
> Having decided not to pursue the remedy available to it, it should not now be able to contend that the order is not a final adjudication of the issues it addressed. *Border* at 1565. Emphasis Added.

D. The *Schmidlin* Decision Is Entirely Consistent With *Ayers, Lucido, Sandoval*, and *Border* By Requiring The Exhaustion Or Waiver Of The Right To Appeal

In *Schmidlin v. City of Palo Alto*, 157 Cal. App. 4th 728 (2008) ("*Schmidlin*"), the plaintiff was charged with misdemeanors for public intoxication and resisting arrest. Plaintiff Schmidlin made a motion to suppress evidence under PC §1538.5. The trial court denied the motion and the plaintiff did not exercise his right to an appeal under PC §1538.5(j), thereby making the trial court's ruling final. Plaintiff Schmidlin subsequently filed an action against the arresting officers

and the City of Palo Alto for excessive force in making the arrest. The City of Palo Alto moved to dismiss the civil suit based upon collateral estoppel of an issue decided in the motion to suppress. The *Schmidlin* court, citing directly to *Border*, found that:

> In determining whether a judgment or order satisfies this test, courts look to factors including "(1) whether the decision was not avowedly tentative; (2) whether the parties were fully heard; (3) whether the court supported its decision with a reasoned opinion; and (4) *whether the decision was subject to an appeal."* Border Business Park, supra, 142 Cal. App.4th at 1565. *Schmidlin* at 774. Emphasis added.

The *Schmidlin* court found that there was a right to appeal that had not been exercised and there was otherwise good cause to apply collateral estoppel. *Id.* at 774-775. Thus, there is nothing in *Schmidlin* that distinguishes it from the other California appellate cases. Indeed, this case makes it very clear that the absence of any right to appeal would be grounds for denying collateral estoppel.[4]

E. Other Decisions In California Federal District Courts Acknowledged That The Right To Appeal Is Essential

[4] *Johnston v. County of Sonoma*, C10-03592 CRB, 2012WL381197 (N.D. Cal. 2012) ("*Johnston*") is another misdemeanor case on a motion to suppress. The *Johnston* court found that California trial court's decision was subject to an immediate appeal, but that Johnston did not pursue an appeal.

There are other decisions by the California federal district courts that are in accord with the foregoing California Appellate decisions. In *Conte v. Aargon Agency, Inc.*, 2013 WL 1907722 (E.D. Cal. 2013) ("*Conte*"), the defendants argued that plaintiff's motion to amend to add class action claims was barred by the denial of the same claims in a prior state action. The court focused on the issue of finality and cited to *Border*. In particular, the *Conte* court at p. 2 discussed the requirement that a decision cannot be final unless an appeal from the trial court has been exhausted or the time to appeal has expired. The court found that the decision of the state court regarding denial of class certification was still pending appeal, and thus, it was not final for purposes of collateral estoppel. The Court dismissed the action.

Another example is *Certain Underwriters At Lloyd's Of London v. Mandell, Menkes & Surdyk,* 2008 WL 4291160 (E.D. Cal. 2008) ("*Underwriters*"), where the court also cited to the *Border* decision. *Id.* at p. 9. The *Underwriters* court found that the prior state court decision in Illinois was a bar because:

> Fourth, the decision by the Illinois Court is firm and final. The ruling was not tentative and terminated the proceedings, the judge explained his rationale, the parties

> were fully heard, *and an appeal was taken but later dismissed*; the ruling is therefore final. See Border, 142 Cal. App.4th at 1566. *Id.* at p. 11. Emphasis Added.

In *Allen v. City of Santa Monica*, 2013 WL 6731789 (C.D. Cal. 2013) ("*Allen*"), the district court cited *Schmidlin* for the criteria to use in deciding the element of finality. *Id.* at p. 10. In finding that collateral estoppel was appropriate, the *Allen* court observed:

> Here, all of the above factors favor finality. As noted above, the parties fully litigated Plaintiff's suppression motion, which was denied by the preliminary hearing judge. *Plaintiff thereafter had the opportunity to exercise his right to appeal that adverse ruling, but did not do so.* The determination by the state court is thus sufficiently final for collateral estoppel purposes. Emphasis Added.

Consistent with *Border* and *Schmidlin*, the *Allen* court made a specific finding that there must be a right to appeal that is either exhausted or waived before collateral estoppel may be applied.

F. Decisions Of Other States Also Require The Right To Appeal Before Applying Collateral Estoppel

California is not unique in its requirement that the right to appeal is a prerequisite for applying collateral estoppel. Many, if not most, states follow the criteria in the Restatement 2d Judgments §13. Here are some examples (in alphabetical order).

Arizona: *Clusiau v. Clusiau Enterprises, Inc.*, 225 Ariz. 247 (2010) the Arizona Court of Appeals refused to apply collateral estoppel to a small claims decision, *inter alia,* because:

> Pursuant to Restatement § 28(1), the absence of a right of review may preclude a judgment from gaining collateral estoppel effect. As a comment to the Restatement explains, "the availability of review for the correction of errors has become critical to the application of preclusion doctrine." *Id.* at ¶ 14.

Colorado: *Carpenter v. Young*, 773 P.2d 561 (1989) the Supreme Court of Colorado acknowledged that the right to an appeal was a prerequisite to collateral estoppel:

> In order to be accorded preclusive effect, a judgment must be "sufficiently firm" in the sense that it was not tentative, the parties had an opportunity to be heard, and there was an opportunity for review. Restatement (Second) of Judgments § 13 (1983);... Finally, the entry of summary judgment originally was subject to review. The respondents, however, waived any right to such review when they entered into the settlement agreement. *Id.* at 568.

Connecticut: *Convalescent Center Of Bloomfield, Inc. V. Department of Income Maintenance*, 208 Conn 187 (1988), the Supreme Court refused to apply collateral estoppel to an administrative ruling because:

> The recurrent theme in our collateral attack cases is that the

> availability of an appeal is a significant aspect of the conclusiveness of a judgment. We are persuaded that, without the availability of judicial review, neither the decision of an administrative agency nor that of a court is ordinarily entitled to be accorded preclusive effect in further litigation. *Id.* at 201.

Idaho: *State Of Idaho v. Martinez*, 125 Idaho 445 (1994) the Supreme Court of Idaho rejected a collateral estoppel argument because:

> The 1980 decision was not a final judgment from which there was a right to appeal which could warrant collateral estoppel effect. *Id.* at 450.

Illinois: *People v. Powell*, 349 Ill. App. 3d 906 (2004) the Illinois Court of Appeal overturned a trial court application of collateral estoppel because:

> It is well established that "a judgment is not final for collateral estoppel purposes until the potential for appellate review has been exhausted." *Id.* at 909.

Massachusetts: *Commonwealth v. Scala*, 380 Mass. 500 (1980) the Supreme Judicial Court refused to apply collateral estoppel because there was no right to appeal a suppression motion as follows:

> In sum, we hold that ... where the defendant was not twice placed in jeopardy for the same offense and where the suppression ruling of the District Court judge could not be appealed and was not supported by a record, the application

> of the doctrine of collateral estoppel is not constitutionally required. *Id.* at 508.

Minnesota: *Vangelder v. Johnson*, 827 N.W. 2d 430 (2013) the Minnesota Court of Appeal upheld the use of collateral estoppel after it found that there had been a right to appeal, but it was waived:

> Collateral estoppel applies to waivers of a right to appeal a decision in the same manner that it applies to determinations of issues decided expressly.

III. Due Process And Collateral Estoppel

The concept that a "full" or "final" proceeding is a prerequisite for collateral estoppel is founded upon the due process requirement that a party is entitled to their "day in court", i.e., a fair chance to be heard on the merits. *The reason for this is obvious: collateral estoppel applies to both correct and erroneous decisions*.[5] Fundamental fairness mandates that a party have the right to correct an erroneous decision by appeal before being collaterally estopped.

A. Due Process And Collateral Estoppel Under California Law

California courts have long acknowledged a due process

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[5] See e.g., *Martin v. Martin*, 2 Cal. 3d 752, 763 (1970), holding that '[a]n erroneous judgment is just as conclusive as a correct one'.

foundation for collateral estoppel. For example, in *Clemmer v. Hartford Insurance Company,* 22 Cal. 3d 865, 875 (1978) ("*Clemmer*"), the California Supreme Court stated:

> Notwithstanding expanded notions of privity, collateral estoppel may be applied only if due process requirements are satisfied. Blonder-Tongue, supra; Bernhard, supra; Dilliard v. McKnight (1949) 34 Cal. 2d 209, 214-215.

Although *Clemmer* only concerned only the factor of privity, there is no logical or policy reason why the due process requirement for fundamental fairness should not extend to the requirement that the prior decision must have been subject to the right to appeal. Lawyers and judges understand that, for a variety of reasons, there are some decisions at the trial court level that are erroneous. The concept of a "full" proceeding (see *Ayers*) requires that an initial determination should be subject to review. That is why there is an almost universal ability to appeal the first decision or ruling, whether judicial or administrative. Obviously, if a litigant does not timely pursue review, they cannot then be heard to complain about collateral estoppel in a

subsequent proceeding.[6]

B. The Right To An Appeal Before Applying Collateral Estoppel Should Be Analyzed Under Due Process

While it is true that an appeal is not a constitutional right under either the United States or California constitutions, see e.g., *Luckenbach Steamship Co. V. United States*, 1926 727 U.S. 533. 536; *Leone v. Medical Board Of California*, 22 Cal. 4th 660, 666-668 (2000), it does not necessarily follow that due process is not the basis for analyzing whether the right to appeal is a mandatory requirement for applying collateral estoppel.

Appellant cannot find any California or United States Supreme Court decision deciding the question put here. However, the *Clemmer* decision indicates that the California Supreme Court would, if faced with the question, would apply the "fundamental fairness" concept. Similarly, the dicta of the United States Supreme Court in *Allen v. McCurry*, 449 U.S. 90, 95 (1980), indicates that it would also find that

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[6] The recent decision by the California Court of Appeal, *Murphy v. Murphy* (2008) 165 Cal. App 4th 376, 404, followed in the same line of California cases and analyzed the *Lucido* factors as due process considerations. See also, *Mooney v. Caspari,* 2006 138 Cal App 4th 704, 717.

the exhaustion or waiver of a right to appeal to be essential to a finding of "finality" if the question was presented:

> But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case. Montana v. United States, supra, at 153, 99 S.Ct., at 973.

IV. This Court's Memorandum Decision Ignores California Law And Violates Fundamental Fairness

The Memorandum Decision misreads and misconstrues *Schmidlin*. As noted above, *Schmidlin* follows *Border* and cites the same criteria that go back to before the *Sandoval* and *Lucido* decisions. The pertinent facts in *Schmidlin* are clear: the plaintiff had a right to appeal and he did not exercise it. Thus, as the *Schmidlin* court observed, there was finality and collateral estoppel applied. If you reverse these critical facts (as they are in this case where Appellant, through no fault of his own, was prevented from exercising the right to appeal), then the *Schmidlin* court would have refused to apply collateral estoppel.

Not only did the Memorandum Decision ignore California decisions, it ignored other California federal district court cases that did

follow California law. A good example is the decision in *Conte* where the district court found that the state court appeal was not final, and therefore, collateral estoppel could not be applied. The contrary holding in this case inappropriately strays from the law of this circuit as established in *Ayers*.

The District Court 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.

V. Conclusion

The Memorandum Decision is an anomaly without jurisprudential support: Appellant has not found a single example where collateral estoppel was applied *when an appeal had not been exhausted or waived*.

Moreover, the due process requirement of "fundamental fairness" is the foundation stone for all of the criteria used in determining if collateral estoppel should apply. The Court simply needs to ask itself whether it is fair to deprive Appellant of the ability to obtain a decision on the merits of his claims when he had no opportunity to challenge the erroneous decision of the trial court.

Based upon the foregoing, this Petition should be granted and this Court should rehear the Memorandum Decision.

Respectfully Submitted,

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

Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1

Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer

(signature block below)

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

X Proportionately spaced, has a typeface of 14 points or more and contains 4,120 words (petitions and answers must not exceed 4,200 words).

or

___ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

___ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant

(New Form 7/1/2000)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY PELLERIN, an individual, Plaintiff - Appellant, v. NEVADA COUNTY, California, a county government; et al., Defendants - Appellees.	No. 13-15860 D.C. No. 2:12-cv-00665-KJM-CKD MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, District Judge

Argued and Submitted April 15, 2015
San Francisco, California

Before: SCHROEDER and N.R. SMITH, Circuit Judges and GLEASON,** District Judge.

Gregory Pellerin appeals from the district court's judgment dismissing his six 42 U.S.C. § 1983 claims and three causes of action under California law, all of

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

** The Honorable Sharon L. Gleason, District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

which arose out of his arrest and criminal prosecution in California Superior Court. We review de novo the dismissal of an action under the doctrine of collateral estoppel. *McQuillion v. Schwarzenegger*, 369 F. 3d 1091, 1096 (9th Cir. 2004). We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

Pellerin was arrested and charged with felony assault, felony battery, and misdemeanor false imprisonment by violence. His wife videotaped the incident, then gave the videotape to the responding police officer. Pellerin has alleged that the Sheriff's Department improperly edited the video and the District Attorney's Office refused to review the exculpatory portion of the video in violation of his constitutional rights. Pellerin moved to dismiss the criminal case on these bases, among other grounds. After a two-day evidentiary hearing, the Superior Court denied Pellerin's motion. Pellerin sought mandamus review to the California Court of Appeal, which issued an alternative writ granting Pellerin's request for recusal of the District Attorney's Office. Several months later, the State dismissed the case.

In the instant case, the district court granted the defendants' motion to dismiss Pellerin's civil rights claims pursuant to Fed. R. Civ. P. 12(b)(6), holding, *inter alia*, that the § 1983 claims were precluded by collateral estoppel. The district court declined to exercise jurisdiction over the remaining state law claims. If the district court did not err, the parties would be bound by the following factual

findings: (1) no continuous video existed on Pellerin's phone; (2) no evidence supported the conclusion that law enforcement created any gaps in the video; (3) no videos were deleted from the phone; (4) the arresting officer's editing of the video, while not best practices, was not intentional and was not misconduct; (5) Pellerin had complete access to the flip phone prior to trial; and (6) no party acted in bad faith or committed intentional misconduct, because the video was not clearly exculpatory. These facts would preclude Pellerin from pursuing Claims 3 through 6 in his complaint. While they may not fully preclude liability on Claims 1 and 2, these facts demonstrate that there would be no harm from any constitutional violation that Pellerin could prove.[1] Accordingly, whether collateral estoppel applies is dispositive in this case.

"State law governs the application of collateral estoppel or issue preclusion to a state court judgment in a federal civil rights action." *Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990). The threshold requirements for application of collateral estoppel under California law are:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily

[1]Even if we were to find that Claims 1 and 2 were not precluded, we would hold that Pellerin failed to demonstrate a municipal policy causing his injuries on Claim 1 and that the Nevada County District Attorney's Office was entitled to prosecutorial immunity on Claim 2.

> decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Lucido v. Superior Court, 51 Cal. 3d 335, 341 (1990). In addition, "application of issue preclusion must be consistent with the public policies of 'preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.'" *White v. City of Pasadena*, 671 F.3d 918, 927 (9th Cir. 2012) (quoting *Lucido*, 51 Cal. 3d at 343).

Here, the parties dispute whether the fourth requirement has been met – whether the decision in the former proceeding was final and on the merits.[2] Pellerin argues that when the State dismissed his criminal case, it terminated Pellerin's right to appeal the earlier adverse ruling on his motion to dismiss, and as a result there can be no finality for collateral estoppel purposes.

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[2]In a footnote in Pellerin's opening brief, he "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 he "reserves the right to further respond . . . if Respondents argue this point[.]" In Pellerin's reply brief, he again raises this issue only in a footnote, stating that "it is unnecessary to argue these issues when Appellant's right to appeal never matured." This argument is waived. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. . . . [A] bare assertion does not preserve a claim, particularly when . . . a host of other issues are presented for review."); *Rodriguez v. Airborne Express*, 265 F.3d 890, 894 n.2 (9th Cir. 2001) (raising argument only in footnote was insufficient to raise issue on appeal).

In *Schmidlin v. City of Palo Alto*, the California Court of Appeal identified four factors to consider in assessing finality for collateral estoppel purposes: "(1) whether the decision was not avowedly tentative; (2) whether the parties were fully heard; (3) whether the court supported its decision with a reasoned opinion; and (4) whether the decision was subject to an appeal." 157 Cal. App. 4th 728, 774 (2008) (citation omitted). A prior adjudication is "sufficiently final to support preclusion if it is determined to be sufficiently firm to be accorded conclusive effect." *Id.* (internal quotation marks and citations omitted).

Pellerin relies on *Ayers v. City of Richmond* to assert that a party must have had the opportunity to appeal the ruling or judgment in order for the finality requirement to be met. 895 F.2d at 1271. But we do not read *Schmidlin* or *Ayers* to require that there must be a right to appeal in every circumstance in order for the finality requirement to be met. Rather, each case requires a consideration of each of the four *Schmidlin* factors to determine if the prior ruling is sufficiently final so as to be accorded preclusive effect.

Here, the Superior Court's decision on the record denying the motion to dismiss was thoroughly reasoned (albeit not in a written opinion); the court's decision was not tentative. The parties were fully heard at an evidentiary hearing and in briefing and oral argument. This is not a case where a routine pretrial order is being invoked to preclude a range of issues never fully litigated. And while

Pellerin did not have a right to appeal the denial of his dismissal motion, he did elect to pursue mandamus review. Lastly, we have no record to suggest that Defendants manipulated proceedings (by dismissing the criminal charges against Pellerin) in order to cut off Pellerin's right to appeal. Pellerin is in no worse position than if he had been acquitted of the charges. In these circumstances, the Superior Court's order is sufficiently firm and on the merits so as to be accorded conclusive effect with respect to Pellerin's § 1983 claims.[3]

AFFIRMED.[4]

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[3]Because we find that Pellerin is collaterally estopped from pursuing his § 1983 claims, we do not reach the parties' additional arguments. The district court did not err in declining to exercise jurisdiction over the state law claims. A district court can decline to exercise supplemental jurisdiction when the district court "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3).

[4]Appellees' Motion Requesting Judicial Notice of the October 21, 2013 Opinion of the California Court of Appeal in *People v. Pellerin*, No. C072654, is denied as moot.