No.

In The

Supreme Court Of The United States

Gregory Pellerin,

Petitioner,

v.

Nevada County, California, et al,

Respondents.

On Petition For Writ Of Certiorari

To The

United States Court of Appeals
For the Ninth Circuit

Patrick H. Dwyer
Counsel of Record
P.O. Box 1705
17318 Piper Lane
Penn Valley, CA 95946
530-432-5407

Attorney for Petitioner
November 9, 2015

Questions Presented

Did the court below correctly determine and apply California law regarding the exhaustion or waiver of the right to appeal as a prerequisite to the use of collateral estoppel?

Does the principle of fundamental fairness under the 14th Amendment require that a party to be collaterally estopped has either exhausted or waived a right to appeal, regardless of any state law to the contrary?

Parties To Proceeding

Gregory Pellerin, an individual

Nevada County, California, a county government

Jesse King, in his official capacity as a deputy sheriff and as an individual

Deputy District Attorney Gregory Weston, in his official capacity as a deputy district attorney and as an individual

Deputy District Attorney Katherine Francis, in her official capacity as a deputy district attorney and as an individual

Table Of Contents

Table of Authorities

Page

United States Supreme Court

United States Court of Appeals

United States Constitution

Federal Statutes

California Court of Appeals

Decisions Of Other States

Petition for a Writ of Certiorari

Gregory Pellerin respectfully petitions the United States Supreme Court for a writ of certiorari to review the denial by the United States Court Of Appeals For The Ninth Circuit of a Petition For Rehearing En Banc of decision of the United States Court Of Appeal For The Ninth Circuit affirming a judgment of dismissal by the United States District Court for the Eastern District of California in the matter of *Gregory Pellerin v. Nevada County, California*, et al (C.A. Case No. 13-15860; Civil Case No. 2:12-CV-00665-KJM-CKD)

Opinions Below

The unreported Decision of the United States Court Of Appeal For The Ninth Circuit denying a Petition For Rehearing En Banc was filed August 14, 2015. Petitioners' Appendix ("Pet. App.") at A1. The unreported Memorandum Decision of the United States Court Of Appeals For The Ninth Circuit affirming the decision of the United States District Court For The Eastern District of California was filed July 1, 2015. Pet. App. at A28-34. The Judgment Of Dismissal of the United States District Court For The Eastern District Of California was filed on March 3, 2013, Pet. App. at A107, and the Decision and Order of the United States District Court For The Eastern District Of California was filed on March 3, 2013, Pet. App. at A108-131.

Jurisdiction

The jurisdiction for this petition for a writ of certiorari is based upon 28 U.S.C. §1257(a).

The Federal Issues Were Raised In The Appellate Court

The federal question regarding the application of the Due Process Clause of the 14th Amendment to the United States Constitution was raised by Petitioner in the Petition For Rehearing En Banc with the United States Court Of Appeals For The Ninth Circuit. See the Petition For Rehearing, Pet. App. at A2-27, Appellant's Opening Brief, Pet. App. At A35-68.

Constitutional Provisions

U.S. Constitution, Amendment XIV, § 1:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of Facts

A. The Original Motion To Dismiss In California Superior Court

On the morning of April 20, 2010, Petitioner was erroneously charged with felony assault and battery arising out of an altercation with a trespasser that had come to Petitioner's residence to serve legal papers in violation of a prior court restraining order. Petitioner was assaulted by the trespasser and Petitioner had to physically restrain him. Petitioner's wife used a Flip video camera to film the incident while she called the Nevada County Sheriff's Department ("NCSD") for assistance. Deputies from the NCSD arrived at the scene, but instead of arresting the trespasser they arrested Petitioner. The Flip video camera was taken by the NCSD as evidence.

During the course of discovery in the criminal case against Petitioner, the Nevada County District Attorney's Office ("NCDA") produced a CD with a one minute video clip as the primary evidence against Petitioner. Petitioner and his wife were shocked because Petitioner's wife had filmed the incident for 10-15 minutes, but there was only a one minute clip produced. Where was the rest of the video that would show that Petitioner was the innocent party?

Counsel for Petitioner inspected the Flip camera in the evidence room and found that there were three or more incomplete and disjointed files of

the video of the incident. Petitioner moved for an evidentiary hearing to explore what had happened to the original Flip camera video files. The trial court denied the motion. Petitioner petitioned for a writ of mandamus with the California Court of Appeal which issued instructions to the trial court to revere its denial of the evidentiary hearing.

Petitioner hired a forensic expert and the trial court ordered the NCSD to allow inspection of the computers that NCSD Deputy King had used to create the video CD. The forensic examination discovered that on the evening of April 20, 2010, Deputy King had plugged the actual Flip camera directly into a PC USB port, then downloaded video editing software, and without having made any kind of a digital backup, prepared the one minute video clip that was used as the primary evidence against Petitioner. The original video file was broken into three or more pieces and portions of the events were apparently lost. However, the largest of the remaining clips *showed the trespasser attacking Petitioner*, not the other way around, as had been charged. This video had not been turned over by the NCDA as part of its responses to Petitioner's specific discovery request for all of the Flip video.

A the evidentiary hearing, it was learned that neither the NCSD nor the NCDA had any training in handling digital evidence and did not have any policies, practices, or procedures for handling digital evidence. It was also learned that the NCDA had never looked at the additional portions of the original video file even though copies had been sent

to the NCDA when after being discovered.

On several occasions thereafter, Counsel for Petitioner asked Respondents Deputy DA Francis and Deputy DA Westin to look at the additional video footage (i.e., the portions of the original footage that remained after Deputy King's editing) because it showed that Petitioner was innocent. These requests were refused. Thereafter, the NCDA took the position that it did not have to look at the exculpatory video files and the prosecution of Petitioner continued. Why?

Petitioner then discovered that the Nevada County District Attorney, Clifford Newell, had been involved in real estate transactions worth several million dollars with a local mortgage broker. It so happened that Petitioner was going to testify in open court on the afternoon of April 20, 2010, about his fraudulent mortgage loan with this same mortgage broker. Unfortunately, Petitioner was sitting in the county jail after his erroneous arrest that very morning and he could not testify against the mortgage broker. Petitioner found a witness that swore under oath that she was on the steps of the court house during the lunch break in the mortgage fraud case on April 20,2010 (that Petitioner was going to testify at that day) and she heard a local county official mockingly state that "Mr. Pellerin had been arrested and would not be showing up." This was just an hour or two after Petitioner had been booked and before he was bailed. No one but Petitioner's family and the NCSD would have known about his arrest that quickly in the normal course of

things.

Petitioner then filed two motions with the trial court: one to dismiss because of the evidence tampering by the NCSD and one to recuse the NCDA because of the just described conflict of interest. The trial court denied both motions. Petitioner then filed two concurrent petitions for mandamus with the California Court of Appeal. The Court of Appeal summarily denied the petition on the motion to dismiss, but granted the petition on the motion to recuse the NCDA.

The California Attorney General ("AG") then immediately substituted in for the NCDA as the prosecutor. 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.

Needless to say, had the AG not dismissed the charges, Petitioner would have moved to recuse the trial judge for bias, having twice obtained extraordinary relief from the Court of Appeal. He would also been able to move for reconsideration of

his motion to dismiss and he would have been able to appeal that ruling after a trial.

However, as discussed further below, *the AG's dismissal of the charges ended Petitioner's right to appeal the ruling of the trial court on his motion to dismiss*.

Petitioner subsequently filed an action for violation of his constitutional rights under 42 U.S.C. §1983, along with pendant state law tort claims, in the United States District Court for the Eastern District of Sacramento (the "District Court Action"). This is the suit that is the subject of this petition.

B. The District Court's Erroneous Application 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 Petitioner's prior motion to dismiss in the criminal trial court. The District Court granted Respondents' FRCP 12(b) motion. Pet. App. at A131. In doing so, the District Court held that the fact that Petitioner's right to appeal had been superceded by the AG's dismissal was not a determinative factor in deciding whether issue preclusion was appropriate. Rather, the District Court observed that Petitioner had filed a petition for mandamus that was summarily denied and that this was sufficient to establish "finality" for the purposes of preclusion. Pet. App. at 124-130.

C. **The Appeal To The Ninth Circuit**

Petitioner pointed out to the Ninth Circuit Court of Appeals that under California law the summary denial of a writ petition is not a decision on the merits, has no preclusive effect, 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. Pet. App. at A62-63.

Petitioner further argued on appeal that the District Court Decision erroneously interpreted and misapplied California law defining "finality" for purposes of collateral estoppel. Petitioner argued that the AG's dismissal of the Superior Court action terminated Petitioner's right to appeal the Superior Court ruling on the Motion To Dismiss. Petitioner correctly pointed out that under California law, collateral estoppel is not to be applied unless there had been a right to appeal that was either exhausted or waived. Through no fault of Petitioner, he was prevented from correcting the trial court ruling. Thus, there is no basis for a determination of "finality" as required for collateral estoppel. Pet. App. at A59-68.

However, in the Memorandum Decision of July 1, 2015, the Ninth Circuit Court of Appeals erroneously observed that "while Pellerin did not have a right to appeal the denial of his dismissal motion, he did elect to pursue mandamus review". This statement by the Ninth Circuit reveals that, contrary to California law, it was interpreting and

giving effect to the summary denial of the writ in the same manner as an adverse appellate decision. Pet. App. at 34.

Further, the Ninth Circuit found that "Pellerin is in no worse position than if he had been acquitted of the charges". In making this statement, the Court was ignoring the central point of the argument: i.e., that the acquittal of a person in a felony criminal case cuts off their right to appeal factual decisions made in the trial court.

The Ninth Circuit then concluded, without citation to any authority, that "[i]n these circumstances, the Superior Court's order is *sufficiently firm* and on the merits so as to be accorded conclusive effect." (Emphasis added) Pet. App. at 34. This was simply a end run around the legal issue that was squarely before the Ninth Circuit and which is now presented in this Petition.

Petitioner then petitioned the Ninth Circuit Court of Appeals for rehearing en banc. This was summarily denied. Pet. App. at A1. This petition for a writ of certiorari followed.

This is Mr. Pellerin's last chance for justice. He just wants a fair and full opportunity to present his case, something that has been denied him since the morning of April 20, 2010, when he was wrongly arrested and prevented from testifying later that day about the mortgage fraud that took away his dream of owning a home.

More importantly, this Petition presents the opportunity to establish in all courts that a "full and fair" opportunity to litigate is the foundation of due process and that when a person's right to litigate the issues is cutoff before the exhaustion or waiver of a right to appeal, the application of collateral estoppel is fundamentally unfair.

ARGUMENT

Why A Writ For Certiorari Should Issue

This case presents two simple issues. First, Did the Ninth Circuit Court of Appeals correctly determine and apply California law regarding the exhaustion or waiver of the right to appeal as a prerequisite to the use of collateral estoppel? Second, but more importantly, does the requirement for fundamental fairness under the 14th Amendment, over any above contrary state law, require a judicial finding that the party to be estopped has exhausted or waived the right to appeal as a prerequisite for the application of collateral estoppel?

Although there are slight differences among the various states and the federal courts on the various elements that must be met before applying collateral estoppel, one requirement that is consistently acknowledged is that the party to be estopped must have had a full and fair opportunity to litigate the issue.

As just detailed in the history, collateral estoppel was applied against Petitioner on a factual determination made by a criminal trial court even though the Petitioner's right to appeal that ruling under California law was cutoff by the intervention of the AG's dismissal of the action against Petitioner.

Petitioner contends that the AG's action inadvertently prevented him from receiving a "full and fair" opportunity to litigate the issues, and

under California law, which is based upon the notion of "fundamental fairness", the loss of these appellate rights should prohibit collateral estoppel against him. Furthermore, Petitioner contends that the use of collateral estoppel against him is a violation of the "fundamental fairness" required by the 14th Amendment due process guarantee, regardless of any state law to the contrary.

A. At Present, State Law Governs The Use Of Collateral Estoppel In A Federal Civil Rights Action

As set forth by this Court in *Allen v. McCurry*, 449 U.S. 90, 96 (1980) ("*Allen*"), state law governs the application of collateral estoppel to a state court judgment in a federal civil rights action. This was acknowledged by the Ninth Circuit in *Ayers v. City of Richmond*, 895 F. 2d 1267, 1270 (9th Cir. 1990) ("*Ayers*"). Accordingly, Petitioner cited to *Ayers* and then to the various decisions of the California appellate courts that set forth the requirements for applying collateral estoppel, Pet. App. at A13-18. Petitioner pointed out that these decisions required the exhaustion or waiver of the right to appeal before allowing collateral estoppel.

Although both the District Court (Pet. App. at A126-127) and then the Ninth Circuit (see Pet. App. at A33) appeared to agree that the decision in *Schmidlin v. City of Palo Alto*, 157 Cal. App. 4th 728 (2008) ("*Schmidlin*") was directly on point, they both ignored its holding. The *Schmidlin* court, at 774, held that, in determining "finality" for purposes of

collateral estoppel California courts look to these four 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**.' *quoting from Border Business Park Inc. v. City of San Diego,* 142 Cal. App. 4th 1538, 1565 (2007) (Emphasis added).

Both the District Court and the Ninth Circuit court tried to distinguish this holding from the facts in this case by noting that Pellerin had filed a writ petition. However, when Petitioner replied that the summary denial of a writ petition in California has no preclusive or precedential effect whatsoever, both of these courts simply skirted around this fact. The District Court veered off course with the argument that what is required is not the exhaustion or waiver of the right to appeal (contrary to what is clearly stated in *Schmidlin*), but a "final" decision that is immune from attack. The District Court then found that the trial court's decision was "final" and ruled against Petitioner. Pet. App. at A130. The Ninth Circuit's reasoning appeared even more disconnected when it found that:

> we have no record to suggest that Defendants manipulated proceedings ... 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 to be accorded conclusive effect. Pet. App. at 34.

Neither of these decisions followed the unambiguous California law that requires the exhaustion or waiver of the right to appeal as a prerequisite to the use of collateral estoppel. As such, these decisions were not following the established federal law of this Court as set down in *Allen* and of the Ninth Circuit in *Ayers*. Accordingly, the decision of the Ninth Circuit must be reversed and the case remanded to the District Court.

B. The Right To An Appeal Before The Use Of Collateral Estoppel Should Be A Prerequisite Of Fundamental Fairness Under The Due Process Clause

Petitioner further argues here that the exhaustion or waiver of the right to appeal should be recognized by this Court as a prerequisite to the use of collateral estoppel as a matter of the fundamental fairness guaranteed by the 14th amendment in every case where there is an existing right to appeal in the initial court or tribunal[1] regardless of any state law

---

1 This petition does not address whether the exhaustion or waiver of a right to appeal is a prerequisite for preclusion of issues decided in judicial or administrative proceedings from which there is no right of appeal. There may be some proceedings, limited in scope or specialized in nature, for which there is no right to appeal and the question is not applicable.

to the contrary.

1. This Court Has Previously Held That A Full And Fair Opportunity To Litigate Is a Prerequisite To Collateral Estoppel

There is nothing new or controversial about a "full and fair" opportunity to litigate an issue as a prerequisite to the application of the doctrine of collateral estoppel. Indeed, this Court made this very clear in *Allen* at 95 where, in ruling on the use of "offensive" collateral estoppel, this Court found that there is:

> 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.

2. The Purpose Of Appeals

Petitioner faced a very hostile trial court that had already been overturned once by Petitioner's extraordinary writ when he filed his motion to dismiss. Thus, he did not expect a favorable ruling. In fact, he was already prepared to pursue further extraordinary writs if both his motion to dismiss and his motion to recuse the NCDA were denied because he knew that the trial court did not look favorably towards him. As explained above, the perception of

the trial court as hostile proved true and Petitioner had to file concurrent petitions for extraordinary relief when his motions were denied

The right to appeal in situations like that faced by Petitioner is a crucial element of due process. Although not commonly discussed in judicial decisions, the bias of trial courts can, on occasions, be very real and the ability to appeal is an essential part of our justice system. This judicial "fact of life" was recently discussed in *Bradley v. Reno*,749 F. 3d 553, 556 (6th Cir. 2014) ("*Bradley*"), where the Court of Appeals observed:

> A core function of issue preclusion also suggests that, in the absence of a chance to appeal, the rule should not apply. The rule tells a second court not to take a second crack at a question in part because we have confidence that the first court reached the correct answer. When the check of appellate review goes away, however, so does some of our assurance that the first court got it right. That is not because appellate judges are special; it is because an appeal permits at least two more judges, and occasionally many more judges, to review the issue. There is safety in numbers. The point grows stronger in the setting of probable—cause rulings made unreviewable by acquittals. An acquittal of course does not refute an

> earlier finding of probable cause; proof beyond a reasonable doubt demands more of the prosecution than probable cause does. But an acquittal at least blunts some confidence in it.

3. The Restatement 2d Judgments And Many States Acknowledge The Right To Appeal As A Requirement For Collateral Estoppel

The right to appeal as a prerequisite for preclusion has been discussed and considered by legal scholars for a long time. Indeed, as observed in Pellerin's Petition For Rehearing in this case, many states follow the Restatement 2d Judgments for the proposition that a right of appeal must have been exhausted or waived before collateral estoppel can be applied. A selection of these state decisions was set out in Petitioner's brief to the Ninth Circuit. Pet. App. at A20-23.[2]

---

2 Petitioner provided the Ninth Circuit with a substantial list of decisions in state court supporting his argument, see Pet. App. at A20-23, and argued this very position. Pet. App. at A24-27. These state decisions cite to several sections in Rest. 2d Judgments, notably §28(1), com. (a) [relitigation of an issue is not precluded in a subsequent action when the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action].

4. The Requirement That The Right To Appeal Be Exhausted Or Waived Before Applying Collateral Estoppel Is Already The Prevailing Law In Many Jurisdictions

In contrast to the Ninth Circuit's ruling in this case, other federal circuits have found that respective state court decisions apply the due process concept of fundamental fairness when establishing rules for collateral estoppel. Indeed, Petitioner has not found any state that does not acknowledge that fundamental fairness must be the basis for deciding whether to apply collateral estoppel, and further, that the exhaustion or waiver of the right to appeal is a matter of "fundamental fairness".

In the Sixth Circuit decision in *Bradley*, the Court of Appeals refused to allow collateral estoppel where if found that the Ohio trial court's finding that officer had probable cause to arrest a truck driver was "unreviewable ". In so holding, the *Bradley* court reviewed the Restatement 2d's position on the question and it cited to prior decisions of the Ohio appellate courts that have looked to the Restatement 2d Judgments as the point of resolution on this matter. In particular, *Bradley* noted a decision of the Ohio Supreme Court that followed the Restatement 2d as the source of 'recognized exceptions to the general rule of issue preclusion', citing to *State v. Williams*, 76 Ohio St. 3d 290, 667 N.E. 2d 932, 936-37. What is especially notable about the *Bradley* decision is its recognition that in past decisions it had held the opposite view. It

specifically observed that in criminal cases, decisions in other courts were "more persuasive" than its previous rulings, and accordingly, the *Bradley* court adopted the mainstream view that "when an acquittal prevents a criminal defendant from appealing, the ruling has no preclusive effect." *Bradley* at 558-559.[3]

In the Seventh Circuit, the right to appeal as a prerequisite to the application of collateral estoppel under Wisconsin law has also been established. In *Gray v. Lacke,* 885 F.2d 399 (7th Cir. 1989) ("*Gray*"), the Court of Appeals was faced with whether to collaterally estop a party against whom the issues had been decided adversely in a prior federal district court case. The *Gray* court observed that it had expressly declined in a previous appeal to decide the issues now sought to be preluded, and therefore, it would not apply collateral estoppel to the same issues in the pending action. Further in its discussion, the *Gray* court cited this Court's holding in *Allen*, *supra* at 95, for the rule that issue preclusion should not be enforced in the absence of a "full and fair opportunity to litigate that issue." Then, citing to an earlier decision in the Seventh Circuit, the *Gray* court expressly recognized that a "'full and fair opportunity to litigate' includes the

---

3 For the Sixth Circuit, see also *Marshall v. City of Farmington Hills,* 578 Fed. Appx. 516 (6th Cir. 2014) (denying preclusive effect to state court's order regarding validity of release-dismissal agreement).

right to appeal an adverse decision."[4]

Although in the Tenth Circuit there has not been a definitive decision on this question, there has been thoughtful discussion of the question on multiple occasions. In *Bell v. Dillard Department Stores, Inc.*, 85 F.3d 1451 (10th Cir. 1996)("*Bell*"), the Court of Appeals reviewed its own prior decisions, along with some from other circuits, and found that the right to appeal was a necessary prerequisite to preclusion. However, the *Bell* court was not able to find definitive Oklahoma law on the question, and therefore, based its decision to not apply collateral estoppel on other problems with the original trial court ruling. Then in *Burrell v. Armijo,* 46 F.3d 1159 (10th Cir. 2006), a case involving a dispute between lessees of tribal land and the Indian tribe, the Tenth Circuit Court of Appeals again reviewed the subject, including *Bell*, and noted that it was "troubled by the lack of a tribal appellate court to review" the tribal judge's prior decision in the matter. *Id.* at 1173. In combination with a variety of other procedural concerns (other than the right to appeal), it declined to apply collaterally estoppel.

In a decision interpreting New York law, the Second Circuit has also decided that the right to appeal is a prerequisite for collateral estoppel. In *Johnson v. Watkins*, 101 F.3d 792 (2nd Cir. 1996)

---

4 The *Gray* court did not focus on Wisconsin law, but upon the decision of this Court in *Allen* and in prior decisions in the 7th Circuit and the Fed. Circuit. This implies a general acknowledgment of the right to appeal as a requirement for a "full an fair" litigation to meet the "fundamental fairness" test.

("*Johnson*"), the Court of Appeals found that where a defendant was acquitted, facts determined in a pretrial suppression hearing could not be given preclusive effect because of the lack of the right to appeal. The court summed the matter up with the simple statement: "[b]ecause there was no opportunity to appeal this adverse finding, that issue was not fully and fairly litigated." *Johnson* at 796.

Lastly, Petitioner directs this Court to its decision in *Standferer v. United States*, 447 U.S. 10 (1980) where the Court refused to apply "nonmutual" collateral estoppel against the government in criminal cases. The absence of "remedial" procedures for the government in a criminal case, such as motion for a new trial *and the lack of appellate review* in the case of an acquittal, were the primary concerns that underpinned the Court's decision. Id. at 21-26.

CONCLUSION

The decision of the Ninth Circuit Court Of Appeals in this case ignored controlling California law that makes the exhaustion or waiver of the right to appeal a prerequisite for the application of collateral estoppel. For this reason, the decision of the District Court should be reversed.

Most courts that have addressed the issue reach the same conclusion as California courts and require the exhaustion or waiver of the right to appeal before allowing preclusive effect. They reach this conclusion by applying the due process principle of fundamental fairness. This Court can ensure uniform compliance with this principle by expanding upon its decision in *Allen v. McCurry* to require the exhaustion or waiver of appeal as a prerequisite to the use of collateral estoppel in all cases, state or federal, when there was a right to appeal the initial decision.

The recognition of the necessity for the exhaustion or waiver of the right to appeal before allowing collateral estoppel is an expression of our innate understanding of due process. We know from long experience that, for one reason or another, the initial decision in a case may not be correct. We compensate for this in our system of justice by providing for an appeal. The acknowledgment of this fact by this Court will allow Petitioner his day in court and it will enhance due process for all citizens.

\\\

Respectfully Submitted,

___/s/_____

Patrick H. Dwyer
Counsel of Record for Petitioner
P.O. Box 1705
17318 Piper Lane
Penn Valley, California 95946
530-432-5407
pdwyer@pdwyerlaw.com

FILED AUG 14 2015 MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS 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
Eastern District of California, Sacramento

ORDER

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

Judge N.R. Smith has voted to deny the petition for rehearing en banc, and

Judge Schroeder and Judge Gleason have so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed R. App. P. 35.

The petition for rehearing en banc is DENIED.

C.A. Case No. 13-15860

UNITED STATES COURT OF APPEALS
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

Patrick H. Dwyer, SBN 137743
Counsel for Petitioner,
P.O. Box 1705
17318 Piper Lane
Penn Valley, California 95946
530-432-5407 (telephone)
530-432-9122 (facsimile)
pdwyer@pdwyerlaw.com

July 15, 2015

Table of Contents

Table of Authorities

California Supreme Court

California Court Of Appeal

Sister State Decisions (Alphabetical Order)

California Statues

Secondary Authorities

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. 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.

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.

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 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.

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 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.

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

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. 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 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.

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 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

FILED JUL 01 2015 MOLLY C. DWYER, CLERK
U.S. DISTRICT COURT OF APPEALS

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
Eastern District of California, Sacramento

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 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 aff1I111 (sic).

* 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.

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:

[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.

> 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 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.

[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]

[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.

C.A. Case No. 13-15860

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Gregory Pellerin, Plaintiff And Appellant

vs.

Nevada County, et al, Defendants And Respondents.

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

Patrick H. Dwyer, SBN 137743
Counsel for Petitioner,
P.O. Box 1705
17318 Piper Lane
Penn Valley, California 95946
530-432-5407 (telephone)
530-432-9122 (facsimile)
pdwyer@pdwyerlaw.com

September 4, 2013

Table of Contents

Table of Authorities

Page

United States Supreme Court

United States Courts Of Appeal

Federal Statutes

Federal Rules Of Civil Procedure

California Supreme Court

California Court Of Appeal

California Statues

STATEMENT OF JURISDICTION

Jurisdiction Of The United States District Court, Eastern District of 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 Appeals

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).

4. 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.

5. 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 ? [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 the Flip camera 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 on 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. One 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 as a matter of public policy. 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 be 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* rule for a finding of a due process violation on the basis of false evidence: i.e., that a Respondent must allege facts showing that the Respondent (here, King) continued the investigation despite the fact that the defendant knew or should have known that the accused was innocent; or that a defendant used investigative techniques that were so coercive and abusive that they 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 it was free from "direct attack". Ibid.

[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.

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. Criteria For Collateral Estoppel

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

[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.

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,[2] did not assert Eleventh Amendment qualified immunity for the NCSD. District Court Decision, EOR 7, lines 6-7.

[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).

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. 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.

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

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

[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").

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 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.

[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.)

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

[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.

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 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 wide, package of policies, practices, procedures and

[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.

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 By Implementing 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 Charged Under Law With 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 Preservation The Evidence

The first allegation of wrongdoing by 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 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 all every one 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 Support Claim 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 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.

[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.

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 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 that note 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. *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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GREGORY PELLERIN,

v.

NEVADA COUNTY, CALIFORNIA, ET AL.,

JUDGMENT IN A CIVIL CASE
CASE NO: 2:12-CV-00665-KJM-CKD

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 3/28/2013

Victoria C. Minor
Clerk of Court

ENTERED: March 28, 2013

by: /s/ G. Michel
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GREGORY PELLERIN,
v.
NEVADA COUNTY, CALIFORNIA, ET AL.,

CASE NO: 2:12-CV-00665-KJM-CKD

ORDER

This case was on calendar on June 22, 2012 for argument on a motion to dismiss filed by defendants Nevada County, Jesse King, Gregory Weston and Katherine Francis. Patrick H. Dwyer appeared for plaintiff; Marcos A. Kropf appeared for defendants. After considering the parties' briefs, supplemental briefs and argument, the court GRANTS defendants' motion to dismiss in part and declines to exercise supplemental jurisdiction over the state claims.

I. BACKGROUND

On March 16, 2012, plaintiff filed a civil rights complaint against defendants Nevada County; Deputy District Attorneys Gregory Weston and Katherine Francis; and Deputy Sheriff Jesse King, containing the following causes of action: (1) violation of Fourth and Fourteenth Amendment rights against Nevada County, stemming from the Sheriff's Department's failure to have a policy for handling and maintaining digital evidence; (2)

violation of Fourth and Fourteenth Amendment rights against Nevada County, stemming from the District Attorney's Office's failure to have a policy for handling and maintaining digital evidence; (3) violation of Fourth and Fourteenth Amendment rights against King, stemming from his handling of digital evidence; (4) violation of Fourth and Fourteenth Amendment rights against Francis, stemming from his failure to review and produce exculpatory evidence; (5) violation of Fourth and Fourteenth Amendment rights against Weston, stemming from her failure to review and produce exculpatory evidence; (6) malicious prosecution against Nevada County; (7) a violation of California Civil Code § 52.1(b) against Nevada County and King; (8) intentional infliction of emotional distress against Nevada County and King; and (9) negligence against Nevada County and King.

According to the complaint, on April 20, 2010, process server Thomas Benzing came on to plaintiff's property in violation of a "stay away" order, assaulted plaintiff and placed plaintiff under citizen's arrest. Complaint, ECF No. 1, 8. As Benzing continued to assault plaintiff despite the citizen's arrest, plaintiff put Benzing in an arm lock and asked his wife to call the sheriff. Id. 9. Plaintiff's wife, Susan Pellerin, filmed "almost the entire incident" on a Flip video camera, which she gave to defendant King, the responding officer. Id. 10. Even though Mrs. Pellerin had shown King the video of Benzing attacking plaintiff, King took plaintiff into custody. Id. 10-11.

King plugged the Flip video camera into a USB port on a Sheriff's Department computer and produced an edited version of the video. Id. 22. At that time neither the Sheriff's Office nor the District Attorney's Office had policies concerning the handling, viewing, processing, enhancing or examining of digital evidence and had not trained their employees to make forensic copies of such evidence. Id. 15-21. As a result, King did not make a forensic copy of the digital evidence, but rather produced a clip of the video designed to show plaintiff in a bad light and in the course of making it, erased portions of the video from the Flip camera. Id. 24.

Plaintiff's counsel sent informal discovery requests to Francis, asking for the entire contents of the Flip video camera; Francis finally produced a copy of the edited clip on June 24, 2010. Id. 25. Plaintiff secured permission to inspect the video camera and discovered that there was not a single ten-to-fifteen minute recording as Mrs. Pellerin had reported to him, but multiple files, none of which matched the clip Francis had turned over. Id. 27-28. Plaintiff then secured permission for an expert to undertake a forensic examination of the camera and of any Sheriff's Department computers involved in making the short clip. Id. 29. Plaintiff's expert determined it was possible that Mrs. Pellerin's ten-to-fifteen minute video had been altered, as it had been broken into three separate files with unexplained time gaps between them. Id. 33.

Neither Francis nor Weston, who took over the

case, explored whether the Sheriff's Department had made a forensic copy of the video or had turned over the entire video to the District Attorney's Office. Id. 31. Weston repeatedly refused to review the exculpatory portions of the video. Id. 35.

The Nevada County Superior Court held an evidentiary hearing concerning the handling of the evidence on the Flip video camera. Id. 36.

Plaintiff's counsel also filed a motion to dismiss the charges, alleging that the handling of the digital evidence violated his right to the release of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and a motion to recuse the District Attorney's Office, based on the District Attorney's conflict of interest. Id. 38-39. After a hearing, the Superior Court denied both motions. Id. 40. Counsel filed a petition for a writ of mandate in the Court of Appeal, which issued an alternative writ granting the request for recusal of the District Attorney's office. Id. 41.

The Attorney General's Office substituted in as the prosecutor and thereafter met with plaintiff's counsel to watch the entire video of the incident with Benzing. Id. 43, 44. On January 26, 2012, the Attorney General's Office dismissed the case. Id. 45.

II. STANDARDS FOR A MOTION TO DISMISS

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss a

complaint for "failure to state a claim upon which relief can be granted." A court may dismiss "based on the lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Although a complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief," FED. R. CIV. P. 8(a)(2), in order to survive a motion to dismiss this short and plain statement "must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint must include something more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" or "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" Id. (quoting *Twombly*, 550 U.S. at 555). Determining whether a complaint will survive a motion to dismiss for failure to state a claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679. Ultimately, the inquiry focuses on the interplay between the factual allegations of the complaint and the dispositive issues of law in the action. See *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984).

In making this context-specific evaluation, this court must construe the complaint in the light most favorable to the plaintiff and accept as true the factual allegations of the complaint. *Erickson v.*

Pardus, 551 U.S. 89, 93-94 (2007). This rule does not apply to "'a legal conclusion couched as a factual allegation,'" *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (quoted in *Twombly*, 550 U.S. at 555), nor to "allegations that contradict matters properly subject to judicial notice" or to material attached to or incorporated by reference into the complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-89 (9th Cir. 2001). A court's consideration of documents attached to a complaint or incorporated by reference or matter of judicial notice will not convert a motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003); *Parks Sch. of Bus. v. Symington,* 51 F.3d 1480, 1484 (9th Cir. 1995); compare *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (noting that even though court may look beyond pleadings on motion to dismiss, generally court is limited to face of the complaint on 12(b)(6) motion).

III. ANALYSIS

Defendants argue that to the extent the District Attorney's Office and the individual deputy district attorneys are sued in their official capacities, they are entitled to Eleventh Amendment immunity because they are deemed to be state officials; to the extent they are sued in their individual capacities, they are entitled to absolute prosecutorial immunity. They also argue that none of the claims against the county, the prosecutors and the Sheriff's Department and deputies are cognizable because they were decided against plaintiff in the criminal proceedings

in Nevada County. They argue that plaintiff cannot raise a Brady claim based on his contention that King mishandled the evidence and that the prosecutors ignored the evidence because defendant was not convicted, the evidence was eventually disclosed, and plaintiff was aware of it, but to the extent that the evidence was mishandled, this does not implicate the Fourth Amendment. They also argue that the complaint does not state a claim against the County because there is no allegation that any malicious prosecution was undertaken pursuant to a policy. Finally, defendants contend that the pendent state claims should be dismissed.

Plaintiff contends there is no Eleventh Amendment immunity because district attorneys are not state officials. He also argues that the doctrine of absolute prosecutorial immunity is not applicable because the failures in this case were administrative. He asserts that collateral estoppel does not bar this action because there was no conviction and he was denied the opportunity fully to litigate the issues below. He then contends that his claims are based on the Fourth and Fourteenth Amendment, not on Brady, though they do have a Brady component. In addition, neither the Sheriff's Department nor the County had policies for maintaining evidence and training deputies about the retention and protection of digital evidence.

A. Prosecutors as State Officials

Defendants assert Eleventh Amendment immunity for the District Attorney's office and

defendants Weston and Francis, to the extent they are sued in their official capacities as deputy district attorneys. Defendant makes no claim of immunity for either the Sheriff's Department or King as the individually named Sheriff's deputy.

In the absence of the state's consent to suit, the Eleventh Amendment bars suits for damages against states, state agencies, and state officials acting in their official capacities. See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Brown v. California Dept. of Corrections*, 554 F.3d 747, 752 (9th Cir.2009); *Han v. United States Dep't of Justice,* 45 F.3d 333, 338 (9th Cir.1995).

In Weiner v. San Diego County, 210 F.3d 1025 (9th Cir. 2000), the Ninth Circuit explored the application of *McMillian v. Monroe County, Ala.*, 520 U.S. 781 (1997) to the question whether a California district attorney was a state or county official for purposes of county liability under *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978). Recognizing that the question is of one of federal law, but yet was intimately bound up with state law, the court examined California's constitutional and statutory provisions and held that "a California district attorney is a state officer when deciding whether to prosecute an individual." Id. at 1031. The Ninth Circuit has relied on Weiner in concluding that prosecutors "act as state officials, and so possess Eleventh Amendment immunity, when acting in [their] prosecutorial capacity." *Del Campo v. Kennedy*, 517 F.3d 1070, 1073 (9th Cir. 2008);

Ambrose v. Coffey, 696 F. Supp. 2d 1119, 1137 (E.D. Cal. 2010). Defendants Francis and Weston, sued in their official capacity for failing to review the exculpatory evidence on the Flip video camera, are immune from suit.

To the extent plaintiff argues that the District Attorney's office itself is liable, his claim also fails, as the office is deemed to be a state agency when involved in prosecutorial activities. *Nazir v. County of Los Angeles,* No. CV 10-06546 SVW (AGRx), 2011 WL 819081, at 8 (C.D. Cal. Mar. 2, 2011).

Finally, the County is also immune. "To hold a local government liable for an official's conduct, a plaintiff must first establish that the official (1) had final policymaking authority concerning the action alleged to have caused the particular constitutional or statutory violation at issue and (2) was the policymaker for the local governing body for the purposes of the particular act." *Weiner v. San Diego County,* 210 F.3d at 1028. Because members of the District Attorney's office were state officials for purposes of prosecutorial decisions, they cannot be deemed to be policy makers for the County. Id. at 1031.

B. Prosecutorial Immunity

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court held that a prosecutor is entitled to absolute immunity for all activities "intimately associated with the judicial phase of the criminal process" even if "the genuinely wronged defendant"

is thereby left "without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." Id. at 427, 430-31. As part of his trial preparation, "a prosecutor may be required to obtain, review and evaluate evidence" and so his decision "not to preserve or turn over exculpatory material before trial" in violation of *Brady v. Maryland,* supra, is part of the prosecutorial process and subject to absolute immunity. *Broam v. Bogan*, 320 F.3d 1023, 1029, 1030 (9th Cir. 2003). A prosecutor is also immune from claims that he initiated prosecution maliciously. *Imbler*, 424 U.S. at 422; *Kalina v. Fletcher*, 522 U.S. 118, 124 (1997). To the extent plaintiff faults defendants Francis and Weston for refusing or failing to obtain or review the complete video of the incident, they are immune.

Plaintiff also argues, however, that the deputy district attorneys and the District Attorney's Office had an affirmative duty to establish and enforce policies for handling, preserving and transmitting digital evidence and that defendants are not absolutely immune for these failures because a prosecutor is not entitled to absolute immunity for actions undertaken in an investigatory or administrative capacity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). In *Van de Kamp v. Goldstein,* 555 U.S. 335 (2009), the Supreme Court considered whether absolute immunity extended to claims that a prosecutor failed to turn over impeachment material "due to (1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an

information system containing potential impeachment material about informants," and concluded that "absolute immunity extends to all these claims." Id. at 339. The Court recognized that "the management tasks at issue . . . concern how and when to make impeachment information available at a trial. They are thereby directly connected with a prosecutor's basic trial advocacy duties." Id. at 346.

The Court then turned to the plaintiff's claim that the district attorney's office in that case should have created a system that would have given prosecutors access to impeachment material concerning informants. Id. at 348. The court noted that the decisions concerning the contents of such a system require knowledge of the law and are therefore connected with the judicial phase of any prosecution. Id. at 349. The court concluded that "where a § 1983 plaintiff claims that a prosecutor's management of a trial-related information system is responsible for a constitutional error at his or her particular trial, the prosecutor responsible for the system enjoys absolute immunity just as would the prosecutor who handled the particular trial itself." Id. In *Cousins v. Lockyer*, 568 F.3d 1063, 1069 (9th Cir. 2009), the Ninth Circuit relied on *Van de Kamp*, holding that the Attorney General's office was immune for failing to develop a system to track information on appellate reversals and thus failing to seek the plaintiff's release in a timely fashion after a reversal. Here, the District Attorney's Office and defendants Weston and Francis are absolutely immune from the claims relating to the failure to implement systems for the handling of digital

evidence.

C. Brady Claims

Plaintiff denies that his claims against the County, the Sheriff's Department and defendant King stem from *Brady v. Maryland*, arguing instead that they stem from the absence of policies for handling digital evidence and King's failures to make a forensic copy of the video and to transmit the complete video to the District Attorney's Office. However, in his complaint, plaintiff cites "his rights under *Brady v. Maryland,* the loss of his substantive rights under the Fourth Amendment to the United States Constitution, and the loss of his due process rights under the Fourteenth Amendment to the United States Constitution" as sources of rights for his underlying constitutional injuries. (ECF 1 ¶¶ 43, 52, 60, 70, 76, 83.)

"As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated." County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) (citation omitted). Without an underlying constitutional injury, there is no § 1983 cause of action. See *City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986); see also *Grossman v. City of Portland,* 33 F.3d 1200, 1203 (9th Cir. 1994) ("Heller holds that when a person sues under §1983 for an allegedly unconstitutional arrest the city cannot be held liable absent a constitutional violation by the arresting officer."). A department policy or regulation that merely has the potential of causing a

constitutional injury will not lend itself to a cause of action under § 1983, unless the plaintiff actually suffers such an injury. See *Heller*, 475 U.S. at 799.

Plaintiff claims he has an independent constitutional right to proper procedures for handling digital evidence. He derives this position from *Kyles v. Whitley,* 514 U.S. 419 (1995), a case that explored the contours of the prosecutor's Brady duty to turn over exculpatory evidence. However, the portion he cites to does not establish an independent right but only recognizes that a prosecutor may avoid Brady problems by establishing adequate procedures: "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." Id. at 438 (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)). Moreover, "[p]roving that an injury or accident could have been avoided if an employee had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct will not suffice [under § 1983]" and "so showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability." *Connick v. Thompson*, U.S. , 131 S. Ct. 1350, 1363-64 (2011) (quotations and citations omitted); see also *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir 2001) (en banc) (finding no constitutional right to have a witness interview conducted in a particular way).

In the absence of any independent right to particular procedures, plaintiff can show a

Fourteenth Amendment violation only by demonstrating that his Brady rights were violated. Defendants argue he cannot do so because he was not convicted.

"There is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." See *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); see also *Schad v. Ryan*, 671 F.3d 708, 715 (9th Cir. 2011), cert. denied, __ U.S. __, 133 S.Ct. 432 (2012). In other words, *Brady* is violated when "the government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles v. Whitley,* 514 U.S. at 434 (citations and quotations omitted). The lack of any trial or conviction would make such an inquiry necessarily impossible.

In *Puccetti v. Spencer*, 476 F. App'x 658, 661-62 (9th Cir. 2011), the Ninth Circuit joined other circuits in concluding that a plaintiff has no claim for a *Brady* violation in the absence of a criminal conviction. See *Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir.1999); *Flores v. Satz*, 137 F.3d 1275, 1278 (11th Cir.1998); *McCune v. City of Grand Rapids,* 842 F.2d 903, 907 (6th Cir.1988). To the extent plaintiff's claims rest on the failure to release exculpatory information, he cannot state a claim because he was not convicted of any offense.

Plaintiff claims defendants' actions and inactions violated his Fourth Amendment rights but he has not cited to any case supporting his claim

that the mishandling of exculpatory evidence constitutes such a violation in the absence of a claim that the failure to produce exculpatory evidence after his arrest unreasonably prolonged his detention or contributed to his conviction. See *Russo v. City of Bridgeport*, 479 F.3d 196, 210 (2d Cir. 2007) (holding that officers who viewed videotape of crime and falsely represented to defendant that it was inculpatory when, in fact, it was exculpatory, could be sued for actively hiding exculpatory evidence resulting in unreasonably prolonged detention in violation of Fourth Amendment); *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996) ("[A]lthough open communication between investigators and prosecutors should be encouraged, the failure of an officer to disclose exculpatory evidence after a determination of probable cause has been made by a neutral detached magistrate does not render the continuing pretrial seizure of a criminal suspect unreasonable under the Fourth Amendment.").

D. Manipulation of Evidence Claim

Plaintiff alleges that King's actions in downloading editing software, editing the video, and deleting portions of it constitute evidence tampering in violation of his right not to be subjected to charges on the basis of false evidence. ECF No. 12 at 13-14.

In *Devereaux v. Abbey*, the Ninth Circuit held 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." 263 F.3d at 1074-75.

To plead such a claim, a plaintiff "must, at a minimum, point to evidence that supports at least one of the following two propositions: (1) Defendants continued their investigation of [plaintiff] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." Id. at 1076 (emphasis in original).

Plaintiff has not met his burden here of pleading a *Devereaux* claim against defendant King. He does allege that Mrs. Pellerin showed King the entire video,[1] which allegedly showed that plaintiff acted in self-defense in his assault against Benzing, but that King thereafter edited the video to exclude any evidence supporting plaintiff's version of the incident. He does not allege the evidence was false, merely that it was incomplete.

[1] At the evidentiary hearing on the motion to dismiss the criminal action, Mrs. Pellerin testified she gave the camera to Deputy Rimoldi, who gave it to Deputy King, and that she never saw any officer play it back at the scene. ECF No. 11-1 at 33. King testified that Mrs. Pellerin showed him some of the video footage at the scene. ECF No. 11-1 at 29.

Plaintiff has not cited nor has the court found any case supporting his theory that this manipulation satisfies Devereaux's requirement that the police used abusive techniques they knew would yield false evidence. Moreover, given both the nuanced law of self-defense and the fact that Mrs.

Pellerin claimed to have filmed "most of the incident," it does not appear that King proceeded against plaintiff even though he knew plaintiff was innocent. See also *Leone v. Township of Deptford,* 616 F. Supp. 2d 527, 534 (D.N.J. 2009) (concluding there can be no constitutional injury from evidence tampering when the accused is acquitted). To the extent that the claims against King stem from his mishandling of the digital evidence, plaintiff has not met the minimum standards for pleading a claim under *Devereaux*.

E. Collateral Estoppel

Defendants claim that the issues raised in this complaint were decided adversely to plaintiff in connection with a motion to dismiss filed in Nevada County Superior Court. The parties have asked the court to take judicial notice of a variety of documents from the Nevada County proceedings. As these are relevant to a determination of this issue, the court grants both requests. United States v. Black, 482 F.3d 1035, 1041 (9th Cir. 2007) (a court may take judicial notice "'of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue.'") (quoting *United States ex. rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.1992)).

In California, "collateral estoppel precludes relitigation of issues argued and decided in prior proceedings." *Lucido v. Superior Court*, 51 Cal. 3d 335, 341 (1990). There are five requirements that

must be met before an issue is collaterally estopped:

> 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 proceedings.

Id. Plaintiff does not allege that privity is lacking, but contends that the instant complaint raises different issues, that the denial of the motion to dismiss did not necessarily decide all the issues in this case, and that the action is not final.

Following an evidentiary hearing on the cell phone evidence, plaintiff submitted a brief arguing the evidence had shown that neither the District Attorney's Office nor the Sheriff's Department had a policy to protect digital evidence, that the video clip was intentionally edited to portray Pellerin in an unfavorable light, the video clip produced by the prosecution to the defendant was only one of three video files of the incident, the video was missing two sections, and the District Attorney's Office had violated Pellerin's Brady rights. ECF 11-1 at 9-10.

The Superior Court denied the motion to dismiss after an evidentiary hearing and argument

on the alleged tampering with the videotape and the Brady violation. It found, based on expert testimony, that law enforcement had not created any gaps on the video; that while Deputy King's handling of the video did not follow best practices, it was not misconduct and not intentional; that the defense had been given access to most of the video and then access to the flip phone with his expert; that whatever was on the video was not necessarily exculpatory because Mrs. Pellerin conceded she did not start filming until after Benzing had initiated the incident; and there was no bad faith or misconduct by the District Attorney's Office. ECF 19-1 at 41-44. Plaintiff filed a writ of mandate with the Third District Court of Appeal, challenging the Superior Court's ruling. ECF 1 ¶ 40. The appeals court declined to review the ruling on the motion to dismiss, but issued a writ recusing the District Attorney. Id. ¶ 41.

After the parties' argument in this case, the court requested briefing on two recent California cases involving collateral estoppel, both of which address the preclusive effect of findings in criminal cases on later civil rights actions. ECF No. 18. In *Schmidlin v. City of Palo Alto*, 157 Cal. App. 4th 728 (2007), plaintiff brought an action against police officers, alleging that they committed various constitutional and common-law torts when they detained and arrested him for public drunkenness. During the course of the criminal prosecution, plaintiff made a motion to suppress evidence on the grounds that the arresting officer lacked probable cause to conduct an investigatory detention and that

all evidence procured from that detention should be excluded. Id. at 736. That motion was denied and eventually all charges were dismissed. Id. Plaintiff subsequently brought a civil action in California Superior Court, and the jury found that the arresting officers had violated his constitutional rights by using excessive force. Id. at 737. However, the court took from the jury the question of whether officers detained plaintiff without legal cause in violation of his constitutional right to be free of unlawful seizures, concluding that plaintiff had already litigated these issues during his motion to suppress evidence. Id. at 765. On appeal, the Sixth District Court of Appeal affirmed the trial court's ruling that plaintiff should be estopped from relitigating his unlawful search and seizure claim. Id. at 766.

In *Johnston v. County of Sonoma*, C 10-03592 CRB, 2012 WL 381197 (N.D. Cal. Feb. 6, 2012), plaintiff filed suit against the County of Sonoma, its elected Sheriff, and three deputy sheriffs who responded to a 911 call for assistance from plaintiff's neighbor. Plaintiff was charged with a misdemeanor violation of California Penal Code section 148(a)(1) (resisting arrest). Id. at *1. During the course of the criminal prosecution, plaintiff filed a motion to dismiss, challenging whether the deputies had probable cause to enter plaintiff's property, to arrest her, and to have her examined by medical personnel at the scene. Id. The trial court granted a conditional motion to dismiss. Id. at *2. Plaintiff subsequently filed a civil suit claiming violations of 42 U.S.C. § 1983. Defendants moved for partial summary judgment on the allegations of forced

medical treatment and unlawful seizure and imprisonment, claiming that plaintiff should be barred by collateral estoppel. Finding that the facts underlying these claims were previously determined by the state court judge, the district court granted defendants' motion. Id. at *6-9.

With respect to the identity of issues in this case, it appears that the thrust of plaintiff's claims, in his motion to dismiss and in the present action, are based upon alleged mishandling of cell phone footage by the Sheriff's Department and the District Attorney's Office. Both the motion to dismiss and the present complaint detail the failure by the two departments to have policies in place to protect digital evidence, to train employees in handling the evidence, and to adequately communicate about and exchange the cell phone evidence at issue; both also allege that these failures caused the evidence in this case to be mishandled. Compare ECF 11-1 at 8-42 (Memorandum in Support of Motion to Dismiss) with ECF 1 (Complaint).

Plaintiff argues that the allegations in the present complaint involve many factual and legal issues that were never addressed or resolved by the criminal trial court. ECF 19. Plaintiff states that the only factual finding made by the trial court during the prosecution was that the video had been made available to him as the defendant in that proceeding, and there was no *Brady* violation on which to base a dismissal. Id. at 2. However, as discussed above, the present complaint appears to mirror the motion to dismiss filed by plaintiff during the criminal

prosecution. See ECF 11-1; ECF 1. Plaintiff directs the court to the transcript of the hearing on the motion to dismiss, as evidence of the trial court's limited consideration of the issues contained

in the present complaint. ECF 19 at 2. However, the transcript shows that both sides argued at length about the handling of the video as well as the failures to make it available to plaintiff. See ECF 19-1 at 29-43. Because the motion to dismiss included plaintiff's complaints not only about the absence of policies and the *Brady* violation but also about tampering with the evidence, the state court's denial of the motion necessarily decided those issues.

With respect to the fourth requirement for applying collateral estoppel, that the former decision was final and based on the merits, the court in Schmidlin considered a four part test for finality: "(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." *Schmidlin v. City of Palo Alto*, 157 Cal. App. 4th at 774 (citing to *Border Business Park v. City of San Diego*, 142 Cal. App. 4th 1538, 1565 (2006)). Plaintiff argues that, unlike the situations in Schmidlin and Johnson, where appeals of the denials of the motions to suppress were available, the only way to challenge the denial of a motion to dismiss was through appeal following a conviction. ECF No. 19 at 4. He concedes that he pursued an extraordinary writ, but argues that it is the absence of the ability to appeal that deprives the order of

finality for collateral estoppel purposes. However, it does not appear that the opportunity for appeal is the gauge of the finality of a decision for preclusion purposes: In *People v. Cooper*, 149 Cal. App. 4th 500 (2007), the court recognized that a "final judgment" for purposes of collateral estoppel is one that is "free from direct attack." Id. at 505-06 (internal citations and quotations marks omitted). "Stated differently, 'To be "final" for purposes of collateral estoppel, the decision need only be immune, as a practical matter, to reversal or amendment.'" Id. at 521 (quoting *People v. Santamaria*, 8 Cal. 4th 903, 942 (1994)). The Superior Court's decision in this case is final, as it is "free from direct attack."

Accordingly because the issues plaintiff raises in this action were decided adversely to him in the state proceedings, he is barred from pursuing them in this court.

F. State Law Claims

Having dismissed all of plaintiff's federal claims, only state law claims remain. Plaintiff brings three causes of action under state law. (ECF 1 at 24, 26.) "A federal district court with power to hear state law claims has discretion to keep, or decline to keep, [the state law claims] under the conditions set out in § 1367(c)." *Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1000, as supplemented by 121 F.3d 714 (9th Cir. 1997). One such condition is when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C.A. § 1367(c)(3).

\\\

The court declines to exercise supplemental jurisdiction over plaintiff's remaining state law claims.

IT IS THEREFORE ORDERED that:

1. Defendants' motion to dismiss claims one through six, ECF 9, is granted;

2. The court declines to retain jurisdiction over the state law claims and so dismisses them; and

3. The case is closed.

DATED: March 27, 2013.

/s/ Kimberly Mueller
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF COMPLIANCE

Gregory Pellerin,

Petitioner,

v.

Nevada County, California, et al,

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 4401 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 11, 2015, by:

Patrick H. Dwyer
P.O. Box 1705; 17318 Piper Lane
Penn Valley, California 95946
530-432-5407
pdwyer@pdwyerlaw.com
Attorney for Petitioner