C.A. Case No. 13-15860

UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Gregory Pellerin, Plaintiff And Appellant

vs.

Nevada County, et al, Defendants And Respondents.

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 REPLY BRIEF

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REBUTTAL ARGUMENT

I. Collateral Estoppel

Appellant relies upon the established rule that collateral estoppel will not be applied in a criminal case unless there has been a full and fair hearing and the opportunity to appeal has been waived or exhausted . *Ayers v. City of Richmond*, 895 F. 2d 1267, 1270 (9th Cir. 1990) ("*Ayers*"). Appellees do not challenge Appellant's reliance on *Ayers*. See ROB 13-14.

Following an evidentiary hearing on tampering with the video, Appellant filed a Motion to Dismiss and a Motion to Recuse. The Superior Court denied both motions. Appellant then petitioned (concurrently) to the California Court of Appeal for writs to overturn both rulings. The Court of Appeal granted the petition for a writ on the Motion to Recuse, but the petition for a writ on the Motion to Dismiss was summarily denied, presumably because the issuance of a writ to overturn the denial of the Motion to Recuse made the petition for a writ on the Motion to Dismiss unnecessary. The AG then substituted for the NCDA, the video was finally reviewed, and the case was promptly dismissed. EOR 93-95.

It is clear on these alleged facts that no right to an appeal of the Superior Court denial of the Motion to Dismiss ever ripened. Appellant would have liked the denial of the Motion to Dismiss to be reviewed and overturned, but that

possibility was cut off when the AG dismissed the case, thereby preventing any right to appeal from arising. Applying these facts to the law as set forth in *Ayers*, the doctrine of collateral estoppel cannot be raised as a bar to Appellant.

Appellees do not challenge the finality rule as stated in *Ayers*. Appellees also do not dispute Appellant's citation of California authority that the summary denial of a writ petition *does not constitute an appeal and denial on the merits*. See ROB 14-15.

Appellees are correct in asserting that a factual ruling or order, like a judgment, may provide the basis for collateral estoppel. ROB 15-20. Appellant has never argued to the contrary. In fact, Appellant agrees that, with regard to the one issue that the Superior Court actually ruled upon in denying the Motion to Dismiss, i.e., whether there had been any *Brady* violation, the Superior Court ruling would have provided the basis for collateral estoppel *if Appellant had been given the opportunity to appeal that ruling*.[1] Without explanation or argument,

[1] There are many factual issues in the Complaint that were not decided, let alone litigated, in the Superior Court. These include the principal issues in this action, such as: is Nevada County liable for its failure to have proper evidentiary procedures; are the two DDA's liable for knowing refusal to conduct an investigation; did Officer King wrongfully tamper with the evidence, causing some evidence to be lost; did Officer King wrongfully send misleading evidence, while withholding exculpatory, to the DA causing Appellant to be prosecuted. Thus, it is obvious that there was insufficient identity of issues. Moreover, it is unnecessary to argue these issues when Appellant's right to appeal never matured.

Appellees ignore the obvious fact that the intervening act of the AG in dismissing the case cut off Appellant's ability to appeal the ruling.

Collateral estoppel must never usurp due process. That is why there must be a full and complete opportunity to litigate the issues, including the right to an appeal on the merits, before estoppel is asserted. It would not only be inherently unfair, it would be an unconstitutional denial of due process, to permit the unilateral dismissal of a case by a state prosecutor to terminate a citizen's remedy for the violation of his or her civil rights in that case.

II. Liability For Failure To Preserve Evidence

A. Appellees Acknowledge Their Responsibility To Preserve Evidence

Appellees do not dispute that there is a duty to preserve evidence on the part of the NCSD, NCDA, DDA Westin, DDA Francis, and Officer King as discussed in AOB 23-24. Nor do Appellees dispute that there is a duty to adopt and implement appropriate policies, practices, procedures, and training to ensure that evidence, in particular digital evidence, is preserved for trial. AOB 24-25.

B. There Was No Measurable Burden To Appellees

This is not a case where a plaintiff is trying to establish a wholly new and novel "administrative responsibility" or a new "task" that would interfere with or make unwieldy the day to day operations of the NCSD or NCDA. All that the Appellees should have done was to implement a simple and inexpensive practice of making a backup copy of all original digital evidence before doing any forensic

editing, modification, or testing. This is something that every legal professional has learned to do over the past 20-30 years as part of his/her daily work. The cost in time and money to Appellees was practically nil. However, the resulting damage to Appellant was catastrophic.

Under any conceivable benefit/burden analysis there was no viable reason for the Appellees not to have implemented the appropriate policies, practices, procedures, and training. Simply put, the harm to Appellant far outweighed the nominal burden to the Appellees. Appellees had a solemn duty under the law to preserve the evidence and they miserably failed.

C. **Appellees' False And Improper Factual Argument**

Appellees ignore the rule for appellate review of a motion to dismiss that all factual allegations are deemed true for the purpose of evaluating whether a legal cause of action has been stated. See e.g., *Goldstein v. City of Long Beach*, 715 F. 3d 750 (9th Cir. 2013) ("*Goldstein*"). Appellees deliberately and repeatedly misstate the alleged "facts" of the case, asserting that there was no harm to Appellant in the end because all of the evidence was purportedly discovered and eventually turned over. See e.g., ROB at 4-6, 26, 27, and 31-32. This "spin" on the allegations is a deception and is wholly improper argument. Appellate is appalled, but not surprised by Appellees tactics.

A correct summary of the factual allegations in the Complaint was set out at AOB, pp. xiv-xvii, where Appellant describes how the video was intentionally edited to delete exculpatory evidence, how a misleading video "clip" was prepared and then transmitted to the NCDA as the basis for false felony charges. Then, the NCDA failed to conduct any investigation into the video editing by the NCSD and then after being told in open court about what the remaining video did show,

refused to conduct any investigation whatsoever. DDA Westin and DDA Francis could have saved Appellant from an excruciating twenty month prosecution for crimes he did not commit. They intentionally persecuted, not prosecuted, Appellant. See EOR 86-95.

III. No Basis For Immunity

A. The Failure To Implement Proper Evidence Handling Was A Local Failure To Act And There Is No Immunity

Appellees fail to make any argument that proper evidence handling is a matter of state, not local policy. With nothing to say in their defense on the First through Third causes of action in this regard, Appellees try to confuse the Court by talking about the separate question of prosecutorial and 11th amendment immunity which only concern the Fourth and Fifth causes of action.

It is self evidence that it was a *local*, not state, responsibility on the part of the NCSD and the NCDA to have implemented appropriate policies, practices, procedures, and training to ensure that digital evidence was preserved for trial. There is simply nothing in Appellees' Answering Brief that negates the liability alleged under the First, Second, and Third causes of action or that lays any factual foundation for immunity under the 11th amendment.

B. Basic Factual Investigation Is Not A Prosecutorial Function

Appellees completely fail to address the substance of the *Goldstein* decision and are unable to distinguish its holding from the factual allegations in this action. *Goldstein* found that failures by the district attorney in the implementation of policies and procedures related to the use of jailhouse informants was administrative, not prosecutorial, in nature, and accordingly, that there was no immunity. With facts and circumstances parallel to *Goldstein*, Appellant is asking this court to find that the failure to implement any digital

evidence handling methods was administrative, not prosecutorial, in nature.

The allegations in the First through Third causes of action in this case cannot logically be distinguished from *Goldstein*. The failure of the NCSD and NCDA to have appropriate evidence handling is a classic example of the type of administrative failure by local officials that should never be given immunity.

C. **Evidence Tampering And Suppression**

Here again, Appellees are unable to distinguish the reasoning and holdings of *Deveraux v. Abbey*, 263 F. 3d 1070, 1074-75 (9th Cir. 2001) ("Deveraux") and *Russo v. Bridgeport*, 479 F.3d 196 (2nd Cir. 2007)("Russo"). These cases set out the rules for holding local officials liable when they engage in evidence tampering and evidence suppression. The factual allegations in the Complaint make it clear that Deputy King is accused of tampering with evidence by deleting and then creating a special "video clip" that was sent to the NCDA. Further, Deputy King not only deleted some video, he actively suppressed most of the remaining exculpatory video by not including it with the misleading "video clip" that he transmitted to the NCDA.

As discussed above, Appellees respond by trying to argue purported facts that are not alleged in the Complaint. See ROB 31-32. Appellees keep trying to claim that all of the evidence was eventually turned over, and thus, no harm no foul. This is not what happened and it is not what is alleged. Appellant alleges that Deputy King edited and deleted the original video leaving gaps in the material that are lost forever. He then created the video clip to show Appellant in a bad light and intentionally failed to turn over the exculpatory video that would have exonerated Appellant, as proven by the fact that when the AG was finally able to look at the exculpatory video, the case was promptly dismissed.

All that Appellees had to do, all that Appellant ever expected them to do, was to investigate the facts with impartiality and objectivity. They not only failed to do this, they deliberately tampered with evidence to permit the persecution, not prosecution, of Appellant. Why? The California Court of Appeal certainly understood the answer to this question when it granted the petition for a writ granting the Motion to Recuse the NCDA.

D. **Failure To Perform Basic Investigative Duties**

The *Russo* decision is most illuminating. At least in *Russo,* the prosecutor did eventually look at the video when defense counsel brought it to his attention. Here, defense counsel did everything humanely possible to get the prosecutors to look at the video for over twenty months. DDA Westin and DDA Francis NEVER looked at the exculpatory video, not after it was handed to them, not after it was the subject of a motion for an evidentiary hearing, not after a successful writ petition for an evidentiary hearing, not after a motion to dismiss and a motion to recuse, and then not even after two more writ petitions were filed.

The conduct in this case is the most egregious that Appellant has ever heard of in any decision. The NCDA and the two DDAs steadfastly refused to conduct any basic investigative function. This had nothing to do whatsoever with the prosecutorial discretion to charge or not to charge Appellant or the particulars of their trial strategy against Appellant. This was a refusal to conduct the most basic function of a DA, to look at the facts.

The behavior of DDA Westin and DA Francis constituted the deliberate frustration of the administrative functions of the NCDA. It had nothing to do with the prosecutorial discretion that the law holds sacred as a necessary safeguard of our system of criminal justice. There is no possible excuse, no possible reason,

and no possible policy concern that could ever support the intentional failure of DDA Westin and DDA Francis to carry out the basic investigative function that is the foundation of their office

IV. **Malicious Prosecution**

As noted by Appellant in the AOB 42-43, normally malicious prosecution is not cognizable under §1983. The exception to this rule, however, was set forth in *Womack v. County of Amador*, 551 F. Supp. 2d 1017 (E.D. Cal. 2008) ("Womack"). When a prosecution is conducted with the intent to deprive a person of equal protection or otherwise subject a person to deprivation of constitutional rights, it will state a claim under §1983.

Contrary to the empty assertions of the Appellees in the ROB at 35-36, the foregoing discussion lays out the solid reasons why malicious prosecution is appropriate in this case. The factual allegations are not "extremely vague and wholly unrelated to his prosecution" as asserted by Appellees, they are crystal clear and could not be more focused on the essence of a malicious prosecution action. The AG's dismissal of the Superior Court case is irrefutable proof of the lack of any merit in the charges. Most importantly, the twenty months of outrageous conduct by the NCDA and DDA Westin and DDA Francis prove the malice and intent with which they persecuted, not just prosecuted, Appellant.

V. **State Claims**

A. **California Government Tort Claim**

The factual allegations in the Complaint show without question the timeliness of Appellant's government tort claim for two reasons. First, Appellant did not know, and had no reason to know, about the nature or extent of Deputy King's actions or the lack of policies, practices, procedures or training at the

NCSD or NCDA until the evidentiary hearing on March 29-30, 2011. Without the facts learned at the evidentiary hearing, it was not possible to know if wrongs had been committed. Thus, Appellant neither knew what the "facts" were and or whether there was any applicable legal theory. Even under the authority cited by Appellees, *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397-398 (1999), there has to be some reasonable basis for formulating and making a claim. It was not until after the evidentiary hearing that Appellant knew that the video had been edited by Deputy King (negligently or intentionally) or that the NCSD and NCDA did not have any policies, practices, procedures or training regarding the handling of evidence. A person cannot be expected to make wild shots in the dark in an effort to try and comply with a statute of limitations. That would lead to all sorts of wild claims and accusations being filed without any reasonable basis.

Second, the doctrine of equitable estoppel is applicable here. Appellant tried to learn the truth from the Appellees, but they refused to disclose the facts that were solely in their possession and under their control. The first inkling that there might have been wrongful acts came to light when Appellant received the report of his expert on August 25, 2010. EOR 92. Appellant then tried again to get the Appellees, especially DDA Westin and DDA Francis, to tell the truth about the video. They refused. Appellant was left no choice but to try and learn whether there had been actionable wrongdoing, so he filed his December 8, 2010, motion in the Superior Court for an evidentiary hearing about the video. EOR 93. Appellant's motion was denied and he had to pursue a writ to obtain relief, which he finally did on March 7, 2011, when the California Court of Appeal issued a *Palma* letter directing an evidentiary hearing to be held. EOR 93. The evidentiary hearing was held on March 29-10, 2011 (date set by the Superior Court).

Appellant filed his Government Tort Claim on May 24, 2011. EOR 95. The record shows that Appellant was prevented from discovering the facts that would give rise to his tort claim through the *inequitable actions* of the very persons who were in effective control of the Superior Court process. It would be a gross injustice if persons acting in an official capacity could use that very official capacity to prevent the innocent victim of learning the facts that would permit the victim to pursue a claim against these wrongdoers.

Finally, the number of days between August 25, 2010, and May 24, 2011, is approximately 212. The total time that Appellant was not actively engaged in litigation to obtain the truth about what happened to the video was about 112 days (i.e., the days before and after the litigation over the evidentiary hearing – before December 8, 2010, and after March 30, 2011). The statute provides for six months or 180 days. Appellant was clearly entitled to a full 180 days to discover what had been done so that he could prepare and file a claim.

B. The Bane Act Permits Actions Involving Threats, Intimidation, And Coercion

Appellees' argument that there was no "force, intimidation, or coercion" is seriously misplaced. Although there was not a physical attack on Appellant, Deputy King knowingly and intentionally falsified evidence, suppressed evidence, and transmitted misleading evidence to the NCDA to harm Appellant. These were knowing and wrongful acts that seriously injured Appellant and denying his constitutional rights.

The intimidation and coercion commenced at the incident scene when King refused to look at or to acknowledge the contents of the Flip video camera and then placed Appellant under arrest when he knew that Appellant was innocent. EOR

86-87. However, the intimidation and coercion did not stop there. Deputy King then caused Appellant to be charged with crimes he did not commit by editing and suppressing the video.

This court should find that such alleged conduct constitutes "intimidation and coercion" needed for a Bane Act cause of action. See e.g., *Bender v, County of Los Angeles* 217 Cal. App. 4th 968, 976-980 (2013), where the California Court of Appeal found that the use of pepper spray at the time of arrest provided the necessary force, intimidation, or coercion. Deputy King's conduct produced far greater harm than mere pepper spray.

C. **Immunity Under The California Government Code**

Appellees cite to California Government Code §821.6 for the proposition that this statute provides absolute immunity for any public employee instituting or prosecuting any judicial or administrative proceeding within the scope of his employment. The problem with this argument is that the primary state claims in the Eight and Ninth Causes of action do not fall under this statute.

In *Phillips v. City of Fairfield*, 406 F. Supp. 2d 1101 (E.D. Cal., 2005), the District Court for the Eastern District faced an immunity defense to state law claims under Cal. Gov. Code §821.6 in a case where officers in a buy/bust operation inured plaintiff in the course of making his arrest. The court found that the arrest was not part of an investigation or directly involved in preparation for a judicial or administrative proceeding and disallowed an immunity defense.

Here, Deputy King is alleged under paragraphs 106 and 112 of the Complaint, EOR 109-110, to have breached his duty "before conducting any investigation of its Digital Evidence content" by failing to make a forensic copy of the video. This allegation has nothing whatsoever to do with whether there was an

"investigation" or a "proceeding". It had to do with only with the duty to properly handle the evidence.

The other allegations in paragraphs 106 and 112, i.e., the allegations in subparts (b) through (d) are also best analyzed in the context of the intentional infliction of emotional distress which requires the: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the potential for causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Tien Van Nguyen v. City of Union City*, 2013 WL 3014136 (N.D.Cal., 2013) quoting from *KOVR–TV, Inc. v. Super. Ct.*, 31 Cal. App. 4th 1023, 1028 (1995). King can be seen as wanting to cause Appellant emotional distress and wrongfully engaging in the alleged conduct. From this perspective, these allegations do not involve normal or typical "investigative" work that is intended to be immune under the statute.

V. Conclusion

Based upon the factual allegations of the Complaint, deemed true for purposes of this appeal, and the applicable law as set forth in the arguments submitted to the Court, the decision of the District Court must be overruled.

Respectfully Submitted,

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

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